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UNITED STATES – TRANSITIONAL SAFEGUARD MEASURE ON COMBED COTTON YARN FROM PAKISTAN

Report of the Panel

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UNITED STATES – TRANSITIONAL SAFEGUARD MEASURE ON COMBED COTTON YARN FROM PAKISTAN (DS192)

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I. INTRODUCTION

1.1 On 3 April 2000, Pakistan requested the DSB to establish a Panel, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 8.10 of the ATC[1], to examine a matter involving the application of the transitional safeguard mechanism of the Agreement on Textiles and Clothing by the United States.

1.2 The DSB established a panel at its meeting on 19 June 2000.[2] At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the Panel are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Pakistan in document WT/DS192/1, the matter referred to the DSB by Pakistan 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.".

1.3 On 30 August 2000, the Panel was constituted as follows:

Chairman:	Mr. Wilhelm Meier
Members:	Mr. Carlos Antonio da Rocha Paranhos
	Mr. Virachai Plasai

1.4 The European Communities and India reserved their third-party rights to participate in the Panel proceedings.

1.5 The Panel met with the parties on 16 and 17 November 2000 and with India on 17 November 2000. (The EU did not participate in this meeting, see paragraph 5.1.) The second substantive meeting with the parties was held on 13 December 2000.

II. FACTUAL ASPECTS

2.1 In late 1998, the United States undertook an investigation to determine whether combed cotton yarn for sale, identified as Category 301,[3] was being imported into the territory of the United States in such increased quantities as to cause serious damage or actual threat thereof to the domestic industry producing like and/or directly competitive products.[4]

2.2 On 24 December 1998, the United States requested consultations with Pakistan pursuant to Article 6.7 of the Agreement on Textiles and Clothing (ATC) regarding Category 301 imports of combed cotton yarn from Pakistan[5]. The report on this investigation, entitled "Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale: Category 301, December 1998", was presented to Pakistan as the market statement that must be

[1] Document WT/DS192/1.
[2] Document WT/DS192/2.
[3] Category 301 refers to the specific U.S. textile category for combed cotton yarn and correlates to partial classifications under the Harmonized Tariff Schedule (HTS) of the United States. Categories serve to identify particular textile and clothing products and represents the basis on which the United States administers its textiles program, including safeguard actions under Article 6 of the ATC. The United States has employed the present category system since 1978.
[4] U.S. First Submission Exhibit 3 (Market Statement) para 1.1.
[5] 63 Federal Register 72288 (31 December 1998) (US Exhibit 2).

submitted according to Article 6.7 of the ATC in support of the request for consultations on the proposed safeguard action.[6]

2.3 Pursuant to Article 6.7, the United States also communicated this request for consultations, including the relevant factual data, to the Chairman of the Textiles Monitoring Body (TMB).

2.4 Consultations were held between the United States and Pakistan on 10-11 February 1999 which failed to result in a mutual understanding. On 5 March 1999, pursuant to Article 6.10 of the ATC, the United States indicated that it would apply the safeguard, effective 17 March 1999 and notified the TMB of its action.[7]

2.5 The TMB reviewed the matter and heard presentations by the United States and Pakistan on 12-14, 20-22 and 27 April 1999. In its report, the TMB "considered that in view of the serious limitations mentioned above, it was not in a position to assess without doubt whether or not serious damage had been caused to the US' industry producing products like and/or directly competitive with combed cotton yarn by increased imports of combed cotton yarn. Consequently, in the view of the TMB, the United States had not demonstrated successfully that combed cotton yarn was being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products. The TMB, recommended, therefore, that the measure introduced by the United States on imports of combed cotton yarn from Pakistan should be rescinded."[8]

2.6 On 28 May 1999, the TMB received a communication from the United States under Article 8.10 of the ATC informing the TMB that it considered itself unable to conform with this recommendation. At its meeting held on 23-24 June 1999, the TMB examined, in accordance with Article 8:10 of the ATC, the reasons given by the United States for its inability to conform with the recommendation. The TMB concluded that the reasons given in this re-examination did not lead it to change its earlier conclusions and recommendation arrived at during its examination of the measure pursuant to Article 6.10. The TMB recommended, therefore, that the United States reconsider its position and that the measure introduced by the United States on the imports of Category 301 products from Pakistan should be rescinded forthwith.[9]

2.7 On 6 August 1999, the United States informed the TMB that it believed that the US action was justified under the provisions of Article 6 of the ATC and that it would maintain the restraint.[10]

2.8 The United States and Pakistan conducted a further round of consultations on 15-16 November 1999, but no mutual understanding was reached.

2.9 The United States extended the restraint for a further year, effective 17 March 2000, pursuant to Article 6:12 of the ATC.[11]

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[6] The President of the United States has delegated the authority to implement textile and apparel agreements, including the ATC, to the Inter-agency Committee for the Implementation of Textile Agreements (CITA). For purposes of safeguard actions, the Office of Textiles and Apparel (OTEXA), within the U.S. Department of Commerce, conducts the investigation and produces the statement of serious damage or actual threat of serious damage, and CITA reviews the statements and makes the determination of serious damage or actual threat thereof.

[7] Document G/TMB/18, para. 3 and 64 US Federal Register 12290 (12 March 1999) (US Exhibit 4).

[8] Document G/TMB/18, para. 32.

[9] Document G/TMB/19, para. 36.

[10] Document G/TMB/R/57, para. 5 and US communication G/TMB/N/346.

[11] 65 Federal Register 14544 (17 March 2000) (US Exhibit 6). The restraint was extended for yet a further year as of 17 March 2001 (66 FR 13307, 5 March 2001).

2.10 Article 8:10 of the ATC provides that if a matter remains unresolved after a further recommendation of the TMB based on that provision, the Members concerned may bring the matter before the Dispute Settlement Body (DSB) and invoke Article XXIII:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (see Section I).

III. CLAIMS BY THE PARTIES

3.1 In the light of the facts and arguments put forward, **Pakistan** requests the Panel:

- to find that the United States failed to demonstrate, before taking its safeguard action on combed cotton yarn from Pakistan on 17 March 1999, that imports of combed cotton yarn caused serious damage and actual threat thereof to its domestic industry producing such yarn and that such damage and threat was attributable to Pakistan because the United States
    - did not examine the state of the entire domestic industry producing combed cotton yarn;
    - based its determination on the state of the domestic industry on unverified, incorrect and incomplete data;
    - based its determination on the causal link between imports and serious damage on changes in economic variables during an eight-month period only;
    - did not conduct a prospective analysis of the effects of imports to determine whether they were causing a threat of serious damage; and
    - attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects;
- to rule, on the basis of the above findings, that the safeguard action imposed by the United States on combed cotton yarn from Pakistan is inconsistent with the United States' obligations under Article 6 of the ATC;
- to rule further that the United States has nullified or impaired benefits accruing to Pakistan under the ATC since, according to Article 3.8 of the DSU, the infringement of an obligation is considered to constitute a *prima facie* case of nullification or impairment;
- to recommend, in accordance with Article 19.1, first sentence, of the DSU, that the DSB request the United States to bring its safeguard action into conformity with its obligations under the ATC; and
- to suggest, in accordance with Article 19.1, second sentence, of the DSU, that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith as has been recommended by the TMB already, in June 1999.

3.2 The **United States** requests the Panel, based on an objective assessment of the facts, to conclude that it acted consistently with the ATC in (i) defining the domestic combed cotton yarn for sale industry, (ii) determining that a sharp and substantial increase in imports of combed cotton yarn

caused both serious damage and actual threat of serious damage to the industry, (iii) attributing the serious damage and actual threat of serious damage to the 283.2 per cent surge of low-priced imports of combed cotton yarn from Pakistan, and (iv) relying on the best available and most up-to-date data.

3.3 For these reasons, the United States submits that its transitional safeguard measure applied to imports from Pakistan of combed cotton yarn satisfies U.S. obligations under the ATC. Pakistan's claims to the contrary are without merit and the Panel should reject them.

IV. ARGUMENTS OF THE PARTIES[12]

A. GENERAL ARGUMENTS

> *Article 6.1 of the ATC: "Members recognize that during the transition period it may be necessary to apply a specific transitional safeguard mechanism (referred to in this Agreement as "transitional safeguard"). The transitional safeguard may be applied by any Member to products covered by the Annex, except those integrated into GATT 1994 under the provisions of Article 2. Members not maintaining restrictions falling under Article 2 shall notify the TMB within 60 days following the date of entry into force of the WTO Agreement, as to whether or not they wish to retain the right to use the provisions of this Article. Members which have not accepted the Protocols extending the MFA since 1986 shall make such notification within 6 months following the entry into force of the WTO Agreement. 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.".*

1. The Basic Questions Before the Panel

4.1 **Pakistan** argues that the object of the ATC are the "provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into the GATT 1994".[13] The basic purpose of these provisions is to ensure that this sector will eventually be integrated.[14] Article 1:5 of the ATC, therefore, calls upon Members to "allow for continuous autonomous industrial adjustment and increased competition in the markets". Raffaelli and Jenkins point out in their book "Drafting History of the Agreement on Textiles and Clothing", that "serious attention needs to be given to this provision, since products representing 49% of total imports in 1990 will be integrated on the last day of the ATC. Autonomous industrial adjustment should be strongly encouraged.".[15]

4.2 Pakistan goes on to point out that Article 6 of the ATC provides for a specific transitional safeguard mechanism for products that have not yet been integrated into GATT 1994 and which is to be resorted to "as sparingly as possible" and consistently with the effective implementation of the process of integrating the textiles and clothing sector into GATT 1994. A Member may resort to Article 6 only if it demonstrates that the product subject to the safeguard action is being imported in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products, and that such damage or threat is attributable to a

[12] With the agreement of the parties, the Panel decided that the parties to the dispute would provide the Secretariat with a confidential executive summary of the claims and arguments contained in their written submissions, oral presentations and answers to questions, for each substantive meeting of the Panel with the parties. These documents would serve the sole purpose of assisting the Secretariat in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They would not serve in any way as a substitute for the written submissions.

[13] Article 1:1 of the ATC.

[14] Preamble to the ATC.

[15] Page 89.

sharp and substantial increase in imports from the Member to which the action is applied. According to the jurisprudence of the Appellate Body, all the terms in Article 6 must be given effect and interpreted in the light of the above object and purpose of the ATC.

4.3 Pakistan notes that the United States has applied a safeguard action under Article 6 of the ATC with respect to combed cotton yarn from Pakistan since 17 March 1999. The TMB, which must examine all such actions, noted that the information provided by the United States had "serious limitations". First, the United States failed to provide data on the segment of the domestic industry which was vertically integrated with the fabric industry, which accounted for about one-third of domestic output of combed cotton yarn. Second, the United States provided data on the evolution of the domestic industry for an eight-month period only. And, third, "some aspects concerning the developments in, and the state of its domestic industry remained unclear (such as the evolution of employment, the closure of plants, investment and the restructuring that could have taken place in the domestic cotton yarn industry)".[16]

4.4 Pakistan recalls that the TMB concluded, therefore, that "the United States had not demonstrated successfully that combed cotton yarn was being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products" and recommended that "the measure introduced by the United States on imports of combed cotton yarn from Pakistan should be rescinded".[17] The United States declared itself unable to follow this recommendation and maintained the measure. Pakistan, therefore, exercised its right under Article 8 of the ATC to request the Dispute Settlement Body to establish a panel under the Dispute Settlement Understanding to resolve the matter.

4.5 In the view of the **United States**, this dispute involves an attempt by Pakistan to use the WTO dispute settlement process to force a re-opening of the safeguard investigation conducted by the United States on Category 301 imports of combed cotton yarn from Pakistan. The United States carefully reviewed the information it had collected over a two-year and eight-month period and determined that the domestic industry had experienced a severe downturn, particularly during January-August 1998 when the surge of imports was at its height. That investigation conclusively demonstrated that a surge in Category 301 imports from Pakistan caused serious damage and actual threat of serious damage to the domestic combed cotton yarn for sale industry.[18] During the time of the surge, all relevant indicators of the industry's economic performance deteriorated substantially: production dropped, shipments declined, inventories increased, unfilled orders fell, profitability evaporated, market share contracted, investment stagnated, employment declined, and mills exited the industry. Based on this compelling evidence, the United States acted in full conformity with the ATC and established a transitional safeguard on imports of combed cotton yarn from Pakistan.

4.6 The United States further argues that the situation described above is precisely the kind of situation that the special transitional safeguard of Article 6 of the ATC is designed to cover. In challenging the U.S. action, Pakistan fails to offer legally sufficient evidence and arguments to establish a *prima facie* case that the U.S. transitional safeguard was inconsistent with its obligations under the ATC. Rather, Pakistan would have the Panel believe that its role is to reopen the safeguard investigation, consider new evidence, and even speculate about hypothetical measures not in existence. In the view of the United States, there is no basis in the DSU for Pakistan's request. This would take the Panel well beyond its proper role of considering whether, based on an objective assessment of the facts, the transitional safeguard action on Category 301 imports of combed cotton yarn from Pakistan conforms with Article 6 of the ATC. Pakistan itself concedes that panels are not

[16] Document G/TMB/18, para. 3.
[17] Document G/TMB/18, para. 32.
[18] The results of this investigation are set out in *Report of Investigation and Statement of Serious Damage or Actual Threat thereof: Combed Cotton Yarn for Sale: Category 301*, December 1998 ("Market Statement").

to engage in *de novo* reviews but rather are to make an objective assessment of the facts surrounding the application of the specific restraint. The Panel in the *United States – Wool Shirts* decision[19] clearly stated that DSU panels do not reinvestigate the market situation or consider developments subsequent to the initial determination but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure – which in this case is the U.S. Market Statement.

4.7 In response to certain of the above comments of the United States, **Pakistan** claims that it has not asked the Panel to reopen the safeguard investigation but to make an objective assessment of the investigation conducted by the United States. According to Article 11 of the DSU and the jurisprudence of the Appellate Body, the role of the Panel is to examine whether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determinations made.[20] The United States did not object to the application of this standard of review. Pakistan has not asked the Panel to make rulings on "a hypothetical future dispute about measures not even in existence". The legal claims on which Pakistan requests rulings from the Panel relate exclusively to inconsistencies that have already occurred. As the Appellate Body noted, "to provide only a partial resolution of the dispute would be false judicial economy".[21] Pakistan has, therefore, requested the Panel to rule on all inconsistencies that have already occurred.

4.8 The **United States** goes on to state that the single question facing the Panel is whether the transitional safeguard established on Category 301 imports from Pakistan is consistent with the actual terms of Article 6 of the ATC and, based on an objective assessment of the facts before the United States at the time of its investigation, supported by the U.S. analysis. The United States urges the Panel to follow Appellate Body practice and analyze this dispute within the four corners of the ATC. This dispute does not raise any issue that the ATC does not fully answer. Article 6.2 addresses the scope of the domestic industry; Articles 6.2 and 6.3 define the standard for examining whether increased quantities of imports cause serious damage or actual threat of serious damage. Article 6.4 fully addresses attribution, and Articles 6.7 and 6.8 define the requirements and time-period for the information necessary for inclusion in the Market Statement. It would be inappropriate to rely on other agreements whose text, object, and purpose differ fundamentally from the ATC when the ATC itself provides the basis for resolution of these issues. Moreover, the Market Statement reflects the evidence used by the United States in making its determination and, therefore, defines the scope of this Panel's factual review. For that reason, the focus must be on these facts and not on unsupported speculation, misstatements of fact, developments occurring subsequent to the investigation, or facts outside the scope of the U.S. investigation advanced by Pakistan. Further, under Article 11 of the DSU, this Panel is not to engage in a *de novo* review of the market situation or to determine what it would have done with the evidence available to the United States. Rather, Article 11 charges the Panel with reviewing whether the U.S. transitional safeguard measure conforms with Article 6 based on an objective assessment of the matter before it, including the facts of the case and the applicability of and conformity with the relevant provisions of the ATC. When this standard is applied, the United States believes that the Panel will have no choice but to conclude that the U.S. transitional safeguard on imports of combed cotton yarn from Pakistan was appropriate and fully consistent with the ATC.

