

**UNITED STATES - RESTRICTIONS ON IMPORTS OF COTTON  
AND MAN-MADE FIBRE UNDERWEAR**

*Report of the Panel*

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## **I INTRODUCTION**

1.1 On 22 December 1995, Costa Rica requested consultations with the United States under Article 4 and other relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the corresponding provisions of the Agreement on Textiles and Clothing (ATC) (WT/DS24/1). Consultations were held on 18 January and 1 February 1996, however, no mutually satisfactory solution was reached. On 22 February 1996, Costa Rica requested the establishment of a panel (WT/DS24/2) which was considered by the DSB at its meeting on 5 March 1996 (WT/DSB/M/12). The Dispute Settlement Body (DSB) accordingly agreed to establish a panel with standard terms of reference in accordance with Article 6 of the DSU.

1.2 On 19 April 1996, the DSB was informed that the terms of reference and the composition of the Panel (WT/DS24/3) were as follows:

### Terms of Reference

"To examine, in the light of the relevant provisions of the covered agreements cited by Costa Rica in document WT/DS24/2, the matter referred to the DSB by Costa Rica in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

### Composition

Chairman: Mr. Thomas Cottier  
Panelists: Mr. Martin Harvey  
                  Mr. Johannes Human

1.3 The Panel heard the parties to the dispute on 24-25 June 1996 and 29 July 1996. The Panel also met with the parties on 15 October 1996 to review aspects of the interim report, at the request of the parties. The Panel submitted its complete findings and conclusions to the parties to the dispute on 25 October 1996.

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## **II FACTUAL ASPECTS**

### **Outward Processing Regime: "807 Trade" and "Guaranteed Access Levels"**

2.1 In the course of the last six years, there has been a significant change in the US cotton and man-made fibre underwear manufacturing industry which has significantly switched from producing and assembling underwear domestically to producing components in the United States for assembly in other countries and subsequent return to the same enterprises in the United States for marketing. This pattern of co-production has enabled the companies in this industry to maintain their share of the US market by making use of the labour force available outside the country while at the same time controlling the source of raw materials, the production timetable, the types and amounts of underwear to be produced and the marketing of the final product. Moreover, these co-production operations were consistent with the policies of the United States, which was encouraging investment and production in Mexico and the Caribbean Basin.

2.2 Item 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS)<sup>1</sup> provides for re-importation into the US of goods that have been assembled abroad from US-made components; it provides the basis for a type of outward processing regime which enables US manufacturers of relatively labour-intensive products to export US parts for assembly abroad and return of the assembled products to the United States with partial exemption from US duties. This programme is not limited to apparel, although it is widely used in apparel trade because of the high labour content and the substantial US duties on apparel imports. To qualify for partial duty exemption under item 9802.00.80, articles must be assembled abroad in whole or in part of fabricated components, the product of the United States, which has been exported in condition ready for assembly without further fabrication; has not lost its physical identity in such articles by change in form, shape or otherwise; and has not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

2.3 The exported articles used in the imported goods must be "fabricated US components," i.e., manufactured articles ready for assembly in their exported condition, except for operations incidental to the assembly process. Integrated circuits, compressors, zippers, buttons and pre-cut or preformed sections of a garment are examples of fabricated components in this sense. To be considered "US components," the exported articles do not necessarily need to be fabricated from materials or components wholly made in the United States. If a foreign product undergoes processing in the United States sufficient to confer US origin for customs purposes, then the resulting processed goods may be exported, assembled abroad and re-imported and still qualify for partial duty exemption under item 9802.00.80. Thus, in an 807 operation, the cloth can come from any country in the world: what is important is to have it cut in the United States. There is no obligation to re-import the articles assembled abroad into the United States; producers of underwear assembled from US components could sell the underwear to any market in the world.

2.4 An article imported under item 9802.00.80 is treated as a foreign article for customs purposes and recorded as a foreign article in US import statistics. Chapter 98, Subchapter II, Note 2 of the HTSUS, provides that any product of the US which is returned after having been advanced in value or improved in condition abroad, or assembled abroad, shall be a "foreign article" for the purposes of the Tariff Act of 1930, as amended. It is not legally of US origin even if the pieces of a garment re-imported are cut in the United States. This rule has been provided as an explicit exception to the US rule of origin for textiles and apparel, in force up to 30 June 1996, which normally deems such products to originate from the place where garment pieces are cut. This exception remains even in the revised rules of origin for textiles which took effect on 1 July 1996. HTSUS Note 2 also provided that textile or apparel articles are to be treated as foreign articles even if they are assembled or processed in whole of fabricated components that are a product of the United States or are processed in whole of ingredients (other than water) that are a product of the United States, in beneficiary countries of the Caribbean Basin Initiative.

2.5 An article imported under item 9802.00.80 is dutiable under the rate otherwise applicable to the assembled product, but the dutiable value is reduced by deducting the cost or value of the exported fabricated components from the value of the imported assembled product. For instance, the underwear re-imports in the present case are subject to customs duties at the rate applicable to underwear, but their customs value is reduced by deducting the cost or value of the exported garment sections, elastic, zippers, buttons, thread, etc. used in assembling the underwear in Costa Rica. The duty reduction (which is not regulated by the ATC) is a key factor in making the offshore assembly operations in Costa Rica economically viable. The "807" programme is not mandated by tax, social or industrial requirements. However, the underlying intent encompasses a variety of broader social and economic objectives, such as aiding structural adjustment, assisting the economic development of foreign countries,

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<sup>1</sup>This provision is frequently referred to as "807 trade" as it was covered by that chapter in the former US tariff schedules.

maintaining the competitiveness of US industry, lowering prices for consumers, and reducing the tax burden on US companies.

### **Guaranteed Access Levels**

2.6 Guaranteed Access Levels, or GALs, are provided for textile re-imports under the US Special Access Programme, a programme designed to develop and expand manufacturing in the Caribbean Basin, Andean Trade Preference countries and Mexico (under the North American Free Trade Agreement (NAFTA)) by allowing guaranteed access to the US market for re-imports of apparel made with fabric formed and cut in the United States. The United States employs this programme as a form of "more favourable treatment" for certain re-imports - those using US formed and cut fabric - as provided for in Article 6.6(d) of the ATC. Under this programme, guaranteed quota access ("GALs") for particular apparel products are specified by agreement with the relevant exporting country. Garment pieces cut in the United States from US-formed fabric (e.g. woven or knitted in the United States) are exported to that country, where they are assembled; the apparel assembled from them is guaranteed access to the United States at the negotiated level, and is entered under HTSUS subparagraph 9802.00.8015, which corresponds to the former Item 807A in the pre-HTSUS tariff nomenclature. Entries must be accompanied by an ITA 370-P form, which certifies the facts necessary for eligibility of the goods under this subparagraph. The Special Access Programme only affects access to the US market for textiles and apparel articles, and does not affect the effective duty rate for imports.

### **Specific Limits**

2.7 A specific limit (SL) refers to the level of restraint (quota) on the exports or imports of the product in question during a set period of time. The ATC provision setting out the method for calculating the applicable restraint level is found in Article 6.8.

### **Chronology of Events**

2.8 In early 1995 the United States Committee for the Implementation of Textiles Agreements (CITA) reviewed data on total imports of cotton and man-made fibre underwear (category 352/652) and examined the state of the domestic industry producing such goods. Based on the factors examined, the CITA determined that there was a situation of serious damage or actual threat thereof to the US underwear industry. The United States attributed the serious damage or actual threat thereof, to imports from seven countries, Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Thailand and Turkey. (See Section V.A.)

2.9 Based on its findings, the United States requested consultations on 27 March 1995 with, *inter alia*, Costa Rica on trade in cotton and man-made fibre underwear (US textile category 352/652), with a view to initiating the transitional safeguard procedure for establishing a quantitative restriction on that product in accordance with Article 6 of the ATC and provided a statement of serious damage setting out the factual information in the matter (Annex). The United States proposed a level of restraint for underwear imports from Costa Rica pursuant to Article 6.8 of the ATC. On 21 April 1995, the United States published the contents of the request for consultations, including the restraint level and period, in the Federal Register.

2.10 Consultations were held on 1-2 June 1995 at which the United States proposed a two-part measure comprising a specific limit (SL) of 1.25 million dozen and a guaranteed access level (GAL) of 20 million dozen. Costa Rica did not consider that the United States had substantiated its case under the provisions of the ATC and the consultations did not result in a mutually acceptable solution.

2.11 On 22 June 1995, the United States made a new proposal for the establishment of a quantitative restriction at a level of 1.325 million dozen specific level (SL) with annual growth of 6 per cent and 20 million dozen GAL for 1996.

2.12 Because no mutual agreement had been reached between the United States and Costa Rica by the end of 30 days after the 60-day consultation period provided for in Article 6.7 of the ATC, the United States implemented a restraint on imports from Costa Rica effective 23 June 1995 for a 12-month quota period starting 27 March 1995 and referred the matter to the Textiles Monitoring Body (TMB), pursuant to Article 6.10 of the ATC.

2.13 On 10 July 1995, the United States sent Costa Rica a further proposal for a specific limit for 1996 of 3 million dozen with 6 per cent annual growth and a guaranteed access level of 30 million dozen. This proposal included a provision to reduce the specific limit to 1.5 million dozen in the event the US Congress passed a law providing for quota-free treatment for goods from the Caribbean Basin that prescribed certain rules of origin (the "ratchet-down" clause). Costa Rica continued to question the basis for the request for a restriction and did not respond to this proposal.

2.14 On 12 July 1995 the US made a proposal to Costa Rica with the same levels as on 10 July but which did not specify the reduction in the specific limit in the event of the above-mentioned law being passed and subjected reduction in SL to subsequent negotiations.

#### **Review by the TMB**

2.15 The TMB reviewed this case, and others, in accordance with Article 6.10 of the ATC and heard presentations from the United States, Costa Rica, Honduras, Thailand and Turkey from 13-21 July 1995. During the proceedings, the United States provided updated data and other relevant information (July 1995 Market Statement, see paragraphs 5.135-5.138). These data were used to update the data presented in March so that all of the data would be consistent with the reference period of the call, the year ending in December 1994. The United States also supplied the TMB with additional information requested by Members subject to the call and by the TMB members concerning the industry, re-imports and exports.

2.16 During its review of this safeguard action by the United States against imports of category 352/652 from *inter alia* Costa Rica, the TMB found that serious damage had not been demonstrated. The TMB could not, however, reach consensus on the existence of actual threat of serious damage. The TMB recommended that further consultations be held between the United States and Costa Rica,

"with a view to arriving at a mutual understanding, bearing in mind the above, and with due consideration to the particular features of this case, as well as equity considerations" (G/TMB/R/2).

2.17 A new round of consultations was held on 16-17 August 1995 at which a number of issues were raised by Costa Rica with respect to the justification of US actions. The consultations did not produce an agreement and both parties reported the situation to the TMB.

2.18 At its meeting on 16-20 October 1995, the TMB received reports from Costa Rica and the United States on the bilateral consultations they had had following the TMB recommendation. It took note of the reports and of the fact that the two parties had not reached a mutual understanding during the consultations. The TMB's discussions confirmed the Body's previous findings in this matter; there being no further requests by the parties involved, the TMB considered its review of the matter completed (G/TMB/R/5).

### **Further Consultations**

2.19 On 22 November 1995, a further consultation was held at which the United States made a new restraint proposal for a specific limit of 7 million dozen (sub-limit of 4 million dozen for knit products) and a GAL of 40 million dozen for the period 1 April 1996 to 31 March 1997 and also including the previously mentioned "ratchet-down" clause and 6 per cent growth. Costa Rica submitted a proposal for a specific limit of 21 million dozen for 1996 followed by a second proposal fixing SL and GAL access for the period corresponding to 1996-1997 at 15.4 and 40 million dozen respectively. These were not accepted by the United States. Thereafter, Costa Rica requested consultations under Article 4 of the DSU.

2.20 The restriction, augmented by the application of a growth rate of 6 per cent was renewed for a second 12-month period on 27 March 1996.

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### **Action Under the Dispute Settlement Understanding**

2.21 On 22 December 1995, Costa Rica requested the US Government to hold consultations under Article 4 of the ATC and the other relevant provisions of the DSU, Article XXIII of GATT 1994 and the corresponding provisions of the ATC. The two countries met on two occasions, on 18 January and 1 February 1996.

2.22 At the first of these meetings, Costa Rica raised a number of questions, which it subsequently submitted in writing, requesting the earliest possible written reply. Moreover, reiterating its view that the call for consultations was not justified under the ATC, Costa Rica again requested that it be withdrawn. On 18 January 1996, Costa Rica proposed establishing, instead of a restriction, a mechanism for monitoring the composition and patterns of trade between the two countries in the category in question. However, this suggestion was not accepted by the United States.

2.23 At a meeting held on 1 February 1996 the United States made a new proposal to Costa Rica offering access for 57 million dozen during the period 27 March 1995 to 30 September 1996. In addition, access for the 18-month period from 1 October 1996 to 26 March 1998 would be fixed at 12 million dozen SL, with a sub-limit of 6.8 million dozen for knitwear, and 30 million GAL. This restraint proposal included a "ratchet-down" clause, in accordance with which SL access would be reduced to 1.5 and 1.6 million dozen for each of the periods covered by the restriction. Once again, Costa Rica rejected this proposal as inconsistent with the corresponding provisions of the ATC.

2.24 The period of 60 days for consultations provided for in the DSU ended without any satisfactory agreement having been reached between the parties, and the United States continued to maintain its unilateral restrictions on the products in question. Consequently, on 5 March 1996, Costa Rica made a request to the DSB, which was granted, for the establishment of a Panel.

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### **III FINDINGS REQUESTED**

3.1 Costa Rica requested the Panel to find specifically, *inter alia*, on the following aspects:

1. That as a result of having imposed a new restriction on the trade in cotton and man-made fibre underwear in violation of the provisions of the ATC, the United States was in breach of Article 2 of that Agreement;

2. That the increase in "807 trade" could not be considered to constitute increased imports, within the meaning of Article 6.2 of the ATC;
3. That if, the above notwithstanding, it was considered that these increased imports did fall within the provisions of Article 6.2 of the ATC, the fact was that this showed the US industry manufacturing underwear cut pieces to be in excellent condition and not to be in need of any protection;
4. That serious damage and actual threat of serious damage were two different concepts which, to be demonstrated, required the submission of separate information and a different analysis;
5. That the finding of the TMB to the effect that the United States had not demonstrated serious damage to its underwear-manufacturing industry should be upheld;
6. That, given the unreliable, erroneous, contradictory and incomplete nature of the information submitted by the United States in an attempt to justify its account of the situation of its industry, that country had failed to fulfil its obligation to demonstrate serious damage;
7. That the United States, having changed the ostensible basis for its measure, had nonetheless never submitted the information required or provided the analysis necessary to demonstrate the existence of actual threat of serious damage to its underwear-manufacturing industry;
8. That, even assuming the existence of increased imports and serious damage or actual threat of serious damage, the United States had not demonstrated the existence of a causal link between the two, and indeed that the agreements which it had reached with the other countries called to consultations in this category confirmed the non-existence of such a causal link;
9. That, even supposing that the United States had met the three basic requirements for entitlement to resort to the special transitional safeguard mechanism, it had never submitted the information necessary nor carried out the analysis required to attribute the alleged damage or threat to imports from Costa Rica;
10. That the various factors present in this case and, in particular, the proposals for restraint made by the United States to Costa Rica and the quota levels which it had negotiated with the other countries called to consultations in this category, indicated that what the United States was really seeking was to protect not the underwear-manufacturing industry but rather the branch of the domestic industry which manufactured the cloth used in underwear production;
11. That the ATC did not permit the imposition of a safeguard measure on an imported clothing product in order to protect the cloth used to produce it;
12. That the United States had imposed and renewed the restriction on the basis of the existence of an actual threat of serious damage, despite never having held consultations on the subject;
13. That in June 1995 the United States had imposed a unilateral restriction on Costa Rica, making it retroactive to March of that year, despite the fact that under the ATC it had no authority to do so; and

14. That the United States violated the spirit and the letter of Article 8 of the ATC by refusing, without any justification, to follow the recommendations made by the TMB, in particular, that it should hold consultations with Costa Rica bearing in mind that serious damage had not been demonstrated, that no consensus could be reached on the existence of actual threat of serious damage, that the trade concerned had particular features and that there were equity considerations which should be taken into account, and by failing to submit a report explaining its inability to conform with those recommendations.

3.2 Costa Rica further requested the Panel, on the basis of the above considerations and in view of the fact that the United States had proceeded in violation of the ATC, to find in its report that the Government of the United States should ensure that the unilateral restriction adopted against Costa Rica should comply with the ATC and that in this particular case compliance should be through the immediate withdrawal of the measure. Costa Rica based its request on Article 19.1 of the DSU, which authorized the Panel to specify the appropriate way of applying its recommendations.

3.3 The United States requested the Panel to find that:

- the United States application and maintenance of a safeguard restriction on imports of cotton and man-made fibre underwear from Costa Rica was consistent with Article 6 of the ATC;
- the restriction was not inconsistent with Articles 2 and 8 of the ATC; and
- the above measure did not nullify and impair benefits accruing to Costa Rica under the ATC or GATT 1994.

3.4 With respect to Costa Rica's request that the Panel find

"in accordance with the terms of reference assigned to it by the DSB, that the United States should withdraw the unilateral restriction imposed on Costa Rica forthwith",

and also to find in its report

"that the United States should proceed to bring its measure into conformity with the ATC, which implies immediately withdrawing it";

the United States considered that the heterogeneity of phrasing left Costa Rica's objective in doubt, but argued that if the request was for a Panel recommendation that specific actions should be taken, or for findings that would amount in effect to such a recommendation, the request was inconsistent with Article 19.1 of the DSU.

3.5 In the view of the United States, the DSU gave WTO panels explicit instructions with respect to the one and only recommendation that properly may be offered if the measures of a Member were found to be inconsistent with its obligations: to bring the measures into conformity with its obligations. The avoidance of granting specific remedies, such as the withdrawal or modification of a measure, was a well-established practice under the GATT, and had been codified in Article 19.1 of the DSU, which provided:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."

The Panel need to make no recommendations at all, as the measures at issue were fully consistent with US obligations under the ATC; however, if any recommendation was made, in their view, the Panel was not authorized to make any recommendation other than that provided for in Article 19.1 of the DSU.

3.6 Costa Rica replied that, Article 19.1 of the DSU, contrary to the statement made by the United States, authorized the Panel to specify the appropriate way of applying its recommendations by providing that:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

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### **Other Issues**

3.7 On 21 June 1996, the United States requested the Panel's attention to breaches in confidentiality by Costa Rica concerning proposals made by the United States in consultations, and Costa Rica's use of that information in this proceeding to prejudice the United States case. On 24 June 1996, Costa Rica had responded in the first substantive meeting of the Panel with information concerning disclosures made by the US embassy in San Jose, Costa Rica, concerning US proposals in consultations with Costa Rica. Subsequently, the US had investigated those disclosures and discovered that they were made in response to the numerous press statements in San Jose by journalists and members of the Costa Rican Government. US embassy statements had been made solely in response to this press offensive by Costa Rica.

3.8 Costa Rica emphasized that publication of any article prior to the initiation of the dispute settlement procedure under the DSU, which in any case was at the initiative of the United States as part of their strategy to exert pressure on the Government of Costa Rica, was irrelevant from the point of view of the confidentiality prescribed by Article 4.6 of the DSU because this applied to consultations initiated under the dispute settlement mechanism of the DSU and not to any event that occurred prior to that time. Accordingly, one of the documents referred to by the United States was irrelevant as it was published prior to the initiation of the consultation procedure under the DSU. The other two articles were replies to public declarations by representatives of the United States Government or by the enterprise which the United States was seeking to protect. Moreover, Costa Rica indicated that the fact that Article 4.6 stated that consultations were confidential could not be interpreted as a limitation on the rights of parties at the Panel stage. On the contrary, confidentiality must be understood as referring to parties not involved in the dispute and to the public, but not in any way to the Panel itself. It was not the intention of Article 4.6 to limit the possibilities available to the Panel to be apprised of information on the dispute before it because this would be to the detriment of the procedure itself.

3.9 The United States accepted that since the US embassy was responsible for some of the disclosures, they withdrew the request. This withdrawal was made without prejudice to the other points made concerning Costa Rica's misuse and distortion of information on consultations in this case.

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## **IV THIRD PARTY SUBMISSION: INDIA**

4.1 India had indicated their interest in the matter and their desire to participate in the Panel process as an interested third party pursuant to Article 10 of the DSU. Accordingly, India was invited to present

their views to the Panel at its first meeting on 25 June 1996. In their submission India reviewed the measure taken by the United States and provided views on various aspects. In particular, India requested the Panel to include in its findings:

- (a) that the United States did not have the option of claiming a situation of actual threat of serious damage in July 1995 after having determined in March 1995 that there was a situation of serious damage and having issued the consultation call to Costa Rica on that basis;
- (b) that all the data necessary to be provided to Costa Rica in terms of the provisions of Article 6 of ATC had not been provided by the United States and some of the data provided was not compiled objectively and therefore lacked reliability;
- (c) that the data available had not indicated that there had been either a situation of serious damage or one of actual threat of serious damage to the domestic industry of the United States, attributable to imports;
- (d) that imports from Costa Rica which had been almost entirely from US components supplied by the US industry producing underwear and mostly produced in Costa Rica by units established by US underwear manufacturers could not have contributed to serious damage of actual threat thereof to the same US industry which engaged voluntarily in such co-production activities;
- (e) that the US action actually sought to protect the US industry producing fabrics for underwear and not the industry producing underwear and this was inconsistent with the provisions of the Article 6 of the ATC;
- (f) that a temporary safeguard action under Article 6 of the ATC had to be pursued by the importing country and reviewed by the TMB entirely on the basis of data that had been available to the importing country at the time they made a determination that there was a situation of serious damage or actual threat thereof;
- (g) that the importing country had to choose between the grounds of serious damage and of actual threat of serious damage at the time of determination of the market situation before initiating the safeguard action and the data requirements for these two grounds was different in nature and not in degree;
- (h) that there was no provision in the ATC for retroactive restraints; and
- (i) that if not endorsed by the TMB after the mandatory review, a safeguard action would not survive.

4.2 With reference to the submission by India, the United States expressed the view that the ATC did not require the importing country to choose between serious damage and actual threat when making its determination and so the United States had relied upon both, and referred to both, in their request for consultations. Also, Article 6.3 of the ATC did not provide any separate criteria for evaluating serious damage on the one hand, and actual threat thereof on the other. The ATC also had no provisions specifically addressing actual threat (unlike the WTO legal provisions concerning anti-dumping duties, countervailing duties, or GATT Article XIX safeguards). India had also referred to "sharp and substantial" and "imminent" increases in their submission. However, in the view of the United States, those standards applied to a determination of attribution under Article 6.4 of the ATC, and were irrelevant to a determination under Article 6.2 of the ATC.

4.3 Costa Rica endorsed and formally incorporated in its submission the arguments and observations contained in the submission made by India and took the view that the Panel should make reference in its written report to the points it had developed and to rule on each of them.

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## **V MAIN ARGUMENTS BY THE PARTIES**

### **A. THE SAFEGUARD ACTION TAKEN BY THE UNITED STATES**

#### **Statement of Serious Damage: Category 352/652 (March 1995 Market Statement)**

5.1 Costa Rica noted that the March Market Statement of the United States (annexed to this report) had said nothing about the percentage of "807 trade" in the production and import data and made no attempt to analyze the impact of this factor on the trade in this category. Accordingly, there was no way of determining whether domestic production really grew or not; what the actual market share of the United States industry was; and the true ratio of imports to domestic production.

5.2 The United States explained by way of background that their Office of Textiles and Apparel (OTEXA) at the Department of Commerce was responsible for collecting data and producing statements of serious damage or actual threat thereof for consideration by the CITA. In early 1995, the CITA had reviewed the data on total imports of cotton and man-made fibre underwear (category 352/652) into the United States in accordance with Article 6.2 of the ATC. Following the criteria in that Article, the United States had looked at total imports of category 352/652. In so doing, they had found that such imports had surged from 65,507,000 dozen in 1992 to 79,962,000 dozen in 1993. The CITA had found that total imports continued to surge in 1994, reaching 97,375,000 dozen, 22 per cent above the 1993 level and 49 per cent above the 1992 level. These data included re-imports.

5.3 The CITA had estimated that approximately 395 establishments in the United States manufacturing underwear employed about 6 per cent of total US apparel workers, and had annual shipments of \$3.2 billion, accounting for approximately 5 per cent of total annual apparel shipments. The concentration of firms in this industry was higher in the men's underwear segment than in the women's segment. In the men's segment, four firms had accounted for over 60 per cent of the shipments. The production of women's underwear was more subject to fashion changes. As a result, production was less standardized, requiring different types of knitting machines and a greater number of workers being employed. There was, however, a large number of smaller producers which generally did not have integrated operations but usually purchased fabrics and then cut and sewed them.

5.4 The CITA had then examined factors listed in Article 6.3 of the ATC, such as US production, market share loss, employment, domestic prices, profits and investment, production capacity and sales. The CITA had found that US production in category 352/652 had declined from 175,542,000 dozen in 1992 to 168,802,000 dozen in 1993, representing a 4 per cent decline. Production had continued to decline in 1994 falling to 126,962,000 dozen during the first 9 months of 1994, four per cent below the January-September 1993 production level. US manufacturers' domestic market share had dropped from 73 per cent in 1992 to 68 per cent in 1993, a decline of 5 percentage points. During the first 9 months of 1994 that share had dropped to 65 per cent. As a per cent of US production, imports had increased from 37 per cent in 1992 to 47 per cent in 1993, and had grown by 54 per cent in the first nine months of 1994.

5.5 Costa Rica questioned if the data on employment and man-hours were a special situation linked to increased imports or if they reflected a continuing trend within the industry. It was also observed that no numbers were given for layoffs; there was no causal link made between imports and job losses; and no basis was given for the statements about postponed investment or disinvestment, nor was

consideration given to the possibility that these might represent economically rational decisions on the part of the companies concerned and might have no causal relationship at all with the trend or level of imports. The comment was also made that shifting production capacity to other product lines should be regarded as a positive trend, favouring the interests of the United States companies themselves.

5.6 Costa Rica affirmed that the United States had not satisfactorily established the existence of problems affecting employment, sales and profits, investment or capacity in its industry inasmuch as it was not possible to establish clearly the state of the industry on the basis of evidence from one or two enterprises. The United States had not properly established either the facts related to imports, domestic production and market size, especially because of the total absence of any analysis of the question of 807 trade in its March statement.

5.7 The United States also pointed out that the CITA had found that the number of production workers in the US underwear industry had dropped from 46,377 in 1992 to 44,056 in 1994, declining by 5 per cent, resulting in the loss of 2,321 workers. Average annual man-hours worked had dropped from 86.2 million in 1992 to 81.5 million in 1994. Based on a survey of individual firms producing cotton and man-made fibre underwear, the following conditions were reported: individual firms had reported layoffs, import-related plant closings and slowed sales; one firm had reported a decline in sales of 17 per cent in 1994 and a decline in profits by 18 per cent and there was pressure on the bottom line throughout the industry due to rising costs and stiff import competition. The uncertainty due to the increasing imports had caused US companies to postpone investment in this industry. Some companies had also closed plants permanently or shifted production capacity offshore, and additional disinvestment of this nature was contemplated by underwear manufacturing firms. Import prices were very low and placed considerable pressure on domestic producers.

5.8 Costa Rica did not accept that an increase in raw cotton prices had affected the producers of cotton fabric or yarn or the producers of cotton or man-made fibre underwear. As to the price-edge which imports enjoyed over domestically produced goods, there was no indication whether this meant all imports or some imports were produced with lower priced fabric and no justification was given for these assertions. Also, these statements did not take into consideration the fact that most of the growth in "imports" of the products in question was concentrated in those assembled outside the United States from US components. This meant that the domestic industry used the same raw material as the "imports" of products assembled from US components, so that the cotton price increases mentioned should have had no effect at all on import levels.

5.9 The United States, however, argued that competing imports had enjoyed a price edge over domestically produced goods because the imports were produced with lower-priced foreign fabric. As a result of the increased market share in underwear held by imports, average retail prices of underwear in the United States had generally declined during the past two years, at a time when US manufacturers' costs, particularly for raw cotton, had increased substantially. This development had seriously eroded the profitability of US underwear manufacturers. Based on the above factors and in accordance with Articles 6.2 and 6.3 of the ATC, the CITA had determined that there was serious damage, or actual threat thereof, to the US underwear industry. The United States then proceeded to identify Member countries to whom this damage could be attributed, as required by Article 6.4 of the ATC.

#### **Attribution to Exporting Countries**

5.10 Costa Rica noted that data on their exports to the US made no reference to the process of production sharing between the two countries, even though all the increase in imports could be attributed precisely to such co-production.

5.11 The United States explained that in applying the criteria in Article 6.4 of the ATC, the CITA had attributed the serious damage, or actual threat thereof, to imports from five WTO member countries - Costa Rica, the Dominican Republic, Honduras, Thailand, and Turkey - and to two countries that had not yet become WTO Members - Colombia and El Salvador. Total imports from the five WTO countries had increased from 22,675,508 dozen in 1992 to 40,293,259 dozen in 1994. This increase had represented a collective sharp and substantial increase of 78 per cent. Together, imports from these countries had increased 32 per cent in 1994 over their 1993 level. Imports in 1992 for these countries were 35 per cent of total US imports in cotton and man-made fibre underwear. In 1994, their share had increased to 41 per cent.

5.12 In the case of Costa Rica, the CITA had found that the increase in imports from Costa Rica alone was higher than the level of imports of category 352/652 from at least 85 other countries and had exceeded the levels of six other suppliers whose imports were under quota. Costa Rica was the second largest supplier to the United States. Consistent with the criteria in Article 6.4 of the ATC, the CITA had found that there was a sharp and substantial increase of low-priced imports from Costa Rica, as imports of cotton and man-made fibre underwear had reached 14,423,178 dozen in 1994, a 22 per cent increase above the 1993 level of 11,844,331 dozen and 61 per cent above the 1992 level. Such imports had entered the United States from Costa Rica at an average landed duty-paid value of \$9.39 per dozen, 69 per cent below the US producers' average price for the product. The CITA had also found that imports from Costa Rica were equivalent to 8.8 per cent of US production of category 352/652 in the year ending September 1994.

### **Consultations with Costa Rica**

5.13 The United States advised that, based on their findings, the CITA had requested consultations with Costa Rica. In accordance with Article 6.7 of the ATC, the request was accompanied by a statement (the March Market Statement) complying with Articles 6.2, 6.3 and 6.4 of the ATC. Further, as required by Article 6.7 of the ATC, the United States had proposed a level of restraint for underwear imports from Costa Rica which would be at a level not less than the level existing at 12 of the 14 months preceding the month of the request for consultations.

5.14 During the first round of consultations, on 1-2 June 1995, the United States had discussed the basis for its request for consultations and the high level of estimated re-imports in Costa Rican trade, approximately 94 per cent of their total trade of 14,423,178 dozen at the time of the call. Taking its estimates of re-imports from Costa Rica into account, the United States had proposed a specific limit (SL) of 1.25 million dozen to cover the portion of imports not qualifying for more favourable treatment that would have grown to 1,488,770 dozen in the final year of the three-year restraint period specified in the ATC. Re-imports had represented a significant portion of Costa Rica's total underwear exports to the United States. Accordingly, consistent with US policy and its obligation under Article 6.6(d) of the ATC to provide more favourable treatment to such re-imports, the United States had proposed a guaranteed access level (GAL) of 20,000,000 dozen. Costa Rica did not make a counterproposal, but maintained that the request for consultations was unsubstantiated.

5.15 With respect to the first bilateral consultations, Costa Rica said that they had drawn attention to a series of inconsistencies, defects and omissions in the March Market Statement, raising numerous points with a view to questioning the compatibility of the Statement with the parameters established by Article 6 of the ATC and hence showing that the Statement could not serve as a basis for the imposition of a restriction.

5.16 Costa Rica also observed that the remedy being proposed by the United States (21.25 million dozen) consisted of an extra dose (30 per cent or more) of the level they claimed to be attacking (14.4 million dozen). Although 14.4 million dozen was supposed to be causing serious damage, the United States had proposed that trade be restricted to 21.52 million dozen. From that

point on, a serious question had arisen as to the objective being pursued by the United States in their attempt to establish new restrictions: was it to protect the underwear manufacturers - by guaranteeing them a further increase in imports, or was it to benefit the US makers of the cloth used for manufacturing the product? Without having replied to any of the questions raised by Costa Rica in connection with the March Market Statement, on 22 June 1995 the United States had made a new proposal for the establishment of a quantitative restriction, this time offering 1.3 million dozen SL and 20 million GAL for the period from 1 January 1996 to 31 December 1996, with an increase of 6 per cent on the quota for subsequent periods. Again, Costa Rica rejected this proposal as the United States was still not complying with the requirements of the ATC for the application of a transitional safeguard.

## **B. REVIEW BY THE TEXTILES MONITORING BODY**

### **Determining Domestic Market Data**

5.17 In its review (see paragraphs 2.15 to 2.18), the TMB members had inquired concerning double-counting in the data presented by the United States because in official US data, re-imports had appeared in both imports and production. Such double-counting had resulted in an overstatement of the size of the domestic market. The United States pointed out that the US Census Bureau counted domestic apparel production by collecting data on unassembled garment parts cut in the United States before they were assembled domestically or shipped offshore for assembly. As a result, Census statistics reflected re-imports as apparel which was cut in the US, sent outside the country to be sewn, and then returned under the tariff provision for re-imports as a finished garment. Re-imports were included as domestic output (cut parts), exports (unassembled cut parts), and imports (finished garments).

5.18 Since export quantity data were generally less reliable than import data, the domestic market for textile and apparel categories as derived by the United States for quota purposes, was: production + imports. As the TMB had requested export data, the United States was now defining the domestic market as: production + imports - exports. Consequently, the domestic market was overstated by the amount of the re-imported products, since re-imported products were counted as production (before assembled) and imports (when finished). In an attempt to remove the double-counting from the US market, the United States had subtracted the re-imports from domestic production. Costa Rica had claimed during the TMB proceeding that such overstatement should be resolved by deducting re-imports from import data instead of production data. However, as an exception to the general rule, the Harmonized Tariff Schedule identified re-imported textile and apparel articles as foreign goods. Therefore, the re-imports were properly counted in import data. After adjusting for the overstatement of the size of the market, the US producers' share of the domestic market had fallen from 69 per cent in 1992 to 62 per cent in 1993 and to 55 per cent in 1994, a 14 percentage point drop in two years.

5.19 Costa Rica highlighted that in the case of imports of cut pieces for assembly in the United States, the United States Government had been treating the product as originating in the country in which the pieces were cut. Thus, for example, fabric cut in China and then assembled in Costa Rica had been treated as a product of China on entering the United States market. At the same time, the US Census Bureau considered that fabric cut, for example in Alabama for assembly in Costa Rica was United States domestic production. That was why "re-imports" were considered to be domestic production by that US statistical office and why the United States included them as such in its March Statement. However, it was also clear that the United States treated the same garments as "imports" when entered under heading 9802 of its tariff, for the purpose of collecting duty on the value added abroad and preventing the use of the "Made in the United States" label.

5.20 The United States also said that when the TMB had suggested later in the proceeding that the overstatement in the US domestic market should be adjusted by introducing US export data, they had pointed out to the TMB that the data derived from this formula would still be flawed because export data were generally less reliable than import data. Despite its concerns about the validity of the available export data, the United States had supplied the TMB with the requested export data. The introduction of export data had left the import/production ratio unchanged from the ratio in the March Market Statement, demonstrating the same picture of declining domestic production and surging imports. Data showing the value of exports had been first presented because of their greater reliability. Data in quantity terms had also been presented in a revised market calculation. The US producers' share of the domestic market had shown a drop from 70 per cent in 1992 to 63 per cent in 1993 and to 57 per cent in 1994, a 13 percentage point drop in two years.

5.21 Costa Rica recalled that they had asserted on numerous occasions that the requirements of "actual threat of serious damage" had not been evaluated in the March Statement, nor was it included in the publications in the Federal Register nor alleged by the United States in the first four proposals of restriction it presented to Costa Rica.

### **The July 1995 Market Statement**

5.22 Costa Rica considered that the updated data presented by the US was not relevant information intended to develop the information contained in the March Market Statement but was information which openly and expressly contradicted it. The United States was endeavouring to submit completely revised and adjusted information in an attempt to justify the adoption of a restriction which it had already adopted. The introduction of a new statement at that point was unacceptable to Costa Rica inasmuch as the data and determinations contained in the March Market Statement had been those which had served to initiate the consultations, impose a unilateral restriction and provide the grounds for the review by the TMB.

5.23 The United States noted that they had supplied updated data and new relevant information at the July 1995 TMB proceeding. Although not required, these submissions had been provided to the TMB consistent with Article 6.10 of the ATC and as part of the practice of the CITA to bring the data up-to-date, to make them as consistent as possible with the reference period for the March 1995 Market Statement, and to provide further information demonstrating that the finding of serious damage, or actual threat thereof remained justified in light of the additional information continually becoming available. The CITA had based its determinations of serious damage, or actual threat thereof on publicly available information from official US Government sources. There was no need to independently verify this information. The production, import, and market share data on which cases were based were published quarterly by the OTEXA and available to all interested parties. The collection and analysis of this data were part of a longstanding process that had been in place for as long as there had been a comprehensive international textile trade agreement, i.e., since the MFA began in 1974.

5.24 The additional relevant information supplied at the time had concerned trade adjustment assistance for US companies adversely impacted by imports and import prices. All of the information provided at the time of the July TMB session had supported and was consistent with the March 1995 Market Statement and the basic justification for the United States safeguard action with respect to underwear imports from Costa Rica remained fully warranted.

5.25 Costa Rica pointed out that, in the July Market Statement there were 302 establishments in the United States that manufactured garments classified in category 352/652, whereas according to the March Market Statement the number of establishments was 395. The March and July Statements

indicated that annual shipments had amounted to \$3.2 billion, although the data on which it was based (domestic production and the US producers' average price) were not the same in the two Statements. According to the July Statement, in 1992 employment in the sector was 35,191, falling in 1994 to 33,309. According to the March Statement, employment in the sector was 46,377 in 1992, dropping to 44,056 in 1994. The July Statement did not explain why there should be this difference of about 10,000 between the figures given in the two Statements. Nor did the data for annual man-hours coincide, inasmuch as the July Statement gave a figure of 65.4 million in 1992 falling to 61.6 million in 1994, whereas the corresponding figures in the March Statement were 86.2 million and 81.5 million respectively.

5.26 Costa Rica also noted that the July Market Statement included a section on trade adjustment assistance for United States companies adversely impacted by imports, giving data on the current US federal programmes for assisting industries and workers that had been unfavourably impacted by imports. It was questioned how these programmes could be put forward as additional justification for imposing a quantitative restriction when their purpose was precisely to provide alternatives to the imposition of a restriction on imports. The fourth section of the July Statement which concerned the countries contributing to serious damage described the price difference between US underwear production and underwear production in other countries. It was noted that this section contained a discrepancy between the July and March Statements, namely whereas in March the average United States producers' price was said to be \$30 per dozen, the July Statement indicated that that price varied between \$16 and \$20 per dozen, depending on where the product was assembled. No information had been given to explain the reason for such a substantial error in the March Statement.

5.27 The United States commented that Costa Rica was incorrect in its characterization of the Trade Adjustment Assistance programme as an "alternative" to safeguard action under the ATC. The United States had not created the programme to replace US rights and obligations under the ATC, Section 204, or similar actions under US law and the WTO. As regards the differences in price and other figures between the March and July Statements, the United States noted that even though there were differences in the updated data, the CITA's determination of serious damage or actual threat thereof was still sustainable.

### **Outcome of the TMB Review**

5.28 At the conclusion of its examination, the TMB had decided that the United States had not demonstrated serious damage, but it could not reach consensus on the existence of actual threat of serious damage (G/TMB/R/2). As a result, the TMB had not reached the issue of attribution. The TMB had, however, recommended that the United States, Costa Rica and Honduras consult further,

"with a view to arriving at a mutual understanding, bearing in mind the above, with due consideration to the particular features of this case, as well as equity considerations".  
(G/TMB/R/2)

5.29 According to Costa Rica, at the new round of consultations as recommended by the TMB, held on 17-18 August 1995, they had asked the United States to clarify the difference between serious damage and actual threat of serious damage and for relevant factual information in support of the latter. They had also urged the United States to explain why, having a market supposedly threatened by the importation of 14.4 million dozen garments from Costa Rica, they had proposed to establish a quantitative restriction which would allow imports of Costa Rican underwear to rise to 33 million dozen. The United States had not offered any explanation, at least at that meeting, which ended without a satisfactory solution having been reached. The two parties then submitted their reports to the TMB for review purposes.

5.30 Costa Rica also pointed out that in October 1995, the OTEXA had published new statistics for the category in question which showed the production situation to be different from that indicated

in the March and July Statements. Whereas according to the March Statement production had declined by 4 per cent between 1992 and 1993 and by 4 per cent between 1993 and 1994, the July data indicated that the decline was 4 per cent for the first period and almost non-existent in the second, while according to the October information the percentage decreases were of the order of 1.5 per cent and 2.6 per cent respectively.

5.31 At its meeting on 16-20 October 1995, the TMB received reports from Costa Rica and the United States on the bilateral consultations they had held following the TMB recommendation. It took note of the reports and of the fact that the two parties had not reached a mutual understanding during the consultations. The TMB's discussions confirmed the Body's previous findings in this matter; there being no further requests by the parties involved, the TMB considered its review of the matter completed (G/TMB/R/5).

### C. THE STANDARD OF REVIEW AND BURDEN OF PROOF

#### Standard of Review - The "Fur Felt Hat" Case<sup>2</sup>

5.32 The United States considered that the appropriate standard to apply to the importing country's determination was a standard of reasonableness. Article 6 of the ATC referred to "a determination by a Member," based on weighing of evidence on certain factors. The standard for panel evaluation of such determinations should follow established GATT practice, which was based on the GATT 1947 case concerning the withdrawal by the United States under Article XIX of a tariff concession on women's fur felt hats and hat bodies. In the Fur Felt Hat case, the Czechoslovak Government had sought a determination that the US invocation of Article XIX had been improper, and asserted that the United States had not met certain conditions under Article XIX to take the action, seeking revocation of the measure. The Working Party rejected the Czechoslovak argument and stated:

"...it may be observed that the Working Party naturally could not have the facilities available to the United States authorities for examining interested parties and independent witnesses from the United States hat-making areas, and for forming judgements on the basis of such examination. Further, it is perhaps inevitable that governments should on occasion lend greater weight to the difficulties or fears of their domestic producers than would any international body, and that they may feel it necessary on social grounds, e.g. because of lack of alternative employment in the localities concerned, to afford a high degree of protection to individual industries which in terms of cost of production are not economic. Moreover, the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt" ("Fur Felt Hat" case, paragraph 30).

5.33 The United States recalled that the US action involved in the 1951 GATT working party Report had been taken under GATT Article XIX:1, which referred to the factual existence of increased imports under conditions

"such ... as to cause or threaten serious injury to domestic producers ... of like or directly competitive products".

The legal standard, and the facts required to be found, were similar to those involved in the case of transitional safeguards under Article 6.2 of the ATC.

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<sup>2</sup>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade Concerning Women's Fur Felt Hats and Hat Bodies, 27 March 1951 - CP/106.

5.34 In October 1950, just before the Fifth Session of the CONTRACTING PARTIES, the United States had announced its intention to withdraw the concession in question under Article XIX. The US Government had entered into consultation with the contracting party with which the concessions had been negotiated and with several contracting parties having a substantial supplying interest. The following month, Czechoslovakia brought a complaint claiming that the action taken did not meet the criteria of Article XIX:1, and sought a determination by the CONTRACTING PARTIES that this action was inconsistent with Article XIX. The complaint was referred to a working party for study. The working party had examined separately each of the conditions for invocation of Article XIX, and presented a report in March 1951 which embodied the findings of the members other than the two parties to the dispute. This report was then adopted at the Sixth Session in 1951. The report had found that the United States had satisfied these conditions.

5.35 The United States suggested that the information used by the "Fur Felt Hat" working party as a basis for its conclusions should be noted, that is GATT notifications, summary records of discussions at the Fifth Session, some additional data submitted at the working party's request, and the report made by the US Tariff Commission in connection with its determination of serious injury. However, in examining whether serious injury and the other conditions in Article XIX:1 existed, the working party chose to rely mainly on the data in the Tariff Commission report. These data were not perfect; for instance, they failed to separate figures on production of men's and women's hat bodies. However, they were the data available at the point in time determined by the working party to be legally relevant in evaluating compliance with Article XIX. As the report stated:

"Since the Working Party was required to consider whether the action taken by the United States in autumn 1950 fulfilled the requirements of Article XIX, the question here to be considered is whether serious injury or a threat thereof to the United States women's hat body industry could be considered to have existed at the time of the United States Tariff Commission investigation on which the United States action was based ...".

5.36 The working party then examined the data and found them inconclusive. It stated that:

"... the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt. No facts have been advanced which provide any convincing evidence that it would be unreasonable to regard the adverse effects on the domestic industry concerned as a result of increased imports as amounting to serious injury of a threat thereof; and the facts as a whole certainly tend to show that some degree of adverse effect has been caused or threatened. It must be concluded, therefore, that the Czechoslovak Government has failed to establish that no serious injury has been sustained or threatened."

5.37 The working party members, excluding the two disputants, concluded that they were satisfied that the US authorities had investigated the matter thoroughly on the basis of the data available to them at the time of their inquiry, and had reached in good faith the conclusion that the proposed action fell within the terms of Article XIX. If the working party in its appraisal of the facts naturally gave weight to international factors, and the US authorities would normally give more weight to domestic factors,

"it must be recognized that any view on such a matter must be to a certain extent a matter of economic judgment and that it is natural that governments should on occasion be greatly influenced by social factors, such as local employment problems. It would not be proper to regard the consequent withdrawal of a tariff concession as *ipso facto* contrary to Article XIX unless the weight attached by the government concerned to such factors was clearly unreasonably great".

Thus, the working party concluded that there was no conclusive evidence that the safeguard measure in question constituted a breach of obligations under the GATT.

### **Applying the "Fur Felt Hat" Case to the Present Case**

5.38 The United States argued that the reasoning of the "Fur Felt Hat" case applied equally to the present case. Both the working party in that case and the present Panel have been charged with determining whether a safeguard action was properly taken at the time that the decision was made. In the case of Article XIX, the working party had examined the information collected by the Tariff Commission in the investigation which was the basis for the decision, and whether the Commission's evaluation of that information had been unreasonable. In the present case, the Panel had been asked to evaluate the consistency of the CITA determination under Article 6.2 of the ATC with the requirements of Articles 6.2 and 6.3 of the ATC. Article 6.2 of the ATC referred to certain facts to be demonstrated "on the basis of a determination by a Member" and Article 6.3 of the ATC required that certain analyses be carried out in making such a determination. Thus, in the view of the United States the focus of the Panel's examination should be not the question of whether serious damage or threat of serious damage exists now, but whether the CITA could reasonably determine that it existed at the time of the CITA determination in March 1995 and whether, after giving the CITA the benefit of any reasonable doubt, Costa Rica had established that no serious damage or threat thereof existed at that time.

5.39 The CITA determination could therefore only be evaluated on the basis of data existing at the time of its original determination. The data presented later to the TMB in fact corroborated the analysis done in March 1995, but they were not legally relevant in evaluating US conformity with Articles 6.2 and 6.3 of the ATC. Article 6.10 of the ATC provided for later refinement of data and for response to TMB requests for additional information, consistent with the TMB spirit of conciliation, compromise and negotiation. However, it was the March data that were legally relevant for evaluating the determination, not the later data. The data recorded in the March Market Statement formed the entire basis of the CITA's determination.

5.40 The data available in March need not have been perfect, as seen in the "Fur Felt Hat" case. Article 6 of the ATC was a safeguard provision invoked in cases of serious damage or threat to an industry, and could not be interpreted to require that the importing Member wait until its industry had succumbed because a complete census of the industry had not yet been conducted. Article 6.7 of the ATC recognized this fact by requiring only that the data submitted with the request for consultations must be "as up-to-date as possible".

5.41 In the present case the burden was on Costa Rica to bring forward evidence and arguments demonstrating a *prima facie* case that the United States had acted inconsistently with Articles 6.2 and 6.3 of the ATC. When evaluating the CITA's analysis of the data available to it in March 1995, the Panel should take into account that domestic authorities were uniquely well-placed to scrutinize and evaluate the situation in a domestic industry, and that the facts in the March Statement clearly indicated that there were adverse effects on the US underwear industry resulting from increased imports of underwear. The Panel should examine whether Costa Rica had advanced facts which provided convincing evidence that it was unreasonable for the CITA to determine that the adverse effects of increased underwear imports on the US domestic underwear industry amounted to serious damage, or actual threat thereof. A similar examination should be applied with respect to determinations under Article 6.4 of the ATC.

5.42 The United States considered that the "Fur Felt Hat" case was still relevant for purposes of the present dispute, even after the incorporation of the Agreement on Safeguards in the WTO Agreement. The Agreement on Safeguards provided for a package of rights and obligations differing from those under Article XIX of the GATT 1994. This package included new procedural and transparency requirements; additional obligations regarding the duration and review of safeguards measures; an explicit ban on grey area measures; and on the other hand, a ban on compensatory withdrawals under

Article XIX:3 if the safeguard measure satisfied certain conditions. The standards for action provided in the Agreement also reflected a shift in focus incorporating the jurisprudence of the "Fur Felt Hat" case. While Article XIX itself referred to the existence of serious injury or threat, in the "Fur Felt Hat" case the working party had focused instead on the evidence found by the authorities in the importing country before their determination and the extent to which it had been shown that the authorities' evaluation of that evidence was unreasonable. The Agreement on Safeguards adopted this approach. Its standards were not phrased in terms of facts that the importing Member must prove (if necessary to a panel). Rather, they were phrased explicitly in terms of the investigation to be undertaken by the competent authorities in the importing country. For instance, Article 2.1 of the Agreement on Safeguards provided that:

"A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

Thus, the United States argued, a panel's evaluation of measures taken pursuant to the Agreement on Safeguards should follow the approach taken in the "Fur Felt Hat" case.

5.43 It was noted by the United States that the approach adopted in the "Fur Felt Hat" working party report had also been adopted in the Agreement on Safeguards because it had come to be widely accepted. In 1951 the "Fur Felt Hat" report was viewed as an important precedent, and it was agreed that, because of its value in relation to the interpretation of Article XIX of the General Agreement, the text of the report should be published. This working party report had become the accepted benchmark for panel evaluation of safeguards actions. No assertion was made that the approach adopted by that working party had been legally incorrect. Indeed, the general acquiescence to this standard, in spite of the many invocations of Article XIX:1 recorded in over 45 years of later GATT history, indicated that this approach had become customary law, or at the least,

"subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation",

in the sense of Article 31.3(b) of the Vienna Convention on the Law of Treaties.

5.44 The United States stated that they had not argued, and would not argue, that the regime now governing textile trade in the WTO was a *sui generis* regime. It was a safeguards regime just as the regime under Article XIX and the Agreement on Safeguards were safeguard regimes. Both regimes permitted a Member to restrict trade in fairly traded goods on the basis of a determination made by that Member, subject to certain limitations. The textile regime diverged from Article XIX but many of its basic concepts depended on the fundamental concepts behind Article XIX; like English and American law, the two were originally one, have diverged over time, but still shared fundamental concepts and structure. Where the negotiators had indicated their desire that the two regimes differ (for instance, concerning the selectivity of actions taken or the duration of safeguards once imposed), the difference in rights and obligations provided in the negotiated text must be respected. However, the "Fur Felt Hat" case, an accepted precedent which predated the divergence between the two regimes, was relevant and persuasive in interpreting the provisions in both, or either, of these regimes concerning the initial decision to take safeguards action.

5.45 The United States confirmed its argument that the standard of review appropriate for this case was the one enunciated in the "Fur Felt Hat" case. That is, the Panel should look to see whether the authority's determinations were reasonable in light of the requirements of the relevant agreement, in this case the ATC, and considering the data available at the time. The United States did not advocate

*de novo* review. In response to the Panel's question, the United States said that if "adequately motivated" meant that the Panel was to explore the possible motives underlying the CITA's decision making process, the United States disagreed with such a standard of review. If "adequately motivated" meant that the Panel was to examine whether the domestic authorities had based their determination on an examination of factors required in the ATC, and whether the basis for the determination had been adequately explained, the United States would agree with this formulation as it was compatible with the standard of review in the "Fur Felt Hat" case, and the United States did not advocate a position on how the TMB's finding by consensus on serious damage should be treated by the Panel. It was only stated that the United States did not agree with the TMB's finding and the ATC, Article 8, did not require them to inform the TMB concerning their view on their finding. Instead, the ATC required that Members endeavour to comply with recommendations and inform the TMB if recommendations could not be accepted. In this case the TMB recommendation did not include a recommendation that they expressed a particular view on the TMB's consensus finding or the lack of consensus on threat.

### **Views of Costa Rica on Standard of Review**

5.46 As regards the standard of review, Costa Rica recalled that the United States had proposed that the Panel should restrict itself, solely and exclusively, to verifying whether the United States had followed the procedures laid down in Article 6 of the ATC and to ruling that its determination was reasonable considering the information available at the time the determination was made. Costa Rica argued and requested the Panel to rule accordingly, that on this point the United States was wrong, since the standard of review which the Panel should apply was a very different one

5.47 In the view of Costa Rica, the standard of review applicable to this case, which must be based on the general principles of GATT law and the provisions of the DSU, required the Panel to undertake an analysis and monitor the following five aspects: compliance with the procedural rules; proper establishment of the facts; objective and impartial evaluation of the facts in the light of the rules of the ATC; proper exercise of discretion in interpretation of the rules; and compliance with the rules.

5.48 Although novel in the textile field, the standard of review to be applied by a panel, was not new in the context of the GATT dispute settlement mechanism nor in the context of many legal systems. Nor was it a question foreign to the WTO itself, since it had arisen in various WTO Agreements. Neither was it unknown to the jurisprudence which, although not very abundant, nevertheless threw useful light on the matter.

5.49 Firstly, Costa Rica noted that this subject had been dealt with on numerous occasions in the reports of various panels set up to review the consistency of a particular measure with the GATT rules, especially in the anti-dumping field. For example, in the case of the New Zealand transformers<sup>3</sup>, the Panel did not share the view expressed by New Zealand to the effect that the determination of "material injury" could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. In support of its ruling, the Panel pointed out that:

"To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."

5.50 Thus, the first thing that Costa Rica noted was that the GATT jurisprudence on this particular point had not been uniform over the course of time and in relation to different subjects. It followed that the above-mentioned "Fur Felt Hat" case could not be regarded as a leading case in this field which

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<sup>3</sup>"New Zealand - Imports of Electrical Transformers from Finland", BISD 32S/67, paragraph 4.4.

ought necessarily to be followed by subsequent panels. The second argument was based on a general principle of GATT law according to which, in the absence of an express rule to the contrary, it was not possible to assume any limitation on the standard of review. This principle was clearly expressed in Article 11 of the DSU, according to which:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements...".

5.51 At the same time, according to Article 3.2 of the DSU, the essential functions of the WTO's dispute settlement system - and, consequently, of the DSB - were:

"... to preserve the rights and obligations of Members under the covered agreements, and ... to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law ...".

5.52 On the basis of these provisions, in Costa Rica's view, in order properly to perform its task of preserving the rights and obligations of Members and clarifying the existing provisions of the WTO Agreements, the DSB must require that the work of panels not be subjected to *a priori* limitations, based on a putative restriction on its powers of review in a particular case.

5.53 With reference to Costa Rica's argument that the reference to objective assessment in Article 11 of the DSU required that panels' scope of review not be limited, the United States pointed out that they had not argued that panels could not review Article 6 determinations by domestic authorities; they had simply argued that these determinations should be accorded the proper weight. It should also be noted that this reference to "objective assessment" and to making findings in DSU Article 11 did not represent a policy-making initiative in the Uruguay Round, but it was the wholesale incorporation of paragraph 16 of the 1979 GATT Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. As the drafters of the DSU had sought to make the review a comprehensive text incorporating all prior codification efforts on dispute settlement, the GATT Contracting Parties had intended the 1979 Understanding and its annex to reflect customary practice and improvements in that practice, which included the standard of review in the "Fur Felt Hat" case.

5.54 Costa Rica pointed out that in the case of the Agreement on Safeguards and the ATC there was no explicit (or implicit) provision establishing limitations on a panel's freedom of review, which was why the above-mentioned general principle should be applied. Where anti-dumping was concerned, the situation was different. Given the actual existence of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter the "Anti-Dumping Agreement"), according to which, in examining the matter submitted to it, the Panel:

- "(i) in its assessment of the facts of the matter, shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the

Panel shall find the authorities' measure to be in conformity with the Agreement if its rests upon one of those permissible interpretations."

### **Views of Authors Relating to Standard of Review**

5.55 Costa Rica referred to this provision and the history of its negotiation, and noted that the authors Croley and Jackson had pointed out that the aim of those behind the drafting of this Article had been to establish limits on the standard of review which could be applied by a WTO panel, for which purpose they had based themselves on the jurisprudence of United States administrative law.<sup>4</sup> The idea was to establish an express rule mainly for the purpose of introducing limitations, in the specific case of anti-dumping matters, on the general principle mentioned above.

5.56 The United States considered the above-cited article by Croley and Jackson to be largely irrelevant to the work of this Panel as it focused almost entirely on specific provisions of a different agreement outside the Panel's terms of reference, the Anti-Dumping Agreement. They nevertheless noted in examining this article that it too recognized the importance of the "Fur Felt Hat" case in GATT law<sup>5</sup>, and referred to other GATT cases recognizing a restrained standard of review.<sup>6</sup> They had also noted that the authors, in their conclusions, overall had recommended caution on the part of WTO panels, arguing that:

"... panels should also recognize that national governments often have legitimate reasons for the decisions they take. At times for example such governments can justifiably argue that an appropriate allocation of power should tilt in favour of the national governments that are closest to the constituencies most affected by a given decision."<sup>7</sup>

### **Relationship to Other GATT Provisions**

5.57 In the view of Costa Rica, these authors had clearly explained how it followed unequivocally from the Decision on Review of Article 17.6 of the Anti-Dumping Agreement and the Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures that this limited standard of review was applicable solely to the review of anti-dumping measures. It was important to make this clear as it provided a useful guide to defining what should be the standard of review in a case in which what was being scrutinized was the consistency of a clothing trade restriction with the requirements of Article VI. As already pointed out, the limitation on the standard of review in anti-dumping matters operated solely and exclusively in that field and, in that respect, must be regarded as an exception to the general rule outlined above.

5.58 Costa Rica argued that, in view of the above, it was not possible to accept a standard of review which would be just as restricted or even more restricted than that established in Article 17.6 of the Anti-Dumping Agreement when a panel scrutinized matters other than those covered by that Agreement,

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<sup>4</sup>Steven P. Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments", in American Journal of International Law, Vol. 90, No. 2, April 1996, page 199.

<sup>5</sup>Croley and Jackson, *op. cit.* page 196.

<sup>6</sup>Citations include "United States - Restrictions on Imports of Tuna", DS29/R, paragraph 3.73; "United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", ADP/87, paragraph 232; "United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", SCM/153, paragraphs 209-212.

<sup>7</sup>Croley and Jackson, pages 212-213.

as the United States insisted. In fact, in the present case the United States wanted the standard of review to consist in verifying that the procedures established in Article 6 of the ATC were followed and ruling that the determination by the United States was reasonable, which was even more limited than the obligation imposed upon any panel under the above-mentioned Article 17.6 of the Anti-Dumping Agreement. This interpretation was not acceptable. The standard of review of this Panel was and must be much broader than that proposed by the United States and that which Article 17.6 of the Anti-Dumping Agreement established for the review of anti-dumping measures.

5.59 The United States noted the various GATT cases concerning anti-dumping determinations, which Costa Rica had cited. In the US view, however, this was not an anti-dumping case. An interpretation of the GATT or the Agreement on the Implementation of Article VI was clearly outside of the scope of the terms of reference of the Panel. In any event, the US had never argued that an importing Member was not required to carry out an investigation and carefully examine the facts before making its Article 6.2 of the ATC determinations under Articles 6.2 and 6.4 of the ATC. The US had also never argued that the determinations were exempt from Panel review. The US authorities had carried out a careful investigation, the results of which appeared in the March Market Statement annexed to their first submission. In that submission, they had established the facts of the case by going through the March Statement and pointing out systematically how the CITA had met the requirements of Article 6 of the ATC. They had simply argued that the expertise of US authorities and the findings in the investigation should be accorded an appropriate weight or margin of appreciation. This would also be consistent with the transitional nature of the ATC and the role of the TMB in monitoring measures taken while textile and apparel trade was integrated into the GATT 1994 and other Annex 1A Agreements.

5.60 Furthermore, according to the United States, Costa Rica's reference to anti-dumping cases was also irrelevant because in an anti-dumping case before a WTO panel, Article 17.6 of the Anti-Dumping Agreement superseded panel reports under GATT Article VI. Even in the "Transformers" case cited by Costa Rica, the Panel had recognized the appropriateness in the context of deferring to factual expertise of domestic investigating authorities:

"The Panel ... considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments of both sides ... the Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping ...".<sup>8</sup>

5.61 Costa Rica argued that in order to define this standard of review for the specific case in question, it was important to bear in mind various considerations. Firstly, effective compliance with the substantive requirements of the ATC for the adoption of a transitional safeguard could not be achieved without the certainty that the full extent of the determinations of the importing Member was open to review. Without such a guarantee there was very little incentive for an importing Member to comply with the basic rules of the Agreement which, in practice, meant a return to the situation that existed in the textiles and clothing trade before the Uruguay Round. It was important to note the increasing legalization of the dispute settlement system, firstly of the GATT and now of the WTO, with the aim of raising legal standards. It was not for nothing that Article 8 and Article 14 of the Agreement on Safeguards subjected the measures adopted to their review procedures, in accordance with the rules of the above-mentioned dispute settlement mechanism.

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<sup>8</sup>L/5814, adopted on 18 July 1985, BISD 32S/55, 67, paragraph 4.3.

### Deference to National Authorities

5.62 Costa Rica recognized that although the national authorities could usually count on having access to most of the factual information needed to carry out an effective investigation, for example for the purpose of determining whether a domestic industry had suffered serious damage, it was also clear that those same national authorities could become a hostage to the local forces of protectionism so that they were prevented from carrying out the investigation properly or interpreting and applying the rules of the agreement in question to the best effect. In this connection, for example, Meier wrote that for deference to be paid to the decisions of a national body:

"... there should be agreement that the national body be independent of government, that all interests be given due consideration, and that the national procedure of enquiry be similar to that followed by the United States International Trade Commission".<sup>9</sup>

Pursuing this question further, Meier expresses the opinion that Article XIX of the GATT should be revised in order to incorporate two key principles:

"(i) that the determination of conditions on which the executive is called to take action be entrusted to a statutory body whose term of office should not be coextensive with that of the executive, and (ii) that, after a preliminary investigation by its own specialized personnel, this body should hold public hearings in which all interested parties, including the foreign firms, could be represented and not only present their views but also cross-examine each other within an adversary procedure".<sup>10</sup>

5.63 Costa Rica considered that the national body entrusted with applying the transitional safeguard in the United States, CITA in no way resembled that described by Meier and neither did the procedure it used to arrive at its determination bear any resemblance to that recommended for enabling the decisions of the national body to be held in greater respect. Accordingly, at least in connection with the review of a determination to apply a transitional safeguard, this argument should not carry much weight with the Panel. Finally, the reasons for adopting a restrictive standard of review in the domestic administrative law of some countries, for example the United States, not only could not be transposed to the context of the WTO but, in many cases, if so transposed, would produce the opposite effect.

5.64 In the view of the United States, the points Costa Rica had cited from the article by Meier were wrong or peculiar. The Uruguay Round negotiators appeared in practice to have overruled Meier as they negotiated an original Agreement on Safeguards which facilitates access to Article XIX while barring grey-area measures. Moreover Costa Rica had urged that the Panel adopt proposals by Meier in 1977 for revision of Article XIX, which amounted to requiring that all governments install an imitation of the US international trade commission. The Uruguay Round negotiators had rejected this point as well. The WTO Agreements do not regulate the separation of powers or delegation of authority by governments to domestic institutions of any WTO Member. US law happens to separate the authority for the implementation of safeguards taken on textiles and clothing purposes and that for safeguards under Article XIX. It would be inappropriate, and legally unsupported to impose a model on any government as a matter of its WTO obligations or to accord that model a legally privileged position as argued by Costa Rica. The notifications made to the WTO concerning national safeguard systems clearly showed great diversity in trade policy making and implementation, a diversity which the WTO has not only tolerated but welcomed. In any event, the determination of serious damage or actual threat

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<sup>9</sup>Gerald M. Meier, "Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations", in Harvard International Law Journal, Volume 18, Number 3, Summer 1977, footnote 10, page 510.