[19] Documents WT/DS33/R and WT/DS33/AB/R.

[20] Page 17 of Pakistan's first submission.

[21] *Australia - Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, para. 223. The Appellate Body confirmed this jurisprudence in *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R - WT/DS142/AB/R, para. 115.

2. Relevance of Other WTO Jurisprudence

4.9 The **United States** argues that Pakistan wrongly assumes that Article 6 transitional safeguards must be interpreted using other WTO agreements. The ATC differs significantly from other, non-transitional WTO agreements in terms of its status as a transitional agreement, its purpose of gradually integrating the textiles and clothing sector into GATT 1994, and its language regarding the definition and treatment of "domestic industry". If, for example, there had been no intent to create a difference between the transitional safeguard of the ATC and the Agreement on Safeguards, negotiators would not have included a safeguard provision in the ATC; rather, they would have relied on Article XIX of the GATT and the Agreement on Safeguards. Accordingly, the Panel should look to the text and purpose of the ATC – not other WTO agreements or interpretations of other agreements – to interpret Article 6 for non-integrated textile and clothing products. The United States also refers to Pakistan's view that there is no reason why the issue of market segmentation in the case of a safeguard action under Article 6 of the ATC should be resolved differently than in the cases of safeguard actions under Article XIX of GATT 1994 and countervailing and antidumping measures. It argues that the plain text of Article 6.2 demonstrates Pakistan's error: the ATC differs in key respects from other agreements and the purpose of Article 6 (to provide a transitional safeguard during the integration of the textiles and clothing sector into GATT 1994) differs substantially from the purpose of the non-transitional provisions and agreements. The United States also considers that the object and purpose of the ATC demands an interpretation of Article 6 that will permit Members to utilize the transitional safeguard mechanism to address a damaging surge in imports. The ATC represents a careful balancing of interests between exporting and importing Members to guide the textiles and clothing sector through the delicate ten-year transition from a regime of special quotas to GATT rules. For importing Members, a fundamental aspect of this bargain was the ability to address damaging surges in imports of non-integrated products through a special safeguard provision separate from Article XIX of GATT 1994 and the Safeguards Agreement. Once that transition is over and textiles and clothing products have been integrated into the GATT, the special, transitional safeguard provision will no longer be available, and textile and clothing products will fall under the normal safeguard rules of the GATT and the Safeguards Agreement.

4.10 In respect of the above argument, **Pakistan** explained its position that the interpretations of other WTO agreements may be taken into account in determining the meaning of the terms of the ATC. All the WTO agreements, including the ATC, are integral parts of the WTO Agreement,[22] which was negotiated and concluded as a single undertaking.[23] It is therefore legitimate and common practice for panels to seek guidance for the interpretation of the terms of a WTO agreement from the rulings on similar terms in other WTO agreements. For instance, the recent panel on *Guatemala - Cement* draws on rulings on provisions of the Agreement on Safeguards to substantiate its interpretations of provisions of the Anti-Dumping Agreement.[24] The panel on *Argentina - Footwear Safeguard* referred to the panels on *United States - Underwear* and *United States - Shirts and Blouses* to substantiate its rulings on the issue of standard of review, methods for collecting data and the question of whether all relevant factors affecting the state of the industry must be examined.[25] If the interpretations of the ATC can be invoked to guide the interpretation of other WTO agreements, why should the interpretation of other WTO agreements not guide the interpretation of the ATC?

4.11 The argument of Pakistan is that interpretations of the terms of other agreements are relevant when the specific issue addressed by those terms is similar to the issue addressed by equivalent terms in the ATC. For instance, both the Agreement on Safeguards and the ATC require a demonstration of causality. There is no reason why this issue should be resolved differently in the two agreements

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[22] See Article II:2 of the WTO Agreement.

[23] See the analysis of the Appellate Body in *Brazil - Measures Affecting Desiccated Coconut, WT*/DS22/AB/R, pages 18-19.

[24] Para. 8.284.

[25] WT/DS/121/R, paras. 8.119 and 8.123.

merely because they deal with different types of safeguards. Article III of GATT 1994 and Article 6 of the ATC both deal with market access and both use the term "directly competitive" to delineate the range of products to which the provision applies in terms of their relationship in the market. There is no reason why the interpretation of these terms in the ATC should be different from the one adopted under GATT 1994 merely because they deal with different measures curtailing market access. Pakistan, therefore, invites the Panel to seek guidance from other WTO agreements.

B. THE INTERPRETATION OF ARTICLE 6.2 OF THE ATC

> *Article 6.2 of the ATC: "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 factors as technological changes or changes in consumer preference.".* (*Footnote not included.)

1. The General Issue

4.12 **Pakistan** states that the core legal issue that gave rise to this complaint is the following: the United States, when evaluating the effect of imports of combed cotton yarn on the state of its domestic industry, did not take into account vertically integrated establishments producing yarn for further processing into fabric (representing about half of the total number of producers of combed cotton yarn and about one-third of total domestic production). The United States does not deny that these establishments produce a product like the combed cotton yarn subject to the safeguard action. It also does not deny that all combed cotton yarn from Pakistan is subject to the restraint, whether sold in the merchant market or shipped to a related fabric producer. However, unsupported by the TMB, the United States argues that these producers were not part of the domestic industry to be examined under Article 6.2 of the ATC because their production did not compete directly with imported yarn in the merchant market for combed cotton yarn.

4.13 Pakistan further argues that the United States fails to explain how its approach could be reconciled with the terms, object and purpose of Article 6.2 of the ATC. This provision defines the domestic industry to be examined as the domestic industry producing products that are like and/or directly competitive with the particular product subject to the safeguard action. Article 6.2, thus, clearly defines the domestic industry in terms of the product it produces, not in terms of the market in which it competes. The terms of Article 6.2 also make clear that the definition of the product subject to the safeguard action controls the definition of the domestic industry. The TMB correctly found (and the United States did not dispute) that, since imported combed cotton yarn sold in the merchant market bore the same physical characteristics as combed cotton yarn produced by vertically integrated plants, the vertically integrated producers were part of the domestic industry producing a product "like" imported combed cotton yarn. Article 6.2, consequently, required the United States to examine the entire domestic industry manufacturing combed cotton yarn and not merely the segment of the industry supplying a particular market.

4.14 The **United States**, however, considers that it acted consistent with the text, object, and purpose of the ATC, in identifying the combed cotton yarn for sale industry as the "domestic industry producing like and/or directly competitive products" and, therefore, excluded vertically integrated producers which manufacture combed cotton yarn for their own consumption in the process of producing a final product (fabric, apparel, or home furnishings). Combed cotton yarn for sale establishments produce combed cotton yarn and sell it in the market. Thus, this yarn competes directly with Category 301 imports. In contrast, vertically integrated producers produce fabric, apparel, or home furnishings and manufacture combed cotton yarn as an input to their production

chain. The yarn manufactured by vertically integrated producers is not intended for release onto the market and thus is not "produced" for purposes of the U.S. market and does not compete with Category 301 imports. Hence, combed cotton yarn for sale establishments and vertically integrated producers of fabric and other non-yarn products are not part of the same industry; they "produce" different products. According to Oxford's English Dictionary, "produce" means "bring a thing into existence, bring about, effect or cause an action or result". In other words, the term "produce" turns on the good that the relevant enterprise actually makes, not the input used to make a subsequent product.

2. Views on the Plain Meaning of Article 6.2

4.15 **Pakistan** agrees that the ordinary meaning of the term "to produce" is "to bring a thing into existence". Hence, in the view of Pakistan, a plant manufacturing combed cotton yarn brings combed cotton yarn into existence, whether it is owned by a fabric producer or not. There is nothing in the ordinary meaning of the terms of Article 6.2 that would permit the exclusion of an establishment that produces combed cotton yarn solely on the ground that it is owned by a company that also produces fabric. The United States' novel interpretation of the term "to produce" cannot be reconciled with the purpose of Article 6.2. An establishment producing yarn for processing into fabric can suffer damage both as a result of rising yarn imports and as a result of rising fabric imports. Article 6.2 is meant to permit safeguard action in either situation. All WTO agreements providing for safeguard or contingency protection define the domestic industry to be examined in terms of the products it produces. If, as the United States argues, captively consumed production is not "produced", no safeguard measures could be taken to protect a domestic industry that uses a large portion of its production of the domestic like or directly competitive product in the manufacture of downstream articles.

4.16 Pakistan goes on to state that with respect to the United States' argument that, for purposes of an Article 6 analysis, the distinction between the production of an input and that of a final product is critical, the United States provides no evidence demonstrating why the economic viability of a combed cotton yarn plant cannot be determined if a fabric producer owns it. Why should it not be possible to determine the output, inventories and market share of plants producing for a captive market? Most of the establishments that the United States included in its investigation produce not only combed cotton yarn but also other types of yarn. If, in analysing the factors mentioned in Article 6.3, it was possible to segregate combed cotton yarn from other types of yarn, why should it not be possible to segregate combed cotton yarn from fabric? By accepting Article 6.3 as drafted, the United States assumed the obligation to examine the eleven factors mentioned in Article 6.3 in all cases. According to Article XVI:4 of the WTO Agreement, the United States "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations" under Article 6.3. The United States must consequently put its agency conducting the transitional safeguard investigations in a position to examine the eleven factors in all cases.

4.17 In response to Pakistan's assertion that "[t]he terms of Article 6.2 also make clear that the definition of the product subject to the safeguard action controls the definition of the domestic industry." (paragraph 4.13), the **United States** argues that, although the imported product is the starting point for an Article 6 analysis, Article 6.2 identifies the producers of the like and/or directly competitive product as ultimately controlling the scope of the domestic industry. In other words, it is what the domestic industry produces, not what the exporting industry produces, that defines the domestic industry (see paragraphs 4.35 and 4.36).

3. Identification of the Domestic Industry

The Views of Pakistan

4.18 **Pakistan** argues that the purpose of the obligation to demonstrate that a rise in imports caused serious damage to the domestic industry in its entirety is to ensure that the importing Member takes into account the state of all producers, including those that are not adversely affected by the rise in imports. The domestic producers that supply a market different from the one supplied by importers may be shielded, temporarily or permanently, from import competition. If there are many such producers, the rise in imports may not cause serious damage to the domestic industry in its entirety and a safeguard action should, therefore, not be taken. If the importing Member could define the "domestic industry" in terms of the market in which it competes rather than the product it produces, it could always exclude the producers less exposed to import competition and, therefore, less likely to suffer serious damage. This would exaggerate the size of imports relative to domestic production and the overall impact of the imports and, therefore, create a bias in favour of affirmative determinations of serious damage. As a result, serious damage determinations would be much more likely, if not almost automatic, and the purpose of the requirement to examine the impact of imports on the entire industry would be completely frustrated.

4.19 Pakistan also considers that the United States' industry definition cannot be reconciled with the object and purpose of the ATC. If Article 6.2 were interpreted to permit Members to divide, for the purposes of their damage investigation, the domestic industry into segments supplying different markets and to base the damage determination exclusively on the segment supplying the market on which imports are sold, the purpose of the ATC could not be achieved. India rightly points out in its oral third-party submission that vertical integration is one way to adjust to import competition. As the integration of the textiles and clothing sector proceeds, more and more fabric producers may, therefore, affiliate with yarn producers. At the end of this process there may only be few independent yarn producers left. In the present case, the United States excluded from examination about half of the producers of combed cotton yarn and about one-third of total domestic production. The proportion of domestic producers and production that it would be able to exclude from the examination under its approach could easily be even more extreme in the future. As a result, the discrepancy between the number of producers examined and the number of producers benefiting from the safeguard action would become greater and greater. This could not be reconciled with the object and purpose of the ATC.

4.20 Recalling its arguments that the terms of Article 6.2 of the ATC make clear that the definition of the product subject to the safeguard action controls the definition of the domestic industry, Pakistan considers that the United States has not offered any arguments that could justify the discrepancy between the definition of the particular product subject to the restraint and the definition of the particular product manufactured by the industry investigated by the United States. Its only reply at the first meeting of the Panel was that there were to its knowledge at present no Pakistani yarn plants that were owned by US fabric producers and that Pakistan was raising a theoretical issue. However, this is not a theoretical issue. As the Appellate Body and numerous panels have recognised, the WTO law governing market access protects competitive opportunities. What is relevant, therefore, is that a fabric producer in the United States is currently not given the opportunity to escape the restraint by purchasing a yarn plant in Pakistan and shipping the yarn directly to its fabric plant in the United States. It is realistic to assume that, if that possibility existed, it would immediately be made use of.

The Views of the United States

4.21 The **United States** considers that its identification of the domestic industry as the combed cotton yarn for sale industry clearly accords with the language of Article 6.2 of the ATC, which requires an analysis of the domestic industry producing like and/or directly competitive products. Combed cotton yarn producers, not vertically integrated establishments, produce a like and directly

competitive product to Category 301 imports. The special safeguard provision of Article 6 of the ATC affords importing Members a mechanism to address serious damage and/or actual threat of serious damage to its domestic industry caused by a surge in imports. But, if the products of domestic producers are not directly competitive with imports – such as in the case of yarn manufactured by vertically integrated producers for their own consumption – the need for safeguard action would not arise (see also paragraph 4.51).

4.22 Also in this regard, the United States argues that Pakistan erroneously claims that the United States did not consider the yarn sold by vertically integrated producers on the open market. These amounts are *de minimis*. Nevertheless, the United States considered all yarn sold on the open market – whether it was produced by combed cotton yarn for sale producers or manufactured by vertically integrated producers of another product. With very limited exceptions, vertically integrated producers consume the combed cotton yarn they manufacture in their production of a final product for sale. On rare occasions, vertically integrated producers sell excess production of combed cotton yarn on the open market and also may purchase outside yarn. The United States verified that vertically integrated producers purchase roughly two per cent of their consumption of combed cotton yarn from the market and sell roughly one per cent of their production on the open market. Contrary to Pakistan's assertions, official U.S. Bureau of Census production statistics account for the *de minimis* amount of yarn sold by vertically integrated producers and record all yarn sold into the market – no matter how *de minimis* – as yarn for sale regardless of the identity of the producer.

4.23 The United States also disagrees with the assertion by Pakistan that the failure to account separately for imports of combed cotton yarn purchased by vertically integrated producers, if any, represents a serious flaw in the U.S. analysis. Pakistan provides no factual basis for the contention that vertically integrated producers import combed cotton yarn. However, even if they do, the amount in question would constitute a subset of the already *de minimis* amount of yarn (two per cent) that vertically integrated producers may purchase on the open market (which includes domestic production and imports). Excluding such *de minimis* quantities from the import figures used in the analysis of serious damage would not have affected the results in any statistically significant way.

4.24 In response to the specific comments in paragraph 4.20, the United States pointed out that, to their knowledge, no U.S. fabric plant wishing to purchase a yarn plant in Pakistan would be unable to do so because of the transitional safeguard. When the U.S. conducted its investigation, no such firms existed. To the United States' knowledge, none exist today. Moreover, the mere existence of a transitional safeguard would not prevent a business from purchasing a yarn plant in Pakistan or shipping yarn from that plant to the United States. In the current year, Pakistan is able to ship 5,578,425 kilograms of combed cotton yarn to the United States, a figure which increases six per cent each year of the restraint.