<sup>10</sup>*Idem*, page 515.

thereof made by the US authorities in this case must be evaluated not against one academic proposal, but against the law and practice of the ATC.

5.65 On the basis of the above, even if a high degree of deference was paid to the decision taken by the national authorities, Costa Rica was of the opinion that the standard of review applicable in this case required the Panel to scrutinize and verify the following aspects:

- (i) Compliance with the procedural rules: this meant formally confirming not only that all the steps in the process of applying the transitional safeguard followed each other chronologically - as the United States would have it - but also that each of these procedural rules was actually complied with. In this connection, the utmost importance attached to the obligation upon the importing Member to bring evidence, as already indicated, and, above all, the effective fulfilment of that obligation through the submission of specific and relevant information, as required by the ATC, and the proper scrutiny of that information in relation to the parameters of the Agreement, as Costa Rica had previously pointed out. This same aspect also included the obligation upon the importing Member to establish, at the time of making the determination, whether the test of serious damage or actual threat of serious damage had been applied, as well as the obligation to hold consultations with the exporting Member on the basis of the premises on which the case was founded.
- (ii) The proper establishment of the facts: from this aspect, the Panel should confirm that, on the basis of the specific and relevant information submitted, a detailed examination had been carried out, thereby enabling the facts to be properly established. From this it followed that there must be a reliable and logical correlation between the information in question and its examination, on the one hand, and between the latter and the establishment of the facts, on the other. This meant, *inter alia*, properly justifying each of the facts established and, conversely, that it was not possible to establish facts which had not been duly justified. With this in mind, for example, it was not possible in the view of Costa Rica to accept that the United States had demonstrated the existence of problems affecting employment, sales and profits, investment or capacity in its industry, inasmuch as these facts had not been properly substantiated, having been established on the basis of the evidence of only one or two enterprises. Nor was it possible to accept that the data on imports, domestic production and market size resulted in the establishment of the facts adduced by the United States, considering the problem created in this particular case by the fact that "807 trade" was counted twice, not to mention the total absence of analysis of this question within the underwear trade.
- (iii) The objective and impartial evaluation of the facts in the light of the rules of the ATC: the Panel must determine whether the facts had been objectively and impartially evaluated by the national body within the framework of the rules of the ATC. Accordingly, the Panel must verify that the process of subsumption of the facts in the legal arguments provided for by the rules had proceeded logically and naturally, without distorting the evaluation of the facts or involving errors of judgement or abuse of power which might have led to a result different from that which could have been anticipated under conditions of objectivity and impartiality. Thus, for example, it was impossible to conclude that the establishment of an SL quota below the call level could constitute the more favourable treatment for re-imports envisaged in Article 6.6(d) of the ATC.
- (iv) The proper exercise of discretion in the interpretation of the rules: when it became necessary to interpret a rule of the ATC, the national body may not assume unlimited powers of discretion, inasmuch as the ATC itself imposed limits which must be respected. Thus, as Costa Rica had already pointed, the principles underlying the

adoption of a transitional safeguard were clearly established in Article 6.1 of the ATC, according to which the safeguard should be applied,

"as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement".

Given these limits, the rules could not be understood, for example, to mean that the ATC authorized the retroactive imposition of a safeguard measure.

- (v) Compliance with the rules: finally, the Panel must make sure that, despite having complied with the requirements mentioned above, the importing Member had not infringed the ATC in some other way.

5.66 Only a case which survived the scrutiny of a Panel on the basis of the above standard of review could be considered consistent with the ATC. In the case in question, it had already been amply shown that the restriction adopted by the United States on this occasion could not survive scrutiny of this kind, which was why Costa Rica had requested the Panel to rule that it be withdrawn.

### **Burden of Proof**

5.67 Recalling that the measures at issue were taken as an invocation of the multilaterally-agreed safeguard provisions set forth in Article 6 of the ATC, the United States argued that, consistent with accepted GATT dispute settlement practice that had been carried over in the WTO, the burden was on Costa Rica in the first instance to demonstrate that United States actions were inconsistent with the ATC. The burden was not on the United States to re-demonstrate that its actions were justified. It was considered that the United States had presented ample material in the TMB justifying the safeguard measure, and they were prepared to refute the claims that Costa Rica had made; however, the Panel should first determine whether Costa Rica had indeed brought forward factual information and legal arguments substantiating its case, which, in their view, Costa Rica had not done.

5.68 Costa Rica argued that this particular conclusion by the United States was wrong, since the burden of proof in a dispute settlement proceeding under the DSU for the purpose of determining the consistency of a clothing trade restriction with Article 6 of the ATC fell upon the importing Member which had adopted the restriction. This followed from the ATC, since Article 6.2 of the ATC expressly stated that the importing Member must demonstrate the fulfilment of the basic requirements which must be satisfied before a transitional safeguard can be adopted. Accordingly, the importing Member must show or prove that the actual situation against which it would protect itself fully satisfied the basic requirements. The importing Member had two obligations to fulfil: firstly, they must submit specific and relevant factual information in support of their claim and, secondly, review the factors listed in Article 6 and show how their case fitted within the substantive criteria established by the ATC as prerequisites for the adoption of a special transitional safeguard.

5.69 In the view of Costa Rica, the importing Member had an obligation to demonstrate the satisfaction of these requirements not only to the exporting Member during the consultations but also to the TMB and, where appropriate, to the Panel. In accordance with Articles 6.7, 6.9 and 6.10 of the ATC, it was clear that the importing Member must demonstrate its compliance with the basic requirements of the ATC to the TMB. In the case in question the TMB had ruled that "the existence of serious damage had not been demonstrated" and "did not reach consensus on the existence of actual threat of serious damage". From this it clearly followed that the burden of proof *vis-à-vis* the TMB fell upon the importing Member, who must demonstrate the existence of the conditions laid down by the ATC. The importing Member was also obliged to demonstrate the existence of damage in a dispute settlement proceeding under the DSU, since logic forbid that, in this stage, suddenly and for no reason, the burden of proof should be reversed, requiring the exporting Member to demonstrate that the basic requirements

of the ATC had not been fulfilled by the importing Member. To proceed in this way would be to establish a presumption in favour of the latter, in the sense that any restriction on the textile and clothing trade adopted by a Member would have to be assumed to be consistent with Article 6 of the ATC unless the exporting Member could prove otherwise. It was clear that such a rule would make completely pointless the existence of the substantive requirements established by the ATC to ensure that the special transitional safeguard remained an emergency measure and did not become the general rule. There was no reason to "reward" a Member which was unable to demonstrate its case to the TMB by relieving this burden of proof. Moreover, establishing a presumption in favour of the importing Member even against the ruling of the TMB did not make sense, since that would imply depriving the TMB of any role in the supervision of the operation of the ATC.

5.70 Costa Rica pointed out that the United States was justifying its position on the basis of a single case, whose findings should not be taken into consideration by the Panel since, in their view, they were wrong. They stressed that no other panel, from 1951 up to today, had based its findings on that case. It was also important to note that panels set up in other cases, in particular where anti-dumping measures were concerned, had treated the question of the burden of proof very differently. For example, when Finland requested a review of its dispute with New Zealand over an anti-dumping proceeding initiated against shipments of electrical transformers from a Finnish company to a local power company in New Zealand (see also paragraph 5.49), the panel had shared the view expressed by the panel on complaints set up to examine a complaint against anti-dumping duties applied by Sweden (BISD, 3S/81) to the effect that:

"it was clear from the wording of Article VI (of the GATT) that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged."

The report of that Panel did no more than recognize what was a general principle of GATT law, according to which the burden of proof fell upon the Member which invoked Article VI or Article XIX of the General Agreement. In this respect, the principle was clearly laid down in Articles 3 and 11 of the Agreement on Safeguards, according to which it was the importing Member which, in accordance with a series of pre-established procedures, must demonstrate compliance with the basic requirements in order to be able to proceed with the adoption of a safeguard measure. As the principle was of general application, it should also govern the adoption of a special transitional safeguard under the ATC, especially as Article 6.2 of the ATC itself was clearly based on the same principle.

5.71 The United States failed to see the relevance of the Costa Rican arguments that legal duties under the ATC flowed from a general principle of GATT law; that the burden of proof fell on the member which invoked GATT Articles VI or XIX; or that since a Member invoking safeguard action under Article XIX must establish certain facts under Articles 3 and 11 of the Agreement on Safeguards, that principle should govern transitional safeguards under the ATC. Interpretation of the GATT or the Safeguard Agreement was beyond the Panel's terms of reference. Moreover since the US had not yet integrated the apparel categories in question, neither the GATT nor the Safeguards Agreement applied in this case. Even if Articles 3 and 11 of the Safeguards Agreement applied here, their provisions only required that the importing country conduct an investigation, provide due process to interested parties and publish a report. In particular there was nothing in either of these articles that shifted the burden of proof in WTO Dispute Settlement to the importing Member.

5.72 Costa Rica noted that various authors had very sharply criticised the report on the "Fur Felt Hat" case. Thus, for example, Meier wrote:

"In the United States withdrawal case (Hatters' Fur case), for example, the working party held that the invoking party (United States) was 'entitled to the benefit of any reasonable doubt'

and that the complainant (Czechoslovakia) 'has failed to establish that no serious injury has been sustained or threatened'. This has made it difficult to maintain the substantive requirements with respect to causation of 'injury', and it has made access to Article XIX freer than it should be. This procedural rule should be revised to require the invoking party to go forward with the burden of proof of 'serious injury'.<sup>11</sup>

5.73 Commenting on the same case, Dam pointed out that:

"Whatever distinctions may be made between the burden of coming forward with evidence and the burden of convincing the working party, it is clear that the effect of this procedural rule is to permit much freer access to Article XIX relief than might appear possible from the language of that article ...".<sup>12</sup>

5.74 Costa Rica suggested that the Panel should take this opportunity to correct the approach taken in the case cited by the United States and proceed on the basis of the considerations previously advanced to establish clearly that the burden of proof in this case rests upon the United States, which must demonstrate to the satisfaction of the Panel that it has complied with the requirements laid down by the ATC for the adoption of a transitional safeguard.

5.75 The United States noted that Article 3.1 of the DSU affirmed Members' adherence to the principle in Article XVI:1 of the Agreement Establishing the WTO that Members must be guided by the decisions, procedures and customary practices of the GATT 1947 and that such practice included findings and recommendations of the "Fur Felt Hat" working party. Therefore, the United States suggested that the Panel refrain from intervening, as requested by Costa Rica, to alter the established practice.

#### **D. ARTICLE 6 OF THE ATC: GENERAL VIEWS ON ITS APPLICATION**

5.76 Costa Rica argued that the United States had failed to comply with the principles applicable to the adoption of a safeguard measure under Article 6 of the ATC. Article 6.1 of the ATC established two principles that must guide the application of any safeguard to be adopted under the said provision. Firstly, "The transitional safeguard should be applied as sparingly as possible ...". This principle of sparing application of the measure carried an obligation of tempering or adjusting safeguard action prudently or sensitively, avoiding excess. It imposed an obligation to be as scrupulous as possible when seeking to establish new restrictions. Failure to comply with this principle would hinder or might even altogether prevent attainment of the objective of further liberalization of trade in textiles and clothing. Secondly, Article 6.1 of the ATC went on to say that the transitional safeguard should be applied. "... consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement".

5.77 Costa Rica further argued that in accordance with this second principle, it was clear, firstly, that any Member wishing to use this mechanism had an obligation to comply with the provisions established by the Article for this purpose, and secondly, that the application of the measure must be guided by the final objective of the ATC which was the full integration of textiles and clothing into the GATT rules. When considering these two principles together, it was clear that Article 6 of the ATC sought to prevent the arbitrary and/or unjustified use of the transitional safeguard, by imposing on all Members a reference framework to which the application of any safeguard measure was subject and against which the adoption of every safeguard must be measured. The imposition of the unilateral

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<sup>11</sup>Meier, *op. cit.*, page 516.

<sup>12</sup>Kenneth W. Dam, The GATT Law and International Economic Organization, The University of Chicago Press, Chicago and London, 1970, page 103.

restriction by the United States on trade from Costa Rica in the category under consideration had infringed Article 6.1 of the ATC because it was an arbitrary and unjustified action that did not comply with the provisions of this Article.

5.78 The United States commented that Costa Rica's argument consistently depended on the assumption that the ATC integration process must be read into Article 6 so as to accelerate the pace of integration. This was not the case. It was clear in the ATC that integration was an independently determined process, and that Article 6 applied only to products not yet integrated.

5.79 The United States noted that both parties to the dispute had agreed that the ATC was the only relevant agreement in this case. In its view, it was clear from the structure of the ATC, Article 6 in particular, and the express direction of Article 3.2 of the DSU, that the Panel's report,

"cannot add to or diminish the rights and obligations provided in the covered agreements".

Accordingly, where the negotiators of the ATC had failed to agree on certain provisions or otherwise had chosen not to address them in the ATC, the Panel must refrain from appearing to create such obligations. Article 6 of the ATC emphasized that it was the importing Member that made the determination based on the "relevant factual information, as up-to-date as possible" and "information ... related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8" of Article 6 of the ATC.

5.80 Accordingly, when examining conformity with the relevant procedures of Article 6 of the ATC, the United States argued that the Panel should seek only to determine whether the investigating authority had followed the procedures in Article 6 of the ATC and whether based on data available, the investigating authority had acted reasonably (see Standard of Review in Section C). The substantive standard for making safeguard determinations for textiles and clothing not yet integrated into GATT 1994 was provided for in the ATC and was substantially, as Costa Rica admitted in its submission, the same as that existing under Article 3 of the Multifibre Arrangement (MFA).

5.81 The United States further argued that Article 6 of the ATC was not the same as other trade remedy provisions with respect to substantive standards. The above-mentioned articles were the relevant provisions to be considered by the Panel in its review. These provisions contained the universe of factors and procedures to be followed by Members taking safeguard action. Article 6 of the ATC did not include more detailed procedures for investigation, nor did it provide more specific definitions to interpret the standard of law to be applied. This omission was a deliberate choice by the Uruguay Round negotiators who in other contexts, such as the Agreement on Safeguards or the Agreement on Subsidies and Countervailing Measures, were capable of providing detailed standards and procedures.

5.82 In the United States' view, the appropriate standard to apply to the importing country's determination was a standard of reasonableness. Article 6 of the ATC referred to "a determination by a Member," based on weighing of evidence on certain factors. The standard for panel evaluation of such determinations should follow established GATT practice, which was based on the 1951 "Fur Felt Hat" case (see Section C).

5.83 The United States argued that although the quantum of injury required to be demonstrated under Article XIX was greater than that under the ATC Article 6, the fundamental process for weighing information was the same. The Panel must determine whether based on the information available, the US determination was made in good faith application of and, was therefore, consistent with Article 6 of the ATC.

**E. REQUIREMENTS FOR THE APPLICATION OF A SAFEGUARD MEASURE**

5.84 Costa Rica argued that the United States had not fulfilled the specific requirements for the adoption of a transitional safeguard measure. Such action required a demonstration of the existence of a number of substantive elements laid down by Article 6 of the ATC itself. Thus, in accordance with paragraphs 2 and 4 of that Article, two stages may be distinguished, with their corresponding substantive requirements, that must be strictly fulfilled in order to be able to impose such a measure. In a first stage, it was necessary to demonstrate the existence of the substantive prerequisites for the importing Member to be entitled to have recourse to a transitional safeguard. Thus, Article 6.2 of the ATC provided:

"Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products ...".

5.85 The United States argued that the CITA had followed all of the procedures required under Article 6 of the ATC in making its serious damage, or actual threat thereof, determination.

**Determination of Serious Damage or Actual Threat Thereof**

5.86 In the view of Costa Rica, Article 6.2 of the ATC established three requirements that must be fulfilled and were the prerequisites for being able to impose a specific safeguard, namely: (a) an increase in total imports of a particular product, regardless of their origin; (b) serious damage or actual threat thereof to the domestic industry producing like and/or directly competitive products; and (c) a causal relationship between the increase in total imports and the existence of the serious damage or actual threat of serious damage.

5.87 The establishment of these three requirements, which were developed in detail in paragraphs 2 and 3 of Article 6 of the ATC, was not new in foreign trade law, as in one way or another they were the conditions laid down by Article XIX of GATT 1994 and by the WTO Agreement on Safeguards for the imposition of a safeguard measure. Broadly speaking, the idea was that these measures were by definition an exception to the rule of free trade. Furthermore, since what they were intended to restrict was fair trade and not unfair trade, such measures must comply with a number of strict requirements so as to be able to "justify" departing from the principles of free trade. The fact that the ATC had established a specific safeguard mechanism for use during the transition period did not deprive it of the intrinsic nature or philosophy of any safeguard mechanism, and in particular its character of being a temporary exception to free trade based on strict fulfilment of a number of requirements. Indeed, in so far as the transitional safeguard provided for by the ATC did not require compensation, its application must be strictly subject to the substantive criteria laid down by the ATC, and this must be judged very rigorously.

5.88 The United States noted that the ATC transitional safeguard departed from the GATT Article XIX requirement that the safeguard be applied on a non-discriminatory basis and that compensation must be provided. The safeguard standard was serious damage, or actual threat thereof. Under the ATC, Members must first determine that a product such as, in this case, underwear, was being imported in such increased quantities as to cause serious damage or actual threat thereof to their domestic industry producing like or directly competitive products. Article 6.2 of the ATC provided that:

"safeguard action may be taken under this Article when, on the basis of a determination by a Member, [footnote omitted] it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage

or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preferences."

5.89 Costa Rica submitted that to have the right to take safeguard action, the importing Member must fulfil the requirements established for this purpose in Article 6.2 of the ATC as developed in detail in that Article and in Article 6.3 of the ATC. Article 6.2 of the ATC obliged an importing Member to demonstrate that the substantive requirements had been met before imposing a transitional safeguard. This demonstration procedure required the Member to submit specific and relevant information on the facts giving rise to its claim and to make the required examination of this information in relation to the parameters of the Agreement. This information, together with the corresponding analysis, must be submitted at the correct time, namely the time the importing Member determines the state of the market, so that the exporting Member can exercise their right of defence. Any failure to observe the provisions could not be remedied by the subsequent submission of information (the July or October Statements) since, the information that was legally relevant for the purpose of analysing conformity of the measure with the ATC was that contained in the March Statement. The exhaustion of this first stage, with the fulfilment of each and every one of its requirements, was a *sine qua non* condition for acquiring what might be called a "generic" entitlement to the use of a specific safeguard measure, which may only be particularized or materialized against a specific Member when the second stage of the process had also been fulfilled. The United States had not fulfilled its obligation to demonstrate the existence of the substantive factors that were part of this first stage, and thus had failed to fulfil the requirements laid down in Articles 6.2 and 6.3 of the ATC.

5.90 The United States pointed out that Article 6.3 of the ATC required that in making a determination of serious damage, or actual threat thereof, a Member

"shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance."

This text required that a Member seriously examine the effects of imports on the industry as reflected in changes in economic data on that industry. However, it did not require that the importing Member examine only the listed variables, or all the listed variables. It only required that the importing Member examine variables such as those listed. CITA had in fact examined many variables including those listed as relevant in Article 6.3 of the ATC. The March Market Statement noted that CITA had examined production, market share, imports, employment, profits, investment, sales, capacity, prices and manhours. All of the information provided in the March Market Statement contained all the substantive economic information on which CITA's decision had been based. While Costa Rica had pointed in particular to exports, exports were only one variable of a long list in Article 6.3 of the ATC and as that Article stipulated, any one variable alone could not necessarily give decisive guidance.

5.91 The United States noted that while export data were generally not as reliable as import data, at the request of the TMB, the US had supplied an export table. Even after using export data to adjust for the overstatement in the market, the figures before the TMB had confirmed the determination made by CITA. After examining the import data, CITA examined output, market share, employment, domestic price and profits and investment information. That information had led CITA to the conclusion that there was a case of serious damage, or actual threat thereof to the US domestic industry. While the United States did not supply data on productivity, inventory, wages and exports, it was not required to do so under Article 6.3 of the ATC. The variables in Article 6.3 of the ATC not directly included in the March Market Statement (productivity, inventories and wages) had been discussed during the

TMB examination in oral responses by the United States to questions from TMB members. Costa Rica had omitted any recognition of the express proviso in Article 6.3 of the ATC that:

"none of [these factors] either alone or combined with other factors, can necessarily give decisive guidance."

A similar proviso was also found concerning the additional factors for consideration in Article 6.4 of the ATC. Nevertheless, the United States had provided verbal responses to questions concerning productivity, wages, and inventory to the TMB.

### **Increase in Imports into the United States**

(see also The Counting of Re-imports, paragraphs 5.142-5.149)

5.92 Costa Rica further argued that, in accordance with its obligation to demonstrate the existence of an increase in imports, the United States should have presented specific and relevant factual information on the subject, and then have analyzed it. In this regard, however, the March Market Statement only indicated that imports in this category had increased from 65.5 million dozen in 1992 to 79.9 million dozen in 1993 and 97.3 million dozen in 1994, reflecting increases of 22 per cent in each year with respect to the previous year. The United States had not made any distinction concerning the nature of this trade, nor any analysis thereof, an omission which was particularly serious in this case given the increasing importance of "807 trade" in this category. In fact, over the last six years there had been a substantial change in the United States industry producing cotton and man-made fibre underwear. There had been a shift from producing and assembling the product locally to producing the product components locally, which were then assembled abroad and returned to the same companies in the United States for marketing. This co-production process (see Section II) had enabled the United States industries to retain their market share in the United States.

5.93 Costa Rica questioned whether, in the case of clothing produced on the basis of the co-production process, one was dealing with "imports" or rather with a case of domestic production which, despite assembly in another country, did not for that reason alone cease to be domestic production. In fact, the United States itself had considered imports of cut parts for assembly in the United States as products of the country where the parts were cut. United States exports of cut parts should be considered United States products. Furthermore, when this case was reviewed by the TMB in July 1995, the United States itself had submitted a loose sheet giving alleged export data in this category, in which cut parts subsequently assembled abroad were included as exports, which logically showed that for this industry these were part of domestic production.

5.94 Costa Rica noted that the "807 trade" had risen from 31.8 million dozen in 1992 to 42 million dozen in 1993 and 57 million dozen in 1994, accounting for an ever larger part of trade in category 352/652. This reflected a pattern which, by all indications, would continue and become more pronounced in the future, driven by the investment policies and incentives that the United States maintained in relation to the Caribbean Basin and Mexico.

5.95 In the view of Costa Rica, much of the cited increase in imports did not in fact exist, and therefore the United States did not have the right to use the transitional safeguard. By nevertheless having done so, it violated Article 6.2 of the ATC. However, if it were to be considered that there was in fact an increase in imports of underwear, it was quite clear that if such imports were increasing it was because United States production of the cut pieces, that were subsequently assembled, was increasing in the same proportions. In other words, if ever more underwear was being assembled in other countries it was because in the United States ever more cut pieces for underwear were being produced that need to be assembled, from which it necessarily followed that any industry producing cut pieces for underwear was thriving and therefore did not need to be protected from something that was rather of benefit to it.

5.96 The United States considered that the ATC did not prohibit inclusion of re-imports in imports; on the contrary, Article 6.2 of the ATC directed importing Members to examine increases in "total" imports. The ATC also did not require Members to separate re-imports from total imports. In fact, all textile and apparel re-imports were defined under United States law as foreign articles. The US Bureau of the Census' statistics reflected HTSUS 9802 re-imports as apparel which were cut in the US, exported to be assembled, and then re-imported under HTSUS 9802 as finished garments. HTSUS 9802 re-imports were included in domestic production (cut parts), exports (cut parts), and imports (finished garments). Re-imports must clear customs like any other imported good. Costa Rica had admitted to the TMB that companies producing goods for re-import into the United States were subject to the same laws, fees and taxes as other domestic Costa Rican manufacturers. HTSUS 9802 apparel re-imports into the US received duty reductions to the extent that they incorporated US content.

#### **Application of Safeguard to Individual Member(s)**

5.97 Costa Rica argued that in the case of the ATC, since the Agreement allowed the selective and discriminatory application of a safeguard measure, it was necessary to fulfil this second stage which was not normally present in other existing safeguard mechanisms in the multilateral system, precisely in order to be able to identify the Member or Members to which the measure would be applied. Thus, Article 6.4 of the ATC stated that:

"Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction: none of these factors, either alone or combined with other factors, can necessarily give decisive guidance ...".

5.98 In the view of Costa Rica, in the second, attribution stage, the importing Member must demonstrate the fulfilment of two substantive requirements: a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually; and the causal relationship between this increase and the serious damage or actual threat thereof created by total imports. In accordance with the above provisions, the fulfilment of the three requirements set out in the first stage was an essential pre-condition to be able to go on to the second stage of the demonstration process. Only when, after having fulfilled the requirements of the first stage, and it had also fulfilled the two requirements of the second stage, may the importing Member apply a transitional safeguard to an exporting Member.

#### **Obligation of Demonstration - Fulfilment of Substantive Requirements**

5.99 Costa Rica argued that, in order to be able to fulfil the above-mentioned requirements, the ATC imposed on the importing Member an obligation of demonstration. Under Article 6.2 of the ATC, the Member wishing to apply a transitional safeguard was obliged to make a determination prior to adopting the measure. In the determination, the Member had the obligation to demonstrate fulfilment of the substantive requirements laid down in order to be able to establish such a measure. It was noted that while it was the Member's obligation to make the determination, the actual content of the determination was clearly established by Article 6 of the ATC itself: it consisted in demonstrating the existence of the substantive requirements that must be fulfilled in order to adopt a transitional safeguard. It was not a question of stating, alleging or repeating opinions without any grounds, but rather of showing or proving that the factual situation on which the Member wished to take protective action fully met the specified conditions. The burden of proof rested with the Member intending to

restrict trade. If the Member took safeguard action without having demonstrated the existence of all the substantive requirements in the two stages as described above - as the United States had done in this case, it was violating the ATC (see also Burden of Proof in Section C).

5.100 This demonstration process which the Member wishing to impose the safeguard must carry out may in turn be divided into two: firstly, the Member must present the specific and relevant information on the facts giving rise to its claim in accordance with Article 6.7 of the ATC; and secondly, it must make an examination of the factors listed in Articles 6.2, 6.3 and 6.4 and of how the conditions it was presenting fell within the substantive criteria laid down by the ATC as necessary requirements to justify the adoption of a safeguard measure. If the information was not presented, the necessary analysis could not be carried out, and consequently there would be a breach of the ATC. In the case under consideration, the United States had failed to demonstrate the existence of the substantive elements of the first stage of the demonstration process, and still less those of the second stage, thereby violating Articles 6.2, 6.3, 6.4 and 6.7.

5.101 The United States stated that it had met all of the substantive requirements of Article 6 of the ATC and that after doing so, met its burden of proof and the transitional safeguard action was justified. It was now up to Costa Rica to show that the United States determination was unreasonable and inconsistent with the requirements of the ATC, in particular Article 6.2, 6.3, 6.4, 6.7 and 6.6(d).

### **Consultations on Safeguard**

5.102 The United States noted that, once the determination had been made, the importing Member must request consultations with the relevant exporting Members. Article 6.7 of the ATC also provided that requests for consultations on proposed safeguard action must be accompanied by "specific and relevant factual information, as up-to-date as possible," particularly factors referenced in Articles 6.3 and 6.4 of the ATC.

5.103 As under the Multifibre Arrangement (MFA) system, during consultations on the application of the safeguard, importing Members must take into account four areas of more favourable treatment as appropriate. One area of more favourable treatment relevant in this matter was that accorded to re-imports included in the determination of serious damage, or actual threat thereof that constituted a significant proportion of an exporting Member's trade. It was not until the consultation stage that the United States was required to give more favourable treatment in accordance with Article 6.6(d) of the ATC. The ATC left the definition of re-imports and the manner of applying more favourable treatment to the importing Member. If the consultations provided for in Article 6.7 of the ATC did not result in a mutual solution, the importing Member must exercise its option to take action to limit the relevant imports within 30 days. Once that action was taken, Article 6 of the ATC required automatic review by the TMB.

### **Data Required for Consultations and Other Relevant Information**

5.104 Costa Rica considered that the "other relevant information" should be understood as information relevant or related to the information specified in the earlier paragraph, which was taken into consideration by the importing Member at the time of making its determination about the market situation and which was available to the exporting Member. The main task of the TMB in this respect was, in accordance with Article 6.10 of the ATC, to examine whether the determination made by the importing Member fit the requirements of the ATC. Thus, the examination was restricted to those elements which the importing Member had taken into consideration in making its determination and of which the exporting Member was duly cognizant at the time. These may be different from the factual elements mentioned in Article 6.7 of the ATC, but they must be related to them. It could not be argued that the TMB could conduct its examination on the basis of information which the importing Member had not taken into consideration at the time of making its determination - because it did not exist, because

it was not available or for any other reason - and which the exporting Member did not have an opportunity to examine and refute before the imposition of the restraint. To do otherwise would jeopardize the rights of the exporting Member and would be contrary to the provisions of the ATC.

5.105 Costa Rica recognized that paragraphs 2, 3 and 4 of Article 6 of the ATC did not distinguish between "re-imports" and imports, but used only the latter term. However, they did not consider that this by itself should be taken to mean that "807 trade" should necessarily be regarded as imports. On the contrary, the word "imports" should be analysed in the context of the case in question and the economic rationale of "807 trade", in order to determine whether, in this particular case, "807 trade" could or could not be regarded as imports for the purposes of Articles 6.2, 6.3 and 6.4.

5.106 The United States pointed out that Article 6.7 of the ATC required that the call for consultations must be "accompanied by specific and relevant data, as up-to-date as possible" relating to the factors referred to in Articles 6.3 and 6.4 of the ATC. Like the working party in the "Fur Felt Hat" case, Article 6.7 of the ATC did not require perfect data. The data relied upon by the CITA at the time of its determination in March were in fact as up-to-date as possible, and provided information as close as possible to the reference period. The United States had presented revised and updated data to the TMB in July which only confirmed the correctness of the CITA's analysis in March that transitional safeguard action was appropriate.

5.107 The data to be used in examining whether a determination was consistent with Article 6 of the ATC must be those data actually used by the authorities of the importing Member at the time it made the determination. The relevant data in this case were those required by Article 6.7 of the ATC. Nevertheless, all later updated or supplementary data only corroborated the data in the March Market Statement.

5.108 The United States pointed out that the TMB must review the case, determine whether the safeguard action was justified and make appropriate recommendations to the Members concerned. In addition to the data supplied in accordance with Articles 6.7 and 6.10 of the ATC also allowed the TMB to consider "any other relevant information provided by the Members concerned." Importing Members must notify the Chairman of the TMB, providing relevant factual data at the same time the request for consultations was made. When a restriction was in place, the ATC placed a three-year cap on the duration of safeguard measures applied by Members, unless the product concerned was integrated earlier.

#### **F. SERIOUS DAMAGE OR ACTUAL THREAT THEREOF**

5.109 Costa Rica submitted that the second substantive requirement that any Member wishing to acquire the right to take safeguard action must demonstrate was serious damage or actual threat thereof to the domestic industry producing like and/or directly competitive products, as stated in Article 6.2 of the ATC. It was noted that Article 6.2 of the ATC referred to the fulfilment of a requirement that may take one of two forms: it may be that what existed was serious damage to the domestic industry, or it may be that what existed was the actual threat of serious damage to the domestic industry. However, it was also noted that while the requirement was fulfilled by the existence of either of the two conditions, they were precisely two different hypotheses, owing to the time factor. In the case of serious damage, the injury to the domestic industry had already occurred, whereas in the case of actual threat of serious damage the injury to the industry had not yet occurred but there was an imminent and hence actual possibility that it would occur. It was not possible to use the same information and the same type of analysis to prove both that a supposed fact had occurred or that it was about to occur.

5.110 Costa Rica claimed that it was the understanding of the TMB itself that serious damage and actual threat of serious damage were not the same thing, since in this particular case it had concluded that the existence of serious damage had not been found, but it could not reach a consensus on the

existence of actual threat of serious damage. If the two conditions were a single hypothesis, the conclusion that one did not exist would necessarily lead to the conclusion that the other did not exist. However, the TMB had not taken this view. The most important consequence of this difference was that the nature of the information submitted and of the analysis made to demonstrate each hypothetical condition was necessarily different, as it was not the same thing to demonstrate that damage had already occurred as to demonstrate that damage might occur. That was why the logical corollary of this difference was that an importing Member could not submit the same information in this connection and carry out the same type of analysis in order to argue indiscriminately that what had existed was damage or threat of damage. At a given point in time - the moment when the call for consultations was made - either one condition existed or the other condition existed. To make an appropriate demonstration thereof the importing Member must at that point in time define what the supposed situation of its industry actually was and make the call, submitting the corresponding information and, if appropriate, adopting the restriction on the basis of the condition it selected.