4.25 In sum, the U.S. approach to the identification of the domestic industry is fully consistent with the ATC. Pakistan's belief that Article 6 requires the United States to include vertically integrated producers of fabric, apparel, or home furnishings within the scope of the "domestic industry producing like and/or directly competitive products" amounts to suggesting that Article 6 requires a Member to incorporate separate industries and include products that do not compete with imports. Neither the text nor the purpose of the ATC support Pakistan's claim and the Panel should reject it accordingly.

<u>The Role of Vertically Integrated Fabric Producers</u>

4.26 In relation to the U.S. argument that Article 6 of the ATC does not permit the division of the industry into segments supplying different markets, **Pakistan** claims that this is based on the incorrect assumption that imported yarn and domestic yarn produced by vertically integrated mills for further processing are not competing with one another. According to the United States' own admission, integrated fabric producers do buy combed cotton yarn on the merchant market. Combed cotton yarn

offered on the merchant market is, therefore, in fact competing with the yarn produced by the fabric manufacturers themselves. The integrated fabric producers might be buying less than 5 per cent of their needs, but there is, nevertheless, a market for imported combed cotton yarn in which integrated fabric producers participate as buyers of yarn. The United States argues that it could ignore this market because the transactions on it were *de minimis*. However, the small quantity of yarn bought by integrated producers reflects the particular conditions prevailing in this market. If the United States had not imposed the safeguard, these conditions would have changed and no doubt more yarn would have been bought by integrated producers. The United States confuses the issue by claiming that the captive yarn production is not normally destined for the merchant market and, therefore, not competing with imports. Yarn produced for internal use competes with imported yarn even if it is never offered on the merchant market.

4.27 Regarding the above comments, the **United States** responds that Pakistan has attempted to suggest that situation, by introducing hypothetical situations where combed cotton yarn manufactured by vertically integrated fabric producers might theoretically compete with imports of combed cotton yarn. Pakistan has provided no evidentiary support for this speculation; the U.S. investigation did not reveal any such circumstances. Moreover, Pakistan's claim that vertically integrated fabric producers would completely restructure simply to take advantage of low cost imports is based on an overly simplistic view of the initial business decision that led these establishments to produce fabric and fabric products within a vertically integrated structure. Likewise, Pakistan seems to confuse "directly competitive" with "indirectly competitive" in asserting that the transitional safeguard actually benefits vertically integrated fabric producers. *De minimis* purchases and sales of combed cotton yarn by vertically integrated fabric producers are not, as Pakistan suggests, evidence of actual or potential competition. In rare circumstances where yarn production does not match fabric production needs, vertically integrated fabric producers purchase roughly two per cent of combed cotton yarn from the merchant market and sell roughly one per cent. This fact does not mean that the other 99 per cent – which never enters the market – is directly competitive with Category 301 imports.

4.28 The United States refers to Pakistan's claims (paragraph 4.26) that the highly exceptional release onto the market of combed cotton yarn by vertically integrated fabric producers – in those rare instances when they spin too much yarn for their fabric production – means that all combed cotton yarn spun by such producers are directly competitive. This flawed argument has no basis in fact. At the time of the Market Statement, vertically integrated fabric producers were not in the business of spinning yarn for sale for the market, and consumers in the market (such as weavers) did not rely on captive combed cotton yarn as an alternative source of supply. Based on the facts, there was no reason to expect that vertically integrated fabric producers would change their established business practices and production methods and begin to produce substantial quantities of combed cotton yarn for sale in the market. The remote and hypothetical possibility that they would is not enough to convert goods, which are in fact not directly competitive, into those that are.

Could Imports of Combed Cotton Yarn Damage Vertically Integrated Producers

4.29 In this regard, the Panel invited the views of the parties as to whether imports of combed cotton yarn could cause "damage" to producers of that product for their own use. In the view of **Pakistan**, the producers of yarn "for own use" go on to produce fabric from their yarn. These fabric producers compete in the fabric market with the fabric from the "for sale yarn". If, as claimed by the United States, imported yarn causes the price of "for sale yarn" to come down, the fabric made from "for sale yarn" will become cheaper and will begin to damage the profitability of the competing fabric made out of "own use yarn". Thus, by the United States own argument, low priced imports of combed yarn will damage the fabric industry using "own yarn". Similarly, if through transitional safeguard measures or any other measure, imports of yarn can be checked, it will, according to the United States' own argumentation, help raise the price of domestic "for sale yarn". This, in turn, will raise the cost of production of fabric produced from "for sale yarn", which will benefit the competing fabric producers using "for own use" yarn.

4.30 On this question, the **United States** argues that the effect of either increased combed cotton yarn imports or the subject transitional safeguard on vertically integrated producers of fabric, apparel, or home furnishings may be, at best, indirect given that they do not normally enter the marketplace for yarn, either as a buyer or seller. Of course, it is possible that an import surge from Pakistan or a safeguard taken to address this surge could eventually have an indirect effect on vertically integrated producers of fabric just as it could have indirect effects on other industries and businesses in the United States. However, the effects, if any, might differ based on the markets, production methods, capital equipment, and other business considerations involved. Pakistan's view that vertically integrated facilities would completely restructure simply to take advantage of low cost imports is based on an overly simplistic view of the initial business decision that led these establishments to vertically integrate. An establishment that is structured to make its production of fabric independent of the "for sale" market achieves advantages other than merely being in a position to produce low-cost yarn. Vertical integration as to yarn allows fabric producers to control the quality, type, delivery, and supply of the yarn that serves as an input to their fabric in ways that would not be available if the fabric producers were dependent on external supplies. Vertical integration can lead to predictability and efficiencies that, from a business perspective, justify continued vertical integration even if yarn is being sold at very low prices in the market.

Other Aspects of This Discussion

4.31 Continuing the discussion of the definition of the domestic industry, **Pakistan** notes that the issue of industry segmentation by markets has been examined in another recent dispute brought before the DSB. The United States, in a complaint against anti-dumping measures on high fructose corn syrup by Mexico, has vigorously (and successfully) challenged the decision of the Mexican authorities to divide the sugar industry into segments supplying different markets and to base the injury determination on the segment supplying the same market as imports. The position the United States took in that case, as an exporter, is inconsistent with the one it adopts in the present case as an importer.

4.32 In response to a further question by the Panel, the **United States** explained that it does not consider the "domestic industry as a whole" provision of the Antidumping Agreement to be generically broader or narrower than the "domestic industry" provision contained in the ATC. The two provisions are different, both textually and in the context and purpose of the agreements that they serve. The ATC provides no definition for domestic industry, but rather refers to "the domestic industry producing like and/or directly competitive products." The Antidumping Agreement devotes an entire Article to the definition of "domestic industry," reflecting precise concepts agreed in the negotiations. The ATC and the Antidumping Agreement also used different concepts to identify the products produced by the "domestic industry." For the Antidumping Agreement, the products are "like products;" for the ATC, the products are "like and/or competitive products." It is noteworthy that the ATC draws from the phrase "like and/or directly competitive products" in the MFA rather than from terms used in the Antidumping Agreement.

4.33 Also in response to the question from the Panel, **Pakistan** notes that the United States has not contested its claim (and the finding of the TMB) that the term "domestic industry" refers to the entire industry. The United States has consistently claimed that it has investigated the entire industry producing combed cotton yarn for sale. According to Article 4.1(i) of the Anti-Dumping Agreement, the term "domestic industry" shall be interpreted as referring to "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that … when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers …". By contrast, Article 6.2 of the ATC does not qualify the scope of the domestic industry in terms of a proportion of

domestic production. The industry definition for safeguard action under the ATC is, therefore, broader than the industry definition applicable in the case of anti-dumping measures.

4. The Interpretation of the Term "like and/or directly competitive products"

(a) Approaches to identification of the industry in terms of "like and/or directly competitive products"

The United States' Position

4.34 The **United States** considers that the ATC requires a focus on the domestic industry "producing like and/or directly competitive products". Read alone, this language would allow a Member to identify an industry producing a product that is: (1) like and directly competitive; (2) like but not directly competitive; or (3) unlike but directly competitive. Accordingly, the U.S. identification of the domestic industry as the combed cotton yarn for sale industry is permissible. Combed cotton yarn for sale is "like and directly competitive" with Category 301 imports from Pakistan.

4.35 In a question to the United States, the Panel sought greater detail on the argument in the above paragraph. In response, the United States explained that the plain language of Article 6.2 of the ATC permits a Member to identify the "domestic industry producing like and/or directly competitive products" as the industry producing like products, the industry producing like and directly competitive products, or the industry producing directly competitive products that are not like. This interpretation does not enable a Member to pick and choose which domestic industry it wants to consider in any manner that is not contemplated by the Agreement itself. Nor does it create an open-ended approach to the identification of the domestic industry. The ATC has set the scope of what can be considered the domestic industry as the domestic industry producing like and/or directly competitive products. The U.S. approach in this case merely accords with that scope by focusing on the domestic industry producing the like and directly competitive product, i.e., the combed cotton yarn for sale industry.

4.36 The United States goes on to explain that it took this approach because it reflected the realities of this particular market and because the United States would otherwise have been unable to consider all the factors set forth in Article 6.3 of the ATC. Nothing about the context or the object and purpose of the ATC would disallow a focus on the industry producing like and directly competitive products. The ATC incorporated this phrase from the MFA and did not draw from other agreements which had defined domestic industry in another manner. In addition, giving the phrase the full range of its ordinary meaning is consistent with the purpose of Article 6 which is to provide assurance that a safeguard mechanism would be available during the transitional period. To disregard the ordinary meaning of that phrase and limit the availability to physically like products would amount to rewriting the carefully negotiated bargain struck in the ATC.

4.37 The United States further sets out its position on the definition of the domestic industry for purposes of the transitional safeguard mechanism, stating that it is the domestic industry producing like and/or directly competitive products which is not an interpretation of the ATC, but are the actual words the Agreement uses. No matter which dictionary is used, this phrase expressly authorizes an importing Member to focus on the domestic industry producing one of three products: (1) like and directly competitive products, (2) like (but not directly competitive) products; and (3) directly competitive (but not like) products. This phrase does not address "directly competitive or substitutable" products; this phrase does not address "indirectly competitive" products; this phrase does not address "hypothetically competitive" products; and this phrase does not address "subsets" of products. On the facts of this case, the United States focuses its identification of the domestic industry on one of the three options in Article 6.2, namely, products which are like and directly competitive with imports. The only domestic mills producing combed cotton yarn like and directly competitive with Category 301 imports are combed cotton yarn for sale establishments. Vertically

integrated fabric producers – upon which Pakistan's entire argument turns – spin combed cotton yarn for their internal consumption, not for sale on the market.

The Position of Pakistan

4.38 **Pakistan** sets out its views as follows: the product to which the United States' transitional safeguard applies is combed cotton yarn. According to Article 6.2, the United States, therefore, had to examine its domestic industry producing a product like combed cotton yarn and/or a product directly competitive with combed cotton yarn. The United States confirmed that there are no material differences in the technical specifications of the yarn produced domestically for sale, for internal use and the yarn imported from Pakistan or Mexico. All domestic combed cotton yarn, whether produced for sale or internal use is, thus, identical to the yarn subject to the restraint. Being identical to imported yarn, all domestic yarn is, thus, indisputably both "like" and "directly competitive". The obvious conclusion is, therefore, that the United States had to examine the state of all mills manufacturing combed cotton yarn, including those manufacturing yarn for further processing into fabric. Instead of accepting this obvious fact, the United States presents to this Panel the argument that captively consumed production is not production within the meaning of Article 6 because a vertically integrated industry does not "produce" the captively manufactured inputs but only the downstream articles that it puts on the market. This is a position that cannot be reconciled with the ordinary meaning of the word "producing". The plain fact is that a yarn mill does not stop producing yarn merely because it is bought by a fabric producer. Accepting the United States' interpretation of the term "producing" would have the curious consequence that a Member's right to take safeguard action would depend on the degree of vertical integration of its industry (see also paragraphs 4.18-4.20).

4.39 Pakistan rejects the United States' claim that a domestic product that is physically identical to an imported product and, therefore, capable of satisfying the same need or taste is nevertheless not "directly competitive" with the imported product if it was produced by an vertically integrated establishment for captive consumption. In the view of Pakistan, this is plainly wrong. In the text of Article 6.2 of the ATC, the term "directly competitive" is used to describe the characteristics of a product, not the characteristics of the industry manufacturing it. The plain fact is that the characteristics of the product produced by a combed cotton yarn plant do not vary with the ownership of the plant. The United States claims that the captive yarn production is not normally destined for the merchant market and, therefore, not competing with imports. However, according to the United States' own admission, integrated fabric producers do buy combed cotton yarn on the merchant market. It is an undeniable fact that integrated fabric producers compete with non-integrated fabric producers and must, therefore, constantly compare the cost of producing yarn with the cost of purchasing yarn. Yarn produced for internal use, therefore, competes with imported yarn even if it is never offered on the merchant market. There is, thus, both latent and extant competition between captively produced yarn and yarn offered on the merchant market. Moreover, the United States' definition of cotton yarn "for own use" comprises yarn destined for consumption by legally separate but affiliated companies. Goods are normally exchanged between legally separate companies at market prices.

4.40 Pakistan also refers to an assumption of the U.S. which is that the particular product to which the United States is applying the restraint is combed cotton yarn for sale. In this regard, the United States acknowledges that, according to Article 6.2, the definition of the product subject to the safeguard action controls the definition of the domestic industry (paragraph 4.17). Therefore, even if the United States were permitted to define the domestic industry as the manufacturers of combed cotton yarn for sale, it could have imposed its restraint only on combed cotton yarn for sale. Conversely, having decided to restrict all imports of combed cotton yarn, whether for sale or not, the United States was obliged to examine the domestic industry producing combed cotton yarn, whether for sale or not. The United States does not dispute that the restraint applies to all imports of combed

cotton yarn, whether destined for sale in the merchant market or for consumption by a related fabric producer (see also paragraph 4.23).

4.41 Pakistan sums up its arguments on this point saying that the United States has not examined the entire domestic combed cotton yarn industry as required by Article 6.2 of the ATC but only the producers of combed cotton yarn that are members of the AYSA. The industry definition adopted by the United States therefore corresponds to the membership of the lobbying organisation that has asked for the restraint and provided the data for the crucial January-August 1998 period. There is, of course, a gap between the combed cotton yarn producers that must be investigated in accordance with Article 6.2 and the combed cotton yarn producers that are members of the AYSA. To bridge this gap, the United States is now asking the Panel to interpret the term "domestic industry producing like and directly competitive products" to mean "domestic industry producing a like product that actually competes with the imported products". Even if this interpretation was consistent with basic principles of treaty interpretation endorsed by the Appellate Body, the United States' industry definition would be inconsistent with Article 6.2 because internally produced yarn and the yarn offered on the merchant market do compete with one another because they are alternative sources of supply satisfying the same needs of integrated fabric producers. Even if the laws of the market did not apply to the United States' integrated fabric producers, the United States' industry definition would be inconsistent with Article 6.2 because it does not correspond to the definition of the products subject to the restraint.

4.42 In relation to the above comments, the **United States** reiterates its arguments that the plain meaning of "like and/or directly competitive" makes it clear that competition is relevant and is an appropriate factor to consider. The language of Article 6.2 – informed by the market-based factors that Members must consider under Article 6.3 – supports this reading and underscores the importance of competition in the marketplace to the identification of the domestic industry. To disregard the ordinary meaning of "like and/or directly competitive" and limit the availability of an Article 6 safeguard to physically "like" products would amount to rewriting the ATC.

(b) Views on the term "like but not directly competitive products"

4.43 **Pakistan** notes that the United States does not deny that combed cotton yarn imported from Pakistan is "like" the combed cotton yarn produced by the vertically integrated mills it excluded from its damage investigation. The central argument of the United States is that the term "and/or" in Article 6.2 gives it the option to define the domestic industry as the industry producing a product that is "like and competitive". The combed cotton yarn produced by the vertically integrated mills was "like" Pakistani yarn but not "directly competitive" with it because it was not competing with Pakistani yarn on the merchant market. In the view of Pakistan, the United States' argument rests on incorrect assumptions.

4.44 Pakistan continues this discussion, stating that one of the assumptions underlying the United States argument is that an individual product can be described as "like but not directly competitive". This assumption is logically incorrect. In the Appellate Body Report on *Korea – Alcoholic Beverages* (paragraph 118), the Appellate Body confirmed an earlier ruling according to which: "like" products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all "directly competitive or substitutable" products are "like". This has important implications for the interpretation of the term "the domestic industry producing like and/or directly competitive products" in Article 6.2 of the ATC. The fact that directly competitive products are a subset of like products means that it is not logically possible to define products as "like but not directly competitive" because, being alike, they are necessarily also directly competitive. To claim that there is yarn that is like but not directly competitive is equivalent to claiming that there is an animal that is an eagle but not a bird.

4.45 On this aspect, the **United States** observes that the Appellate Body made its findings, not on the phrase "directly competitive products," as Pakistan asserts, but rather on the phrase "directly competitive or substitutable product" found in Ad Article III:2 of GATT 1994. The word "substitutable" – a key term which does not appear in Article 6.2 of the ATC – was central to the Appellate Body's findings. The United States submits that the Panel should, therefore, not impute interpretations of the phrase "directly competitive or substitutable" to an agreement which covers "like and/or directly competitive" products.

4.46 **Pakistan** concludes from its arguments, above, that an individual product cannot logically be described as "like and/or directly competitive". These terms can, therefore, only be interpreted to refer to different products manufactured by the particular domestic industry. It follows that the particular industry to be examined may produce different products of which some might be "like" and others that are "not like but directly competitive". However, the domestic industry cannot produce an individual product that is like but not directly competitive because there are no such products. The United States' interpretation, therefore, does not make sense. Pakistan is not asking the Panel to ignore the words "and/or" in Article 6.2. Pakistan is asking the Panel to recognise that these terms reflect the fact that a domestic industry can produce different products of which some may be like and others directly competitive. The term "and/or" therefore has a function and a meaning even if one recognises that a single product that is physically identical to the imported product cannot be "like but not directly competitive".

(c) Discussion of the term "directly competitive"

4.47 **Pakistan** refers to the assumption on which the United States' argument rests; namely, that a domestic product is "directly competitive" within the meaning of Article 6.2 of the ATC only if it is actually competing with the product subject to the restraint. The extracts from the Appellate Body report on *Korea – Taxes on Alcoholic Beverages*, as reproduced in the Panel's question, leave no doubt that this assumption is incorrect. The Appellate Body makes clear that the dictionary meaning of the term "competitive" is "characterised by competition" and concludes therefrom that products are competitive if they are interchangeable on the market. In examining whether a product is competitive, both latent and extant, demand must, therefore, be considered. The Appellate Body ruling quoted by the Panel leaves no doubt: "competitive" does not mean "actually competing". The conclusion that must be drawn from the ruling of the Appellate Body is clear: "directly competitive products" are products with common characteristics that give them the potential of satisfying the same need or taste.

4.48 Pakistan notes that the United States, in a third-party submission to the Appellate Body, has argued itself that two products can be demonstrated to be directly competitive, *inter alia*, "through the inherent degree of substitutability evidenced by the products' similar physical characteristics and basic end-uses".[26] Pakistan believes that the Appellate Body ruling sought by the United States inevitably leads to the following conclusion: Combed cotton yarn from Pakistan and combed cotton yarn produced by the vertically integrated mills that the United States excluded from its investigation are "directly competitive" products because they share common characteristics that give them the potential of satisfying the same need or taste. The fact that integrated firms buy, according to the United States' own admission, certain quantities of yarn on the merchant market demonstrates that this yarn has the potential of satisfying the needs of integrated fabric producers. The term "directly competitive" in Article 6.2 does not permit the United States to distinguish, for the purpose of defining the domestic industry, between yarn that is actually being offered and hence competing in the merchant market, and yarn that is not.

4.49 Pakistan recalls that one of the assumptions on which the United States argument rests is that imported combed cotton yarn and domestic combed cotton yarn produced by vertically integrated mills for further processing are not competing with one another. Pakistan considers this to be

[26] Para. 72 of the Appellate Body report on *Korea – Alcoholic Beverages*.

factually incorrect. If a company owns a yarn plant and a fabric plant, it must treat each of these plants as separate profit centres and constantly compare the costs of producing yarn internally with the cost of purchasing yarn externally. The company must do so because the fabric processed from internally produced yarn is sold on the same market as fabric manufactured by the company's competitors with yarn purchased on the merchant market. The company cannot, therefore, ignore the opportunity costs of manufacturing yarn. The yarn produced internally and the yarn available on the merchant market are, therefore, actually competing with one another. The fact that integrated firms buy, according to the United States' own admission, certain quantities of yarn on the merchant market demonstrates that this yarn is actually competing with the yarn produced by these firms. The restraint imposed by the United States benefits, therefore, all producers of combed cotton yarn: the non-integrated producers benefit because they can sell the combed cotton yarn itself at a higher price and the integrated producers benefit because they can sell the fabric processed from combed cotton yarn at a higher price.

4.50 Pakistan also notes that because of the likeness of the combed cotton yarn exported by Pakistan and the combed cotton yarn produced by the vertically integrated mills, these mills are part of the domestic industry to be examined. The question of whether the yarn produced by vertically integrated mills is directly competitive is, consequently, irrelevant. The United States' claim that "only yarn produced by the combed cotton yarn for sale industry is 'directly competitive' with imported yarn", therefore, does not support its proposition that vertically integrated mills producing combed cotton yarn are not part of the industry to be examined. Pakistan points out that the United States confounds, and therefore confuses, the concepts "directly competitive products" and "directly competing products". Two products are "directly competitive" if there is the potential of a substitution between them and they are consequently capable of directly competing with one another. This is the situation contemplated by the terms of Article 6.2. There is nothing in the terms of Article 6.2 that allows Members to distinguish, for the purpose of defining the domestic industry, between products that are actually being offered, and hence competing in a given market, and those that are not. Pakistan considers it illogical to equate "competitive" and "competing".

4.51 In the view of the **United States**, Pakistan is wrong in arguing that the mere manufacture of a physically like article – even if it is not released onto the market and even if it does not directly compete with the import in question – should determine the scope of a domestic industry for purposes of the ATC. This interpretation denies the relevance of the marketplace for purposes of transitional safeguard action; would make it infeasible for a Member to analyze many of the market based factors listed in Articles 6.2 and 6.3 of the ATC; and, contrary to the object and purpose of the ATC, would render recourse to Article 6 impossible. That was not part of the carefully negotiated balance struck by the ATC. The United States believes that the Panel must analyze the meaning of the term "directly competitive" within the "four corners" of the ATC based on the facts of this case and considered in light of the object and purpose of Article 6 and the ATC. The essential purpose of Article 6 is to allow Members to resort to a transitional safeguard to address a damaging surge in imports that compete with domestic products on the market. The phrase "directly competitive" is in Article 6 for a reason, and the Panel should not accept Pakistan's invitation to read those key words out of the ATC.

4.52 **Pakistan** further notes that in *Korea – Taxes on Alcoholic Beverages*, the Appellate Body ascertained the meaning of "directly competitive" in Article III:2 of GATT 1994 by basing itself on the ordinary meaning of this term. The United States interprets the terms "directly competitive" in Article 6.2 of the ATC to mean "directly competing", which is contrary to the ordinary meaning of the term. The Appellate Body has repeatedly emphasised that all interpretation must be based on the language of the treaty and that the principles of treaty interpretation do not "condone the imputation into a treaty of words that are not there".[27] This principle follows from Article 3.2 of the DSU. The ATC, just as the GATT, is an agreement covered by the DSU. The principles of treaty interpretation that the Appellate Body applied to determine the meaning of "directly competitive" in Article III:2 of

[27] Appellate Body in *India - Patents* (WT/DS50/AB/R) para. 45.

the GATT are, therefore, equally applicable to the interpretation of the same terms in Article 6.2 of the ATC.

4.53 Pakistan also recalls that the immediate context in which the term "directly competitive" appears is the requirement to demonstrate that a rise in imports caused serious damage to the domestic industry. The "domestic industry" to be examined is defined in Article 6.2 in terms of the products it produces. The term "domestic industry" is not otherwise qualified and can, therefore, only be interpreted to refer to the domestic industry in its entirety. The purpose of the requirement to investigate the domestic industry in its entirety is to ensure that the importing Member, when assessing the damage caused by imports, takes into account the state of all producers, including those that are not adversely affected by the rise in imports. If there are many domestic producers that are shielded from import competition because they supply a market different from the one supplied by importers, the rise in imports does not cause damage to the domestic industry in its entirety and no safeguard action may be taken. Contrary to the assertions of the United States, the very purpose of the obligation to demonstrate that a rise in imports caused serious damage to the domestic industry in its entirety is to ensure that the domestic industry is not divided into segments supplying different markets. The immediate context in which the terms "directly competitive" appear thus makes clear that they cannot be interpreted in a manner that would permit such market segmentation. If "competitive" were interpreted to mean "actually competing", the domestic industry could be divided into segments supplying different markets and the purpose of the requirement to examine the industry in its entirety could be frustrated. The immediate context in which the term "directly competitive" is used consequently does not support the United States' interpretation.

4.54 Pakistan goes on to argue that the wider context that must be taken into account in interpreting the term "directly competitive" includes Article 6.1 of the ATC, which stipulates that "the transitional safeguard should be applied as sparingly as possible" and consistently with "the effective implementation of the integration process". In *Japan - Alcoholic Beverages* the Appellate Body further ruled that Article III:1 of the GATT, according to which internal measures "should not be applied to imported or domestic products so as to afford protection to domestic production", constitutes part of the context of each of the other paragraphs of Article III. The Appellate Body stated that "any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation".[28] The principle of effective treaty interpretation requires an interpretation of the term "directly competitive" that takes into account that the basic principle enunciated in the first paragraph of Article 6 informs the remaining paragraphs of that Article. In *EC -Bananas* the Appellate Body ruled that, because of their exceptional nature, "waivers should be interpreted with great care".[29] Article 6.2 should be interpreted with similar care. The words "as sparingly as possible" make clear that the drafters of the ATC regarded transitional safeguard actions as measures running counter to the basic purpose of the ATC. Any interpretation of Article 6.2 that expands the possibilities of recourse to transitional safeguards beyond the scope indicated by the ordinary meaning of its terms would be an interpretation that fails to take into account the context in which these terms appear and the object and purpose of the ATC.

[28] *Japan - Taxes on Alcoholic Beverages* , WT/DS 8/AB/R - WT/DS 10/AB/R - WT/DS 11/AB/R, Section G.

[29] *European communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R) para. 185.

4.55 The **United States** re-iterates its view that the Panel should give full meaning to the term "directly competitive" contained in Article 6.2 and should not read these words out of the ATC. The ordinary meaning of "directly competitive" read in light of the object and purpose of the ATC means that products are directly competitive only when, in reality, they compete with each other on the marketplace. The New Shorter Oxford English Dictionary defines "competitive" as "of, pertaining to, involving, characterized by, or decided by competition." The qualifying term "directly" suggests "a degree of proximity in the competitive relationship between the domestic and the imported product." In other words, "directly competitive" reflects the actual state of affairs in the marketplace. In this case, the combed cotton yarn manufactured by vertically integrated establishments is consumed internally, is not intended for release onto the market, and thus does not compete with imports of combed cotton yarn in the real marketplace. Therefore, such yarn is not a "directly competitive product" with imports of combed cotton yarn.

(d) Discussion of the term "directly competitive or substitutable"

4.56 The **United States** replied to an invitation from the Panel to discuss the Appellate Body's findings in *Korea - Taxes on Alcoholic Beverages* in relation to the use of the term "directly competitive or substitutable"[30]. In the view of the United States, these findings confirm that the ordinary meaning of "directly competitive" turns largely on whether the imported and domestic products compete with each other in the marketplace. However, these findings concern the phrase "directly competitive and substitutable" considered against the object and purpose of Article III of the GATT and rely on the word "substitutable," particularly for findings on potential competition or latent demand. The United States believes that the Panel should be cautious about relying on interpretations of the phrase "directly competitive or substitutable" to analyze the term "like and/or directly competitive" in the ATC, particularly given that the object and purpose of Article 6 of the ATC differ significantly from those of Article III of the GATT. Nevertheless, as applied to the facts of this case, the Appellate Body's findings on "directly competitive or substitutable" support the U.S. conclusion that combed cotton yarn manufactured by vertically integrated fabric producers for internal consumption is not "directly competitive" with imports of combed cotton yarn. Unlike combed cotton yarn for sale establishments, vertically integrated fabric producers do not produce combed cotton yarn for the purpose of sale in the marketplace and therefore do not have actual or potential customers for the combed cotton yarn they spin.

4.57 Also in this regard, the United States notes that there are fundamental differences between the text, context, and object and purpose of Article III:2 of the GATT and Article 6 of the ATC which yield a fundamentally different relationship between "like" and "directly competitive." Textually, "like" and "directly competitive" appear separately and refer to separate obligations in GATT Article III. By contrast, Article 6 of the ATC joins in the same sentence the terms "like" and "directly competitive" with the "and/or" function word. In addition, "directly competitive or substitutable" is informed by the term "substitutable" which does not appear in ATC Article 6. The phrase "like and/or directly competitive" is informed by the term "and/or," which does not appear in GATT Article III. Finally, unlike Article III:2, the terms "like" and "directly competitive" are tied to the same legal obligation and identify the range of products within which an importing Member may identify the domestic industry for purposes of Article 6.

[30] Appellate Body Report on *Korea – Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R paragraphs 114-115 and 120.

(e) The term "like and/or directly competitive products" as used in the MFA

Relationship to the Concept of Market Disruption

4.58 The **United States** notes that the phrase "like and/or directly competitive products" was central to "market disruption" for safeguard actions taken under the MFA. The relevant MFA provisions (Article 3 and Annex A) based assessment of serious damage on the impact of imports on like and/or directly competitive products. MFA signatories underscored the importance of "directly competitive" to this phrase in paragraph 24 of the 1986 Protocol of Extension of the MFA, which expanded the MFA's fibre coverage from cotton, wool and man-made to include silk blend and non-cotton vegetable fibres. By agreeing to expanded fibre coverage, MFA signatories explicitly acknowledged that textile products made from the so-called "new MFA fibres," while perhaps not identical to textile products made from traditional MFA fibres, nonetheless were directly competitive in the market. The interpretation given to "like and/or directly competitive" as products which compete in the marketplace – along with the prior MFA existence of this phrase – should inform an interpretation of Article 6. The United States believes that the Panel should be guided by the fact that the ATC retains the MFA phrase "like and/or directly competitive products" and does not draw from GATT Article XIX or other non-transitional WTO agreements.