5.111 Costa Rica stated that correct identification by the importing Member of the supposed claim made in relation to the state of its domestic production was essential in order to comply properly with its demonstration obligation. In the view of Costa Rica, it was only when the TMB had determined that the existence of serious damage had not been proven that the United States changed tack and appeared to assume that it could maintain its restriction on the basis of the purported threat, which had not been alleged or proved previously. The United States affirmed that as the ATC was not worded in the same terms as other WTO Agreements, it was not possible to require the presentation of different information in order to prove serious damage or actual threat of serious damage. However, Costa Rica argued that even though something may not be specifically stated in an agreement, common understanding required it, because it was not possible to use the same information and the same type of analysis to prove both that a supposed fact has occurred or that it is about to occur.

5.112 Costa Rica argued that, in some measure, that was what the United States had done in this process. The great majority of the communications initially sent by the United States in connection with the case, the Statement submitted in March and the adoption of the unilateral restriction in June were all based on the purported existence of serious damage to the United States industry. The United States had begun this case and had adopted this restriction on the basis of the existence of serious damage, and had not considered that a threat existed. That was why the element of actual threat had not even been taken into account. Hence, at the moment when the TMB determined that serious damage did not exist, the United States should have withdrawn the unilateral restriction it had imposed.

5.113 However, the United States had not withdrawn the restriction, but had maintained and even renewed it. Although the United States had not explicitly argued this at any time, it appeared to have assumed that it was authorized to maintain the measure on the basis that the TMB could not reach a consensus on the existence of actual threat of serious damage. In the view of Costa Rica, this reasoning was incorrect and violated Articles 6.2 and 6.3 of the ATC, which specifically required the demonstration that this was the condition, with the presentation and analysis of specific and relevant information concerning the existence of actual threat of serious damage. The fact was that there existed neither serious damage to the United States industry, nor actual threat of serious damage to that industry, which was why, by adopting a restriction without this second requirement being fulfilled, the United States had violated Articles 6.2 and 6.3 of the ATC.

5.114 The United States argued that Article 6.2 of the ATC required that a Member determine that a particular product was being imported into its territory in such increased quantities as to cause "serious damage, or actual threat thereof" to the domestic industry producing like or directly competitive products. Unlike other agreements such as the Agreement on Implementation of Article VI, the ATC did not provide separate requirements for determinations of threat of injury. "Serious damage" or "actual threat" never appeared separately in the text of Article 6 of the ATC; each reference to one of these two different legal concepts was coupled with a reference to the other. Thus, Article 6 of the ATC

provided only one standard, with one set of criteria, for determinations of serious damage or actual threat thereof. This standard and these criteria had been employed in the CITA determination of March 1995. Thus, this determination of "serious damage, or actual threat thereof" was fully consistent with Articles 6.2 and 6.3 of the ATC.

5.115 The United States noted that their 27 March 1995 diplomatic note to Costa Rica making the actual call for consultations had referred to "serious damage, or actual threat thereof" to the industry producing underwear in the United States, even if the March Market Statement which accompanied it abbreviated this reference to "serious damage". Furthermore, during consultations with Costa Rica the United States had consistently taken the position that underwear imports from Costa Rica were causing both serious damage and actual threat of serious damage. During TMB deliberations, in July 1995, it was clarified that the reference in the March Statement had included both serious damage and actual threat of serious damage, and the United States had corrected the statement accordingly.

5.116 Costa Rica was of the view that the US diplomatic note of 27 March 1995 was merely a standard form used by the United States for its calls. Even though the note alleged a threat of serious damage, the fact was that the statement attached to it in order to justify the restriction - the March Market Statement - did not contain any information or analysis relating to this allegation. Moreover, during the consultations held between the two governments under Article 6 of the ATC, no evidence or analysis of any kind was submitted that might have demonstrated the existence of such a threat. Similarly, there was no mention of the existence of a threat of serious damage as justification for the adoption of a safeguard in the notes which the United States had attached to the various restraint proposals it submitted to the Government of Costa Rica.

5.117 With respect to the status of the TMB finding that serious damage had not been demonstrated, the United States pointed out that they did not agree with the TMB finding and did not at the time it was made; nothing in the ATC made TMB findings or recommendations binding on the parties concerned. As a practical matter in light of the TMB's initial finding the United States had been compelled to shift the focus of its argument to "actual threat" after July 1995, but as a matter of law the ATC did not confer upon the TMB the power to make findings of fact that legally bound Members. Moreover, as noted in relation to the standard of review, the burden of proof was on Costa Rica to produce a *prima facie* case that the US determination was inconsistent with Articles 6.2 and 6.3 of the ATC; the United States did not have the burden here of proving that its actions had been consistent with the ATC (see also Section V:C). Furthermore, the question to be addressed was not the existence of "serious damage" as such, but whether facts had been advanced which provided convincing evidence that it was unreasonable for CITA to determine that the adverse effects of increased underwear imports on the US domestic underwear industry had amounted to serious damage, or actual threat thereof.

5.118 Costa Rica observed that, in its first review of this case, the TMB had reached the clear conclusion that "serious damage ... had not been demonstrated", as required by Articles 6.2 and 6.3 of the ATC. It was clear that the restriction imposed by the United States infringed the above-mentioned provision because the United States had failed to demonstrate the existence of serious damage to its industry. As the TMB decision in this regard had not been challenged, it had to be understood that both parties had accepted it. Consequently, the discussion as to the supposed existence of serious damage should not be reopened, since it was clear that this was not demonstrated at the time when it should have been demonstrated.

5.119 Costa Rica argued that the United States had also failed to demonstrate the purported actual threat of serious damage. The industry producing clothing classified in category 352/652 was not only not suffering any serious damage but also not suffering any actual threat of serious damage, as required under Article 6 of the ATC. Firstly, the United States itself did not consider that actual threat of serious damage existed in this case. It never argued that this was the case in order to justify the unilateral restriction imposed on Costa Rica. This was shown by the unreliable, erroneous, contradictory and

incomplete information it had included in the March Market Statement, which did not serve for making an analysis of whether serious damage existed, and was not even designed to be used as a basis for an alleged actual threat of serious damage. When the United States made the call for consultations, the condition it had in view was that of serious damage and not of actual threat of serious damage. That was why the March Statement did not make any specific reference to the issue of threat, except indirectly in a single sentence of the text. That is also why, when the United States published in the Federal Register the request for public comments concerning these negotiations, it referred only to serious damage, and not to actual threat of serious damage.

5.120 The supposition of actual threat of serious damage became important when the TMB, after having reached the conclusion that the existence of serious damage had not been demonstrated, did not reach a consensus as to the existence of actual threat of serious damage - a strange decision, considering that the hypothetical condition of actual threat was not in itself under consideration - and recommended that the parties hold further consultations bearing this in mind, *inter alia*. It may be thought that, following the TMB's decision, the only option open to the United States was to try to justify *a posteriori* the restriction adopted, by now invoking a supposed threat to its underwear-producing industry. However, the fact was that it also failed to establish this justification, even in subsequent months.

5.121 Costa Rica argued that neither the March Market Statement, nor the July Statement, nor any other information furnished by the United States, not even following the imposition of the unilateral restriction, provided evidence or furnished an analysis of the kind required to demonstrate the existence of actual threat. The obligation to demonstrate the actual threat of serious damage had two dimensions. Firstly, it was necessary to demonstrate that an imminent increase in imports existed, on the basis of objective criteria, such as the goods having already been exported and en route; or that they were in port waiting to be shipped; or that they were covered by a contract and would be shipped once production had been completed. A second dimension, closely linked to the first, referred to volume, in the sense that not every possible increase in imports was capable of creating a threat. It followed from the foregoing that it was necessary that the goods should be able to be counted, which in turn was linked with the need for objective criteria to determine the imminence of the imports.

5.122 The United States argued that they were not required by the ATC to choose between serious damage and actual threat in making their determination. The ATC standard allowed Members to assert, at the same time, both serious damage or actual threat. The plain meaning of the standard invoked merely the notion that there could be a determination on the basis of serious damage or actual threat. Neither was exclusive of the other. There was no obligation in other safeguard proceedings that one standard must be alleged instead of the other. The ATC treats them equally, that is, without any special factors to establish a case for one or the other. The simple fact was that Members could allege both based on the same factors. In addition, contrary to the assertion of Costa Rica, it did not follow that if the TMB found that there was no serious damage, and reached no consensus on threat, there was no threat. No consensus on threat was just that. No consensus on that finding, therefore, no finding or decision on threat.

5.123 Upon request of the Panel, the United States argued that they did not take the view that a finding of actual threat of serious damage implied some sort of prospective analysis because there was no provision of this kind in the ATC that would have guided the United States in making its determination. The United States did not split the phrase "serious damage, or actual threat thereof" and was not asking the Panel to do so. The ATC did not provide separate criteria for threat. They maintained that whatever analysis was chosen by the Panel must not add to or diminish the rights and obligations of the parties. They believed that the ATC must be observed and that any interpretation that would re-write the ATC would probably require the re-opening of the Marrakesh Agreement Establishing the WTO.

### The March 1995 Market Statement

5.124 Costa Rica considered that the United States could base its restriction only on the March Market Statement which was the statement the United States had notified within the terms of Article 6 of the ATC and on the basis of which consultations had been held. It also provided the basis for the United States' adoption of a unilateral restraint. Thus, it was clear that the March Market Statement alone ought to be examined by the Panel in order to determine whether the restriction applied by the United States complied with Article 6 of the ATC.

5.125 Conversely, Costa Rica was of the view that a finding of actual threat of serious damage implied a prospective analysis. Since the ATC required that the threat be "actual", this implied that the Member wishing to impose this ground could not do so on the basis of conjecture or speculation, but must effectively demonstrate that there was an imminent damaging impact on the industry which was about to occur in the future. Once this specific and relevant information had been presented, the importing Member must carry out a prospective, forward-looking analysis of what could happen to its industry, bearing in mind that what was under examination was the imminence of a situation that had not yet occurred. In the case under consideration, the United States had submitted absolutely no information aimed at seeking to demonstrate the existence of actual threat of serious damage, still less to carry out any kind of analysis to that end. Hence, it was impossible to consider that the unilateral restriction imposed could have been based on the existence of a supposed actual threat.

5.126 Costa Rica contrasted the requirements of Article 6.3 of the ATC with the information included in the March Market Statement. According to Article 6.3 of the ATC, in making a determination of serious damage,

"The Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance."

5.127 Costa Rica argued that, pursuant to this provision, the United States had to demonstrate the effect of imports from Costa Rica on the state of its underwear producing industry, as reflected in changes in the relevant economic variables. The first stage of this process of demonstration consisted of the presentation of the necessary information to be able subsequently to make an analysis of the information. In this connection, Article 6.7 of the ATC provided that:

"The request for consultations shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors referred to in paragraph 3, on which the Member invoking the action has based its determination of the existence of serious damage or actual threat thereof; ...".

5.128 Given the characteristics of the information in the March Market Statement - summarized by Costa Rica in the following table - it was impossible in their view for the United States to fulfil their obligation to demonstrate the existence of serious damage.

Information Required Under the ATC and Information  
Presented by the United States

ATC	Information included in the March Statement (MS) submitted by the United States
Output	The MS mentioned that production had declined by 4% in 1992 and 1993 and a further 4% between 1993 and 1994; in July the United States indicated that the percentage of decline of the first period remains the same but that in the second there was no decline; in October the United States believed that for the first period there was a decline of 1.5%, whereas in the second the supposed decline was 2.6%.
Productivity	No information was included on this variable.
Utilization of capacity	No specific information was included on this variable, apart from a sentence stating that because of the import competition, firms reported shifting production capacity to other product lines. The source of this information was the survey which the United States says that it had carried out, but the slightest details of which were unknown.
Inventories	No information was included on this variable.
Market share	The MS states that the domestic industry's share of the market fell from 73% to 68%. The problem of how to treat "807 trade" was not taken into consideration, and therefore it was not determined for certain that the domestic industry's market share did not rather increase.
Exports	The MS did not include any information of this variable. In July the United States had submitted a loose sheet stating that exports had increased from \$284 million in 1992 to \$406 million in 1993 and to \$458 million in 1994. This loose sheet did not indicate the source of the information.
Wages	No information was included on this variable.
Employment	The MS stated that employment declined from 46,377 workers in 1992 to 44,056 workers in 1994. In July, however, the United States said that the number of workers in 1992 was 35,191 and that the number had declined to 33,309.
Domestic prices	The MS stated that the producers' average price is \$30 per dozen in 1994, without giving the source of the information. In July the United States "corrected" this information and indicated that it believes that this price is between \$16 and \$20 per dozen.
Profits	The MS stated that profits were down 18% at one firm - of the 395 which supposedly existed - and there was pressure on the bottom line throughout the industry due to rising costs and stiff import competition. The MS also stated that sales declined and that one company had reported that their sales were down about 17% in 1994. No statistics were given in this respect. The source of this information was the survey that the United States said it carried out, but the details of which were unknown.
Investment	The MS stated that companies "generally" had been postponing investment in this industry, that some companies had closed plants permanently or shifted production offshore, and additional disinvestment of this nature "was being contemplated". No statistics were given in this respect. The source of this information was the survey that the United States said it carried out, but the details of which were unknown.

5.129 Costa Rica noted that of the 11 factors listed in Article 6.3 of the ATC, the March Market Statement had not included any information concerning four of them; it had included information which the United States itself subsequently considered wrong in the case of three of them (two of which were output and prices); and included information for three factors based on a survey whose coverage, methodology, representativeness, dates etc. were not mentioned - and indeed, on another occasion the United States itself declared that it could not use this type of instrument to collect information in these cases. In these circumstances, the only possible conclusion was that the information submitted by the United States was unreliable, erroneous, contradictory and lacking, and therefore any measure based on it was in breach of Articles 6.2, 6.3 and 6.7 of the ATC.

5.130 Costa Rica argued that the information submitted was unreliable for three reasons: firstly, much of it did not give the source from which it is taken; secondly, where a source was specified, it turned out not to be very serious; and lastly, the best evidence that the information of the March Market Statement was unreliable was that in July the United States itself submitted fresh information that substantially contradicted all the major indicators covered in the March Statement. Then, a few months later the United States again published information that was at variance both with the information produced in July and with the information included in the March Statement.

5.131 Costa Rica recalled that Section III of the March Market Statement was divided into two sections, the first headed "serious damage to the domestic industry" and the second "industry statements". The first of these sections included data on domestic production, market share loss and import penetration, for which the source was given. In the case of the information on employment and man hours it stated that the data were derived from various sources, which were not identified with any degree of precision. It was noted that the industry statements had a questionable source, being

"Based on a survey of individual firms producing cotton and man-made fibre underwear ... the observations are concentrated in the men's underwear sector but also include the even more heavily import-impacted ladies underwear sector."

5.132 In effect, the data on employment, sales, profits, investment, capacity and prices included in the March Market Statement were based on an alleged survey whose coverage, methodology, representativeness, date, etc., were unknown since the Statement was completely silent in this respect. This explained the opinions included in the Statement for which there was so little basis or justification. Clearly, it was impossible to make generalizations of any kind or determine the state of the industry on the basis of a number of opinions from one or two firms - it was recalled that the Statement itself stated that there were 395 establishments producing in this category - for which no grounds or explanations were given and included in a survey whose details were unknown. It was also obvious that this could not constitute any kind of demonstration of the impact of imports on the industry in question, since it did not shed any light on the effect of the increased imports on the variables mentioned.

5.133 Costa Rica did not consider the data based on the alleged survey of individual firms, of which nothing was known, to be serious. The survey referred to the opinions of one or two firms as to capacity utilization, inventories, exports, wages, profits and investment. The submission of information was so important that the United States should have included in its Statement data on at least all the factors set out in Article 6.3 of the ATC and perhaps even on some others; however, it had failed to do so.

5.134 The problem of the March Market Statement was not confined to the lack of information but also to the total absence of any analysis of that information. The United States did not make any kind of analysis of the information, although given the incoherencies of that information, it would have been difficult to do so. This led Costa Rica to the conclusion that with the information submitted, the United States had failed to fulfil its obligation to demonstrate the existence of serious damage to its industry, as required under Articles 6.2 and 6.3 of the ATC, and as the TMB itself had found.

### **The July 1995 Market Statement**

5.135 Costa Rica considered that the reliability of the information was also brought into question by the United States, which published further data in July and again in October 1995, altering the March data substantially. Thus, in July data that differed from the March data were given in essential fields including: (a) number of establishments producing underwear in category 352/652: in March there were 395, but in July there were 302; (b) supposed decline in output: whereas in March output was believed to have declined by 4 per cent between 1992 and 1993 and by a further 4 per cent between 1993 and 1994, in July it was indicated that the first percentage remained the same but that in the second period there was no decline; (c) market size: whereas in March, "807" production was wrongly counted twice, both as domestic production and as imports, in July this market size was "adjusted", introducing significant alterations compared with the March Statement; (d) number of workers employed in the sector: whereas the March Statement stated that 46,377 people worked in the sector in 1992, in July it was stated that that was not the number, but rather 35,191 persons, in other words the March Statement was wrong by 11,000 workers; (e) average price of United States underwear production: whereas in March it was stated that this was \$30 per dozen, in July it was "clarified" that this figure had a margin of error of nearly 100 per cent, the price being between \$16 and \$20 per dozen.

5.136 Costa Rica emphasized that the March Market Statement, on which the consultations had been held and the unilateral restriction imposed in June 1995, had so many errors that all its main parameters were modified in July. Virtually the only section of the March Statement that was not modified was that based on the survey. Furthermore, in October 1995 the Textile and Apparel Office of the United States Department of Commerce had published updated statistics to June 1995 for category 352/652 in which some of the data given in July were "revised" once again, having already been "revised" with respect to the March Statement, and the results obtained were at variance with those submitted earlier. It thus turned out once again that the data for output and market size were different. This lack of reliability of the information submitted by the United States was enough to maintain beyond all doubt that the United States had failed in its primary duty of presenting the necessary information to proceed to carry out an analysis of whether the serious damage it alleged actually existed.

5.137 The July Statement had been used by the United States from July 1995 and up to the establishment of the Panel as an "ex post facto" justification for the restriction applied to Costa Rican trade in this category in June 1995. Nevertheless, Costa Rica had always maintained that the July Statement could not be regarded as the basis for the call, since it was not. The information contained in the July Statement was not that which should be analysed for the purpose of determining whether the restriction adopted by the United States complied with Article 6 of the ATC. In this respect, it was correct to say that this statement had no legal relevance. The July Statement was useful for confirming how erroneous was the information included in the March Statement which formed the basis of the unilateral restriction adopted in June 1995. This Statement - which for the most part was based on the same information that was available in March - was useful as evidence, inasmuch as it showed that the information which served as basis for the adoption of the restriction in question was seriously flawed.

5.138 The United States pointed out that it had a general practice of monitoring and updating textile and apparel production and trade data. The data provided in July only confirmed the correctness of the CITA's analysis in March that transitional safeguard action was appropriate. As regards the updated information provided in October 1995, these were equally irrelevant. The United States pointed out, however, that the October 1995 data still showed a 5.5 per cent decline in underwear production during the January-June 1995 period. Furthermore, more recent published updates in March 1996 showed that underwear production actually declined by 2.8 per cent for the period from 1 October 1994 to 30 September 1995. This and other updated information demonstrated that the situation for US underwear manufacturers progressively deteriorated during 1995.

### Analysis of March and July Market Statements

5.139 According to Costa Rica, both the March Market Statement and the July Market Statement, annual shipments amounted to \$3.2 billion. However, analysing the data on the basis of which this information had been obtained it found that this figure was not correct. Thus, considering that the amount of annual shipments was obtained by multiplying the volume of clothing produced by the average producer price of the clothing, and making this calculation for 1994, the ensuing result would be \$5.06 billion according to the data in the March Statement, while according to the information in the July Statement this figure could be \$3.37 billion or \$3.03 billion, according to which United States producer price was used. In any case, what was important to stress was that while one section of each of the Statements gave a figure, if the data in the Statement itself were multiplied in order to obtain the same figure a different result was obtained. Clearly, there was an error in the figure of the annual shipments, production data or in the price, which then also significantly affected other data included in the Statement.

5.140 The United States considered that the information provided in the March and July Statements was not contradictory and was consistent with the requirements of Article 6 of the ATC. Costa Rica had asserted that the data available in March 1995 contradicted the updated data the United States had provided to the TMB in July 1995. The March Statement presented by the United States contained data from a variety of official sources, current at that time. Article 6.7 of the ATC provided that when requesting consultations the requesting Member must supply "factual information as up-to-date as possible". The March data had satisfied that requirement, even though some of the information had been preliminary. During consultations and the TMB proceeding, the United States had been asked to provide other and updated information. The TMB had put many questions to the United States for response during the proceeding as well. In the context of the Article 6.10 of the ATC reference that the TMB must consider the earlier statement and "any other relevant information", the United States had provided a revised statement during the July proceeding which was accepted by the TMB.

5.141 The information in the July Statement had not, in the view of the United States contradicted the March Statement, but had only supported it. Since Article 6.7 of the ATC stated that

"the request for consultation shall be accompanied by specific and relevant factual information, as up-to-date as possible, ..." and that "... the information shall be related, as closely as possible, to identifiable segments of production and to the reference period ..."

of the call action, there was no credibility issue with respect to the data presented in March or July. Article 6.7 of the ATC clearly recognized that the data upon which the initial request for consultations was based, would necessarily be imperfect. Article 6.10 of the ATC similarly acknowledged that data would not be as accurate as desired at the time of the call, requiring that the TMB

"have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned".

The latter was clearly designed to include further updated information that was available at the time of TMB review.

### The Counting of Re-imports

(see also Increase in Imports, paragraphs 5.92-5.96)

5.142 According to Costa Rica, one of the most serious mistakes in the March Market Statement, was the double counting of "807" production and the problem of the alteration of market size. In its statistics, the United States had rightly included as domestic production the production of pieces that were part of a garment subsequently assembled in another country and then reimported into the

United States under tariff heading 9802.00.80. However, it had also included as imports the same pieces once they had been assembled, even though they had already been counted as domestic production. This resulted in an alteration in the size of the market, because the same product was included twice.

5.143 Having been made aware of this problem by the comments addressed to it by Costa Rica, the United States had tried to correct the situation in its July Market Statement, but, according to Costa Rica, in the wrong way. Thus, in July the United States counted "807" production once; but it chose to include "807" production as imports and not as domestic output, which appeared inconsistent as "807" production was domestic production in the sense of manufacture and/or cutting of cloth. Assembly, which was the only part of the process carried out abroad, had a much smaller weight in the final cost of production of underwear, and therefore this "807" production should not have been counted as imports.

5.144 In support of this same approach, although in contradiction with what it had done in the July Statement, when the case was being reviewed by the TMB in July the United States submitted a loose sheet giving the supposed export data in this category, in which it included cut pieces as exports. In other words, whereas in the July Statement the United States counted "807" production as imports, in the export data it provided in the same month it counted it as domestic production. Then, in the data published in October they returned to the March situation, disregarding the entire problem of double counting of "807" production which the July Statement had tried to take into consideration.

5.145 The United States explained that under Article 6.2 of the ATC, before taking safeguard action an importing Member's authorities must make a determination that a particular product was being imported in such increased quantities as to cause serious damage or actual threat thereof; this serious damage or actual threat thereof must be caused by increased quantities of "total imports" of the product concerned. The reference to "total" imports included re-imports. No distinction was made between re-imports and other imports in Articles 6.2, 6.3 or 6.4 of the ATC. The drafters of the ATC were quite aware of the existence of re-imports and outward processing trade, which were significant commercial factors in world textile and clothing trade and which were explicitly referred to in Article 6.6 of the MFA. The drafters had chosen to refer specifically to re-imports in Article 6.6(d) of the ATC, in relation to the application of a transitional safeguard, after the determinations necessary for a safeguard action have been made. Thus, if the drafters had meant to exclude re-imports from the scope of "total imports", thus barring transitional safeguard action against re-imports, they certainly could have done so. However, they did not, and it must be assumed that this omission was intentional. It therefore could not be assumed that re-imports are incapable of causing or threatening damage to the industry of an importing Member. Thus, the increase in "total imports" referred to in Article 6.2 of the ATC included increases in re-imports as well.

5.146 The United States referred to the allegation of Costa Rica that the March Statement had overstated the level of imports through its treatment of re-imports. It was explained that during the process of negotiations and the TMB examination of this case, it was recognized that there was double-counting of re-imports, and the United States had made appropriate corrections. However, the effect of this double-counting was not an overstatement of the level of imports but an overstatement of the size of the US underwear market. CITA practice, long accepted by the TSB in their examination of calls by the United States, had consistently been to treat the total market for a textile or apparel category as production plus imports. In response to questions during bilateral consultations with Costa Rica, the United States had deducted re-imports from production, because re-imports are of foreign origin under the relevant US rule of origin. Costa Rica has repeatedly asserted that the origin of apparel re-imports was determined by the place where the pieces were cut, but, as discussed below, this is a factual error.

5.147 Costa Rica had then claimed during the TMB proceeding that re-imports should be deducted from imports. The TMB had suggested that the overstatement in the US domestic market should be

adjusted by using US export data. The United States had pointed out to the TMB that export data were generally less reliable than import data, but they supplied the TMB with the requested export data in a table adjusting for the overstatement in the US underwear market. The changes in the data did not contradict the March Statement. In fact, the data corroborated the original determination of serious damage or actual threat thereof. The change in the data was minimal; even as adjusted, the data still showed a large increase in imports. The adjustment in market size also had no impact in the data on important factors listed in Article 6.3 of the ATC, such as production, output, capacity, employment, domestic prices, profits and investment. Even taking the adjustments into account, the data as a whole still showed a picture of a seriously damaged industry threatened with further damage.

5.148 The United States also noted that the updated data and other relevant information presented to the TMB only supported the basis for the determination of the United States. At the time when the data were initially presented in the March 1995 statement, they were the latest available and most correct. The updated data presented in the July 1995 statement to the TMB also provided import data through April 1995, indicating that imports continued to increase, supporting the determination. Contrary to the statement of Costa Rica in its submission, the United States considered that the TMB had not excluded or disregarded the updated data provided in July. In fact, the TMB referred mostly to the revised data throughout its examination. The TMB considered the updated and other relevant data in the July Statement, with full regard to the relevant provisions in Articles 6.7 and 6.10 of the ATC, despite attempts of Costa Rica and others to characterize the data in both statements as inaccurate and contradictory. In fact, during the TMB proceeding the United States had adjusted data to reflect concerns about double counting of re-imports. The United States had initially properly deducted re-imports from production. The United States had then responded to TMB comments and requests by further adjusting the data, using US export data. After these adjustments, the data still showed declines in production and increases in imports.

5.149 In the view of Costa Rica, by failing to treat this aspect correctly in its March Market Statement or in July or October, the United States was not only making a mistake from the standpoint of the counting of data; this error also proved to be very important in this particular case, given the nature of the trade between Costa Rica and the United States in this category. If the United States had not differentiated this "807" production, it should not have continued with this case. Accordingly, Costa Rica argued that the information submitted by the United States to demonstrate the supposed serious damage was not only unreliable, erroneous and contradictory, but above all it was also incomplete.

#### **G. EXISTENCE OF A CAUSAL LINK**

5.150 Costa Rica claimed that the third requirement whose existence the United States should have demonstrated in order to be able to invoke a transitional safeguard measure was the existence of a causal link between the supposed increase in imports and the supposed serious damage or actual threat of serious damage to the domestic industry producing a like and/or directly competing product. The United States did not do so, and consequently violated Article 6.2 of the ATC. This Article provided that a measure of the kind described may be applied when an importing Member demonstrated that:

"... a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference" .

5.151 It followed that, prior to demonstrating the existence of a causal link, the United States should have demonstrated the existence of the two conditions which it would be trying to link in this exercise, namely, the increase in imports and the serious damage or actual threat thereof. Since the United States

had failed to fulfil that part of the exercise, it was impossible to analyze whether or not a causal link existed. Even assuming for the sake of argument that there had existed an increase in imports and serious damage or actual threat thereof to the United States industry producing cotton and man-made fibre underwear - which, as repeatedly stated by Costa Rica, did not exist - it would not be possible to conclude that this supposed damage or threat was being caused by imports.

### **Restraint Agreements with Other Countries**

5.152 In Costa Rica's view, the best proof of the non-existence of this causal relationship lay in the levels of restraint which the United States had obtained with the other countries that had been called for consultations in category 352/652 - Colombia, El Salvador, Honduras, the Dominican Republic and Turkey. It was pointed out that the access which the United States had granted to the five countries with which it had reached an understanding in this category was about 170 million dozen for 1996, equivalent to an increase of 478 per cent with respect to imports from the same five countries in 1994, which amounted to 29 million dozen. If 29 million dozen were causing or threatening to cause serious damage, how could the United States have negotiated an increase in this quantity by a percentage of 478 per cent?

5.153 Costa Rica argued that the foregoing provided grounds for categorically maintaining that if the United States underwear industry was suffering any serious damage or actual threat thereof - which, it claimed, it was not - it was impossible to believe that imports were the cause of it, as in that case it would be most strange for the United States itself to seek to increase the source of its supposed problems in such a significant way as to cause its ruin. The only reasonable conclusion was that imports were neither causing nor threatening to cause serious damage to the United States industry and that by nevertheless taking safeguard action the United States had violated Article 6.2 of the ATC.

5.154 The United States noted that Costa Rica had made extensive use of information on negotiated settlements with countries not party to this dispute in its first submission and at the first substantive Panel meeting. This information, in the US view, was inappropriate to the Panel's task and the Panel should not allow it to be used to prejudice US rights in this case. Article 6.9 of the ATC provided a mechanism for collective review of negotiated settlements in the form of TMB review. Costa Rica's argument undercut and attacked those settlements in a manner which also undercut the TMB. These settlements and Article 6.9 of the ATC were not within the Panel's terms of reference. However, since the Panel's questions had focused in part on these settlements, the United States responded to the question while reserving their rights in this matter.

5.155 Upon request of the Panel, the United States commented that the Panel should consider the situation which required them to impose the restraint on Costa Rican underwear in a broader context. When a finding of serious damage or threat thereof was made, and in the resulting imposition of a restraint and formulation of a negotiating strategy, various considerations needed to be taken into account, some of which may be in conflict as measures were devised to achieve the greatest degree of fairness to all concerned. These included: special attributes of the individual major suppliers, which affected equity considerations towards other countries under restriction; the US obligation to comply with Article 6.6(d) of the ATC; and the diverse nature of the US industry and the differing impact of the increased quantities of underwear imports on the individual segments of the industry. After making a finding of serious damage, or actual threat thereof, affecting the industry producing a particular product, the United States must then consider attribution to the particular countries whose imports were causing the serious damage, or actual threat thereof. It was at this stage of the process that a range of factors must be integrated into the decision such as the nature of the imports, the various levels of imports accounted for by the supplying countries (both controlled and uncontrolled), and the specific impact on the US firms and their employees (including those that participate in outward processing and those that do not). When the underwear calls were made, there were many divergent interests involved.

5.156 In establishing attribution to individual countries, the basic situation facing the CITA was that in the 352/652 category, half of the import total was accounted for by imports under outward processing arrangements (cut parts assembled offshore), and 30 per cent of the imports were from the two largest suppliers, Dominican Republic and Costa Rica, both uncontrolled. The United States had to establish a balance when implementing policies affecting its own outward processing programmes with no one consideration taking precedence over another. The underwear restraint on Costa Rica was an example.

5.157 The United States explained that many countries supplying underwear to the United States that were under restriction, did not utilize the "807" programme and were not eligible for the "807A" programme. Many of the specific limits to which these countries were subject had been substantially exceeded by the import level attained by Costa Rica at the time its restraint was imposed. Costa Rica's higher level was attained because of its participation in outward processing, yet it evidently was not interested in participating in the programme designed to give more favourable treatment to the trade. The US policy allowing liberal import access for Caribbean-assembled clothing thus had resulted in a situation whereby competing imports from non-CBI countries in category 352/652 had been placed at a disadvantage. The proposed levels were intended as a partial redress to this situation. In a safeguard action, a number of factors such as equity towards other suppliers, welfare of US firms, and broader trade policy considerations were also reflected in the overall position taken in negotiations. In conjunction with the offer of substantial GAL made to Costa Rica, the United States had proposed to set a Specific Limit to cover the imports of underwear made from fabric not formed and cut in the United States that, while lower than the call level, was more than enough to allow for the estimated existing level of this trade. This offer was consistent with the offers accepted by other major suppliers, the Dominican Republic, for example, which agreed to an SL well below the level of trade.