4.59 **Pakistan** observes in this regard that the MFA was based on the concept of "market disruption", while the ATC is based on the concept of "serious damage". Raffaelli and Jenkins point out in their book "Drafting History of the Agreement on Textiles and Clothing" that damage, as defined in the ATC, "has nothing to do with market disruption".[31] According to Annex A of the MFA "market disruption shall be based on the existence of serious damage to domestic producers or actual threat thereof". However, the Annex did not define the domestic producers that must be demonstrated to have suffered serious damage. In particular, the Annex - unlike Article 6.2 of the ATC - does not use the terms "like and/or directly competitive products" to define the domestic industry to be examined.

4.60 Pakistan also points out that Annex A of the MFA stipulated that the serious damage to domestic producers must demonstrably not be caused by changes in technology or consumer preferences "which are instrumental in switches to like and/or directly competitive products made by the same industry." This means that the market disruption provisions of the MFA could not be invoked in respect of a product made of a fibre not specified in Article 12 of the MFA even if it might be directly competitive with a product made of a fibre specified in Article 12. It was only in 1986 that the GATT Textiles Committee acknowledged, "the concern of some importing countries regarding substantially increased imports of textiles made of vegetable fibres, blends of vegetable fibres with fibres specified in Article 12, and blends containing silk, which are directly competitive with fibres specified in Article 12. Accordingly, the Committee agreed that the provisions of Articles 3 and 4 may be invoked with respect to directly competitive imports of such textiles, in which any or all of such fibres in combination represent either the chief value of the fibres or 50 per cent or more by weight of the products, which cause market disruption … . In examining the case for market disruption, the Textiles Surveillance Body is instructed to pay particular attention to the evidence demonstrating that these products are directly competitive with products of cotton, wool, and man-made fibres manufactured in the importing country concerned.".[32] In 1986 the MFA was extended subject, *inter alia*, to the above conclusion of the Textiles Committee.[33]

[31] Page 109.
[32] BISD 33S/13-14.
[33] BISD 33S/7.

4.61 Pakistan continues its explanation, arguing that the approach of the ATC on product coverage is completely different from the MFA: Article 6 may be invoked in respect of the products listed in the Annex to the ATC. In respect of products not listed there, including any product that may be directly competitive with a listed product, only Article XIX of the GATT can be invoked.[34] Against this background, it is difficult to see how the industry definition of the MFA could illuminate the industry definition of the ATC. In any case, according to Article 32 of the Vienna Convention on the Law of Treaties, the preparatory work of the treaty and the circumstances of its conclusion can be used to determine the meaning of the terms of the treaty only if the interpretation according to the text-based method set out in Article 31 of that Convention leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. However, the text-based method of interpretation does not leave the meaning of Article 6 of the ATC unclear nor does it lead to absurd or unreasonable results.

The Legal Relevance of the MFA in Interpreting the ATC

4.62 In response to a request from the Panel for both parties to clarify their positions regarding the legal relevance of the MFA in interpreting the ATC, the **United States** argues that the MFA is relevant as context for interpreting the ATC and it made reference to the MFA to illustrate that the ATC drew from the MFA's phrase "like and/or directly competitive" rather than from any other agreement. The United States notes the Appellate Body's discussion of the MFA in making its findings on Article 6.10 of the ATC in *United States – Underwear:* "We turn to another element of the context of Article 6.10 of the ATC: the prior existence and demise, as it were, of the MFA ... . We believe the disappearance in the ATC of the earlier MFA provision for backdating the operative effect of a restraint measure, strongly reinforces the presumption that such retroactive application is no longer permissible.".[35] Given this clear statement of the Appellate Body, the United States expresses surprise at Pakistan's assertion that the Appellate Body "did not use the MFA as part of the 'context' relevant for the interpretation of the terms of Article 6"[36] and its contention that "the United States misrepresents the rulings of the Appellate Body".[37] Rather, it appears that Pakistan has misread both the Appellate Body's findings and the U.S. arguments regarding the MFA by suggesting, contrary to the plain language of the Appellate Body's findings, that the prior existence of the MFA does not inform interpretations of the ATC.

4.63 Commenting on this particular point, **Pakistan** states that the United States has misrepresented the Appellate Body statement because it failed to report for which purpose the Appellate Body referred to the demise of the MFA. It was true that the Appellate Body had used the word "context" when referring to the prior existence of the MFA. However, it obviously did not use this word within the technical meaning of Article 31:1 and 2 of the Vienna Convention on the Law of Treaties. This clearly follows from the fact that the Appellate Body did not use the MFA to determine the meaning of the terms of Article 6:10 of the ATC in accordance with Article 31 of the Vienna Convention. The Appellate Body referred to the MFA only to confirm the meaning of Article 6.10 that it had already given to this provision without any reference to the MFA in accordance with Article 31. The Appellate Body, after having determined the meaning of the terms of Article 6:10 in accordance with their ordinary meaning in the context provided by the other paragraphs of Article 6, stated: "We believe the disappearance in the ATC of the earlier MFA express provision for

[34] Para. 3 of the Annex to the ATC.

[35] *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body, 25 February 1997 ("Report of the Appellate Body, *United States - Underwear*"), at p. 16.

[36] Second written submission of Pakistan, at para. 50.

[37] Second written submission of Pakistan, at paras. 48 and 49.

backdating the operative effect of a restraint measure strongly reinforces the presumption that such retroactive application is no longer permissible.".[38]

4.64 In the view of Pakistan, a fair reading of the Appellate Body ruling as a whole thus leads to the conclusion that the Appellate Body used the comparison with the MFA merely as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention in order to confirm the meaning resulting from the application of Article 31. Article 31:2 of the Vienna Convention on the Law of Treaties provides a clear and exhaustive list of the elements that comprise the context for the purposes of the interpretation of a treaty in accordance with Article 31:1. A former treaty is not among those elements. Therefore, to suggest that the Appellate Body used the MFA as context within the meaning of Article 31:1 of the Vienna Convention, is to suggest that the Appellate Body acted inconsistently with the basic principles of treaty interpretation that it has itself applied in all cases.

The Question of the MFA as Relevant Context of ATC Article 6

4.65 As it has argued during this proceeding (paragraphs 4.56 and 4.57), the **United States** considers as highly relevant the fact that the ATC retains the MFA's phrase "like and/or directly competitive" for non-integrated textile and clothing products and does not draw from GATT Article XIX or any other agreement. The United States submits that just as the Appellate Body in *United States - Underwear* drew strong inferences from the disappearance of the MFA's "backdating" language in the ATC, so this Panel should draw strong inferences from the fact that the ATC retains "like and/or directly competitive" from the MFA, rather than using language from other available agreements. Accordingly, it would be inappropriate to interpret the "domestic industry producing like and/or directly competitive products" in light of WTO agreements – such as the GATT, the Safeguards Agreement, or the Antidumping Agreement – which do not employ this formulation.

4.66 In addition, the United States points out that customary rules of treaty interpretation require giving full meaning to the phrase "domestic industry producing like and/or directly competitive products," whose ordinary meaning permits an identification of the domestic industry producing (1) like and directly competitive products, (2) like (but not directly competitive) products, and (3) directly competitive (but not like) products. In other words, the "and/or" function word gives independent meaning to the term "directly competitive" in options (1) and (3). To support this ordinary meaning, the United States refers to the MFA as relevant context. As the United States explained, "directly competitive" had independent meaning for MFA signatories – including the United States and Pakistan – which explicitly recognized a separate class of "directly competitive" products in paragraph 24 of the 1986 Protocol of Extension of the MFA. Pakistan, however, appears to deny the independent relevance of "directly competitive" for purposes of Article 6.2 and suggests that "directly competitive" is only a secondary inquiry. Pakistan has stated that because combed cotton yarn manufactured by vertically integrated fabric producers may be "like," "the question of whether the yarn produced by vertically integrated mills is directly competitive is consequently irrelevant".[39] This claim appears to run counter to both the ordinary meaning of the "domestic industry producing like and/or directly competitive products" and its context as informed by the "prior existence and demise, as it were, of the MFA".[40]

[38] WT/DS24/AB/R, page 17.

[39] Statement of Pakistan at the first meeting of the Panel, at p. 5.

[40] Report of the Appellate Body, *United States - Underwear*, at p. 16.

4.67 The United States explains that it also fails to understand Pakistan's assertion that the U.S. reliance on the MFA as context is an effort to "loosen up the language in Article 6"[41] or impute the MFA's market disruption analysis into the ATC.[42] Contrary to Pakistan's claim, the United States has not argued that the Panel should interpret the serious damage analysis of Article 6 in light of the MFA's market disruption provision. Rather, as discussed above, the United States believes that the ATC's clear retention of the MFA's phrase "like and/or directly competitive products" and the fact that the "directly competitive" element of this phrase had independent meaning under the MFA provide relevant context for interpreting the domestic industry provision of Article 6.2 of the ATC.

4.68 On this same point, **Pakistan** explained its position that, according to the consistent jurisprudence of the Appellate Body, the claims of the United States related to the MFA have to be examined in the light of the principles of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. According to Article 31 of the Vienna Convention, a treaty is to be interpreted 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". According to Article 32 of the Vienna Convention, the preparatory work of the treaty and the circumstances of its conclusion can be used for two purposes: First, "to confirm the meaning resulting from the application of Article 31". Second, "to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable". Neither Pakistan nor the United States claims that an interpretation of Article 6 of the ATC in accordance with Article 31 leaves its meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. The arguments of the United States to which the Panel refers in its question, therefore, give rise only to two issues. The first is whether the Panel, in interpreting the terms of Article 6 of the ATC in accordance with Article 31 of the Vienna Convention, should regard the MFA as part of the context of those terms. The second is whether recourse to the MFA confirms the interpretation of Article 6 of the ATC that the United States requests the Panel to adopt.

4.69 Pakistan argues that the MFA is not part of the context of the terms of Article 6 of the ATC. Article 31:2 of the Vienna Convention clearly defines the "context" that may be taken into account in giving meaning to the terms of a treaty as follows: "The context for the purposes of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.". In the view of Pakistan, the MFA does not fulfil the above criteria: it is not part of the text, preamble or annexes of the ATC nor was it concluded in connection with the ATC. There can for this reason be no doubt that the "context" to determine the meaning of Article 6 does not comprise the MFA. Furthermore, Pakistan states that the Appellate Body has not treated the MFA as part of the context of Article 6 of the ATC.

4.70 Pakistan points out that the United States claims that the Appellate Body used the MFA as context of Article 6 of the ATC. It asserts that: "the Appellate Body was very clear in *United States – Underwear* that the "prior existence and demise, as it were, of the MFA" informs the context of Article 6 of the ATC. In that case, the Appellate Body drew strong inferences from the disappearance of certain MFA language in the text of the ATC.".[43] In the view of Pakistan, however, the United States misrepresents the rulings of the Appellate Body. In *United States – Underwear,* the Appellate Body faced the question of whether the practice of "backdating" which was explicitly permitted under the MFA was also permissible under the ATC. The Appellate Body ruled on this as follows: "Article 6.1 directs that transitional safeguard measures be applied "as sparingly as possible" on the

[41] Second written submission of Pakistan, at para. 48.

[42] Second written submission of Pakistan, at para. 51.

[43] United States' answers to the Panel's questions, para. 26 (footnotes omitted).

one hand and, on the other, applied "consistently with the provisions of [Article 6] and the effective implementation of the integration process under the [ATC]". It appears to the Appellate Body that to inject into Article 6.10 an authorisation for backdating … will encourage return to the practice of backdating … under the regime of the MFA [and] … loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members.".[44]

4.71 Pakistan also considers that the United States incorrectly claims that the Appellate Body ruled that "the MFA informs the context of Article 6 of the ATC". The Appellate Body merely stated that "the disappearance in the ATC of the earlier MFA express provision for backdating ... strongly reinforces the presumption that such retroactive application is no longer permissible [because it cannot be assumed that] the disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen".[45] In the *Underwear* case the Appellate Body thus used the MFA only to confirm an interpretation it had already reached in accordance with Article 31 of the Vienna Convention. It did not use the MFA as part of the "context" relevant for the interpretation of the terms of Article 6 of the ATC. The United States' claim to the contrary is plainly incorrect.

4.72 Pakistan further argues that the MFA does not confirm the meaning that the United States has asked the Panel to give to the terms "directly competitive". Pakistan comments that the United States invites the Panel to "draw strong inferences from the fact that the ATC retains the MFA phrase 'like and/or directly competitive products' and does not draw from GATT Article XIX or other non-transitional WTO agreements".[46] It argues that, "nothing about the context or the object and purpose of the ATC suggests that the ordinary meaning of the phrase "like and/or directly competitive" would disallow one or the other of these three possibilities. The ATC could have drawn from other agreements which had defined domestic industry in another manner. Yet the ATC draws directly from the MFA and incorporates its "and/or" phrase. Given this apparently intentional selection of this phrase, it should not be interpreted in a manner that nullifies any part of the meaning of the phrase absent some compelling reason based on the purpose and intent of the ATC.".[47]

4.73 Pakistan stresses that the ordinary meaning of the terms "like and/or directly competitive" is not what the United States claims it to be. In the context of Article 6.2, these words simply confirm that a domestic producer to be examined may not only manufacture like products or directly competitive products but also both like and directly competitive products. The terms "like" and "directly competitive" are used in Article 6.2 to define the characteristics of the physical objects manufactured by the domestic industry to be examined, not the characteristics of the producer manufacturing it. For these reasons, it does not follow from the ordinary meaning of the terms "like and/or directly competitive" in their context that a particular product can be like but not directly competitive.

4.74 Pakistan goes on to point out that, contrary to the suggestion of the United States, the MFA does not use the terms "like and/or directly competitive products" to define the domestic industry. These terms appear in a clause in Annex A to the MFA that imposes on participants the obligation to demonstrate that the damage they found to exist was not caused by changes in technology or consumer preferences that "are instrumental in switches to like and/or directly competitive products made by the same industry". In defining the domestic industry, the drafters of the ATC thus clearly did not "retain" the phrases that the drafters of the MFA used to define the domestic producers to be examined for the purposes of a serious damage determination. Moreover, the use of the terms "and/or" is not specific to the MFA or in any way unusual. They appear about 40 times in the WTO

[44] WT/DS24/AB/R, page 15.
[45] WT/DS24/AB/R, page 17.
[46] United States' answers to the Panel's questions, para. 26.
[47] United States' answers to the Panel's questions, paras. 70 and 71.

agreements. One can, therefore, not readily assume that their use in the ATC reflects an intention to incorporate MFA concepts into the ATC. It is for these reasons inappropriate to suggest that the drafters of the ATC faced a choice between the MFA industry definition and the Article XIX industry definition and selected the MFA definition with the terms "like and/or directly competitive products". There simply was no such industry definition in the MFA.

4.75 It is also the view of Pakistan that the differences in the working of the safeguard provisions of the MFA and the ATC confirm that Article 6 of the ATC should not be interpreted in a manner that encourages a return to practices under the MFA. The United States argues that the Panel should take into account, as the relevant context, that U.S. market disruption analyses and safeguard actions taken on yarn products under the MFA were based on an examination of the yarn for sale industry. However, Pakistan believes that it would be legally incorrect, and inconsistent with the Appellate Body ruling in the *Underwear* case if the Panel were to base its interpretation of Article 6 on the United States' practices under the MFA. Unlike the ATC, the MFA was based on the concept of "market disruption". According to Annex A of the MFA "market disruption shall be based on the existence of serious damage to domestic producers or actual threat thereof". However, Annex A did not define the domestic producers. The absence of any definition of the producers and the focus on the disruption of a market by imports might have given the United States some justification under the MFA to base its determinations of serious damage on the effect of imports in a particular market supplied by imports and the state of domestic producers supplying that market. However, the concept of "market disruption" has been purposefully kept out of the text of the ATC. The serious damage must, therefore, now be caused by increased quantities of imports, not by the situation prevailing in the domestic market supplied by imports. The vague reference to "domestic producers" has been replaced by clear terms defining the producers to be examined as the entire industry producing a particular product. These changes no longer leave any room for an interpretation according to which a serious damage determination may be based on an examination of the state of producers supplying a particular market disrupted by imports. The differences in the drafting of the ATC and the MFA thus confirm, just as in the *Underwear* case, that the carefully negotiated language of Article 6 of the ATC should not be loosened up in a manner that encourages a return to practices under the MFA.