5.158 The limits established covering the 1995 underwear calls were heavily weighted in favour of "807A trade". The US policy to allow more liberal treatment for the CBI products that contain US-made fabric obviously maximised the benefit to US economic welfare. In evaluating the damaging impact of imports, absolute levels were only one of many elements taken into consideration, along with rates of growth, the ability of the domestic producers to adjust, employment patterns, industry structure, etc. Goods imported under the "807A" provision were not regarded as less damaging than non-GAL 807 and other imports, but it was recognized that the nature of their effect on the domestic industry could be significantly different. Unlike GALs, non-GAL imports were not eligible for increased quota access. One significant distinction among US companies was between those that had moved their finished garment assembly facilities to the Caribbean to take advantage of the 807 duty provision and CBI liberal access, and those that continued to produce finished garments domestically. The former were the companies which had moved the bulk of their underwear production offshore and were reaping enormous benefit from the trade concessions affecting the CBI. At the same time, the restrictions were also intended to furnish a degree of temporary protection for the US producers which had not yet begun to or were in the early stages of making the adjustment to increased international competition in this product category.

5.159 In the view of the United States, the GAL programme recognized the economic realities of apparel manufacturing and was intended to furnish a competitive option to US firms operating in this industry and, from a policy perspective, provides some important benefits: (i) the comparatively high levels offered allowed sufficient flexibility and latitude for US companies and their CBI partners to efficiently serve the market, while providing some certainty and a reference level for those domestic producers that were unable or unwilling to participate in outward processing arrangements; (ii) prior to eventual CBI parity with the NAFTA, the GAL programme provided a means of identifying the goods that would qualify for parity while allowing a lower Specific Limit to exercise a degree of control over the non-GAL component of trade which could conceivably be filled by goods with non US content; and (iii) the high GAL levels offered in 352/652 were intended as a guarantee of ample access to the US market during the three-year term of the restraint and in anticipation of the CBI countries' future

inclusion in a wider Free Trade Area of the Americas. They were not expected to be fully filled immediately.

5.160 Costa Rica pointed out that none of these considerations were included in the ATC: Therefore, they could not be used as justifications to deviate from the ATC provisions. Although these considerations could be useful at the domestic level, they did not authorize the United States to breach its obligations under the ATC.

5.161 Costa Rica emphasized that GAL trade and "807 trade" were not the same thing. The "807 trade" referred to products assembled using US components which could represent all or part of the components used to assemble the product and must be cut in the US, although the fabric could be sourced from anywhere. Thus, within "807 trade", there might be garments that qualify for GAL, which would be those made from fabric formed and cut in the US, and others that require SL, which would be those made with any amount of non-US formed and cut fabric. In sum, for US restraints, "807" trade included both SL and GAL to the extent that both of them shared the characteristic of being made from at least some fabric cut in the US.

5.162 The United States, commenting on the above, agreed that it was impossible to distinguish, from the data available, between Category 352/652 products that would qualify for a GAL quota and those that would not. This had been their position throughout the proceeding. This consideration was, in fact, a major element in the US offers of a GAL quota in negotiations with Costa Rica, since such a determination could not be made without an agreement in place containing a GAL provision.

5.163 Costa Rica also drew particular reference to the US statement in the penultimate sentence of paragraph 5.149. With reference to this, Costa Rica pointed out two aspects, first, it was only after finding that the imposition of a restraint was justified that the importing Member could implement it, bearing in mind its obligation to grant the minimum SL level mandated by Article 6.8 of the ATC, which in the present case would be equal to 14,423,178 dozen. Moreover, according to the language of Article 6.6(d), a "more favourable treatment" to re-imports, which would necessarily represent an improvement in the conditions to which the Member whose trade had been restricted would have been entitled, must also be granted. Any other interpretation of this provision was considered to be incorrect. Costa Rica further argued that by pretending to impose on Costa Rica an SL quota lower than the call level and attempting to justify its action under Article 6.6(d) of the ATC by granting a GAL quota of 40 million, the United States was violating Article 6.8 of the ATC as well as Article 6.6(d). Article 6.8 mandated that the minimum SL level should be the quota level. On top of that level, the importing Member was obliged to offer a more favourable treatment to re-imports from the exporting Member. In any case, an unconditioned access could not be substituted by a conditioned access, even if the latter were larger in quantitative terms than the former.

5.164 Costa Rica reiterated that in the absence of GAL procedures, it was impossible for the US to identify and monitor imports that might be entitled to the GAL programme and therefore to determine that the SL quota offered, although lower than the call level, was "more than enough" since there was no data to determine that amount. The standard provided in the ATC was not an SL level that was more than enough, but an SL level that equalled the call level as a minimum. The United States was justifying its offers on estimates that had no basis, being only arbitrary estimates made by the US Government.

5.165 In response to the above point, the United States agreed that it was only after the importing Member had determined that a safeguard restriction was necessary and justified that the Member could implement the restriction. The United States had always maintained that this was the case here. They disagreed that their proposals during consultations were inconsistent with Article 6.8 of the ATC. It was clear that all proposals to Costa Rica involved levels above the reference period mandated in Article 6.8. The proposals made concerning the guaranteed access level (GAL) component of the

restriction were consistent with Article 6.8 and the requirements of Article 6.6(d) of the ATC. The GAL proposals were offered with the understanding that the programme was improved access for Costa Rica. The improved access was evidenced in earlier agreements with Costa Rica, and other Caribbean Basin countries, as well as the fact that companies established in Costa Rica participating in the GAL programme had resulted in more employment for Costa Rican nationals and investment in Costa Rica and that products exported to the United States under the GAL programme were treated even in Costa Rican statistics as Costa Rican products when exported to the United States (and as imports when entering Costa Rica as cut parts).

5.166 The United States had met its obligation under the ATC to provide more favourable treatment to re-imports. That obligation had been met after the United States satisfied the requirements of Articles 6.2, 6.3 and 6.4. Article 6.6(d) gave the importing Member wide discretion on how more favourable treatment to re-imports was to be provided. That is the way the text was negotiated. The United States has established a GAL programme which requires, for proper monitoring and certification, the agreement of the exporting Member. The United States could not be faulted if Costa Rica chose not to accept its offer of more favourable treatment. All outward processing programmes in other countries typically were preferential programmes which allowed the importing country the latitude to establish the criteria for participation in the programme - including the conditioning of the use of fabric manufactured in the importing country. The United States was not alone concerning that condition; other WTO Members maintained quotas, which limited outward processing traffic. The policy basis for the various conditions for participation in an importing country's outward processing programme may inherently represent the balancing of various domestic interests. In the case of the United States, the balancing of interests reached beyond the industry provided relief when safeguard action was taken on imports that includes re-imports. The safeguard action taken in this case was not action to provide adjustment to an "upstream" product.

5.167 Costa Rica pointed out that the US had mentioned that equity was one of the factors taken into account when establishing a safeguard. However, the United States, besides having no justification, never achieved half of the minimum SL level to which Costa Rica was entitled, nor was this level comparable in either relative or absolute terms to the levels agreed with the other countries called under this same category. Other countries received an SL quota higher than their call levels, in some instances obtaining increases that went up from 54 to 99 per cent in SL access. In the view of Costa Rica, the Dominican Republic had accepted an SL quota lower than its call level as a result of findings reached by the US after a number of investigations that determined the existence of transshipment in this category.

5.168 The United States responded to the above point, stating that the equity considerations taken by the United States were discussed thoroughly with Costa Rica and other countries during consultations. Costa Rica insisted on access that was beyond what was equitable in the case of access to the US market for Costa Rica and compared to other countries. It was incorrect that all of the other countries received SL's higher than the call level. Most egregious of Costa Rica's assertions on that point was the false statement that the lower SL portion for the Dominican Republic was to account for transshipments. The alleged transshipments referred to by Costa Rica were already covered before the agreement with the Dominican Republic, and the transshipment cases took place before the time frame of the safeguard action. Further, in the view of the US, even the Dominican Republic did not agree with the assertion of Costa Rica.

5.169 Costa Rica also noted that the US had stated (paragraph 5.158) that "unlike GALs, non-GAL imports are not eligible for increased quota access"; however, the US had notified both SL and GALs under Article 2 of the ATC. Therefore, both quotas were subject to the increased percentages mandated by Article 2.1 of the ATC. Also, the US considerations intended to justify the GAL levels offered and agreed in this category (NAFTA Parity Programme or the Free Trade Area of the Americas) could not be used as justifications to deviate from the ATC provisions.

5.170 The United States argued that Costa Rica was incorrect in its interpretation of Article 2.1 of the ATC concerning growth for quotas, and in particular growth for GALs notified by the United States under Article 2. First, Costa Rica did not understand what the United States meant concerning eligibility for increased quota access. Eligibility for increased quota access referred to the requirements of the GAL programme which was a US domestic programme, not established under the ATC. Second, the United States could not discern any increased percentages of quotas mandated by Article 2.1 of the ATC as claimed by Costa Rica. Even if Costa Rica meant to refer to another provision of Article 2, the provision would only apply to those levels that were specifically allocated growth before notification under Article 2. The GALs notified under Article 2 specifically did not include growth percentages since GAL quotas already provide preferential access. US policy considerations when providing more favourable treatment or negotiating any settlement with Costa Rica, especially when those policy considerations included benefits for both the United States and Costa Rica, were not breaches of the ATC. There was no issue here concerning whether the ATC contained or required any policy considerations. The United States noted in this proceeding, however, that the very discretion provided in Article 6.6(d) for more favourable treatment did account for such policy considerations - including taking into account NAFTA parity for textile and apparel products - which the United States thought was of general interest to Costa Rica.

### **The United States Policies in Applying the Safeguard**

5.171 In the United States' view, the CITA determination had been entirely reasonable, based on the situation of serious damage or actual threat, and Costa Rica had not demonstrated otherwise. If the United States had shown generosity in the context of its bilateral negotiating strategy, this still did not change the fact that the original determination had been made on the basis of serious damage or actual threat thereof. In bilateral textile negotiations, the United States formulated its overall position by integrating a number of policies, such as the need for time for structural adjustment in the US industry, equity toward other suppliers, the requirements of ATC Article 6.6 of the ATC, and broader trade policy and foreign policy considerations. The ATC did not limit the policies that could be taken into account in this context; indeed, to do so would be contrary to the interests of textile and apparel exporters. Should the ATC be interpreted in accordance with Costa Rica's arguments, so as to require an importing Member to offer in negotiations only the most restricted access to its market?

5.172 In the context of Article 6.6(d) of the ATC, the United States had proposed to Costa Rica a restraint of 7 million dozen on a specific limit (SL) basis and an additional 40 million dozen guaranteed access level for future GAL-qualifying trade. CITA had determined that imports in Category 352/652 were causing serious damage or actual threat thereof to the US underwear industry, and that this serious damage was attributable to the 14.4 million dozen imports from Costa Rica. The access levels proposed to Costa Rica were designed to provide security of access for Costa Rican exports during the restraint period. In return, the agreement would have provided for an orderly flow of imports from Costa Rica, allowing the US industry time to adjust to the increased import competition in the US underwear market.

5.173 The United States argued that, in evaluating the GAL programme, the Panel should not lose sight of the overall goals of the ATC. The Agreement will accomplish the long-sought integration of the textile and clothing sector into the GATT, over its ten-year lifetime. Accomplishment of that goal will require substantial and difficult structural adjustment by the textile and apparel industries of importing Members during that period. The GAL programme served as an adjustment mechanism. Safeguards under Article 6 of the ATC were only transitory matters, lasting a maximum of three years. However, the Agreement had recognized the need for such safeguards in order to allow industry to adjust and prepare for the post-integration environment that was now less than ten years away. The Agreement provided procedural provisions that required that such safeguards not be taken without consultation and discussion with the exporting country and maximized the possibility that safeguards would be implemented consensually in a manner that took the interests of the exporting country into account. The GAL programme was fully consistent with those policies.

## **H. ATTRIBUTION TO INDIVIDUAL EXPORTING COUNTRY(IES)**

5.174 Costa Rica noted that the application of a transitional safeguard measure to the trade of a particular Member required the fulfilment of two successive stages, each of which had its own substantive requirements. In the case under consideration, the United States had failed to demonstrate the prerequisites for having the right to resort to the safeguard mechanism in accordance with Articles 6.2 and 6.3 of the ATC. Consequently, an analysis of whether or not it had fulfilled the substantive requirements laid down for the attribution stage provided for in Article 6.4 of the ATC was not required. Nevertheless, for illustration, an analysis of how the United States had also failed to fulfil this second stage of the process, thus once again demonstrating the unjustified nature of the restriction adopted against Costa Rican trade in category 352/652, was provided.

5.175 The first requirement which the importing Member must demonstrate in this second stage of the process was, under Article 6.4 of the ATC, the following:

" ... The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in the imports, actual or imminent, from such a Member or Members individually ...".

For these purposes, Article 6.7 of the ATC provided that

"... The request for consultations should be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: ... (b) the factors, referred to in paragraph 4, on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned".

### **Obligation to Submit Specific and Relevant Information**

5.176 Costa Rica argued that in accordance with the above, the United States had the obligation to submit specific and relevant information and to carry out an examination, on an individual basis, of the specific case of Costa Rican trade. In the March Market Statement, the basis of the unilateral restriction, the United States had claimed to show in four lines that there was a sharp and substantial, real or imminent increase, in imports from Costa Rica. To this end, the United States had provided a few statistics, without any kind of analysis. This omission of any analysis, which was part of its demonstration obligation for this requirement, was extremely serious, all the more serious in this case since, as the impact of "807 trade" on Costa Rican trade in products classified in category 352/652 was all-important.

5.177 The possibility of attributing a particular condition of serious damage or actual threat thereof to another Member obviously depended on the existence of the serious damage or actual threat thereof. In the case under consideration, firstly it was highly questionable whether an increase in Costa Rican imports of this product existed, except if such imports were considered purely and simply as such, without regard for their special features, and secondly, no such serious damage or actual threat thereof existed.

5.178 It could be demonstrated that if such damage or threat had existed, it could not be attributed to imports from Costa Rica, by referring to the proposals made by the United States to Costa Rica in seeking to reach an agreement on the volume of the quantitative restriction. How could it be argued that 14.4 million dozen of underwear, which was what Costa Rica exported in 1994, was causing serious damage or actual threat thereof to the United States underwear industry if the United States had proposed to Costa Rica that the restriction for this category should be in the order of 47 million dozen? The

only possible conclusion was that the United States had also failed to demonstrate this substantive requirement, thus infringing Article 6.4 of the ATC.

### **The Nature of Costa Rica's Exports**

5.179 It was recalled by Costa Rica that 99.5 per cent of their exports in category 352/652 in 1993, and 99.76 per cent of their exports in 1994, had entered the United States under tariff subheading 9802.00.80, in order to benefit from the tariff exemption provided for that subheading. This meant that trade in the category under consideration between Costa Rica and the United States concerned almost exclusively a process of co-production or shared production. In this condition, it was questionable whether one was dealing with "imports" or rather with domestic production, which, while assembled in Costa Rica, did not cease to be domestic production simply for that reason. It was recalled that the United States itself considered imports of cut parts for assembly in the United States as products of the country in which the parts were cut. In these circumstances, United States exports of cut pieces should logically have been considered United States products. Accordingly, one could not speak of an increase in "imports", since they were not really imports.

5.180 The United States noted that Article 6.6(d) of the ATC stated that re-imports were "... defined by the laws and practices of the importing Member." All apparel re-imports, qualifying for special quota access or not, were defined under United States law and practice as "foreign articles" and were accorded duty reductions to the extent of their US content. Under US law, quota benefits accrued if an agreement with the exporting country had been concluded for apparel assembled with US formed and cut fabric. However, a high percentage of US content did not automatically confer US origin or make a re-import a US good under US law.

5.181 The United States considered that Costa Rica had been given incorrect information with respect to the re-imports of textile and apparel articles. Costa Rica had asserted in its submission that the rule of origin in the United States for products entering under tariff heading 9802.00.80 was the place where the pieces were cut. Thus, Costa Rica was asserting that because underwear exported by Costa Rica to the United States had been cut in the United States, it was US origin under US law. Cutting did not confer origin for these products under US law. Neither the rule of origin for textiles and apparel which was in effect at that time nor the revised rule of origin, which became effective on 1 July 1996, had any applicability to apparel re-imports because the US headnote to HTSUS 9802 clearly stated that such goods were "foreign articles" and not US goods. Therefore, underwear re-imported from Costa Rica to the United States was treated by US law as Costa Rican goods.

5.182 Costa Rica argued that, if it were decided to consider that there had been an increase in imports of Costa Rican underwear, it was quite clear that if such imports were increasing it was because United States production of cut pieces that were subsequently assembled in Costa Rica was increasing in the same proportion. If ever more underwear was being assembled in Costa Rica it was because in the United States ever more cut pieces for underwear were being produced that needed to be assembled. It therefore followed that any industry producing cut pieces for underwear was in a thriving condition and so did not need to be protected from something that was rather of benefit to the underwear producing industry. Consequently, under either hypothesis, the fact was that the measure imposed by the United States against Costa Rica's trade in products included in category 352/652 had no grounds in Article 6.4 of the ATC.

### **I. MORE FAVOURABLE TREATMENT FOR RE-IMPORTS**

5.183 With respect to the provision of preferential treatment under Article 6.6(d) of the ATC, Costa Rica considered that there were three aspects to be taken into account: (i) before establishing a restriction it had to be justified under the terms of Articles 6.2 and 6.3 of the ATC; (ii) only after that stage had been fulfilled, the importing Member could implement such a restriction, bearing in

mind its obligation to grant the minimum SL level mandated by Article 6.8 of the ATC (i.e. in the present case 14,426,178 SL quota) and only over that minimum extend the more favourable treatment established in Article 6.6(d) of the ATC; and (iii) according to the language of Article 6.6(d) of the ATC this more favourable treatment was mandatory and shall represent an improvement on conditions to which the Member whose trade has been restricted would have been entitled to if it had not had the right to such more favourable treatment. Upon request of the Panel, Costa Rica clarified that it had never rejected a more preferential treatment because such treatment had never been offered by the United States. The best SL quota offered to Costa Rica had not even reached half of the minimum SL level to which it was entitled under Article 6.8 of the ATC. Furthermore, the SL had been more restrictive to the extent that it was subject to a sub-limit and to the "ratchet down" provision.

5.184 The United States noted that the sole reference to re-imports in the ATC appeared after the stage when the importing Member had made its determination of serious damage, or actual threat thereof, and attribution, in the context of consultations on the application of the transitional safeguard. The United States had sought to provide preferential treatment to re-imports from Costa Rica consistent with the requirements of Article 6.6(d) of the ATC which provided, in part, that,

"[i]n the application of the transitional safeguard, particular account shall be taken of the interests of exporting Members as set out below: (d) more favourable treatment shall be accorded to re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation, as defined by the laws and practices of the importing Member, and subject to satisfactory control and certification procedures, when these products are imported from a Member for which this type of trade represents a significant proportion of its total exports of textiles and clothing."

5.185 The United States argued that, in accordance with customary rules of international law concerning treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties, the United States had looked to the plain meaning of the terms in their context and object and purpose. The plain meaning of "more favourable treatment" did not mean that re-imports must be excluded from safeguard action. If that were the intent, the agreement would have so stated. Concerning the context of Article 6.6(d) of the ATC, they saw that this and the other provisions for favourable treatment in Article 6.6 of the ATC appeared in the text of Article 6 of the ATC after and separate from the provisions on the requirements for making determinations of the serious damage, or actual threat thereof, and attribution. Also, the "chapeau" of Article 6.6 of the ATC plainly stated "in the application of the transitional safeguard... ." To the extent that the meaning of the plain text of Article 6.6 of the ATC may be considered ambiguous, Article 32 of the Vienna Convention on the Law of Treaties permitted recourse to supplementary means of interpretation "in order to confirm the meaning resulting from the application of Article 31" of the Convention. They could find supplementary assistance in a similar provision in the MFA.

5.186 Article 6.6(d) of the ATC was derived from Article 6.6 of the MFA and paragraph 15 of the 1986 Protocol to the MFA concerning more favourable treatment to re-imports. These provisions for more favourable treatment for re-imports were largely demanded by exporting countries benefitting from outward processing programmes. MFA Article 6.6 provided that

"[c]onsideration shall be given to special and differential treatment to re-imports into a participating country of textile products which that country has exported to another participating country for processing and subsequent re-importation, in the light of the special nature of such trade without prejudice to the provisions of Article 3 [ MFA safeguard]." Paragraph 15 of 1986 Protocol added that: "in conformity with the provisions of Article 6.6 of the Arrangement for consideration to be given to special differential and more favourable treatment, in the light of the special nature of the trade referred to therein, participants agreed that, in negotiating

bilateral restraints account shall be taken of the relative degree to which these exports contribute to situations of market disruption or real risk thereof."

5.187 It was noted that one commentator in the United States<sup>13</sup> had observed concerning the interpretation of paragraph 15:

"To the extent it could be argued that paragraph 15 does go beyond Article 6 [of the MFA] by defining 'special and differential treatment' to include an accounting of the extent to which such merchandise contributes to market disruption, it appears to be applicable only in the negotiation of bilateral restraints. In any event, neither the [MFA] nor the Protocol creates a presumption that re-imports cannot cause or contribute to market disruption."

Both of these provisions clearly indicated that the preferential consideration for re-imports arose only after the determination of market disruption had been made; that is, in the application of the safeguard and in proposals for restraints to be applied by mutual agreement. The United States considered that they had followed the requirements in Article 6.6(d) of the ATC in consultations with Costa Rica.

5.188 The United States also argued that the form of "more favourable treatment" was left to the importing Member. Whereas other provisions for favourable treatment in the ATC provided for specific types of favourable treatment to be given, Article 6.6(d) of the ATC indicated that it was the importing Member which accorded the more favourable treatment, and the negotiators had left it up to the importing Member to assign the type of treatment to be given to re-imports. It followed that even the definition of what kind of more favourable treatment was to be given to re-imports was left to the law and practice, or otherwise discretion, of the importing Member. The relevant laws and practices included customs laws, which affected the applied duty rate on re-imports, as well as the laws and regulations governing textile and apparel trade quota programme, which affected the treatment accorded re-imports in this context.

5.189 The ATC did not define how an importing country must give more favourable treatment. Nothing in the text or negotiating history of Article 6.6(d) of the ATC provided otherwise. Importing countries had different ways of according more favourable treatment to re-imports. No one country defined its outward processing programmes the same way. Article 6.6(d) of the ATC, and the MFA provisions from which it was derived, allowed for that fact. In this case, the United States had made use of the GAL programme as its means of providing preferential quantitative treatment for apparel re-imports from the Caribbean Basin. The United States could mitigate the effects of serious damage and actual threat thereof to its domestic producers by offering more favourable treatment to some re-imports than it provided to other re-imports.

5.190 Costa Rica considered that the restraint proposals made by the United States could not lead to the conclusion that these could be situated within the concept of more favourable treatment provided for in Article 6.6(d) of the ATC. The specific restraint level (SL) offered to Costa Rica was not even close to the minimum SL level to which Costa Rica would have had the right pursuant to Article 6.8 of the ATC which obliged the United States to offer as a minimum an SL quota of 14,423,178 dozen whereas the US' most generous proposal did not even reach half the level at the time of the request for consultations and was even more restrictive due to the fixing of a sub-limit and the "ratchet-down" provision. Since the United States had not granted the minimum level to which Costa Rica had a right, it was not possible to consider that they had granted the more favoured treatment prescribed in Article 6.6(d) of the ATC. On the contrary, the United States had granted Costa Rica less favourable treatment than the treatment it was obliged to grant to any Member of the WTO under Article 6.8 of the ATC.

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<sup>13</sup>Jacob, B. "Renewal and Expansion of the Multifibre Arrangement" 19 Law and Policy in International Business 7, 33 (Georgetown University Law Center, 1987).

5.191 The establishment of an SL quota below the level provided for in Article 6.8 of the ATC, together with the establishment of a GAL quota to cover the difference and if necessary exceed this level, was contrary to the spirit and letter of Article 6.6(d) of the ATC and would place an exporting Member that did not participate in co-production in a better situation than a Member that does participate because the former would enjoy the minimal unconditional level of access provided for in Article 6.8 of the ATC, while the second would see their market access subject to rigid conditions.

5.192 In the United States' view, Costa Rica's arguments treated the process of making determinations under Article 6 of the ATC as a one-dimensional process in which the sole factors that governed action by importing Members were those listed in Articles 6.3 and 6.4 of the ATC. In Article 6.6(d), the ATC fully permitted Members to be flexible "in the application of the transitional safeguard" for special needs of the exporting country and the importing country. Article 6.6(d) of the ATC permitted the importing country to provide more favourable treatment by taking advantage of special access policies, such as the 807A (GAL) outward processing programme. It did not require that such programmes reflect solely the needs of the exporting country. In fact, the access levels offered in the context of the GAL programme do not legally correspond to the determinations required under Articles 6.2, 6.3 and 6.4 of the ATC. These factors were distinct from the factors that the authorities should take into account when making the determinations required in Articles 6.2, 6.3 and 6.4 of the ATC. GALs were arranged through negotiation and agreement in order to verify and certify that such goods met the requirements of the programme. Article 6.6(d) of the ATC even made reference to satisfactory control and certification procedures. A country may opt, as did Costa Rica, not to accept the type of more favourable treatment offered.

5.193 The purpose of the safeguard was to provide relief from import surges, not to prevent growth of imports. Therefore, if re-imports were surging, they would contribute to serious damage and actual threat thereof. Unlike the other provisions for special treatment, Article 6.6(d) of the ATC allowed importing countries the most flexibility to decide how to provide favourable treatment for re-imports, taking into account the special nature of the trade, but it did not mandate any particular form or manner of providing favourable treatment. The other subparagraphs in Article 6.6 of the ATC provided more specific guidance on how the special treatment should be given in those cases. The United States at one point had offered 7 million dozen specific limit and 40 million dozen GAL to Costa Rica. This offer was made to provide security of access for Costa Rica exports throughout the three-year term of the restriction. It also would have provided for orderly access of imports from Costa Rica allowing the US industry to adjust to increased import competition in the US underwear market. The offers made concerning a combination of SL and GAL access were consistent with the ATC and overall US policy interests and were consistent with US policy under the MFA.

5.194 The United States referred to the assertion of Costa Rica that since some of the provisions for special treatment in Article 6.6 of the ATC specified the form such treatment was to take, and Article 6.6(d) of the ATC did not, then an importing Member must accord favourable treatment to re-imports at some earlier point: while making its determination of serious damage, or actual threat thereof; while making its attribution determination; and/or before consultations. This argument was without basis in Articles 6.2, 6.3 or 6.4 of the ATC, which did not even mention re-imports, let alone provide for special treatment. The only provision for special treatment was Article 6.6 of the ATC, which only addressed special treatment to be given "[i]n the application of the transitional safeguard". DSU Article 3.2 stated the fundamental principle that DSB recommendations could not "add to ... the rights and obligations provided in the covered agreements." To read obligations into the purposeful blanks left in Article 6.6(d) of the ATC would contradict this principle, which was central to the stability of the dispute settlement system. The notion that favourable treatment under Article 6.6(d) of the ATC *must* be accorded in a particular form was inconsistent with the plain text of Article 6.6(d) of the ATC, which provided no such limitation on treatment.

5.195 The United States estimated that 94 per cent of Costa Rica's exports were re-imports made from fabric cut in the United States. The remaining 6 per cent, made from fabric not cut in the United States, amounted to 889,101 dozen. This meant that the portion made from fabric not cut in the United States would not qualify for the guaranteed access level. The 889,101 dozen alone would still have led the United States to attribute serious damage, or actual threat thereof to Costa Rica's imports. Therefore, Costa Rica's assertion that the remaining 6 per cent could not damage or threaten damage to the US domestic industry was false. Finally, the re-imports had posed a threat to the US domestic industry that did not participate in outward processing (approximately 60 per cent of the US firms producing underwear in the United States). The United States had taken this into account during negotiations when balancing the effect of re-imports on the domestic industry and formulating proposals for more favourable treatment under Article 6.6(d) of the ATC.

5.196 Costa Rica was concerned that there could be some confusion about the levels of trade in "807" and those in GALs. In their view, the United States could not know prior to the implementation of a GAL programmes which clothing was "eligible" or not under the programme because it was only when the customs inspections under the programme were carried out that it was possible to know which clothing had been manufactured using cloth formed and cut in the United States. The figure of 94 per cent which the United States had referred to was not necessarily all eligible for GAL. In fact, according to the statistics published by the United States Department of Trade, the percentage of Costa Rican trade in the 352/652 category within the framework of "807 trade" exceeded 99 per cent. However, even if 99 per cent of a country's trade was under the "807 trade" framework, this would bear no relation to the percentage of its trade which utilized fabric formed in the United States.

5.197 The United States pointed out that it had always stated in this proceeding that it could not identify GAL eligible products until a country entered into an agreement with the US for GALs and the proper certification was in place that would verify that US "formed" fabric was used, not just that it was fabric "cut" in the US. Before a GAL agreement was established, the US only had data on fabric "cut" in the US, not "formed" in the US as well. For GAL eligibility, US "formed" and "cut" fabric must be used. As the United States had stated in its submissions, the 94 per cent figure only indicated "cut" parts not whether the fabric was also "formed" in the United States. The United States had verified that 94 per cent of Costa Rica's trade was made from parts "cut" in the United States.

### **The United States Fabric Industry**

5.198 Costa Rica claimed that, from its analysis the question arose: what was the domestic industry which the United States was really trying to protect by imposing the safeguard on Costa Rica in this category? In accordance with Article 6.2 of the ATC it was clear that a safeguard measure as provided for therein had the purpose of providing temporary protection for the domestic industry producing "like and/or directly competitive products" with respect to the specific products that were being imported. That was why the proper action to provide such protection, once the due justification had been provided, was the restriction of imports.

5.199 Costa Rica argued that, as the product being imported was cotton and man-made fibre underwear, the only domestic industry which it could be sought to protect through Article 6 of the ATC was the United States industry that produced cotton and man-made fibre underwear, and not any other industry. Although the United States had formally stated that the industry it was seeking to protect was the cotton and man-made fibre underwear industry, the fact of the matter was that in view of the proposals made by the United States to Costa Rica and the agreements it had reached with other countries called for consultations over this category, the clear conclusion was that the United States was not seeking to protect the domestic industry producing such products. It was impossible to consider that that was its objective when in the negotiations it had agreed to a substantial increase in market access for imports of such products. On the other hand, neither did it appear reasonable to consider that the United States had no motives for its decision to apply a specific safeguard measure to Costa Rica in category 352/652.

The United States certainly did have a motive, but, in the view of Costa Rica, that motive was not covered by the ATC.

5.200 Costa Rica considered that the reply to this question was to be found both in the proposals made by the United States to Costa Rica and in the agreements reached with the other countries called for consultations in this category, and it was the following: what the United States was seeking to do was to protect the domestic industry that produced the fabric used in the production of underwear. For this purpose, the United States had followed two routes: firstly, it had sought to restrict access to its market for underwear made from fabric not produced in the United States, and secondly, it had guaranteed wider and substantial access to its market for underwear made from fabric formed and cut in the United States. As the same time as imports of underwear produced from non-US fabric were restricted, a guaranteed broad level of access was provided for imports using fabric formed and cut in the United States. That was why the various proposals made by the United States to Costa Rica to try to reach an agreement on the level of restriction were two-fold in nature: a lower access level for non-conditional or specific level (SL) trade - in the order of 1.5 to 4.5 million dozen versus the 14.4 million dozen which was the minimum guaranteed for Costa Rica by the ATC - and a "generous" level for conditional or GAL trade, amounting to as much as 40 million dozen depending on the specific proposal. That was also why among the agreements reached with the other countries called for consultation in this category, more than 80 per cent of the negotiated restraint volumes - or access volumes - required the use of United States formed fabric, while only the remaining 20 per cent may use non-United States formed fabric.

5.201 Costa Rica stated that the United States may wish to promote the use of fabric produced in that country; however, the problem lay in the mechanism it had decided to use for this purpose. Imposing a restriction on imports of underwear from a country in order to oblige that country to use United States cloth for the production of the underwear as a requirement for it to be able to enter the United States market was not a condition provided for in Article 6 of the ATC. The ATC did not allow imposition of a safeguard measure on a clothing product in order to protect the fabric used to produce it. The ATC only envisaged the safeguard governed by Article 6 of the Agreement to protect the domestic industry producing "like and/or directly competitive products". Underwear was not a like or directly competing product with respect to the fabric used to produce it, since these were products which had different characteristics from the standpoint of any objective or subjective criterion. The fact that underwear and fabric were not like or directly competitive products was recognized by the United States itself. This was shown by the fact that the United States had not even attempted to argue this openly, since in its reports it had always argued that the domestic industry allegedly affected was the underwear industry and did not mention the fabric industry explicitly. However, the reason why the case was confusing was that basically the United States was trying to justify an action whose true objective was very different from its apparent objective in order to try to bring it within the terms of a provision which did not authorize action to attain the objective which the United States was actually pursuing. By proceeding in this way, the United States had affected not only Costa Rica but also all the producers of this type of fabric, whose rights would be impaired in so far as the action restricted and possibly hindered their ability to become suppliers of this raw material.

5.202 The United States argued that they had properly based their determination on damage or threat to the domestic industry producing like or directly competitive products. The United States had satisfied the Article 6 requirement that the serious damage, or actual threat thereof, must be to the domestic industry producing like or directly competitive products, as could be seen from the March 1995 Statement and further confirmed by the US statements. Unlike agreements that permit other safeguard actions, the ATC did not provide a definition of domestic industry nor did it require that the importing member apply a transitional safeguard that corresponded exactly to the scope of the industry seriously damaged or actually threatened by serious damage. While the US fabric industry may incidentally benefit from the more favourable treatment provided for re-imports incorporating US formed and cut fabric, it had been made clear in the March 1995 Statement that the serious damage, or actual threat thereof

determination was made solely on the basis of the situation in the US underwear industry, which included both vertically integrated firms which manufactured their own fabric and domestic firms that did not use offshore operations. There were approximately 220 underwear manufacturers in the United States, 85 of which used outward processing operations and the remaining 60 per cent, or 135 firms, which did not use offshore operations. In making its determination under Article 6.2 of the ATC, the CITA had examined the situation of the broad array of US underwear producers, including the integrated firms which spun their own yarn, knit fabric, and cut and assembled the finished product; the large number of small “cut and sew” operators who obtained their fabric and trim from a variety of independent sources, and did not have offshore operations; and those operators who knit fabric and cut pieces in the United States for final assembly overseas. The fact that the underwear industry in the United States was a diverse industry, and that some producers also made their own fabric, did not change the fact that the CITA’s determination was based on the economic conditions in the *underwear* industry, not the industry producing only fabric.

5.203 The United States noted that many countries with outward processing programmes condition participation in that programme on use of fabric manufactured in their countries. They also maintain quantitative limits on how much of that trade can be re-imported.

5.204 In the view of the United States, the facts before the CITA and the record before the Panel demonstrated that US underwear producers (including both those which did and those which did not manufacture offshore) had been seriously damaged or actually threatened with such damage from a surge in re-imports. It was the responsibility of the United States to balance the damage to and interests of many different types of domestic underwear producers. The ATC permitted Members to impose a transitional safeguard even if the damage did not extend to 100 per cent of the industry. Any requirement that the damage must be sustained by a percentage or majority of the industry or a certain size or type of firm, was conspicuously omitted from the ATC. In other WTO safeguard procedures, there were express requirements with respect to the proportion of the affected industry represented. Clearly, the negotiators of the ATC had been aware of those procedures, but had chosen to continue the safeguard mechanism used under the MFA system.

## **J. THE REQUIREMENT TO HOLD CONSULTATIONS**

5.205 Costa Rica argued that even if, for illustration, it was considered that the United States had fulfilled the substantive requirements needed to have the right to apply a transitional safeguard measure to Costa Rican trade in category 352/652, which, as they had already shown, the United States had not done, the fact was that the unilateral restriction imposed was fraught with its own problems and in itself also violated the ATC. The adoption, maintenance and renewal by the United States of this unilateral restriction suffered from two serious flaws of different kinds. First, the United States had adopted, maintained and renewed a measure unilaterally, without having held consultations on the basis of the substantive requirement on which the measure was supposedly based, thus violating Articles 6.7 and 6.10 of the ATC. And second, it had applied the measure retroactively to the date of the call for consultations, thus violating Article 6.10 of the Agreement.

5.206 The request for consultations made by the United States, the information presented in the Statement on which the action taken was based, the consultations held with Members and the unilateral restriction adopted in this case all referred to the condition of the existence of serious damage to the United States industry. In other words, the United States made the call for consultations and proceeded thereafter until it adopted the transitional safeguard in June 1995 on the basis of the purported existence of serious damage to its industry.

5.207 Costa Rica noted that, at its July meeting the TMB had determined that serious damage did not exist. The United States should then have immediately withdrawn the measure. Nevertheless, it did not do so, but rather appeared to have interpreted that, as the TMB had not reached a conclusion

as to the existence or not of actual threat of serious damage, it could continue maintaining the measure on that basis. By proceeding in this way, the United States had violated Articles 6.7 and 6.10 of the ATC, in so far as they contained an obligation to hold consultations during a 60-day period before a unilateral restriction may be adopted. In other words, it was impossible to adopt a unilateral restriction without having held consultations with the Member affected, as provided for by the various paragraphs of Article 6 of the ATC.

5.208 This meant that, in order to have been able to adopt a measure on the basis of the existence of actual threat of serious damage, the United States should have made the call, presented the information and held consultations on that basis. It could not be admitted that a unilateral restriction may be imposed without specifically having had the opportunity to rebut the alleged existence of a substantive requirement on which the measure was allegedly based. To maintain the contrary would imply leaving the exporting Member completely defenceless, because there would not be a point in the proceedings at which it could try to defend itself. In the case under consideration, if the United States had considered that the basis for its call was the existence of actual threat of serious damage, it should have said so in its call for consultations, and should have presented the factors and information required to demonstrate its existence, and then should have imposed the unilateral restriction on that basis.

5.209 The United States pointed out that Article 6.10 of the ATC regulated the date when, if consultations had failed to reach agreement, an importing Member may move ahead unilaterally with implementation of the textile restriction in question. Provision of such deadlines was fully consistent with the scheme of Article 6 of the ATC, which attempted to maximize the possibility that transitional safeguards would be applied on a consensual basis; any negotiator could appreciate that a lack of deadlines would mean lack of any incentive for negotiation and agreement. However, Article 6.10 of the ATC did *not* regulate the effective date for a unilateral transitional safeguard. The United States had applied its transitional safeguard with respect to imports of underwear from Costa Rica effective on 23 June 1995. This date fell within 30 days following the 60-day period for consultations after the initial call made on 27 March 1995. The reference year for imports within the levels specified in this transitional safeguard began on March 27. This reference year was fully consistent with US obligations under Article 6.10 of the ATC.

5.210 Costa Rica argued that, when the TMB determined that serious damage to the United States industry did not exist in this case, what the United States should properly have done was to withdraw the measure adopted on that basis and, if there really were grounds justifying the existence of actual threat of serious damage, begin the procedure anew on that ground, to comply with Articles 6.7 and 6.10 of the ATC, and give Costa Rica a chance to defend itself. By failing to do so, the United States violated the above-mentioned provisions.

5.211 The United States argued that they were not required by the ATC to choose between serious damage and actual threat in making their determination. The ATC standard allowed Members to assert, at the same time, both serious damage or actual threat. The plain meaning of the standard invoked merely the notion that there could be a determination on the basis of serious damage, or actual threat. Neither was exclusive of the other. There was no obligation in other safeguard proceedings that one standard must be alleged instead of the other. The ATC treated them equally, that is, without any special factors to establish a case for one or the other. The simple fact was that Members could allege both based on the same factors. In addition, contrary to the assertion of Costa Rica, it did not follow that if the TMB had found that there was no serious damage, and reached no consensus on threat, there was no threat. No consensus on threat was just that. No consensus on that finding, therefore, no finding or decision on threat.

5.212 The United States also stated that it held consultations with Costa Rica in accordance with Article 6.7 of the ATC before placing a restriction. It then applied the restraint, and referred the matter to the TMB, pursuant to Article 6.10. Article 6.12 therefore permitted the United States to maintain

the restraint for up to three years, without extension. Article 6.10 expressly allowed for the placement of a unilateral restraint before TMB review. Nothing in the text indicated that the restraint must be withdrawn in the absence of any recommendation to do so. A lack of consensus in the TMB, or even a finding without a recommendation to withdraw, did not obligate an importing Member to withdraw a restraint. Even if there was a recommendation to withdraw a restraint, Members must only "endeavour" to comply, and provide reasons to the TMB if they could not comply with the recommendation. In this case, the United States had complied with the TMB recommendation.

#### **K. EFFECTIVE DATE OF THE RESTRICTION**

5.213 Costa Rica also argued that the United States had applied retroactively the unilateral restriction imposed on trade with Costa Rica in category 352/652, thereby violating Article 6.10 of the ATC. This Article provided that:

"If, however, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of this Article, within 30 days following the 60-day period for consultations ...".

5.214 In accordance with the above, if the Members failed to reach agreement on the application of the safeguard once the 60-day period fixed for holding consultations had expired, the Member which proposed to take safeguard action may do so unilaterally within the following 30 days. Thus, the provision under consideration granted the importing Member the power during a specified period to impose a unilateral restriction on the imports after a certain number of days had passed. Nowhere, in Costa Rica's view, did Article 6.10 of the ATC authorize the imposition of a unilateral restriction retroactive to the date of the call for consultations. The fact was that retroactivity could not be assumed, but must be explicitly authorized, as it was under the MFA. Article 3.5(i) of the MFA explicitly stated that:

"... If, however, after a period of sixty days from the date on which the request has been received by the participating exporting country or countries, there has been no agreement either on the request for export restraint or on any alternative solution, the requesting participating country may decline to accept imports for retention from the participating country or countries referred to in paragraph 3 above of the textiles and textile products causing market disruption (as defined in Annex A) at a level for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries not less than the level provided for in Annex B ...".

5.215 Costa Rica further argued that, if retroactivity was not explicitly provided for, as in the case of Article 6.10 of the ATC, the measure in question must be applied "forwards". This was particularly clear in the case of this provision of the ATC which, when establishing a procedure similar to that provided for in the MFA for the imposition of a unilateral restriction, differed from the latter in respect of retroactivity, by eliminating the explicit provision the MFA contained in this regard. This interpretation was bolstered by the principles established in Article 6.1 of the ATC, according to which:

"... The transitional safeguard should be applied as sparingly as possible, consistently with the provisions of this article and the effective implementation of the integration process under this Agreement".

5.216 Since any gaps or doubts arising in the legal text governing the imposition of a transitional safeguard must be interpreted on the basis of the principles and spirit guiding the ATC, it was not possible to conclude that a restriction adopted under the Agreement may be applied retroactively in

the absence of any explicit provision to that effect. This interpretation was supported by other agreements that were an integral part of the WTO Agreement and which therefore must also serve as interpretative sources for the ATC in the absence of any express provision in the latter. Thus, for example, Article XIII:3(b) of GATT 1994, referring to import restrictions involving the fixing of quotas, expressly authorized retroactive application of a restriction only for products that were en route at the time at which public notice was given of the restriction.

5.217 Accordingly, in the view of Costa Rica, the only possible conclusion was that, where Members had not reached agreement, the importing Member may, within the following 30 days, adopt a unilateral restriction which would begin to be applied as from the time when it was adopted, and not before. This meant that the imposition of the restriction by the United States should have begun as from 16 June 1995, the date when the restriction was established, and could not be made retroactive to 27 March 1995, the date of the request for consultations, as the United States in fact had done. By proceeding in this way, and by continuing to do so, the United States had disregarded the very significant revisions of the information presented as a basis for its action, disregarded all the aspects discussed in the consultations, and the conclusions of the TMB and had violated Article 6.10 of the ATC.

5.218 The United States argued that the ATC was silent concerning the effective date of safeguard measures, and did not prevent a Member from providing that the effective date would be the date of the request for consultations. The United States had held consultations with Costa Rica in accordance with Article 6.7 of the ATC before placing a restriction; had then applied the restraint at issue in this case; and had referred the matter to the TMB, pursuant to Article 6.10 of the ATC. Article 6.12 of the ATC therefore, permitted the United States to maintain the restraint for up to three years, without extension. When asked by exporting countries including Costa Rica to address this question, the TMB had responded recognizing this fact. The TMB had noted that

"with respect to the introduction of a safeguard measure, the [ATC] does not provide any indication with respect to the effective date of implementation of that measure" (G/TMB/R/2).

The MFA explicitly recognized the customary practice of counting imports during the consultation period against restraint levels, and the ATC did not change this practice. The universal application of textile restraints on this basis and the recognition accorded to this practice generally in the TSB and TMB, demonstrated that it was in fact a matter of accepted custom which constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the sense of Article 31.3(b) of the Vienna Convention on the Law of Treaties (1969).

5.219 In this regard the United States (and Costa Rica) were of the view that the reference in Article XVI:1 of the WTO Agreement to "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947" did not include the MFA. Costa Rica noted that GATT 1947 and the MFA were two independent, self-standing agreements while the United States pointed out that to some extent, the MFA was an agreement relevant to the history of the ATC, as even though the MFA had expired, many of the provisions of the ATC were drawn from the MFA.

5.220 The United States emphasized that the omission of an explicit reference to the effective date of the restriction in the ATC could not be construed as an attempt to prevent it. It was essential to the effective application of transitional safeguard as an adjustment mechanism. Textile restrictions would not work without the flexibility to set the effective date. Without it, a flood of imports would vitiate their adjustment function. Under Article XIX an importing country could simply act when it had made its determination of serious injury, but under the MFA and the ATC importing countries had been required to wait for consultations before acting. It was argued that the principle of effective treaty interpretation requires that transitional safeguards under Article 6 of the ATC must be permitted

to have an effective date as of the date of the request of consultations as any contrary position would make the ATC-consistent transitional safeguards ineffective.

5.221 Along these same lines, it was observed that restraints were normally applied effective on the date of the call as a call would trigger speculative trade. If traders believed that imports before completion of the consultation process would not be counted, speculative imports would aggravate injury or bankrupt the remaining industry. A transitional safeguard was an adjustment measure which facilitated the ultimate accomplishment of the ten-year programme of the ATC. A sudden flood of speculative imports for stockpiling in warehouses could not be permitted to frustrate this adjustment process. The widespread recognition of application of textile restrictions as from the date of the request reflected a common-sense appreciation of the practical aspects of this larger policy imperative. As a matter of treaty law, the principle of effective application of treaties (*ut res magis valeat quam pereat*) argues that restrictions must be permitted to have an effective date as of the date of the request for consultations, as any contrary position would make ATC-consistent transitional safeguards ineffective.

5.222 Article 6.10 of the ATC expressly allowed for the placement of a unilateral restraint before TMB review. Nothing in the text indicated that the restraint must be withdrawn in the absence of any TMB recommendation to do so. A lack of consensus in the TMB, or even a finding without a recommendation to withdraw, did not obligate an importing Member to withdraw a restraint. Even if there was a recommendation to withdraw a restraint, Members must only "endeavour" to comply, and provide reasons to the TMB if they could not comply with the recommendation.

5.223 The United States noted that the ATC provided for an absolute sunset of three years for an Article 6 safeguard measure. Furthermore, it was recalled that such safeguards were transitional and could only be invoked until the ATC expired, eight and a half years from now. The United States had continuously reviewed data on products subject to restraint and monitored production and trade data on a voluntary basis, even though the ATC did not so require. When new data warranted review of a safeguard measure, the United States considered whether it was necessary to maintain the restraint.

5.224 With respect to the Panel's question to the United States concerning "retroactive application of treaty obligations"; this could be read to refer to Article 28 of the 1969 Vienna Convention. However, this was not a case of retroactive application of a treaty to events which took place before the treaty entered into force; Article 28 was not relevant at all. All events which had led to this dispute took place *after* entry into force of the WTO Agreement, and in particular took place within the time frame provided for under ATC Article 6, including Articles 6.7 and 6.8. It could not be argued that Costa Rica was unaware of the applicable treaty rules at the time these events took place.

#### **L. ARTICLE 2 OF THE ATC**

5.225 Costa Rica argued that the United States had introduced a new restriction on its trade in the clothing products classified in category 352/652, without basing itself on the provisions of the ATC, and thereby violated Article 2.4, of the said Agreement. As recalled in the Preamble of the ATC, the terms of reference of the Uruguay Round Negotiating Group on Textiles and Clothing had established that:

"Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade."

In order to carry out this mandate, Article 1.1 of the ATC, provided that:

"This Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994."

Costa Rica further argued that for the purpose of attaining this objective, the ATC strictly defined, *inter alia*, what type of restrictions may be applied to trade in textiles and clothing under cover of the safeguard clause. These restrictions must necessarily fall within one of the following three categories:

- (a) Quantitative restrictions within bilateral agreements maintained under the MFA in force on the day before the entry into force of the WTO Agreement and notified in accordance with Article 2.1 of the ATC, which would continue to be governed by the provisions of the ATC in this respect:
- (b) restrictions established under the specific transitional safeguard mechanism governed by Article 6 of the ATC, which may be applied, in accordance with paragraph 1 of that Article, to all textile and clothing products that had not yet been integrated into GATT 1994; or
- (c) restrictions established in accordance with Article XIX of GATT 1994, in the case of products already integrated into GATT 1994.

5.226 Thus, Article 2.4 of the ATC, provided very clearly that:

"No new restrictions in terms of products or Members shall be introduced except under the provision of this Agreement or relevant GATT 1994 provisions."

Conversely, it followed from this provision that the introduction of new restriction in terms of products or Members that had not been introduced in accordance with the rules of the ATC or GATT 1994 infringed Article 2.4 of the ATC.

5.227 In the case in point, imports into the United States from Costa Rica in category 352/652 were not subject to any quantitative restriction based on the Multifibre Arrangement prior to the entry into force of the WTO Agreement, and therefore the first option was ruled out. Furthermore, cotton and man-made fibre underwear was not a product that the United States had already incorporated into GATT 1994 and therefore Article XIX was likewise not applicable. Hence, the only possibility open to the United States to restrict the imports under consideration was to apply the specific transitional safeguard mechanism in accordance with the criteria established in Article 6 of the ATC. However, the United States had failed to demonstrate the existence of the requirements laid down in Article 6 of the ATC as an essential condition for being able to apply a transitional safeguard. Consequently, the United States had violated Article 2.4 of the ATC, as it had applied to Costa Rica a new restriction on trade in products classified in category 352/652 without complying with the provisions of Article 6 of the ATC.

5.228 The United States argued that because the safeguard action taken on imports of underwear in category 352/652 from Costa Rica was fully consistent with Article 6 of the ATC, there was no violation of Article 2 of the ATC.

**M. A MEMBER MUST ENDEAVOUR TO ACCEPT RECOMMENDATIONS OF THE TMB**

5.229 Costa Rica argued that the United States had violated Article 8 of the ATC, which in its paragraphs 9 and 10, defined the nature of the recommendations made by the TMB. Thus, the first of these paragraphs provided that: "The Members shall endeavour to accept in full the recommendations of the TMB ...". Paragraph 10 provided that:

"If a Member considers itself unable to conform with the recommendations of the TMB; it shall provide the TMB with the reasons therefor not later than one month after the receipt of such recommendations ...".

5.230 In the view of Costa Rica, it was clear from an analysis of these two provisions that the TMB's recommendations were not binding. However, it was also clear that the formulation of such recommendations must have some purpose, because it was meaningless for the ATC to provide for the TMB to carry out an exercise without any purpose. This aspect became clear from the reading of paragraphs 9 and 10 of Article 8 of the ATC, from which it may be concluded that although Article 8 does not impose the obligation to abide by the recommendations of the TMB, it does impose other obligations on Members. Article 8 of the ATC laid down two obligations on Members: firstly, in paragraph 9 it imposed an obligation for Members to endeavour to accept in full the recommendations of the TMB. This was a "best-endeavours" obligation, in the sense that while the TMB recommendations were not binding, there was an obligation for Members to do their best to accept them. If, given the TMB's recommendations, a Member did not even try to accept them, it would be violating the best-endeavours obligation of Article 6.9 of the ATC.

5.231 Secondly, Article 8.10 of the ATC imposed on Members another obligation that complemented the first, namely, that where a Member, having endeavoured to accept the recommendations of the TMB, found itself unable to conform with them, it shall provide the TMB with the reasons therefor. The imperative character of the verb used in this Article clearly indicated that, while the TMB recommendations may not be binding, this provision did impose on a Member the obligation to justify, "not later than one month after receipt of such recommendations", the reasons why it was unable to conform with them.

5.232 Costa Rica argued that in the case under consideration, the United States not only had not tried to accept the TMB recommendations, but furthermore did not submit to that body any document explaining the reasons why it considered itself unable to conform with the recommendations, and therefore it was in breach of Articles 8.9 and 8.10 of the ATC.

5.233 The United States argued that Costa Rica's allegation that the US had violated Article 6.9 of the ATC was without legal or factual foundation. They had proceeded in good faith to reach mutual understanding in consultations recommended by the TMB, consistent with obligations inherent in Article 8 of the ATC. They also noted that the TMB recommendation had been directed to both the United States and Costa Rica. Contrary to the assertion of Costa Rica, the United States had followed the TMB recommendation to consult and to take into account the considerations it had cited. Therefore, there was no need to invoke Article 8.10 of the ATC and provide reasons to the TMB for not accepting its recommendation in this case. As evidenced by the initiation of these Panel proceedings, it was Costa Rica that could not ultimately comply with the TMB recommendation. The TMB's response in October 1995 to the reports of the United States and Costa Rica did not characterize the United States as having failed to follow the TMB's recommendation. The TMB stated that:

"[i]t took note of the reports and of the fact that the two parties did not reach a mutual understanding during the consultations. The TMB's discussions confirmed the Body's previous findings in this matter (G/TMB/R/2, first two sentences of paragraph 16). There being no further requests by the parties involved, the TMB considered its review of the matter completed" (G/TMB/R/5).

5.234 Costa Rica argued that the violation by the United States of the best-endeavours obligation imposed by Article 8.9 of the ATC was clearly demonstrated by the following facts. In July 1995, the TMB, pursuant to Article 6.10 of the ATC, had proceeded to examine the unilateral restriction applied by the United States to Costa Rica in category 352/652. On that occasion, the TMB had found that "serious damage", as envisaged in Articles 6.2 and 6.3 of the ATC, "had not been demonstrated",

but "could not, however, reach consensus on the existence of actual threat of serious damage". Therefore, the TMB recommended:

" ... that further consultations be held between the United States and the parties concerned, with a view to arriving at a mutual understanding, bearing in mind the above, and with due consideration to the particular features of this case, as well as equity considerations".

Thus, the recommendation of the TMB had been that Costa Rica and the United States should hold new consultations, but also that these consultations should be conducted on the basis of three considerations: (a) that it was clear that the United States had not demonstrated the existence of serious damage, but that a consensus had not been reached in the TMB as to the existence of actual threat of serious damage; (b) that trade in this category between the United States and Costa Rica had some particular features, which should be borne in mind; and (c) that equity considerations should be borne in mind, with respect to the levels of restriction agreed by the United States with other countries called for consultations on this same category.

5.235 In the view of the United States, the TMB recommendation went no further than a recommendation to consult further and report back to the TMB. The TMB did not recommend that the parties actually reach agreement, nor did it recommend that the United States withdraw the safeguard measure, nor did it recommend that the parties even discuss dropping the restriction. Also, a lack of consensus in the TMB did not translate into a recommendation to drop a restriction. In accordance with the TMB's recommendation, the United States had duly consulted, and duly reported back; thus, the United States had complied fully with the TMB recommendation. In its note of October 1995, the TMB had stated that the parties had reported no solution and that it considered its review completed.

5.236 In Costa Rica's view, what subsequently had occurred, however, showed that the United States had not fulfilled the obligation imposed by Article 8.9 of the ATC in the sense of at least endeavouring to proceed in accordance with the recommendations of the TMB. Firstly, the United States did not even attempt to justify the adoption of the safeguard measure on the basis of the alleged actual threat of serious damage. Once the TMB had determined that serious damage did not exist and that there was no consensus as to the existence of actual threat of serious damage, the United States - as a minimum at that stage of the proceedings - should have demonstrated the existence of this latter hypothetical condition brought to light by the TMB. However, the fact was that they did not even attempt to do so, nor did it take into account the special characteristics or trade between the two countries in this category - feigning to ignore the overriding importance of so-called 807 trade - nor did it take into account any considerations of equity because, even if there were grounds for imposing the safeguard in question, the levels of restriction proposed to Costa Rica were very different to those offered and granted to other countries involved in consultations.

5.237 The United States argued that Costa Rica had misinterpreted the TMB recommendation to mean that the TMB had asked the United States to reconsider, in consultations, its determination that there was serious damage, or actual threat thereof to the domestic underwear producing industry which had been attributed to imports from Costa Rica. Further, Costa Rica had misinterpreted the TMB recommendation to take into account equity considerations in light of the specific case to mean that the United States was to deem the re-import content in Costa Rica's trade not to cause or actually threaten serious damage to US industry. Based on these misinterpretations, Costa Rica had asserted that the United States was required in consultations to withdraw the restraint.

5.238 Costa Rica held that if the United States genuinely had accepted to consider the recommendations of the TMB, when taking into account that the TMB had not reached a consensus as to the existence of actual threat of serious damage it should have lifted the quota unilaterally imposed on Costa Rica in category 352/652. This was because the letter and spirit of the ATC were very clear: the ATC was conceived as a transitional system whose essential function was to integrate trade in textiles and

clothing into the rules and the disciplines of GATT 1994. From this statement, the transitional safeguard provided for in Article 6 of the ATC was extraordinary by nature and should be applied only in cases where it had been possible to demonstrate the existence of the requirements laid down by paragraphs 2 and 3 of that Article, and where consequently the TMB had arrived at a consensus that the existence of the threat had been demonstrated. Conversely, if the TMB had not arrived at a consensus to that effect, a restriction that had been imposed could not be maintained, because it would mean that the TMB had not found the necessary justification for taking such action. There was nothing in the ATC to establish a presumption that, in the absence of consensus in the TMB, it should be presumed that the importing Member had the necessary justification to impose the measure. In the absence of any explicit provision to that effect, following Article 6.1 of the ATC and the spirit of the ATC it was necessary to proceed in the least restrictive manner, that is to say, the imposed restriction should have been lifted as there was no justification for adopting it.

5.239 In this respect, the United States considered that Costa Rica had construed the TMB recommendation to mean that the United States was to rescind the restraint on Costa Rican exports by including an analysis of Article 6.1 of the ATC. Reference to integration and the taking of transitional safeguard action and the re-import content of Costa Rican exports supported the notion that the United States was required to rescind the restraint when it consulted with Costa Rica. Costa Rica's argument consistently depended on the assumption that the ATC integration process must be read into Article 6 so as to accelerate the pace of the integration. This was not the case. It was clear in the ATC that integration was an independently determined process, and that Article 6 applied only to products not yet integrated. Article 2 of the ATC specifically allowed Members to designate what products would be integrated and when, as long as they were chosen from the Annex to the ATC, from certain product groups and comprised the appropriate proportion of trade indicated for each stage of the transition. Nothing in the ATC required the United States or other Members to schedule sensitive products at certain stages for integration. The negotiators had specifically left that decision to the importing Members. Thus, Costa Rica could not use this Panel proceeding to compel integration of this category.

5.240 Costa Rica also argued that, in accordance with the TMB's recommendations, the United States was obliged to take into consideration the particular features of the trade in this category between the two countries. This meant that the United States should have borne in mind that, given that virtually all exports from Costa Rica in category 352/652 were "807 trade", the possibility that they should have been causing serious damage or actual threat thereof was really non-existent. If the United States had endeavoured to accept the recommendation of the TMB to consider the particular features of trade with Costa Rica in this category, it would clearly have appreciated how absurd it was to impose a quota in such circumstances. However, the United States had not made any effort to accept the recommendation of the TMB.

5.241 The United States further argued that the TMB recommendation did not say what Costa Rica claimed it did. Again, the TMB had not, in its 25 October 1995 note, responded to Costa Rica's same assertions in their report back to the TMB dated 24 August 1995. (G/TMB/SPEC/107) The lack of TMB consensus on actual threat of serious damage did not translate into a "recommendation" that a restraint be withdrawn. Accordingly, there was no obligation on the United States, in consultations, to assume such a proposition.

5.242 In the view of Costa Rica, if the United States had insisted on adopting a safeguard measure in these circumstances - when in fact it should have withdrawn the measure - it should at least have borne in mind the obligation to grant more favourable treatment to re-imports from Costa Rica, as provided for in Article 6.6(d) of the ATC. In this regard, however, the position of the United States appeared to have been somewhat self-contradictory. On the one hand, it started from the position that the rise in imports of these products was causing serious damage to its industry, but on the other, the level of these imports was of no importance whatsoever provided the product in question was produced using fabric formed and cut in the United States. The ATC established this obligation to grant more

favourable treatment to re-imports - which the United States had never tried to fulfil in any of its proposals - but what it certainly did not provide for was the establishment of new restrictions in order to ensure that future trade consists solely of re-imports.

5.243 Costa Rica noted that the TMB had also indicated that equity considerations should be borne in mind, by which it was referring to the fact that the same treatment should be accorded to those who were in the same position. In this connection, apart from Costa Rica, the United States had called for consultations six other countries concerning this category, had withdrawn the call addressed to one of them and had reached an agreement with the remaining five. In the case of each of the latter, the United States had agreed on specific level (SL) restraints that were much higher than the respective "call" levels. Thus - and assuming that the United States had the right to adopt a safeguard, which, in the view of Costa Rica, was not the case - in order to comply with the TMB's recommendation it should have made restraint proposals to Costa Rica that reflected SL restraint levels which provided for increases in relation to the call level, in the same way as it had granted to the other countries. In none of the proposals formulated by the United States to Costa Rica was this equity factor taken into consideration, because not even in its last proposal did the United States propose a SL restraint level approaching the call level, still less exceeding it. In fact, the highest level that the United States had offered at any time for the establishment of the SL restraint was about 40 per cent below what should have been the level for Costa Rica in accordance with the ATC itself - assuming that the necessary requirements for imposing it had been demonstrated, which was not the case.

5.244 Costa Rica argued that, on the basis of the above explanation, it was clearly demonstrated that the United States had completely disregarded the recommendations adopted by the TMB in July 1995, without even endeavouring to accept them as provided for in Article 8.9 of the ATC. Furthermore, the United States had violated Article 8.10 of the ATC, which imposed on Members another obligation that complemented the obligation established in Article 8.9 of the ATC. That is to say, the United States had not fulfilled the obligation of presenting to the TMB its reasons explaining why it considered itself unable to conform with the TMB's recommendations. Suffice it to say that the United States had never at any time presented to the TMB any document to that effect. Failure to comply with this requirement imposed under Article 8.10 of the ATC may be due to the fact that, since the United States had not even attempted to follow the TMB's recommendations, it would be difficult, if not impossible, for it to justify a hypothetical failure in its attempt to accept those recommendations, since it had made no such attempt.

5.245 Costa Rica also noted that the United States had declared that they did not agree with the finding of the TMB that the existence of serious damage had not been demonstrated. Moreover, as in the US view there was no provision in the ATC that made the TMB's findings binding, the Panel was obliged to consider the question of serious damage. In this connection, Costa Rica emphasized that the United States had not contested at the appropriate moment in the procedure the TMB's finding that the existence of serious damage had not been demonstrated, as required by Articles 6.2 and 6.3 of the ATC. Costa Rica was, therefore, concerned that contesting the action of the TMB at this stage of the procedure and calling into question its decisions would mean divesting the Body of any function related to monitoring the implementation of the ATC.

5.246 The United States argued that they had made efforts to reach a mutual understanding with Costa Rica. As recommended by the TMB, the United States had taken into account that the TMB could not reach consensus on actual threat of serious damage (though they maintained that they had demonstrated the existence of serious damage); had examined the nature of trade from Costa Rica; and, in the interest of equity, had again compared Costa Rica's trade with trade from other countries to which the serious damage and actual threat had been attributed. The record showed that Costa Rica had refused to respond. In so doing, the United States had made a proposal to Costa Rica that, in its view, took these factors into account in an effort towards mutual understanding. The United States stated that the record showed that Costa Rica had refused to respond. The United States stated that

there was no requirement in the ATC that the United States respond to "findings" but must "endeavour to comply" with TMB "recommendations". The United States did comply with the TMB recommendation.

**N. NULLIFICATION OR IMPAIRMENT OF BENEFITS**

5.247 Costa Rica argued that the unilateral restriction imposed by the United States on trade in clothing classified in category 352/652 from Costa Rica was a blatant violation of the obligations laid down in the ATC, in particular Articles 2, 6 and 8. On this basis, and given that the ATC was a "covered agreement" within the meaning of Article 1 of the DSU, the provisions of Article 3.8 of the DSU applied. That Article stated:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment ...".

It clearly followed from the above provision that in the case under consideration, given the infringement of Articles 2, 6 and 8 by the United States, benefits accruing to Costa Rica under the WTO Agreement, and in particular under the ATC, had been nullified or impaired.