4.76 Also on this topic, Pakistan argues that the 1986 Protocol of Extension of the MFA does not confirm the meaning that the United States has asked the Panel to give to the term "directly competitive". The United States argued that probably the most prominent example of agreement among MFA signatories on the term "like and/or directly competitive" is found in paragraph 24 of the 1986 Protocol of Extension of the MFA, which expanded the MFA's fibre coverage from cotton, wool and man-made fibre textiles and textile products to include silk blend and non-cotton vegetable fibres (such as ramie), and blends thereof. In paragraph 24, MFA signatories underscored the importance and meaning of the term directly competitive for purposes of the MFA's safeguard provision. By agreeing to expanded fibre coverage, MFA signatories explicitly acknowledged that textile products made from the so-called "new MFA fibres," while perhaps not identical to textile products made from traditional MFA fibres, nonetheless were directly competitive on the market.

4.77 In the view of Pakistan, however, contrary to the assertion of United States, paragraph 24 of the 1986 Protocol of Extension of the MFA does not reflect an agreement on the terms "like and/or directly competitive" products. This paragraph simply acknowledges that textiles made of fibres specified in Article 12 of the MFA and textiles made of vegetable fibres (or blends thereof) may be directly competitive. It also permits the invocation of Articles 3 and 4 of the MFA in respect of imports of fibres not covered by Article 12 on the condition that such products are directly competitive with products made of covered fibres. Paragraph 24 of the 1986 Protocol of Extension of the MFA thus essentially redefined the products in respect of which restraint may be applied, not the domestic producers to be examined. It is noteworthy that the term "directly competitive" is used in paragraph 24 to limit the extension of the MFA's market disruption provisions to products made of vegetable fibre. It is for these reasons not clear to Pakistan how paragraph 24 could possibly confirm

the contention of the United States that, under the ATC, a particular product can be like but not directly competitive.

4.78 In the negotiation of the ATC a key objective of the developing countries was, thus, to free the multilateral trading system of this concept. They succeeded and Article 6 is worded accordingly. According to Pakistan, the United States requests the Panel to reintroduce this concept by arguing that, because the ATC was preceded by the MFA, Article 6 entitles the importing Member to base its serious damage determination on an examination of the state of producers that actually compete with imports in a particular market. In the view of Pakistan, however, there is no legitimacy in this request and there is no recognised principle of interpretation on which it can be based.

4.79 Commenting on the views of Pakistan set out above, the **United States** observed that Article 6 of the ATC should be interpreted in accordance with its ordinary meaning in light of its object and purpose. Should the Panel look to another agreement to inform its interpretation of "domestic industry producing like and/or directly competitive products", the United States believes that the Panel should focus on the Multifibre Arrangement - the ATC's predecessor - not any other agreement. Pakistan has repeatedly denied the relevance of the MFA to any interpretation of Article 6 of the ATC. Contrary to clear Appellate Body guidance, Pakistan has claimed that the MFA does not inform the context of Article 6. Pakistan has also suggested that the retention in the ATC of the MFA's phrase "like and/or directly competitive products" is inconsequential. Instead, Pakistan appears to believe that it is more appropriate for the Panel to look, not to the MFA, but to other agreements - whose plain text and object and purpose differ significantly from the ATC - to interpret Article 6.

4.80 As the United States discussed earlier, it is noteworthy that Article 6.2 of the ATC drew from the MFA's phrase "like and/or directly competitive products" rather than from GATT Article XIX or any other agreement. While there are specific and important differences between the MFA and the ATC, the ATC - the carefully negotiated successor to the MFA for textile and clothing items not yet integrated into the GATT - is an outgrowth of the MFA's regime, rules and structure. The MFA's phrase "like and/or directly competitive products" is an important example. Pakistan claims that the term "and/or" is "not specific to the MFA or in any way unusual" to suggest that the selection of "and/or" was somehow random. While the use of "and/or" generally may not be unique, the phrase at issue - "like and/or directly competitive products" – is certainly "specific to the MFA" and is, in this respect, "unusual." Other than the MFA and the ATC, no other WTO agreement employs that formulation.

4.81 The United States considers that Pakistan also attempts to trivialise the ATC's reliance on the MFA's phrase "like and/or directly competitive products" by asserting that the MFA did not use this term in the context of the domestic industry. Although there are some differences between the MFA and the ATC, both agreements use the phrase "like and/or directly competitive products" in the context of a finding of serious damage and actual threat thereof, and both agreements use the phrase to refer to goods "made" or "produced" by the relevant domestic producer or domestic industry. Annex A to the MFA, paragraph 1, reads: "The determination of a situation of "market disruption", as referred to in this Arrangement, shall be based on existence of serious damage to domestic producers or actual threat thereof. Such damage must demonstrably be caused by the factors set out in paragraph II below and not by factors such as technological changes or changes in consumer preference which are instrumental in switches to like and/or directly competitive products made by the same industry, or similar factors. The existence of damage shall be determined on the basis of an examination of the appropriate factors having a bearing on the evolution of the state of the industry in question such as: turnover, market share, profits, export performance, employment, volume of disruptive and other imports, production, utilization of capacity, productivity and investments. No one or several of these factors can necessarily give decisive guidance.".

4.82 Similarly, Article 6.2 of the ATC states that "[s]afeguard 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.". Contrary to Pakistan's suggestion, both Annex A of the MFA and Article 6.2 of the ATC refer to the like and/or directly competitive products produced by the industry in question. Given this clear similarity, it is highly curious for Pakistan to assert that the MFA did not use the phrase "like and/or directly competitive products" in connection with the definition of the domestic industry.[48]

4.83 The United States also clarified that, contrary to Pakistan's claim, it has not invited the Panel to interpret Article 6 of the ATC in a manner that encourages a return to practices under the MFA. Rather, the United States has urged, and continues to urge, the Panel to interpret the ATC according to the ordinary meaning of its carefully negotiated language in light of its object and purpose. As the United States has argued, customary rules of treaty interpretation require giving full meaning to the phrase "domestic industry producing like and/or directly competitive products". The ordinary meaning of this phrase permits an identification of the domestic industry producing (1) like and directly competitive products, (2) like (but not directly competitive) products, and (3) directly competitive (but not like) products. Pakistan challenges this argument and asserts that the ordinary meaning of the terms "like and/or directly competitive" is not what the United States claims it to be. However, Pakistan neither explains why this is the case nor offers any rationale for the ordinary meaning of "like and/or directly competitive" that is any different from that set forth above. In fact, although Pakistan claims that the ordinary meaning is something else, Pakistan appears to agree with the United States regarding the plain meaning of Article 6.2: "[i]n the context of Article 6.2, these words terms simply confirm that a domestic producer to be examined may not only manufacture like products or directly competitive products but also both like and directly competitive products."[49] In other words, like the United States, Pakistan acknowledges that "like and/or directly competitive products" refers to (1) like products, (2) directly competitive products, and (3) like and directly competitive products. However, Pakistan then appears to contradict itself by re-iterating its claim - which runs counter to the plain text of Article 6.2 – that the ordinary meaning of the term "like and/or directly competitive" does not permit the existence of a product that is like but not directly competitive.[50]

4.84 Thus, the United States argues, it is clear that the ordinary meaning of "like and/or directly competitive products" as contained in either the MFA or the ATC permits the U.S. identification of the domestic industry in this case. Pakistan has pointed to nothing about the ordinary meaning or context of the phrase "domestic industry producing like and/or directly competitive products," or the object or purpose of Article 6 and the ATC that would suggest otherwise. Pakistan has also failed to explain why the Panel should not follow the Appellate Body's guidance and consider as relevant the prior existence of the MFA - which used the identical phrase "like and directly competitive products" to refer to the products made by the relevant domestic industry - or why the Panel should instead rely on other WTO agreements with completely different texts, contexts, and purposes.

[48] Answers of Pakistan to additional written questions of the Panel, at para. 10.
[49] Answers of Pakistan to additional written questions of the Panel, at para. 9.
[50] Answers of Pakistan to additional written questions of the Panel, at para. 9.

C. THE DETERMINATION BY THE UNITED STATES OF SERIOUS DAMAGE, OR ACTUAL THREAT THEREOF (ARTICLE 6.3 OF THE ATC)

> *Article 6.3 of the ATC: "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.".*

1. The United States Determination of Serious Damage to the Domestic Industry

The United States Explanation of its Determination of Serious Damage

4.85 The **United States** argues that it has satisfied the requirements under Articles 6.2 and 6.3 of the ATC in reaching the conclusion that imports of combed cotton yarn caused serious damage to the domestic industry. The Market Statement clearly documents sharp increases in Category 301 imports and the effect of these soaring levels of imports on the eleven variables enumerated in Article 6.3 of the ATC, as well as additional variables that the United States identified as relevant and material. The U.S. investigation demonstrated that total Category 301 imports of combed cotton yarn nearly doubled between January-August 1997 and January-August 1998, and imports from Pakistan nearly quadrupled, increasing 283.2 per cent in the same period. The price of imported combed cotton yarn – particularly from Pakistan – was significantly below the average U.S. price of combed cotton yarn for sale.

4.86 The impact of these surges of low-cost imports on the U.S. industry was unmistakably serious damage and the evidence is clear and striking. As these imports were surging during the relevant time period, the economic variables set out in Article 6.3 of the ATC deteriorated substantially: U.S. domestic production dropped 10.2 per cent, shipments declined 14.2 per cent, productivity lagged four per cent, capacity utilization declined, inventories increased 145.9 per cent, the share of the market held by U.S. producers contracted ten percentage points, exports fell by one-third, 6.6 per cent of the production workforce left the industry, profitability was nearly cut in half and investment stagnated. Two mills exited the industry during this eight-month period.

4.87 The United States also demonstrated that increased imports – not other factors – caused serious damage to the domestic industry producing like and/or directly competitive products. While imports were taking a greater share of the U.S. market, the apparent domestic market remained relatively constant during the investigation period, indicating that there was no change in consumer preference. Likewise, technological changes could not account for the serious damage given that there had been no significant new technological changes in the defined industry during the period covered by the investigation.

4.88 Every relevant economic indicator, taken individually, shows an industry irrefutably suffering serious damage resulting from the surge of Category 301 imports. Taken collectively, the indicators reveal a state of serious damage. The United States argues that, with this evidence, it is hard to draw any conclusion other than that the domestic industry was in immediate peril and had suffered serious damage during the period analyzed in the U.S. investigation. In the case before the Panel, Pakistan leaves this clear record of serious damage caused by the import surge unchallenged. In fact, Pakistan asks the Panel to negate this showing based on the fact that a few mills converted their production from combed to carded yarn in the face of serious damage to the industry from imports.

4.89 The United States goes on to state that Pakistan assails the U.S. determination of serious damage using a misplaced reliance on interpretations of other WTO agreements and otherwise fails to establish any violation of the ATC. Pakistan suggests that the Panel should impute interpretations of the Agreement on Safeguards to its causation analysis under the ATC and of the Safeguards and Anti-Dumping Agreements to establish benchmarks for the minimum period for which data must be collected. Pakistan provides no support for either claim other than asserting that interpretations of other agreements are somehow relevant. As is plain from the text, the ATC and non-transitional WTO agreements were drafted in different ways and use different language. The ATC has a fundamentally different purpose from other non-transitional WTO agreements. The United States further states that Pakistan tries to draw attention away from the totality of the data by isolating one small factor after another and speculating about what could have been or might have been the case. The ATC does not allow a Member to isolate one factor in the list of eleven factors in Article 6.3 in reaching its determination of serious damage. Quite the contrary, the ATC states that "none of [these factors], either alone or when combined with other factors, can necessarily give decisive guidance." The United States submits that the Panel should resist Pakistan's efforts to focus exclusively on one particular factor and should instead, as the ATC directs, review whether the U.S. examined all relevant factors in conducting its analysis. When this is done, the U.S. findings must stand.

Interpretation of "Serious Damage" and "Serious Injury"

4.90 In response to a question by the Panel, the **United States** points out that, contrary to Pakistan's suggestion, "serious damage" does not set a higher bar for the invocation of the transitional safeguard than would the term "serious injury." "Serious damage" and "serious injury" are different terms that must be interpreted in light of their context and the object and purpose of the agreements they serve. The ATC does not define "serious damage" but places this determination in the hands of Members, which must carefully consider the factors set forth in Article 6. The use of "serious damage" from the MFA rather than the serious injury contained in other agreements is significant. Although the term "serious injury" of Article XIX of the GATT was available at the time the ATC was drafted, the ATC uses the term "serious damage"– a term that did not carry the connotations that might attach to "serious injury." The purpose of the transitional safeguard in the ATC was not to make safeguard actions more difficult during the transitional period but rather to ease the transition from the MFA to normal GATT rules over a defined period. In fact, "serious damage" – as derived from the MFA – was intended to give Members greater ability to address domestic market disruptions from floods of imports than was available under Article XIX of the GATT or the Safeguards Agreement. The United States also comments that Pakistan has asserted that the ordinary meaning of "serious damage" is "grave injury impairing value or usefulness." While this assertion is questionable, this much is clear: whether or not there is a difference between "serious damage" and "serious injury," "serious damage" under the ATC does not require a Member to go beyond what is required under the Safeguards Agreement. The ATC's transitional safeguard was not intended to make it more difficult to invoke a safeguard during the transitional period than it would be after the transitional period.

4.91 Also in response to this question, **Pakistan** expresses the view that, according to the principles of interpretation followed by the Appellate Body, the term "serious damage" in Article 6 must be interpreted on the basis of its ordinary meaning in its context and in the light of the object and purpose of the ATC. The ordinary meaning of the words " serious damage" is "grave injury impairing value or usefulness".[51] The ordinary meaning of "serious injury" is the same. The United States asserted that a retooling of a combed cotton yarn plant may, for the purposes of a serious damage determination, be deemed to be a "closure" of that plant and the change in activity of the workers involved as "a loss of jobs". However, the fact that a plant retooled in response to a change in the market situation does not demonstrate that imports caused serious damage to that plant. Thus, if a plant produces carded instead of combed yarn, thrives in its new activity and retains its workforce, the

[51] *The Concise Oxford Dictionary*, Third Edition, Oxford at the Clarendon Press.

increase in imports obviously did not cause any injury that impaired its value or usefulness. The United States' definition of serious damage can, therefore, not be reconciled with the dictionary meaning of serious damage.

4.92 Pakistan also considers that an interpretation of the term "serious damage" in its context and in the light of the purpose of the ATC does not justify the United States' approach. According to Article 6.1 of the ATC, safeguard actions should not frustrate the "effective implementation of the integration process" under the ATC. Article 1.5 of the ATC provides that, in order to facilitate this process, "Members should allow for continuous autonomous industrial adjustment". The terms "serious damage" cannot, therefore, be interpreted to permit safeguard actions in response to autonomous industrial adjustment. If Members were permitted to declare successfully retooled plants to have suffered "serious damage" within the meaning of Article 6.2 merely because they are no longer part of the domestic industry, they would be permitted to invoke the transitional safeguard provisions for the purpose of preventing autonomous industrial adjustment. The United States' approach is, for these reasons, incompatible with the ordinary meaning of the term "serious damage", the context in which this term appears and the objective and purpose of the ATC.

Continuous Autonomous Industrial Adjustment

4.93 In this regard, the **United States** considers that Pakistan misuses the term "continuous autonomous industrial adjustment" in suggesting that it is incompatible with a finding of serious damage or actual threat thereof. Pakistan also implies that this process somehow conflicts with the transitional safeguard mechanism. Continuous autonomous industrial adjustment and serious damage can go hand in hand. For instance, in the case before the Panel, the combed cotton yarn for sale industry was engaged in the process of autonomous adjustment during the period prior to the damaging surge in imports: production was increasing as the number of plants in the industry were decreasing. However, during the investigation period – particularly during the first eight months of 1998 – a dramatic surge in imports led to a significant deterioration in the conditions of the industry, as measured by the marked decline in the Article 6.3 factors: production dropped, shipments declined, inventories increased, etc. The fact that the industry was already engaged in adjustment – with some establishments leaving the defined industry and others becoming more efficient – does not minimize the serious damage and actual threat thereof that the industry was experiencing. Pakistan denies the very reality of the deterioration in each and every one of the Article 6.3 factors when it suggests that efforts to convert production from combed to carded yarn or otherwise readjust imply that serious damage or actual threat thereof could not have existed or did not exist.

4.94 The United States argues that the facts of this case - as set forth in the Market Statement and in the various submissions of the United States - clearly establish that the industry was in fact suffering serious damage and actual threat thereof, notwithstanding ongoing efforts to retool, to readjust, and to cope even in the face of the flood of imports. Furthermore, the United States finds it very difficult to understand how Pakistan could suggest that Article 6 is incompatible with continuous autonomous industrial adjustment. Far from being so, the Article 6 transitional safeguard is an essential element of this restructuring process. Article 6 gives Members the ability to act so that industries seriously damaged by increased imports can adjust to the changed circumstances rather than be destroyed by them. The ATC explicitly recognizes this fact by providing a transitional safeguard mechanism during the ten-year restructuring process given to the textiles and clothing sector and contemplates that importing Members might need to resort to Article 6 to provide a temporary limit on imports during the adjustment process. Moreover, the transitional safeguard does not prevent imports; it merely limits imports to current levels and provides for growth in subsequent years.

2. The Nature of the Data Used and the Data Verification Process

Arguments of Pakistan

4.95 **Pakistan** argues that the United States failed to base its determination of serious damage on verified, correct and complete data and to provide an adequate, reasoned and reasonable explanation of how the relevant facts support the determinations made. For the Market Statement submitted in 1998, the United States used data on production, shipments, employment, wages, man-hours, capacity utilisation, inventory and unfilled orders provided by the American Yarn Spinners Association (AYSA). The Market Statement declares that the United States "verified and determined that AYSA production data for the defined industry was consistent with official Bureau of the Census production statistics for the subject yarn". However, in December 1998, when the Market Statement was finalised, official statistics for the period ending in August 1998 were not yet available. The United States could, therefore, not have verified the consistency between the AYSA data and official data.

4.96 Thus, for the period January-August 1998, during which most of the unfavourable developments are claimed to have occurred, the United States used exclusively unverified data supplied by AYSA, which had an interest in the safeguard action and which was already known to have previously supplied incorrect data. The Census figures published subsequent to the finalisation of the Market Statement cannot be reconciled with the data provided by AYSA for this period. While AYSA had reported a 10.2 per cent decline in production between January-August 1997 and January-August 1998, Census figures show only a drop of 5 per cent from 1997 to 1998. This confirms that the data provided by AYSA could not be trusted.

4.97 Pakistan also points out that the United States used in its investigation data on profits and investments based on the results of surveys conducted by AYSA among its members. The results of the survey were reported on an aggregate basis. The United States indicates in the Market Statement that it verified that AYSA conducted the surveys and that the firms responded to them, but does not indicate how it verified the accuracy of the information reported by the establishments included in the survey. During its consultation with the United States, Pakistan repeatedly requested details on the AYSA survey, such as the names of the respondents. The United States, however, declined to provide any such details.

4.98 In sum, Pakistan contends that, instead of examining the entire industry producing combed cotton yarn, it examined only those producers that are united in AYSA, the lobbying organisation that had asked for the restraint. However, AYSA's membership comprises only about one half of the domestic producers of combed cotton yarn. For its determination on the changes in economic variables affecting these producers during the first eight months of 1998, the United States relied exclusively on the data supplied by AYSA. It did not verify any of these data even though this organisation had previously supplied the United States government with production data that were incorrect. AYSA informed the United States government that three of its members had closed during the investigation period and 423 jobs were lost. This information turned out to be incorrect because, in fact, the three producers had not closed but switched to the production of carded yarn. As a result, the United States never examined the state of any of the "closed" producers. Nor did it examine whether the workers had actually lost their job or had merely been assigned to another activity in the same plants. The determination of the United States that its combed cotton yarn industry was suffering serious damage during the first eight months of 1998 was, thus, based on unverified information supplied by an interested party that had previously supplied incorrect data. The information was incomplete because it concerned only one half of the producers and, as far as plant closures and job losses are concerned, incorrect.

4.99 Pakistan also notes that the United States combed cotton yarn industry has undergone extensive restructuring in the years prior to the imposition of the restraint. Thus, between 1993 and 1997 the number of units producing combed cotton yarn for sale declined by 37 per cent while production increased by 44 per cent. It was, therefore, far from clear whether the adverse changes in economic variables reported by AYSA could be ascribed to the rise in imports or autonomous adjustment. Nevertheless, the United States made no effort to segregate the various potential causes of the damage reported by AYSA. One way to demonstrate that imports were the cause would have been to demonstrate that there was a consistent relationship between the trends in imports and trends in economic variables. However, there was no such consistent relationship during the investigation period covering two years and eight months. All that the United States was able to show was that a rise in imports coincided with adverse changes in the economic variables reported by AYSA during the last eight months of this investigation period. The United States determined that the rise in imports constituted a threat of serious damage without making any attempt to assess and quantify the size of the expected increase and its impact on the domestic industry. All it did was to extrapolate the present conditions into the future. Finally, it attributed the whole of the damage reported by AYSA to imports from Pakistan, ignoring completely the fact that imports from Mexico had been more substantial and had risen more sharply than those of Pakistan. As a result, it effectively attributed to Pakistan all of the damage reported by AYSA even though Pakistan's could not possibly have been its sole cause.

4.100 While Pakistan fully recognises that the ATC does not impose on the importing Member any specific method for collecting and verifying the data on the relevant economic factors; nevertheless, whatever method the Member has chosen, it must result in a demonstration that the increased quantities of imports are causing serious damage or actual threat thereof.[52] Pakistan's claim is that the method for collecting and verifying data that the United States chose to adopt in this specific case did not result in the demonstration required by Article 6.2. The panel on *United States - Blouses*, while fully recognising the United States' right to determine its methods for collecting data,[53] criticised it for having collected only inadequate data on certain economic factors. Thus, it concluded that the United States should have been able to obtain more reliable data on market shares by data from private surveys "or even directly from the fifteen or so producers in this sector".[54] It is, therefore, clear that the right to choose a method for collecting and verifying the data does not include the right to chose a method that fails to generate reliable and correct data.

4.101 Pakistan believes for these reasons that it has established an unrebutted *prima facie* case that the United States based its damage determination on unreliable and unverified data, that it failed to examine the state of the allegedly "closed" mills that switched to the production of carded yarn and that the United States has, therefore, not provided the required demonstration of serious damage of the industry as it had defined it.

Arguments of the United States

4.102 The **United States** argues that it employed an appropriate and reasonable methodology for collecting and analyzing the data used to support its determination that the surge in imports from Pakistan had caused serious damage and actual threat of serious damage to the U.S. combed cotton yarn for sale industry. The United States conducted its investigation using the best information available and relied on official data to the extent possible. The United Sates relied on official U.S. Bureau of Census Statistics to obtain import and export data for the defined industry and to verify the production data supplied by AYSA. Because official data were not available for shipments, employment, wages, man-hours, capacity utilization, inventories, unfilled orders, productivity, profitability, and investment, the United States utilized AYSA data for these factors and verified them

[52] WT/DS33/R, para. 7.24
[53] WT/DS33/R, para. 7.52.
[54] WT/DS33/R, paras. 7.37 and 7.51.

to the extent possible. The United States also relied on published data to the extent that it was available.

4.103 The United States goes on to point out that the ATC sets forth no methodology for the collection and analysis of data and affords the importing Member discretion in establishing its methodology, including relying on data furnished by the private sector. The Panel in the *United States – Wool Shirts* case specifically allowed the importing Member to collect the relevant data from relevant sources, including the private sector. The ATC only requires that the Member accompany its request for consultations with specific, relevant, and current factual information related, as closely as possible, to identifiable segments of production and to the 12-month reference period. As discussed above, the United States fully complied with these requirements. U.S. data – reflecting data for 1996, 1997 and for the first eight months of 1998 – was as up-to-date as possible. The data enabled the United States to evaluate the level of imports and the effect of the increase in imports of combed cotton yarn on the defined domestic industry, as reflected in such economic variables as output, productivity, capacity utilization, inventories, market share, exports, wages, employment, domestic prices, profits and investment.

4.104 The United States verified all data it received from the private sector to the extent possible. None of Pakistan's arguments to the contrary establish a violation of the ATC. Rather, Pakistan makes unfounded allegations and introduces new evidence outside the scope of this dispute in an effort to cast doubt on the reliability of the U.S. data. The United States also states that, contrary to Pakistan's assertions, AYSA data are not "inherently untrustworthy." The United States verified AYSA data by comparing them with official data and by engaging in direct discussions with individual firms. Also contrary to Pakistan's insinuations, AYSA did not provide "incorrect" production data for 1997 and did not provide "false" and then "unverifiable" data for the first eight months of 1998. AYSA production data for 1996 and 1997 were fully consistent with official U.S. Bureau of the Census data. As the United States explained with respect to data for 1998, official 1998 production data were not available to the United States at the time the Market Statement was prepared. The AYSA data, current through August 1998, were the most up-to-date available at that time, and the United States assessed its accuracy based on the accuracy of other AYSA data and discussions with individual producers. In addition, contrary to Pakistan's completely false claims, the subsequently released 1998 official Census data supported rather than undermined AYSA figures. The United States discussed the consistency of the two sets of data, and pointed out that, while AYSA production data were slightly higher than Census Bureau data, the difference in each year was quite small (only two-tenths of one per cent) and the level of decline was the same for both sets of data.

4.105. The United States also responded to Pakistan's calculations on page 23 of its Second Written Submission, where Pakistan claims to have demonstrated that the AYSA partial year data was necessarily in conflict with full year Bureau of the Census data. The United States claims that its analysis shows Pakistan's computation yields a mathematically impossible result.

4.106 Contrary to assertion by Pakistan, the United States claims that the membership of AYSA fully represents the yarn for sale industry even though five of its members produce fabric in addition to sales yarn. These members produce fabric and sales yarn in separate divisions as separate profit centers and report their production data separately. The separate yarn for sale divisions of these five AYSA members are, therefore, part of the defined yarn for sale industry. Concerning Pakistan's claims that the United States failed to examine the entire industry because it relied on data furnished by AYSA, the United States points out that the membership of AYSA fully represents the yarn for sale industry and the United States verified this information to ensure that it was complete. Pakistan has been unable to advance any argument that contradicts this fact. The Panel requested an explanation for the adoption by the United States of the "best information available" standard, and in reply, the United States explains that it did not intend to imply in its first written submission that the "best information available" was a standard required by the ATC. Rather, in the absence of any specific requirement for the collection of data set out in the ATC, the United States was making the

factual statement that it relied on the best and most reliable information available to it in the preparation of the Market Statement. In addition, the United States does not intend to imply that its data collection ended with whatever statistics were available. Rather, the United States verified all data it received from the private sector, to the extent possible, to ensure their accuracy and consistency with official statistics.

4.107 In sum, the U.S. Government employed an appropriate and reasonable methodology for collecting and analyzing the data and conducted its investigation using the best information available relying on official data to the extent possible. Where official data were not available, the United States used information from other sources and conducted ongoing verification of this information. Pakistan's insinuations that the data supplied by the AYSA were "false data" or that the United States failed to verify the accuracy of such data are plainly wrong. Pakistan offers no concrete evidence to support these claims; nor does Pakistan explain how the United States should have acted any differently. Pakistan merely makes and draws inferences from unsupported and inaccurate assertions.

Discussion of the Data Verification Methodology

4.108 In a question to the United States, the Panel notes the above explanations that the United States has verified the data for the Market Statement by (a) comparing them with the US official statistics prepared by the US Bureau of the Census; and (b) direct contact with producers (including vertically integrated firms). The Panel asks the United States to explain this second aspect more fully and to describe how this verification methodology (both in regulation and practice) compared with the methods used in other types of investigation of imports (e.g., in antidumping/countervailing duties/safeguards procedures).

4.109 In its response, the **United States** notes that the ATC sets forth no requirements regarding the data collected and analyzed during an investigation conducted by the importing Member. The United States recalls that Article 6.7 provides: "The Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action. 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; and (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. In respect of requests made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8 … .". The Panel on *United States - Wool Shirts* did not find that the ATC imposed any specific methodology for the collection and analysis of data. Instead, it underscored that "... we do not interpret the ATC so as to impose on WTO Members any method of collecting data but that it is up to each concerned Member to collect the relevant data from relevant sources, possibly including the private sector.".[55] The United States has fully complied with these requirements by providing Pakistan with a Market Statement containing specific, relevant, and current information with respect to the economic variables listed in Article 6.3 of the ATC and the attribution factors in Article 6.4. The Market Statement, reflecting data from 1996, 1997, and the first eight months of 1998 and including the most current import data through October 1998, was as up to date as possible and was related, as closely as possible, to identifiable segments of production and to the reference period set out in Article 6.8.

4.110 Commenting on the above response of the United States, **Pakistan** emphasises that it fully recognises that the ATC does not impose on the importing Member any specific method for collecting and verifying the data on the relevant economic factors and that it does not exclude the resort to

[55] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 6 January 1997, WT/DS33/R, at para. 6.4.

private sector data. However, whatever method the Member has chosen, it must result in a demonstration that the increased quantities of imports are causing serious damage or actual threat thereof".[56] Pakistan's claim is that the method for collecting and verifying data that the United States chose to adopt in this specific case did not result in the demonstration required by Article 6.2. The panel on *United States - Blouses*, while fully recognising the United States' right to determine its methods for collecting data,[57] criticised it for having collected only inadequate data on certain economic factors. Thus, it concluded that the United States should have been able to obtain more reliable data on market shares by data from private surveys "or even directly from the fifteen or so producers in this sector".[58] It is, therefore, clear that the right to choose a method for collecting and verifying the data does not include the right to chose a method that fails to generate accurate and reliable data and that the Member may have to obtain data directly from the companies involved.