5.248 Considering that Article 3.1 of the DSU stipulated that

"Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 ...",

it was important to note that these Articles had established that the benefits accruing under the GATT Rules - and consequently the WTO Rules - did not comprise exclusively those derived from the Agreement at the time when a concession came into effect, but also the future trading opportunities that would result from that concession. Thus, and by virtue of the *prima facie* case of nullification or impairment of benefits that existed in cases of infringement of the obligations assumed under a covered agreement, such as the ATC, the claims presented by one or more Members relating to the imposition of infringing unilateral measures must be accepted even where statistical evidence of commercial damage cannot exist.

5.249 It was also necessary to emphasize that nullification or impairment should be considered not only in relation to the effect which the violation in question may have had on the volume of trade but also in relation to possible increases in transaction costs and the creation of uncertainty liable to affect investment plans.

5.250 As a result of all the foregoing, Costa Rica considered that the Panel should find that the unilateral restriction imposed by the United States on the trade of Costa Rica in category 352/652 infringed Articles 2, 6 and 8 of the ATC and that, consequently, these infringements entailed the nullification or impairment of benefits accruing to Costa Rica under the WTO Agreement. Accordingly, Costa Rica urged the Panel to find in its report that the United States should proceed to bring its measure into conformity with the ATC, which implied immediately withdrawing it.

5.251 The United States argued that Costa Rica's rights and benefits under the ATC had not been nullified and impaired. The United States had demonstrated that they had not violated Articles 2, 6 or 8 of the ATC. Thus, nullification and impairment of any benefits and rights accruing to Costa Rica in this case could not be presumed.

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**VI INTERIM REVIEW**

6.1 On 4 October 1996, the United States and Costa Rica requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 20 September 1996. Both Costa Rica and the United States requested the Panel to hold a meeting for that purpose. The Panel met with the parties on 15 October 1996 to hear their arguments concerning the interim report. The Panel carefully reviewed the arguments presented by the parties.

6.2 In approaching the interim review stage, the Panel drew guidance from Article 15.2 of the DSU, which states that "a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to Members". While the Panel was willing to approach the interim review stage with the broadest possible interpretation of Article 15.2 of the DSU, it was of the view that the purpose of the review meeting was not to provide the parties with an opportunity to introduce new legal issues and evidence, or to enter into a debate with the Panel. The purpose of the interim review, in the Panel's view, was to consider specific and particular aspects of the interim report. Consequently, the Panel addressed the entire range of such arguments presented by the parties which it considered to be sufficiently specific and detailed.

6.3 The United States submitted to the Panel at the review meeting copies of press reports relating to the interim report. At the meeting, the Panel expressed its disappointment about the apparent breach of confidentiality and reiterated the utmost importance of maintaining confidentiality so as to preserve the credibility and integrity of the dispute settlement process, particularly at the interim review stage.

6.4 Regarding the timing of settlements with other exporters, the United States argued that the Panel had erroneously stated that the United States requested consultations with Costa Rica while at the same time it settled with other countries. In order to clarify its findings, the Panel introduced some drafting modifications in the final report at paragraphs 7.50 and 7.51.

6.5 The United States disagreed with the interim report that use of the ATC safeguard should be exceptional. It based its argument on the fact that Article 6.1 of the ATC couples the term "sparingly" with "as possible", suggesting that the standard was relative. The Panel was not persuaded by this argument, which in effect would result in reading the text of the Article as meaning that the transitional safeguard "should be applied sparingly *if possible*".

6.6 Regarding the causation analysis required under Article 6.2 of the ATC, the United States argued that the Panel's finding in paragraph 7.46 of the final report was a mischaracterization of the CITA's conclusions. The Panel slightly modified the language of this paragraph so as to avoid any misunderstanding of its findings.

6.7 In respect of the relationship between Articles 6.2 and 6.4 of the ATC, the United States argued that the Panel incorrectly merged the analyses under these two paragraphs. This was not the intention of the Panel. To clarify its findings, the Panel introduced certain drafting changes in paragraphs 7.23, 7.24, 7.47 and 7.48.

6.8 The United States argued that in its review of the March Market Statement, the Panel had erred by relying on the July Market Statement. It specifically argued that if Members were penalized in the dispute settlement process for supplying updated data to the TMB, there would be a disincentive to providing it at the TMB level. The Panel consequently examined the issue, as spelled out in paragraphs 7.29 and 7.45 of its final report.

6.9 Regarding the Panel's interpretation of Article 6.6(d) of the ATC, the United States argued that finding the United States in violation of this provision based on the requirements under Article 6.8 was erroneous because the US action was taken based on Article 6.10. The Panel's additional discussion on this point is reflected in paragraph 7.59.

6.10 Both the United States and Costa Rica disagreed with the Panel's interpretation of Article 6.10 of the ATC regarding the effective date of application of the restriction. The United States argued that the restraint was not a measure "of general application" within the meaning of Article X:2 of GATT 1994. It further argued that the restraint was not "enforced" until 23 June 1995, which was after the date of the publication. The Panel's finding on these points can be found in paragraphs 7.65 and 7.69 of the final report. Costa Rica questioned the compatibility of the Panel's general approach that Article 6 of the ATC should be interpreted narrowly and its interpretation of Article X:2 of GATT 1994. The Panel failed to see any incompatibility or contradiction between the two approaches. Costa Rica further questioned the Panel's consideration of practical aspects of this issue. The Panel carefully examined Costa Rica's argument, and decided to maintain paragraph 7.68 of the final report.

6.11 Costa Rica and the United States differed with respect to acceptable figures for the percentage of 807 or 807A trade in Costa Rican underwear exports to the United States. In the absence of clear verification by the importing country (i.e., the United States), the Panel decided to use the most conservative figure of 94 per cent, coupled with the expression "at least" in paragraph 7.46 of the final report.

6.12 Costa Rica and the United States made some other suggestions concerning language changes, which the Panel accepted and introduced in its final report.

## **VII FINDINGS**

### **A. CLAIMS OF THE PARTIES**

#### **Introduction**

7.1 We note that the issues in dispute arise essentially from the following facts: On 27 March 1995, the United States requested consultations with Costa Rica on trade in cotton and man-made fibre underwear (US category 352/652) under Article 6.7 of the ATC. As consultations between the two countries did not result in a mutually acceptable solution, on 23 June 1995 the United States implemented a restriction on underwear imports from Costa Rica for a period of 12 months starting from 27 March 1995. At the same time, the United States referred the matter to the TMB in accordance with Article 6.10 of the ATC. The TMB found that serious damage had not been demonstrated by the United States, but it could not reach consensus on the existence of actual threat of serious damage. The TMB recommended further consultations between the two parties. A series of further consultations was held in which the United States put forward several new proposals as far as the level of the restriction was concerned. However, the parties failed to reach a mutually agreed solution. The restriction, augmented by the application of a growth rate of 6 per cent, was renewed for a 12-month period on 27 March 1996.

#### **Main substantive claims**

7.2 Costa Rica essentially claims before the Panel that the United States, by imposing a unilateral quantitative restriction on cotton and man-made fibre underwear classified in category 352/652, has acted in violation of Articles 2, 6 and 8 of the ATC. Costa Rica requests the Panel to recommend that the United States withdraw the measure in question.

7.3 The United States essentially claims that it respected its obligations under the ATC when imposing the restriction on cotton and man-made fibre underwear classified in category 352/652. Consequently, the United States requests the Panel to dismiss Costa Rica's claim.

7.4 There is no disagreement between the parties to the dispute that the restriction applied by the United States is a "transitional safeguard" and that transitional safeguards are to be applied in accordance

with Article 6 of the ATC. In this respect, Costa Rica claims that the United States has violated a number of provisions of this Article. In particular, Costa Rica claims that the United States violated its obligations under Article 6 of the ATC by:

- (a) imposing a restriction on imports from Costa Rica without having satisfied the conditions laid down in Article 6.2 and 6.4 of the ATC, namely by not having shown that serious damage or actual threat thereof resulted from those imports;
- (b) not granting, when applying the restriction, more favourable treatment to re-imports from Costa Rica in contravention of Article 6.6(d) of the ATC;
- (c) not consulting with Costa Rica on the issue of actual threat of serious damage contrary to its obligations under Article 6.7 and 6.10 of the ATC; and
- (d) applying the restriction retroactively in contravention of Article 6.10 of the ATC.

Costa Rica also claims that the United States violated Articles 2 and 8 of the ATC. In this respect, Costa Rica claims that the United States violated Article 2.4 of the ATC which stipulates that: "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions". With respect to the alleged violation of Article 8 of the ATC, Costa Rica essentially claims that the United States has not respected the recommendations made by the TMB in this case.

7.5 We will deal first with what we view as Costa Rica's basic claim under Article 6 of the ATC: that the United States imposed restrictions on imports into the United States of underwear without having demonstrated, as required by Article 6.2 and 6.4 of the ATC, that the US underwear industry had suffered serious damage from Costa Rican imports or that there was an actual threat of such damage. In considering this claim, we examine the issues in the following order: First we consider general interpretative issues. Second, we consider Costa Rica's basic claim by reviewing the findings by the US investigating authorities on serious damage attributed to Costa Rica. Third, we consider the question of actual threat of serious damage - a matter relating to the scope of Costa Rica's basic claim. Finally, we consider Costa Rica's other claims, namely, its claims with respect to Article 6.6(d) of the ATC, with respect to the alleged failure of the United States to consult, with respect to the alleged retroactive application of the US restriction, with respect to the alleged violation of Article 2.4 of the ATC and with respect to the alleged violation of Article 8 of the ATC.

## **B. GENERAL INTERPRETATIVE ISSUES**

7.6 Before turning to the examination of the specific import restriction, we deal with four interpretative issues relating to the application of the ATC, namely:

- (a) the standard of review that should be applied in this case;
- (b) the burden of proof;
- (c) the interpretation of the ATC; and
- (d) the structure of Article 6 of the ATC.

### **Standard of Review**

7.7 We note that the two parties to the dispute present diverging views with respect to the standard of review to be applied by the Panel in this case. The United States advocates a standard of review similar to that applied in the "Fur Felt Hat" case<sup>14</sup>, in which the neutral members of the Working Party, examining a US escape clause measure in light of the requirements of Article XIX of the General Agreement on Tariffs and Trade (GATT) 1947, afforded to the US authorities considerable discretion by concluding that the United States was not called upon to prove conclusively that the degree of injury caused or threatened in that case should be regarded as serious. Costa Rica argues in favour of a five-step procedure whereby the Panel would certify whether the administrative authority of the importing country, when imposing the restriction had: (i) complied with the ATC's procedural rules; (ii) properly established the facts; (iii) made an objective and impartial evaluation of the facts in the light of the rules of the ATC; (iv) properly exercised its discretion in the interpretation of the rules; and (v) complied with the rules in general, while also having complied with the other four requirements mentioned above.

7.8 We note that the ATC does not establish a standard of review for panels, contrary, for example, to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, where Article 17.6 defines the standard of review that panels have to apply when reviewing cases arising under that Agreement. We further note that the DSU does not contain a provision mandating a specific standard of review.

7.9 In our view, the main relevant provision of the DSU in this respect is Article 11, which reads as follows:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.10 In our opinion, a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue, and most notably in the panel report on the "Transformers" case.<sup>15</sup>

7.11 The panel in the "Transformers" case was confronted with the argument of New Zealand that the determination of "material injury" by the competent New Zealand investigating authority could not be scrutinized by the panel. The "Transformers" panel responded to this argument as follows:

"The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled,

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<sup>14</sup>See "Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade", GATT document CP/106, adopted on 22 October 1951 (CP.6/SR.19), version published by the Secretariat in November 1951, preface by E. Wyndham White.

<sup>15</sup>"New Zealand - Imports of Electrical Transformers from Finland", adopted on 18 July 1985, BISD 32S/55.

under the relevant GATT provisions and in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT".

7.12 We see great force in this argument. We do not, however, see our review as a substitute for the proceedings conducted by national investigating authorities or by the TMB. Rather, in our view, the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review.<sup>16</sup> In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. In our view, the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States. Consequently, the ATC constitutes, in our view, the relevant legal framework in this matter.

7.13 We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the "March Statement") which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review.<sup>17</sup> In our view, an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States.<sup>18</sup> We note in this respect, that in response to a question by the Panel, the United States argued that the Panel had to examine whether the domestic authorities *had* based their determination on an examination of factors required by the ATC and whether the basis

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<sup>16</sup>See the panel reports on "Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States", adopted on 27 April 1993, BISD 40S/205; "United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 27 April 1994; "United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada", adopted on 3 June 1987, BISD 34S/194.

<sup>17</sup>A *de novo* review, if at all, is to be conducted by the TMB. Article 8.3 of the ATC reads as follows: "The TMB...shall rely on notifications and information supplied by the Members under the relevant Articles of the Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them". Article 8.5 of the ATC calls for a "thorough and prompt" review of the matter by the TMB.

<sup>18</sup>This approach is largely consistent with the approach adopted by the panel reports cited in footnote 16, although it should be pointed out that the standard of review was expressed in slightly different terms in each of the aforementioned panel reports.

for the determination was adequately explained. In the US view, such an approach was compatible with the standard of review adopted in the "Fur Felt Hat" case.<sup>19</sup>

### **Burden of Proof**

7.14 The parties to the dispute have divergent views on the question of burden of proof. The United States essentially argues that it is not its duty to re-establish the consistency of the restriction with the relevant rules of the ATC, since it has already established that in the March Statement. Costa Rica, on the other hand, insists that in accordance with Article 6.2 and 6.4 of the ATC, it is incumbent upon the United States to establish to the Panel's satisfaction that the conditions required before imposing a restriction have in fact been met.

7.15 We recall in this context that one of the central elements of the ATC is the prohibition, in principle, for Members to have recourse to any new restrictions beyond those notified under Article 2.1 of the ATC. Article 2.4 of the ATC reads as follows:

"...No new restrictions in terms of products or Members shall be introduced *except* under the provisions of this Agreement or relevant GATT 1994 provisions" (emphasis added).

We further note that Article 6.2 of the ATC reads as follows:

"Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is *demonstrated* that..." (emphasis added).

7.16 In our view, Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC. It is a general principle of law, well-established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception. Consequently, in our view, it is up to the United States to demonstrate that it had fulfilled the requirements contained in Article 6.2 and 6.4 of the ATC in the March Statement which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel.

### **The Interpretation of the ATC**

7.17 Article 3.2 of the DSU requires panels to interpret the covered agreements "in accordance with customary rules of interpretation of public international law". The customary rules of interpretation of public international law are embodied in the text of the Vienna Convention on the Law of Treaties (VCLT).<sup>20</sup>

Article 31.1 of the VCLT reads:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

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<sup>19</sup>See paragraph 5.45 above.

<sup>20</sup>See the Appellate Body Decision on "United States - Standards for Reformulated and Conventional Gasoline" (WT/DS2/AB/R).

7.18 First, we pay attention to the phrase "ordinary meaning to be given to the terms of the treaty in their context". The reason why, in our view, particular attention is paid to the context is simply that the terms of a treaty should not be interpreted in isolation, but in their particular context in the entire agreement. We recall that Article 31.2 of the VCLT expressly defines the context of the treaty to include the text. Thus, it is clear that the entire text of the ATC is relevant in order to interpret Article 6.2 to 6.4 of the ATC.

7.19 Second, the overall purpose of the ATC is to integrate the textiles and clothing sector into GATT 1994. Article 1 of the ATC makes this point clear. To this effect, the ATC requires notification of all existing quantitative restrictions (Article 2 of the ATC) and provides that they will have to be terminated by the year 2004 (Article 9 of the ATC). The ATC allows adoption of new restrictions in addition to those notified under Article 2 of the ATC for products not yet integrated into GATT 1994 pursuant to Article 2.6 to 2.8 of the ATC only exceptionally and in accordance with the relevant provisions of the ATC or in accordance with the relevant provisions of GATT 1994. Article 2.4 of the ATC reads:

"...No new restrictions in terms of products or Members shall be introduced *except* under the provisions of this Agreement or relevant GATT 1994 provisions" (emphasis added).<sup>21</sup>

The exceptional nature of these restrictions is confirmed by the wording of Article 6.1 of the ATC which reads as follows:

"...The transitional safeguard should be applied as *sparingly* as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement" (emphasis added).

7.20 Finally, we recall that the relevant provisions have to be interpreted in good faith. Based upon the wording, the context and the overall purpose of the Agreement, exporting Members can legitimately expect that transitional safeguards, adopted under Article 6 of the ATC, would only be applied sparingly in order to serve the narrow purpose of protecting domestic producers of like and/or directly competitive products. Exporting Members can, in other words, legitimately expect that market access and investments made would not be frustrated by importing Members taking improper recourse to such action.

7.21 We conclude from the interpretation of these provisions in the light of Article 31 of the VCLT that recourse to transitional safeguards should be taken on an exceptional basis only. Consequently, in our view, Article 6 of the ATC should be interpreted narrowly. This conclusion is consistent with the past practice of GATT panels.<sup>22</sup>

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<sup>21</sup>We note that a footnote to Article 2.4 of the ATC reads as follows: "The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex".

<sup>22</sup>See the panel reports on "Canada - Administration of the Foreign Investment Review Act (FIRA)", adopted on 7 February 1984, BISD 30S/140; "United States - Customs User Fee", adopted on 2 February 1988, BISD 35S/245; "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163; "European Economic Community - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93; "Canada - Import Restrictions on Ice Cream and Yogurt", adopted on 5 December 1989, BISD 36S/68; "European Economic Community - Regulation on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132; "United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada", adopted on 11 July 1991, BISD 38S/30; "United States - Definition of Industry (continued...)"

**The Structure of Article 6 of the ATC**

7.22 Article 6.2 of the ATC conditions the application of a transitional safeguard on a finding that a product is being imported in such increased quantities so as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Article 6.2 of the ATC reads as follows:

"Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other facts as technological changes or changes in consumer preference".

Article 6.3 of the ATC contains an indicative list of economic variables that can be taken into account in order to assess the serious damage or actual threat thereof. After having satisfied the conditions of Article 6.2 of the ATC, Members must attribute the serious damage or actual threat thereof to a particular Member or Members, since, in accordance with Article 6.4 of the ATC, transitional safeguards "shall be applied on a Member-by-Member basis". Article 6.4 of the ATC reads as follows:

"Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent<sup>23</sup>, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement."

7.23 The overall purpose of Article 6 of the ATC is to give Members the possibility to adopt new restrictions on products not already integrated into GATT 1994 pursuant to Article 2.6 to 2.8 of the ATC and not under existing restrictions, i.e., not notified under Article 2.1 of the ATC. Article 6 of the ATC, in our view, establishes a three-step approach which has to be followed for a new restriction to be imposed. Articles 6.2 and 6.4 of the ATC constitute the first two steps which, taken together, amount to a determination that serious damage has occurred or is actually threatening to occur and that it may be attributed to a sharp and substantial increase in imports from a particular Member or Members: No action can be taken on the basis of Article 6.2 alone.

7.24 A determination under Article 6.2 of the ATC is, therefore, a necessary but not sufficient condition to have recourse to bilateral consultations under Article 6.7 of the ATC. Only when serious

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<sup>22</sup>(...continued)

Concerning Wine and Grape Products", adopted on 28 April 1992, BISD 39S/436; "United States - Measures Affecting Alcoholic and Malt Beverages", adopted on 19 June 1992, BISD 39S/206.

<sup>23</sup>Footnote 6 accompanying this text reads: "Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising, for example, from the existence of production capacity in the exporting Members".

damage or actual threat thereof has been demonstrated under Article 6.2 and has been attributed to a particular Member or Members under Article 6.4 of the ATC, can recourse to Article 6.7 of the ATC be made in a way consistent with the provisions of the ATC.

**C. REVIEW OF THE FINDINGS BY THE US INVESTIGATING AUTHORITIES ON SERIOUS DAMAGE ATTRIBUTABLE TO COSTA RICAN IMPORTS**

7.25 We now turn to an examination of Costa Rica's basic claim: that the United States imposed restrictions on imports of underwear into the United States without having demonstrated, as required by Article 6.2 and 6.4 of the ATC, that the US underwear industry suffered serious damage from Costa Rican imports. We first discuss the scope of the matter before us, i.e., the information that we will consider in our examination of Costa Rica's claim. We then undertake an objective assessment of the US action and its conformity with the ATC in accordance with the standard of review set out above. In this respect, we will examine the determination by the United States in respect of (i) whether the US industry suffered serious damage, (ii) the cause of the serious damage and (iii) the attribution of serious damage to Costa Rican imports.

**The Scope of the Matter**

7.26 We agree with the parties to the dispute that we should restrict our review to an examination of the March Statement. We believe that statements subsequent to the March Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof in the present case. A restriction may be imposed, in a manner consistent with Article 6 of the ATC, when based on a determination made in accordance with the procedure embodied in Article 6.2 and 6.4 of the ATC. This is precisely the role that the March Statement is called upon to play. Consequently, to review the alleged inconsistency of the US action with the ATC, we must focus our legal analysis on the March Statement as the relevant legal basis for the safeguard action taken by the United States.

7.27 Costa Rica submitted to the Panel information concerning the bilateral negotiations that took place between Costa Rica and the United States before and after the imposition of the restriction. More specifically, Costa Rica submitted information relating to settlement offers made by the United States concerning the level of the restriction to be imposed. In this respect, we note that Article 4.6 of the DSU reads as follows:

"Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings."

In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information.

**Serious Damage**

7.28 Article 6.2 of the ATC authorizes safeguard action following a demonstration that a particular product is being imported in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry. The factors that should be taken into account in order to establish serious damage are listed in Article 6.3 of the ATC, which reads as follows:

"In making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables

as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; *none of which, either alone or combined with other factors, can necessarily give decisive guidance*" (emphasis added).

The United States determination in this regard is contained in the March Statement.

7.29 The March Statement included under the heading "Market Situation" one sub-heading entitled "Serious Damage to the Domestic Industry" (sub-heading A), which contained general information about the effect of underwear imports in Category 352/652, and a second sub-heading "Industry Statements" (sub-heading B), which summarized statements to the US authorities by individual US companies. To some extent, there was an overlap between the information contained under the two sub-headings. The same categories of information were equally discussed in a statement submitted to the TMB by the United States in July 1995 (the "July Statement"). While we have concluded that the July Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof, we feel that we can legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement. Consequently, we will use the July Statement for this limited purpose only. By doing so, we do not share the concerns expressed by the United States that such use of the July Statement would impair proceedings in the TMB in the future. We consider that a reluctance to submit updated information would normally adversely affect Members concerned. The interest to cooperate as required by Articles 6.7 and 6.9 of the ATC would prevail.

7.30 In the following paragraphs, we evaluate the information in the March Statement in light of the economic variables listed in Article 6.3 of the ATC, to the extent and in the order that they were raised in the March Statement.

### **Overview**

7.31 The March Statement under the heading "Industry Profile" refers to 395 establishments that manufacture cotton and man-made fibre underwear, while the July Statement under the same heading refers to "approximately 302 establishments". In our view, this basic and substantial inconsistency concerning the scope of the domestic industry raises serious questions about the accuracy of the information contained in the March Statement and the conclusion that serious damage exists.

### **Output (US Production)**

7.32 The March Statement contains general information on the evolution of US production of underwear. In this connection, however, Costa Rica argues that the US restriction was introduced to protect the US fabric-producing industry and not the US underwear industry. We see two aspects to this argument. First, this argument may be viewed as a claim that the United States had not demonstrated the existence of serious damage to the US domestic industry producing products that were like and/or directly competitive with products imported from Costa Rica (i.e., underwear). In this connection, we do not see anywhere in the March Statement where fabric producers were treated as the domestic industry. Rather, the Statement consistently refers to the industry that manufactures "cotton and man-made fibre underwear", which is the subject of the restriction in question. The statistics all purport to relate to that industry. Thus, the claim by Costa Rica would seem to lack a factual basis.

7.33 There is, however, a second aspect to Costa Rica's argument. The parties agree that the industry situation within the United States is different between those manufacturers that produce underwear in a totally domestic process and those that utilize the outward processing regime ("807 or 807A trade"). The manufacturers in the latter category are engaged in the cutting process, while assembly of the cut pieces is contracted out to overseas manufacturers and then the finished products are re-imported by the US manufacturers for sale in the US market. It is quite possible that in the case of increased imports

damage could occur to manufacturers in the former category, while those in the latter category could see their position improve. The March Statement contains no breakdown of the effect of imports on these two components of the US industry. That such an analysis would have been appropriate is indirectly confirmed by statements of the United States, which recognize that the nature of the effect of 807 or 807A trade on the domestic industry could be significantly different than non 807/807A trade (paragraph 5.158).

7.34 Finally, we would note that the general statistics on declining production of underwear only weakly support a demonstration of serious damage. For example, if those firms with declining underwear production shifted their capacity to other products (see below under "Utilization of Capacity", where this is reported as occurring), then it is quite possible that neither the firms nor their workers would be seriously damaged. This uncertainty about the relation of production declines to serious damage arises because of the limited statistics and cursory analysis contained in the March Statement.

#### **Market Share (Market Share Loss/Import Penetration)**

7.35 The March Statement contains general information on the market share of US underwear producers and on import penetration levels. As noted in the preceding paragraph, however, the failure of the March Statement to analyze the extent of 807 or 807A trade detracts from its conclusion that serious damage was caused by the increase in imports.

7.36 With respect to the US analysis of imports, Costa Rica argues the volume of importation is overstated because 807/807A trade should not be counted as imports by the United States. We disagree with this assertion. Article 6.6(d) of the ATC clearly acknowledges the possibility that Members might impose restrictions on re-imports "as defined by the laws and practices of the importing Member". According to the United States, 807/807A trade is considered as re-imports. Consequently, the United States could consider 807 and 807A trade originating in Costa Rica in its analysis of whether the US underwear industry had suffered serious damage and could impose a restraint on such trade, provided that the rest of the conditions of Article 6 of the ATC were met.

#### **Employment**

7.37 With respect to "Employment", the March Statement reads as follows:

"Employment in the US cotton and man-made fibre underwear industry dropped from 46,377 production workers in 1992 to 44,056 workers in 1994, a five percent decline and a loss of 2,321 employees".

The same heading in the July Statement reads as follows:

"Employment in the US cotton and man-made fibre underwear industry dropped from 35,191 production workers in 1992 to 33,309 workers in 1994, a five percent decline and a loss of 1,882 employees".

As we noted in respect of the general industry description discussed above, the extent of the discrepancy between the statistics in the March and July Statements, which purported to cover the same time period, raises questions about the accuracy of the information contained in the March Statement. This concern was not alleviated by the industry statement in sub-heading B since information as to employment was obtained from only two companies out of the more than 300 establishments in the industry, of which only one was apparently suffering damage. The March Statement reads in this respect as follows:

"... one company reported that employees were also being transferred to production of other types of garments. Employment losses have also occurred because of import-

related plant closing. A company that has already closed two plants employing 165 workers is anticipating two additional closures in 1995 representing total employment of about 400".

### **Man-Hours**

7.38 Under the heading "Man-Hours", the March Statement reads as follows:

"Average annual man-hours dropped from 86.2 million in 1992 to 81.5 million in 1994, a five per cent decline."

The same heading in the July Statement reads as follows:

"Average annual man-hours worked dropped from 65.4 million in 1992 to 61.6 million in 1994, a six per cent decline."

In our view, as expressed above, the extent of the discrepancy in the information included in the two statements casts doubts as to the sufficient accuracy of the data included in the March Statement.

### **Sales**

7.39 The March Statement reads as follows:

"Sales have slowed, and one company reported that their sales were down about 17 per cent in 1994".

The information on only one company, however, does not suffice, in our view, to support the general statement that sales have slowed.

### **Profits**

7.40 The March Statement reads as follows:

"Profits were down 18 per cent at one firm, and there is pressure on the bottom line throughout the industry due to rising costs and stiff import competition".

Again, information on only one company does not suffice, in our view, to support the general statement that profits were under "pressure" (whatever that may mean) generally.

### **Investment**

7.41 The March Statement reads as follows:

"Because of the impact of imports and the uncertainty they have caused in the market, US companies generally have been postponing investment in this industry. Some companies have closed plants permanently or shifted production off-shore, and additional disinvestment of this nature is being contemplated by underwear manufacturing firms".

In our view, the information contained in this statement is not sufficiently conclusive. We fail to see, for reasons discussed above (paragraph 7.34), a sufficient causal link between imports and "postponing investment" in the US industry. Moreover, the second sentence of this statement is indefinite ("some companies") and merely speculative ("is being contemplated") and cannot support any definite conclusion

on the reasons why investment were slowing down in the United States. Finally, we note the absence of any statistics on, or analysis of, the evolution of investment in the US industry.

### **Utilization of Capacity**

7.42 The March Statement reads as follows:

"Because of the import competition, firms report shifting production capacity to other product lines including outerwear".

Again, the statement is vague as no quantification is given. Moreover, it is not clear that a shift of production, as opposed to a decline, would support the determination of serious damage in any event.

### **Prices**

7.43 The March Statement indicates that the US producers' average price was \$30.00 per dozen in 1994, while the July Statement indicates that the average US price was \$20.00 per dozen. The extent of this discrepancy between the March and July Statements raises serious questions about the accuracy of the information contained in the March Statement.

7.44 In addition, in respect of "Prices", the March Statement reads as follows:

"Import prices in these sectors have been very low which has placed considerable pressure on domestic producers:

- (a) Raw cotton costs in the United States have increased substantially, seriously eroding US underwear producers' margins. These cost increases have not been recouped because prices cannot be raised without becoming uncompetitive with imports.
- (b) Competing imports enjoy a price edge over domestically produced goods because the imports are produced with lower priced foreign fabric which often reflects a subsidized cotton price. As a result of the increased import market share in underwear, average retail prices of underwear in the United States have generally declined during the past two years at a time when US manufacturers' costs, particularly for raw cotton, have increased substantially. This development has seriously eroded the profitability of US underwear manufacturing".

It could be argued that points (a) and (b) show that the damage to the US industry was not due only to imports, but also to increases in the US price for raw cotton. The relative importance of these two causes is not analyzed. There is, for example, no discussion of why US cotton prices increased and, more to the point, whether the price increases are expected to continue in effect. Moreover, to the extent that imports are 807A trade, the increase in cotton prices would be reflected in their prices as well, but here again there was no consideration of 807A trade in respect of this item. Finally, we find that the conclusion that profitability has been "seriously eroded" is not sufficiently precise to serve as a basis for establishing serious damage.

7.45 In conclusion, in our view, the information submitted in the March Statement under the heading "Market Situation" suffers from two important weaknesses: the information in some cases is inconsistent with other information later submitted by the United States to the TMB and in other cases is inadequate to demonstrate serious damage to the US industry. This latter problem is generally true in respect of the information supplied by specific companies in sub-heading B, where the March Statement typically

refers to only one or two companies of indeterminate size or market share out of an industry consisting of 395 establishments. Moreover, while there are general statistics on declines in production and market share, there is no information at all on the general state and performance of the US underwear industry. For example, the discussion of profits in the industry refers to only one company. In this connection generally, we note that the TMB, in its more fact-intensive review in accordance with Article 8.3 of the ATC, has by consensus concluded in this case that there was absence of serious damage caused to the US industry. The weaknesses in the March Statement that are discussed above raise considerable doubts as to whether serious damage has been demonstrated. However, we refrain from making a finding on this point of law. The factors listed in Article 6.3 of the ATC do not provide sufficient and exclusive guidance in this case. We are, therefore, not in a position to conclude that the United States has failed to demonstrate serious damage or actual threat thereof.

### **Causality**

7.46 In addition to establishing serious damage or actual threat thereof, the United States was required to demonstrate that such damage or threat was caused by imports. Article 6.2 of the ATC, second sentence, reads as follows:

"Serious damage or actual threat thereof must *demonstrably* be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference" (emphasis added).

Nowhere in the March Statement could we find a discussion or demonstration of causality as required under this provision, beyond the mere statement that the imports were responsible for the damage. This assertion is inadequate, in our view, because of special factors affecting trade in underwear between the United States and a number of exporting Members including Costa Rica. (As noted above, most of this trade with Costa Rica -- at least 94 per cent -- is apparently 807 or 807A trade.) While such trade may certainly cause damage to the domestic industry, the nature of the trade is such that it may benefit the domestic firms that participate in it (see paragraph 7.44). Thus, in a discussion of whether such trade has caused serious damage, it is necessary to look at this trade to determine its effects on the industry. Because of the nature of the trade it is not possible in these circumstances to conclude from the simple fact that there has been a fall in production that there has also been serious damage. The March Statement undertakes no such discussion. Moreover, the March Statement suggests other possible causes of serious damage, such as rising cotton prices (see paragraph 7.44), but does not consider their role as a cause of such damage. Thus, it cannot be said that the March Statement "demonstrably" shows that serious damage was caused by increased levels of imports. We find, therefore, that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.2 of the ATC by imposing a restriction on imports of Costa Rican underwear without adequately demonstrating that increased imports had caused serious damage.

### **Attribution of Serious Damage to Costa Rica**

7.47 We now turn to the issue of whether the March Statement adequately attributed serious damage to Costa Rica. Article 6.4 of the ATC requires the attribution of serious damage, or actual threat thereof, to a Member or Members before their imports may be restricted. This also raises an issue of causality since attribution results in a direct linkage being drawn between exports from a particular Member or Members and serious damage to the domestic industry of the importing Member. The question facing the CITA in the present case was whether Costa Rican exports contributed to serious damage in the US domestic industry. Since the US authorities have attributed serious damage in the present case to imports from Costa Rica, all of the deficiencies with respect to the analysis of serious damage and causality that are detailed in the preceding sections are relevant to the analysis under Article 6.4 of the ATC.

7.48 With respect to serious damage attributed to imports from Costa Rica, the March Statement reads as follows:

"The sharp and substantial increase of low priced imports from Costa Rica is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

"US imports of cotton and man-made fibre underwear, Category 352/652, from Costa Rica reached 14,423,178 dozen in 1994, 22 per cent above the 11,844,331 dozen imported in 1993 and 61 per cent above its 1992 level.

"US imports of cotton and man-made fibre underwear, from Costa Rica in Category 352/652, entered the US at an average landed duty-paid value of \$9.39 per dozen, 69 per cent below U.S. producers' average price for cotton and man-made fibre underwear.

"Costa Rica is the number two supplier of Category 352/652 imports with 15 per cent of total US imports of Category 352/652 in 1994. Category 352/652 imports from Costa Rica were equivalent to 8.8 per cent of US production of Category 352/652 in the year ending September 1994."

7.49 Article 6.4 of the ATC requires that the attribution of serious damage to individual Members be made on the basis of "a sharp and substantial increase in imports" and on the basis of "the level of imports compared with imports from other sources, market share and import and domestic prices ...". While there has been a significant increase in imports of underwear from Costa Rica, we would note in overview that the position of Costa Rica in respect of each of these factors is not significantly different from that of the other five exporting Members considered in the March Statement and that the March Statement undertakes no comparative assessment of imports from Costa Rica and those five exporting Members.

7.50 In our analysis of whether the US authorities appropriately attributed serious damage to Costa Rican imports, we pay particular attention to the fact that imports into the United States from Costa Rica had reached 14,423,178 dozen in 1994, an increase of 22 per cent during the period of investigation. However, we also note the following facts: The restraint was imposed on Costa Rica on 23 June 1995; Bilateral agreements were concluded with Colombia on 27 June 1995, with the Dominican Republic on 25 June 1995 and with El Salvador on 6 July 1995; Later, agreements were concluded with Honduras on 15 September 1995 and with Turkey on 19 July 1995. The United States imposed the restraint on underwear imports from Costa Rica while, during the period that immediately ensued, it reached agreement with five other exporters on quotas of 170,305,774 dozen, an increase of 478 per cent compared to the actual exports from these countries during the period of investigation.

7.51 Thus, taking into account the US agreements with its other suppliers and the statement by the United States that goods imported under 807A are not regarded as less damaging than non-GAL 807 and other imports (paragraph 5.159), we cannot reconcile the US restriction on imports from Costa Rica with the requirements of attribution under Article 6.4 of the ATC. More specifically, in light of the purpose of Article 6, we find that the United States cannot enter into agreements permitting imports of 170,305,774 dozen units of a product (an increase of 478 per cent over then current import levels) and at the same time claim that imports of 14,423,178 dozen units (an increase of 22 per cent over then current import levels) are contributing to serious damage. In this regard, we recall the TMB's consensus conclusion that the United States had not demonstrated that imports were causing serious damage to the US underwear industry. We find therefore that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under

Article 6.4 of the ATC by imposing a restriction on imports of Costa Rican underwear without making an adequate attribution of serious damage to such imports.<sup>24</sup>

7.52 In light of (i) the fact that restrictions under Article 6 of the ATC are to be applied only sparingly, (ii) the fact that the United States has the burden of proving that it has complied with the requirements of Article 6 of the ATC, (iii) the deficiencies detailed above in respect of the evidence on the existence of serious damage, which raise serious questions in our view as to whether there was serious damage shown under Article 6.2 at all, (iv) the fact that the United States failed to demonstrate adequately that the cause of serious damage was imports, and (v) the fact that the United States voluntarily agreed to accept import limits from other countries exporting underwear to the United States that permitted increases over their current export levels that were far in excess of Costa Rica's export levels to the United States, we conclude that the United States failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC.

#### **D. ACTUAL THREAT OF SERIOUS DAMAGE**

7.53 We next turn to a question related to the scope of Costa Rica's basic claim: Whether the March Statement contained a finding on actual threat of serious damage.

7.54 The United States argued before the Panel that the March Statement supports a finding on actual threat. We note that the March Statement contains no reference to actual threat; the findings included related exclusively to serious damage. We recall, however, that the parties to the dispute agreed that the Diplomatic Note that was handed to Costa Rica along with the March Statement made reference to actual threat of serious damage.

7.55 Article 6.2 and 6.4 of the ATC make reference to "serious damage, or actual threat thereof". The word "thereof", in our view, clearly refers to "serious damage". The word "or" distinguishes between "serious damage" and "actual threat thereof". In our view, "serious damage" refers to a situation that has already occurred, whereas "actual threat of serious damage" refers to a situation existing at present which might lead to serious damage in the future. Consequently, in our view, a finding on "serious damage" requires the party that takes action to demonstrate that damage has already occurred, whereas a finding on "actual threat of serious damage" requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future.<sup>25</sup> The March Statement contains no elements of such a prospective analysis.<sup>26</sup> In our view, even if the mention of "actual threat" in

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<sup>24</sup>We note that by the same reasoning we could have concluded that the United States failed to demonstrate the existence of serious damage in the March Statement as required by Article 6.2 of the ATC. The fact that the US underwear industry was able to accept and withstand such a huge inroad of products from the five other exporting Members suggests that there was no serious damage to the industry in the first place. However, we felt that the inadequacy of the US measure was more acutely represented in the attribution under Article 6.4, which requires a source-specific or Member-by-Member analysis, as opposed to the analysis of total imports under Article 6.2. See also our discussion in paragraph 7.45 above.

<sup>25</sup>See the panel reports on "United States - Measures Affecting Imports of Softwood Lumber from Canada", adopted on 27 October 1993, BISD 40S/358, paras. 402, 408; "New Zealand - Imports of Electrical Transformers from Finland", *op. cit.*, para. 4.8; and "Korea - Antidumping Duties on Imports of Polyacetal Resins from the United States", *op. cit.*, paras. 253, 272, 278.

<sup>26</sup>We note that the only elements that could be used in a prospective analysis were the following: in sub-heading B ("Industry Statements") under "Employment", the March Statement reads: "A company ... is anticipating  
(continued...)"

the Diplomatic Note accompanying the March Statement were to be considered, the fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual threat of serious damage.

## **E. OTHER CLAIMS**

### **Article 6.6(d) of the ATC**

7.56 Costa Rica claims that the United States violated Article 6.6(d) of the ATC by not granting a more favourable treatment to Costa Rican imports under "807 trade". Article 6.6(d) of the ATC reads as follows:

"In the application of the transitional safeguard, particular account shall be taken of the interests of exporting Members as set out below:

(d) more favourable treatment shall be accorded to re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation, as defined by the laws and practices of the importing Member, and subject to satisfactory control and certification procedures, when these products are imported from a Member for which this type of trade represents a significant proportion of its total exports of textiles and clothing".

7.57 The United States accepted before the Panel that "807 trade" should be considered a re-import according to US laws. In our view, the legal issue before us is the interpretation of the term "more favourable treatment". The "chapeau" to Article 6.6(d) of the ATC makes it clear that the more favourable treatment must be granted "in the *application* of the transitional safeguard" (emphasis added). This means, in our view, that Members availing themselves of the Article 6 transitional safeguard are obliged to grant more favourable treatment to re-imports, independently of whether such treatment has been previously rejected by the affected Member during the bilateral consultations or whether other privileges were envisaged to be accorded to such a Member in negotiations based upon the implemented safeguard measure. The term "more favourable treatment" is not further qualified in the ATC. We, therefore, reject the United States argument (paragraph 5.157) that they had complied with Article 6.6(d) of the ATC by offering Costa Rica enhanced access under GAL programmes during the course of the consultations.

7.58 Costa Rica specifically argues in this respect that the United States was obliged to grant to Costa Rican imports a quantitatively more favourable treatment. Costa Rica argues that the United States was obliged to grant Costa Rica a quota larger than that under Article 6.8 of the ATC, which provides that a quota cannot be fixed at a level:

"lower than the actual level of exports or imports from the Member concerned during the 12-month period terminating two months preceding that month in which the request for consultation was made".

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<sup>26</sup>(...continued)

two additional closures in 1995 representing total employment of about 400". In the same sub-heading, under "Investment", the March Statement reads: "... additional disinvestment of this nature is being contemplated by underwear manufacturing firms". We note that both elements were used in the March Statement to support a finding on serious damage. Even if, however, these elements were used to support a finding on actual threat, they could hardly constitute adequate evidence of actual threat of serious damage.

We cannot fully share the approach advocated by Costa Rica. We agree with Costa Rica that quantitatively more favourable treatment for the full three-year period is one of the options available to Members in order to comply with the requirements of Article 6.6(d) of the ATC. We do not consider it, however, to be the only option. In our view, a Member could, for example, comply with the requirements under Article 6.6(d) of the ATC by imposing a restriction for a period shorter than three years.

7.59 However, in our view, under Article 6.10 of the ATC, the level of Costa Rican imports required to be admitted to the United States under an Article 6 of the ATC restraint was 14,423,178 dozen, which equals the minimum level under Article 6.8. We reach this conclusion because of the following two reasons: First, in the absence of a mutual agreement under Article 6.8, Article 6.10 authorizes the application of "the" restraint. In our view, this reference points to Article 6.8. Second, the absence of a minimum restraint level under Article 6.10, set at the level specified in Article 6.8, would fundamentally undermine the balance of rights and obligations between exporting and importing Members and any interest they might have to enter into negotiations. The restriction imposed on Costa Rican imports under the implementing order of the March Statement was 14,423,178 dozen, i.e., identical to the level required under Article 6.8 of the ATC, and did not make allowance for re-imports in a quantitative way.<sup>27</sup> Nor does the implementing order make allowance for re-imports in any other way. We, consequently, conclude that the United States has violated its obligations under Article 6.6(d) of the ATC.

### **Obligation to consult**

7.60 We next examine Costa Rica's claim that the United States violated Article 6.7 of the ATC by failing to hold consultations on the basis of actual threat of serious damage following the TMB's conclusion that the existence of serious damage was not demonstrated, since all the bilateral consultations were based on the March Statement which explicitly based its findings on the existence of serious damage. We note that the United States maintains that the reference to "serious damage" in the March statement was an abbreviated expression for "serious damage, or actual threat thereof" and the Diplomatic Note to Costa Rica making the actual request for consultations in fact referred to "serious damage, or actual threat thereof".

7.61 Since consultations under Article 6.7 are essentially a bilateral process and no official records are kept, a panel generally is not in a position to know exactly what has been discussed during the consultations. However, in our view, it is unnecessary to decide whether the basis of the consultations in the present case was "serious damage" or "actual threat thereof", because we have already found that the issue of actual threat did not dispose of this particular dispute. Both Costa Rica and the United States agree that the March Statement should be the sole basis for the Panel to examine the legality of the US action, and as noted above, in our view, the March Statement was not predicated on and did not demonstrate the existence of actual threat.

### **Date of Application of the Restriction**

7.62 Costa Rica argues that the United States retroactively applied the restriction in violation of Article 6.10 of the ATC. The restriction was introduced on 23 June 1995 for a period of 12 months starting on 27 March 1995, which was the date of the request for consultations under Article 6.7 of the ATC. Although Article 6.10 of the ATC allows the importing country to "apply the restraint, ... within 30 days following the 60-day period for consultations", it is silent about the initial date from which the restraint period should be calculated. In contrast, Article 3.5(i) of the Multifibre Arrangement (MFA) stated that the restraint could be instituted "for the twelve-month period beginning on the day

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<sup>27</sup>See the Implementing Order published in 60 Federal Register 32653, No. 121, 23 June 1995.

when the request was received by the participating exporting country or countries". Thus, the question before the Panel is whether the silence of the ATC in this regard should be interpreted as prohibition of a practice which was explicitly recognized under the MFA, and if so, what should be the appropriate date from which the restraint period is to be calculated under the ATC.

7.63 In our view, this is not a question of retroactive application of a treaty to events that took place before the entry into force of the treaty, as envisaged in Article 28 of the Vienna Convention on the Law of Treaties (VCLT). Rather, it is a technical question regarding the opening date of a quota period.

7.64 Since the ATC is silent on this question, we will first examine how the matter is treated under the provisions of the GATT 1994, which is an integral part of the WTO Agreement along with the ATC. Article 1.6 of the ATC states that "[u]nless otherwise provided in this Agreement, its provisions shall not affect the rights and obligations of Members under the provisions of the WTO Agreement and the Multilateral Trade Agreements". Members assume under the WTO certain transparency obligations when they implement trade-restrictive measures. Article X:2 of GATT 1994 is the relevant provision, which reads:

"No measure of general application taken by any [Member] effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition of imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published".

7.65 We note that Article X:1 of GATT 1994, which also uses the language "of general application", includes "administrative rulings" in its scope. The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.

7.66 In the absence of a provision comparable to Article 3.5(i) of the MFA in the ATC, a Member's obligation under this provision applies in the application of transitional safeguard measures for textiles. If a Member sets the initial date of a restraint period as the date of the request for consultations, without having officially published the content of the request for consultations, the Member is acting in violation of Article X:2 of GATT 1994. Conversely, if the Member has published that information, specifying the proposed restraint level and restraint period, it can, when implementing the restraint at a later time, set the initial date as the date of the publication of the information, which could be the date of the request for consultation if the information were published on the same day.

7.67 In this context, we note that the Panel report on the "Chilean Apples" case stated that "the allocation of back-dated quotas, that is, quotas declared to have been filled at the time of their announcement, did not conform to the requirements of Article XIII:3(b) and Article XIII:3 (c)" of the GATT.<sup>28</sup> While we agree with this conclusion, we note that the facts are different in the present case. After having made the request for consultations on 27 March 1995, the United States published the proposed restraint period and the restraint level in the Federal Register on 21 April 1995. The United States therefore did not "back-date" the restraint period in the way which was found to be inconsistent

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<sup>28</sup>"European Economic Community - Restrictions on Imports of Dessert Apples", Complaint by Chile, *op. cit.*, at para. 12.26.

in the report on "Chilean Apples" since here it was made public well before the measure was imposed on 23 June 1995.

7.68 Finally, we note the US argument that if the safeguard measure could only be applied starting at some time later than the date of the request for consultations, there would be a flood of imports in anticipation of the eventual restriction, which might defeat the whole purpose of the transitional safeguard measure. We find this argument to be persuasive from a practical point of view. In order to avoid such a consequence, in our view, all that is needed on the part of the importing country is to publish the content of the request for consultations immediately.

7.69 In light of the foregoing, we conclude that the prevalent practice under the MFA of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the ATC. However, we note that if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint. In the present case, the United States violated its obligations under Article X:2 of GATT 1994 and consequently under Article 6.10 of the ATC by setting the restraint period for 12 months starting on 27 March 1995. However, had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period. The United States argues that it did not "enforce" the restraint until 23 June 1995. We note the US argument. However, in so far as the restraint was applied to exports from Costa Rica which had taken place prior to the publication, it was implemented and therefore enforced within the meaning of Article X:2 of GATT 1994.<sup>29</sup>

#### **Article 2.4 of the ATC**

7.70 In our view, a finding that the United States violated Article 2.4 of the ATC would depend on a previous finding that the United States violated Article 6 of the ATC; conversely, a finding by the Panel that the United States acted consistently with its obligations under Article 6 of the ATC would automatically mean that Article 2.4 of the ATC was not violated.

7.71 We note our previous conclusion that the United States imposed the restriction in a manner inconsistent with its obligations under Articles 6.2, 6.4 and 6.6(d) of the ATC. In our view, the United States by violating its obligations under Article 6 of the ATC has *ipso facto* violated its obligations under Article 2.4 of the ATC as well.

#### **Article 8 of the ATC**

7.72 Finally, we turn to Costa Rica's claim that the United States violated Article 8 of the ATC by refusing to follow the recommendations made by the TMB and by failing to submit a report explaining its inability to conform with the recommendations.

7.73 We have examined the contents of recommendations made by the TMB in the present case. In the relevant part of its report, the TMB made the following recommendations after the review conducted between 13 and 21 July 1995:

"During its review under paragraphs 2 and 3 of Article 6 of the safeguard action taken by the United States against imports of category 352/652 from Costa Rica and Honduras, the TMB found that serious damage, as envisaged in these provisions, had not been

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<sup>29</sup>A similar conclusion was reached by the panel on "European Economic Community - Restrictions on Imports of Apples", Complaint by the United States, adopted on 22 June 1989, BISD 36S/135, at para. 5.23.

demonstrated. The TMB could not, however, reach consensus on the existence of actual threat of serious damage. The TMB recommended that further consultations be held between the United States and the parties concerned, with a view to arriving at a mutual understanding, bearing in mind the above, and with due consideration to the particular features of this case, as well as equity considerations.

"These consultations shall be held consistent with the Agreement on Textiles and Clothing, in particular with Articles 6 and 4, and be concluded within 30 days. Parties shall report to the TMB on the outcome of such consultations no later than at the end of that period."<sup>30</sup>

7.74 We note that the only obligation the United States assumed under these recommendations was to hold consultations with Costa Rica regarding the safeguard action in question. The United States and Costa Rica in fact held consultations on 16-17 August 1995. Therefore, we conclude that the United States did not act inconsistently with its obligations under Article 8 of the ATC.

## **VIII RECOMMENDATION**

8.1 Costa Rica requests the Panel to recommend if it reached the conclusion that the US restriction was imposed in a manner inconsistent with the obligations of the United States under the ATC that the United States withdraw the illegal act. The United States essentially argues that Article 19.1 of the DSU prohibits panels from recommending such a remedy.

Article 19.1 of the DSU reads as follows:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the member concerned could implement the recommendations".

8.2 Under the second sentence of Article 19.1 of the DSU, panels can, in addition to their recommendations, "suggest ways in which the Member concerned could implement the recommendations".

8.3 We recall our conclusions that the United States violated its obligations under Article 6.2 and 6.4 of the ATC by imposing a restriction on Costa Rican exports without having demonstrated that serious damage or actual threat thereof was caused by such imports to the US domestic industry and under Article 6.6(d) of the ATC by not granting treatment more favourable to Costa Rican re-imports. We further recall our conclusion that the United States violated its obligations under Article 2.4 of the ATC by imposing a restriction in a manner inconsistent with its obligations under Article 6 of the ATC. We also recall our conclusion that the United States violated its obligations under Article 6.10 of the ATC by setting the restraint period starting on the date of the request for consultations, rather than the date of publication of that information. We, consequently, recommend that the Dispute Settlement Body request the United States to bring the measure challenged by Costa Rica into compliance with US obligations under the ATC. We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further suggest that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure.

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<sup>30</sup>Textiles Monitoring Body, Report of the Second Meeting (G/TMB/R/2), paras. 16 and 17.

STATEMENT OF SERIOUS DAMAGE: CATEGORY 352/652

Cotton and Man-made Fibre Underwear  
Category 352/652

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<sup>1</sup>Called under domestic legal authority. Not a WTO Member.

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**STATEMENT OF SERIOUS DAMAGE: CATEGORY 352/652**

Cotton and Man-made Fibre Underwear  
Category 352/652

I. Product Description

Category 352/652 covers men's and boys', and women's and girls' underwear. The term "underwear" refers to garments which are worn under other garments and are not exposed to view when the wearer is conventionally dressed. Men's and boys' and women's and girls' knit underwear is provided for in Harmonized Tariff Schedule (HTS) headings 6107, 6108 and 6109. Woven underwear is provided for in HTS headings 6207 and 6208.

II. Industry Profile

There are approximately 395 establishments in the US that manufacture cotton and man-made fibre underwear, Category 352/652. The establishments are located mainly in the Atlantic seaboard states, especially New York, Pennsylvania, North Carolina, and Georgia. This industry employs close to 6 per cent of the total apparel workers in the US, and the annual shipments from these establishments at \$3.2 billion account for approximately 5 per cent of the total annual apparel industry shipments.

The concentration of firms in this industry is higher in the men's and boys' underwear than in the women's and girls'. In the men's and boys' segment, four firms account for over 60 per cent of the shipments. The production of women's and girls' underwear is more diversified, largely because women's underwear is subject to more fashion changes. As a result production is less standardized, requiring different types of knitting machines and a greater number of workers employed. There is, however, a large number of smaller producers which generally do not have integrated operations but usually purchase fabric and then cut and sew it.

III. Market Situation

A. Serious Damage to the Domestic Industry

The sharp and substantial increase in imports of cotton and man-made fibre underwear, Category 352/652, is causing serious damage to the US industry producing cotton and man-made fibre underwear.

Category 352/652 imports surged from 65,507,000 dozen in 1992 to 79,962,000 dozen in 1993, a 22 per cent increase. Cotton and man-made fibre underwear, Category 352/652, imports continued to increase in 1994, reaching 97,375,000 dozen, 22 per cent above the 1993 level and 49 per cent above the level imported in 1992 (see Table I).

Serious damage to the domestic industry resulting from the sharp and substantial increase in imports of cotton and man-made fibre underwear is attributed to imports from the Dominican Republic, Costa Rica, Honduras, Thailand and Turkey.<sup>2</sup> The combination of high import levels, surging imports, and low-priced goods from these countries have resulted in loss of domestic output, market share, investment, employment and man-hours worked.

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<sup>2</sup>El Salvador and Colombia called under domestic legal authority not WTO.

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1. US Production

US production of cotton and man-made fibre underwear, Category 352/652, declined from 175,542,000 dozen in 1992 to 168,802,000 dozen in 1993, a decline of 4 per cent. Production continued to decline in 1994, falling to 126,962,000 dozen during the first nine months of 1994, 4 per cent below January-September 1993 production level (Table II).

2. Market Share Loss

The share of this market held by domestic manufacturers fell from 73 per cent in 1992 to 68 per cent in 1993, a decline of five percentage points. The domestic market share dropped to 65 per cent during the first nine months of 1994 (Table II).

3. Import Penetration

The ratio of imports to domestic production increased from 37 per cent in 1992 to 47 per cent in 1993, and reached 54 per cent during January-September 1994 (Table II).

4. Employment

Employment in the US cotton and man-made fibre underwear industry dropped from 46,377 production workers in 1992 to 44,056 workers in 1994, a 5 per cent decline and a loss of 2,321 employees (Table III).

5. Man-hours

Average annual man-hours worked dropped from 86.2 million in 1992 to 81.5 million in 1994, a 5 per cent decline (Table III).

B. Industry Statements

Based on a survey of individual firms producing cotton and man-made fibre underwear the following conditions were reported. The observations are concentrated in the mens' underwear sector but also include the even more heavily import-impacted ladies underwear sector.

1. Employment

There have been layoffs in the sector and one company reported that employees were also being transferred to production of other types of garments. Employment losses have also occurred because of import-related plant closings. A company that has already closed two plants employing 165 workers is anticipating two additional closures in 1995 representing total employment of about 400.

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2. Sales

Sales have slowed, and one company reported that their sales were down about 17 per cent in 1994.

3. Profits

Profits were down 18 per cent at one firm, and there is pressure on the bottom line throughout the industry due to rising costs and stiff import competition.

4. Investment

Because of the impact of imports and the uncertainty they have caused in the market, US companies generally have been postponing investment in this industry. Some companies have closed plants permanently or shifted production offshore, and additional disinvestment of this nature is being contemplated by underwear manufacturing firms.

5. Capacity

Because of the import competition, firms report shifting production capacity to other product lines including outerwear.

6. Prices

Import prices in these sectors have been very low which has placed considerable pressure on domestic producers:

- (a) Raw cotton costs in the US have increased substantially, seriously eroding US underwear producers' margins. These cost increases have not been recouped because prices cannot be raised without becoming uncompetitive with imports.
- (b) Competing imports enjoy a price edge over domestically produced goods because the imports are produced with lower priced foreign fabric which often reflects a subsidized cotton price. As a result of the increased import market share in underwear, average retail prices of underwear in the United States have generally declined during the past two years at a time when US manufacturers' costs, particularly for raw cotton, have increased substantially. This development has seriously eroded the profitability of US underwear manufacturing.

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**STATEMENT OF SERIOUS DAMAGE: CATEGORY 352/652**

IV. Countries Contributing to Serious Damage: Category 352/652 (Table I, IV and V)

Serious damage, or actual threat thereof, to US producers of cotton and man-made fibre underwear, Category 352/652, is attributed to the sharp and substantial increase in imports from the Dominican Republic, Costa Rica, Honduras, Thailand and Turkey.<sup>3</sup>

Total imports from the five countries listed above increased from 22,675,508 dozen in 1992 to 40,293,259 dozen in 1994, a sharp and substantial increase of 78 per cent. As a group their imports were up 32 per cent in 1994 over their 1993 level. Together their 1992 imports were 35 per cent of total Category 352/652 imports. Their share of total category imports increased to 41 per cent in 1994.

A. Dominican Republic

The sharp and substantial increase of low-priced imports from the Dominican Republic is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

US imports of cotton and man-made fibre underwear, Category 352/652, from the Dominican Republic reached 16,442,148 dozen in 1994, 20 per cent above the 13,691,280 dozen imported in 1993 and 60 per cent above its 1992 level.

US imports of cotton and man-made fibre underwear, from the Dominican Republic in Category 352/652, entered the US at an average landed duty-paid value of \$10.10 per dozen, 66 per cent below US producers' average price for cotton and man-made fibre underwear.

The Dominican Republic is the number one supplier of Category 352/652 imports with 17 per cent of total US imports of Category 352/652 in 1994. Category 352/652 imports from the Dominican Republic in 1994 were equivalent to 10 per cent of US production of Category 352/652 in the year ending September 1994.

B. Costa Rica

The sharp and substantial increase of low-priced imports from Costa Rica is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

US imports of cotton and man-made fibre underwear, Category 352/652, from Costa Rica reached 14,423,178 dozen in 1994, 22 per cent above the 11,844,331 dozen imported in 1993 and 61 per cent above its 1992 level.

US imports of cotton and man-made fibre underwear, from Costa Rica in Category 352/652, entered the US at an average landed duty-paid value of \$9.39 per dozen, 69 per cent below US producers' average price for cotton and man-made fibre underwear.

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<sup>3</sup>El Salvador and Colombia called under domestic legal authority not WTO.

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Costa Rica is the number two supplier of Category 352/652 imports with 15 per cent of total US imports of Category 352/652 in 1994. Category 352/652 imports from Costa Rica were equivalent to 8.8 per cent of US production of Category 352/652 in the year ending September 1994.

C. Honduras

The sharp and substantial increase of low-priced imports from Honduras is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

US imports of cotton and man-made fibre underwear, Category 352/652, from Honduras reached 6,550,810 dozen in 1994, 108 per cent above the 3,153,608 dozen imported in 1993 and 182 per cent above its 1992 level.

US imports of cotton and man-made fibre underwear, from Honduras in Category 352/652, entered the US at an average landed duty-paid value of \$11.39 per dozen, 62 per cent below US producers' average price for cotton and man-made fibre underwear.

Imports from Honduras were 6.7 per cent of total US imports of Category 352/652 in 1994, and were equivalent to 4 per cent of US production of Category 352/652 in the year ending September 1994.

D. Thailand

The sharp and substantial increase of low-priced imports from Thailand is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

US imports of cotton and man-made fibre underwear, Category 352/652, from Thailand reached 1,586,005 dozen in 1994, 20 per cent above the 1,323,116 dozen imported in 1993 and nearly double its 1992 level.

US imports of cotton and man-made fibre underwear, from Thailand in Category 352/652, entered the US at an average landed duty-paid value of \$18.58 per dozen, 38 per cent below US producers' average price for cotton and man-made fibre underwear.

Imports from Thailand were 1.6 per cent of total US imports of Category 352/652 in 1994, and were equivalent to nearly 1 per cent of US production of Category 352/652 in the year ending September 1994.

E. Turkey

The sharp and substantial increase of low-priced imports from Turkey is causing serious damage to the US domestic industry producing cotton and man-made fibre underwear.

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US imports of cotton and man-made fibre underwear, Category 352/652, from Turkey reached 1,291,118 dozen in 1994, 133 per cent above the 553,442 dozen imported in 1993 and two and a half times its 1992 level.

US imports of cotton and man-made fibre underwear, from Turkey in Category 352/652, entered the US at an average landed duty-paid value of \$10.43 per dozen, 65 per cent below US producers' average price for cotton and man-made fibre underwear.

Imports from Turkey were 1.3 per cent of total US imports of Category 352/652 in 1994, and were equivalent to 0.8 per cent of US production of Category 352/652 in the year ending September 1994.

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**STATEMENT OF SERIOUS DAMAGE: CATEGORY 352/652**

Table I  
US Imports from Selected Suppliers  
Cotton and Man-made Fibre Underwear  
Category 352/652  
(Dozen)

	1992	1993	1994	94/92 % Change	94/93 % Change
<b>World</b>	<b>65,507,078</b>	<b>79,961,555</b>	<b>97,375,350</b>	<b>48.65</b>	<b>21.78</b>
Dominican Republic	10,264,139	13,691,280	16,442,148	60.19	20.09
Costa Rica	8,935,565	11,844,331	14,423,178	61.41	21.77
Honduras	2,318,683	3,153,608	6,550,810	182.52	107.72
Thailand	796,235	1,323,116	1,586,005	99.19	19.87
Turkey	360,886	553,442	1,291,118	257.76	133.29
<b>TOTAL</b>	<b>22,675,508</b>	<b>30,565,777</b>	<b>40,293,259</b>	<b>77.7</b>	<b>31.8</b>

Table II  
Category 352/652  
Cotton and Man-made Fibre Underwear  
US Production, Imports, Market, Import/Production Ratio and Domestic Market Share

Period	Production <sup>1</sup>	Imports	Market <sup>2</sup>	I/P	Domestic Market Share
	1,000 dozen			Per cent	
1992	175,542	65,507	241,049	37	73
1993	168,802	79,962	248,764	47	68
Year Ending September					
1993	175,392	77,368	252,760	44	69
1994	164,252	88,961	253,213	54	65
January-September					
1993	131,512	59,388	190,900	45	69
1994	126,962	68,387	195,349	54	65

<sup>1</sup>A new benchmark was established with the 1992 Census of Manufacturers Survey, therefore, US apparel production data for 1992 forward is not comparable to previous years' data.

<sup>2</sup>US market for domestically produced and imported cotton and man-made fibre underwear.

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Table III  
Employment Data for Industry<sup>1</sup> Producing Cotton and Man-made Fibre Underwear  
Category 352/652

<b>Employment Data</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>
Number of Production Workers	46,377	44,379	44,056
Average Weekly Hours	35.8	37.1	35.6
Average Annual Manhours (million)	86.2	82.5	81.5

Table IV  
Average Landed Duty-Paid Value of Imports of Cotton and Man-made Fibre Underwear  
Category 352/652

	<b>1994 Unit Value (\$ per Doz)</b>	<b>% Above or Below US Producers' Price</b>
<b>US Producers' Average Price</b>	<b>30.00</b>	
<b>World</b>	<b>12.11</b>	<b>-60</b>
Thailand	18.58	-38
Honduras	11.39	-62
Turkey	10.43	-65
Dominican Republic	10.10	-66
Costa Rica	9.39	-69

Table V  
Selected Suppliers' Share of Imports and Production  
Cotton and Man-made Fibre Underwear  
Category 352/652  
(Dozen)

	<b>1992 % of Imports</b>	<b>1994 % of Imports</b>	<b>1992 % of Production</b>	<b>Y/E 9/1994 % of Production</b>
<b>World</b>	<b>100.0</b>	<b>100.0</b>	<b>37.3</b>	<b>59.3</b>
Dominican Republic	15.7	16.9	5.8	10.0
Costa Rica	13.6	14.8	5.1	8.8
Honduras	3.5	6.7	1.3	4.0
Thailand	1.2	1.6	0.5	1.0
Turkey	0.6	1.3	0.2	0.8
<b>Total</b>	<b>34.6</b>	<b>41.4</b>	<b>12.9</b>	<b>24.5</b>

<sup>1</sup>Data derived from 1992 US Census of manufacturers, Apparel Current Industrial Reports, and data from the Bureau of Labor Statistics.