4.111 The **United States** goes on to explain its earlier statements that it has carefully confirmed the accuracy and reliability of the core data in this case. The United States used official Bureau of Census data as source data to the extent possible (e.g., import data) and to verify data provided by the AYSA. AYSA collected data from the industry on production, shipments, employment, man-hours, wages, capacity utilization, inventories, exports, unfilled orders, profits, price, and investment, aggregated the data, and provided aggregate information to the United States. The United States verified all of this data to the fullest extent possible. In addition to relying on official statistics for verification purposes, the United States engaged in direct discussions with individual firms to verify AYSA data. For instance, the United States obtained profit and investment data that were based on the results of two separate surveys conducted by AYSA of the financial performance of its members which produce combed cotton yarn for sale. The surveys were designed to obtain information about the combed cotton yarn for sale industry and included information specifically with respect to combed cotton yarn for sale. The surveys did not reflect the financial performance of firms that do not produce combed cotton yarn for sale, and reflected only those operations of member firms producing combed cotton yarn for sale.

4.112 **Pakistan** comments on the above paragraph stating that, as far as the data for the crucial period of the first eight months of 1998 were concerned, no official statistics were available that could be used for verification purposes. The AYSA data could not be verified through direct discussions with individual firms because these data had been supplied on an aggregate basis. Notwithstanding the pointed question of the Panel, the United States provided no evidence demonstrating the contrary.

4.113 The **United States** continues its explanation, stating that eight firms, representing 90 per cent of the domestic industry, had participated in both of these surveys. Each of these firms, except one, was privately owned and did not report financial data outside the company. Therefore, data on profitability and investment were collected through surveys conducted by AYSA with the understanding that results would be reported to the United States on an aggregate basis. The United States engaged in individual discussions with these eight firms to confirm that they had participated in the survey and that the aggregate figures reported by AYSA were consistent with their own profitability and investment picture. With respect to profits, the eight firms which responded to the survey reported declining profits of combed cotton yarn for sale. The results of the survey indicated that the industry's profits, as measured by operating income from sales of the combed cotton yarn as a per cent of sales, declined throughout the investigation period. Likewise, the United States verified the results of the AYSA investment survey through individual discussions with these firms with the view to assessing the degree to which investment or lack of investment affected the competitiveness of the U.S. combed cotton yarn for sale industry. Typically, the responses fell into two categories. Investment had been made in either machinery for the production of yarn, or automated materials handling and yarn packaging. In either case, the objective was to cut cost in an effort to become as

[56] WT/DS33/R, para. 7.24
[57] WT/DS33/R, para. 7.52.
[58] WT/DS33/R, paras. 7.37 and 7.51.

competitive as possible within the global market. However, according to the survey, as verified by the United States in conversations with individual firms, because of sharply declining returns, the prospects for investment in new capacity in the industry, or even new production or handling methods to improve efficiency, were not good.

4.114 Furthermore, the United States has engaged in separate conversations with individual mills to verify AYSA-supplied data concerning the number of mills that exited the combed cotton yarn for sale industry, the number of jobs lost, and that these job losses were in the production of combed cotton yarn. The United States also engaged in direct discussions with vertically integrated fabric producers to verify the extent to which such firms purchased or sold combed cotton yarn in the open market. In Appendix I to the Market Statement, the United States noted that it "verified that less than five per cent of the integrated sector's yarn consumption was purchased from the 'for sale' market during the period covered by the investigation." The United States based this figure on a poll, conducted by AYSA, of leading manufacturers (both sales yarn and vertically integrated fabric producers), which indicated that vertically integrated fabric producers play a small role in the purchase of combed cotton yarn, estimated to be less than 5 per cent per year of the sales yarn market. The United States verified this information in individual discussions with representatives of large vertically integrated fabric producers. The United States specifically asked these producers what per cent, if any, of their combed cotton yarn requirements were met by yarn that was purchased from the "for sale market" during the period covered by the investigation. In individual discussions with the United States, these vertically integrated fabric producers confirmed that, on average, for the period covered by the investigation, they purchased less than 5 per cent per year of their combed cotton yarn requirements.

4.115 In addition to the above, prior to the TMB review of the transitional safeguard measure, the United States had engaged in additional discussions with vertically integrated fabric producers to determine what per cent of their combed cotton yarn requirements were met by purchases of yarn from the "for sale" market, and what per cent of their production was sold.[59] Based on discussions with these vertically integrated fabric producers, in addition to the information provided by the vertically integrated fabric producers prior to the TMB review, the United States determined that these mills purchase roughly two per cent of their yarn requirements from the "for sale" market and sell roughly one per cent of their output in the "for sale" market.

Comparing the ATC Verification Process with Methods in Other Agreements

4.116 In response to the question by the Panel as to how this verification process compared with the methodology used by the United States in other types of import investigations, the **United States** commented that the President had delegated the authority to implement textile and apparel agreements – including the ATC – to the interagency Committee for the Implementation of Textile Agreements ("CITA").[60] For purposes of safeguard actions taken under Article 6, the Office of Textiles and Apparel ("OTEXA"), within the U.S. Department of Commerce, conducts the investigation and produces the statement of serious damage, actual threat thereof, and attribution, and CITA reviews the statement and makes the final determination of serious damage, actual threat thereof, and attribution. As discussed above, the ATC contains little procedural guidance concerning the investigations or the

[59] The United States asked these mills four separate questions: during the period 1996, 1997 and the first eight months of 1998, have you 1) produced any combed cotton yarn for your own consumption; if so, how much?, 2) have you sold any combed cotton yarn; if so, how much?, 3) have you purchased any combed cotton yarn from the "for sale market"; if so, how much?, and 4) have you purchased any combed cotton yarn from foreign sources; if so, how much?

[60] Section 204 of the Agricultural Act of 1956, as amended, grants the President the authority to regulate imports of textile products. 7 U.S.C. sec. 1854. The President delegated this authority to CITA pursuant to Executive Order 11651 of March 3, 1972.

determinations of serious damage – other than the factors contained in Article 6.3 of the ATC. U.S. law and regulation do not impose any additional requirements.

4.117 The United States explains that antidumping and countervailing duty laws are administered by the U.S. Department of Commerce and the U.S. International Trade Commission ("USITC").[61] The USITC also has responsibility for assessing whether U.S. industries are seriously injured by imports in a global safeguard action. In contrast to transitional safeguards taken in the textile area, U.S. statute and regulation provides extensive guidance with respect to procedures, time-frames, and investigations taken with respect to antidumping and countervailing duty actions[62] and global safeguard actions.[63] With respect to verification, the Department of Commerce verifies information provided by respondents in anti-dumping and countervailing duty proceedings, in accordance with Article 6.7 and Annex I of the Antidumping Agreement and Article 12.6 and Annex VI of the SCM Agreement, respectively, as well as the pertinent U.S. statutory and regulatory provisions.[64] In each instance, the main purpose of the investigation is to verify information provided or to obtain further details about the information received in the questionnaire response from the responding company or government. In addition to verifying the accuracy of the submitted information, the practice of the Department of Commerce is also to verify that relevant data were not omitted from the response.[65]

4.118 In injury investigations under the antidumping, countervailing duty, and safeguard laws, the USITC may verify data submitted by representative companies in the relevant domestic industry. Although no domestic laws or regulations specifically govern the methodology for verifying such data in injury investigations, the typical USITC verification process is as follows. During the investigation, USITC prepares and sends to the relevant domestic producers questionnaires seeking the types of industry information required by the U.S. statute and the relevant WTO agreement. Responses to the questionnaires are reviewed by the USITC. As considered appropriate, USITC staff may conduct onsite verification of the information submitted by domestic producers in the replies to these questionnaires. Typically, the verification includes a review of all information submitted in the company's questionnaire response. Often, an important aspect of the verification is an examination of the allocation of costs between the product covered by the investigation and other related products produced by the company. Allocations are typically an issue since few antidumping, countervailing duty, or global safeguard investigations cover products that constitute the entire output of the U.S.

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[61] Less than fair value price information (used in antidumping determinations) and subsidy information (used in countervailing duty determinations) fall within the jurisdiction of the Department of Commerce. Injury determinations for both antidumping and countervailing duty purposes fall within the jurisdiction of the USITC.

[62] Subtitle IV of the Tariff Act of 1930, 19 U.S.C. sec. 1671-1677n (provides the U.S. statutory requirements for countervailing and antidumping duties). See also 19 C.F.R. Part 351 (provides the federal regulations for antidumping and countervailing duties) and 19 C.F.R. Part 207 (provides the federal regulations for injury determinations in antidumping and countervailing duty cases).

[63] Section 201-204 of the Trade Act of 1974, as amended, 19 U.S.C. sec. 2251-2254 (provides U.S. statutory requirements for safeguard actions). See also 19 C.F.R. Part 206 (provides the federal regulations for investigations relating to safeguard actions).

[64] See 19 U.S.C. sec. 1677m(i) (U.S. statutory requirement that "[t]he administrating authority shall verify all information relied upon in making ... a final determination in an investigation ...") and 19 C.F.R. sec. 351.307 (U.S. federal regulations concerning verification of information in a determination of sales at less than fair value or of a countervailable subsidy).

[65] The verification undertaken by the Department of Commerce in antidumping and countervailing duty investigations involves information relating to foreign respondents (and therefore may be less relevant to the Panel's question, which addresses verification of data provided by the relevant domestic industry). For further details regarding the verification process of the Department of Commerce in anti-dumping actions, see Commerce Anti-dumping Manual, "Verification," Chapter 13 at 2, www.ita.doc.gov/admanual. Following the verification, Commerce prepares a report detailing the methods, procedures, and results of the verification. 19 C.F.R. sec. 351.307(c).

producers. Unlike OTEXA, the USITC also possess subpoena powers to compel the response of information from outside sources.[66]

4.119 The United States stresses that the practices described above have been developed by the Department of Commerce and the USITC in connection with investigations in antidumping, countervailing duty, and global safeguard cases. While the practices of these two agencies differ from each other and from that of the Department of Commerce in a transitional safeguard case, what is crucial is that each practice comports with the obligations of the relevant WTO agreement and that the practice satisfactorily establishes the reliability of the data on which the decision is based. For example, where the ATC is silent, Article 6.6 of the Antidumping Agreement provides that the "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based;"[67] Annex I of the Antidumping Agreement and Annex VI of the SCM Agreement authorize "on-the-spot investigations" for purposes of verifying information provided or obtaining further details; and paragraph 3 of Annex II to the Antidumping Agreement states that "[a]ll information which is verifiable, which is appropriately submitted ... should be taken into account when determinations are made." Practices developed under these agreements accommodate these express provisions. In addition, Article 6.7 of the Antidumping Agreement and Article 12.6 of the SCM Agreement authorize, but do not require, investigations of foreign entities for verification, subject to certain limitations. The Safeguards Agreement does not address verification, but unlike the ATC, it provides detailed guidance with respect to the investigation procedures of the importing Member.[68] Accordingly, the practices developed under that agreement reflect that guidance.

4.120 The Panel also asked for an explanation of whether and how exporting Members are given the opportunity to present their views and supporting evidence in the US investigation procedures. The United States explained that Article 6.7 of the ATC requires that the Member proposing transitional safeguard action seek consultations with the relevant Member and accompany that request with specific, relevant, and up-to-date factual information, but that it does not set forth requirements for the collection and analysis of data. The ATC allows the importing Member to establish this methodology. Nor does the ATC (unlike non-transitional agreements) contain specific requirements for public notice and comment during the investigation. The United States fulfilled the requirements of the ATC by requesting consultations with Pakistan accompanied by the specific, relevant, and current factual information contained in the Market Statement. Although not required by the ATC, the United States also provided public notice and solicited public comments on its request for consultations with Pakistan regarding Category 301 imports of combed cotton yarn. The United States added that it believes that it would be inappropriate for the Panel, particularly in the absence of such allegations by Pakistan, to impute requirements from non-transitional WTO agreements (e.g. specific notice and comments procedures) into the text of the ATC, particularly in view of the carefully negotiated balance that this agreement struck between importing and exporting Members.

[66] 19 U.S.C. sec. 1333; 19 C.F.R. sec. 207.8.

[67] Article 12.5 of the SCM agreement similarly provides that "... the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based."

[68] Safeguards Agreement, art. 3. There is no parallel to this provision in the ATC.

4.121 In sum, the United States explains that, regardless of the agreement under which the need to verify data arises, the objective is in all instances the same, i.e., to satisfactorily establish the reliability of the data on which the decision is based. This could be accomplished using any number of approaches. Accordingly, the question in this case should be whether there was any serious doubt concerning the reliability of the data presented rather than whether the steps taken in this case were the same as or different from the steps that might be taken by another agency, or a different component of an agency, in a different investigation involving separate facts and a different WTO agreement. In this case, the United States has engaged in a careful and thorough verification of the data it received from AYSA to ensure its completeness and accuracy. The United States has relied on official U.S. Bureau of Census statistics, where available, to assess the data provided by AYSA. The United States has also engaged in discussions with individual mills to confirm data in areas where official statistics were unavailable. Therefore, Pakistan's many unfounded and unproven assertions concerning the "unverified," "unverifiable," "untrustworthy, "inaccurate," "incorrect," or "false" AYSA data have no basis in fact and fail to undermine the inescapable conclusion that the U.S. transitional safeguard measure on imports of combed cotton yarn from Pakistan is fully consistent with the ATC.

Further Comments of Pakistan

4.122 **Pakistan** points out that it is not claiming that the United States violated any rules on the collection, verification or evaluation of data. It recognises that there are no such rules. However, Pakistan claims that, by relying exclusively on unverified data supplied by the lobbying organisation that stood to benefit from the safeguard action and that had previously furnished incorrect information, the United States chose a data collection method prone to abuse by an interested party and, therefore, incapable of yielding the required demonstration. Pakistan emphasizes that it does dispute the core data on which the United States relied in making its determinations. The United States reliance on unverified data supplied by an organisation of producers standing to benefit from the safeguard is of great concern to Pakistan. It considers this to be an important issue before this Panel. The decision of the United States to respond to Pakistan's arguments by claiming that Pakistan never made them is regrettable.

4.123 With respect to the above point and in response to a Panel question, Pakistan states that it agrees with the United States that the Panel cannot examine evidence for the purpose of a reinvestigation of the market situation. However, according to the established WTO jurisprudence endorsed by the Appellate Body, the Panel must make an objective assessment in accordance with Article 11 whether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determination made. The *U.S. - Underwear* panel made clear that the task of a panel under Article 11 of the DSU comprises an examination of whether the United States "had examined all relevant facts before it (including facts which might detract from an affirmative determination …)".[69] Pakistan is, therefore, entitled to submit facts that were available to the United States at the time of the investigation but that it failed to consider in the Market Statement. Otherwise, Pakistan would be prevented from demonstrating that the United States did not consider relevant facts detracting from an affirmative determination.

Further Comments by the United States

4.124 In this regard, the **United States** notes that Pakistan introduced a market statement produced in 1997 on combed cotton ring spun yarn (a subset of Category 301 combed cotton yarn) to suggest that the U.S. data were unreliable. Given that the Panel is limited to the evidence used by the Member in making its determination, this document is outside the scope of the Panel's review and should not be considered. The figures contained in previous market statements are not relevant to this dispute. As the United States explained, the 1997 market statement on ring-spun cotton yarn is not an issue in

[69] WT/DS24/R, para. 7.13.

this case. No safeguard measure was applied as a result of that investigation. Accordingly, it is inappropriate for Pakistan to draw conclusions about the Market Statement at issue in this proceeding from previous documents covering different time periods. Nevertheless, this document – which the United States used to consider transitional safeguard action on imports from Pakistan of combed cotton ring spun yarn – only enhances the integrity of the Market Statement. The United States ultimately decided to drop its Article 6 action after ongoing verification of the data raised questions about the data in the 1997 statement. Thus, far from suggesting that the United States used unreliable data, the circumstances surrounding the U.S. decision not to take transitional safeguard action on combed cotton ring spun yarn demonstrates the extent to which the United States used the best information available, verified the information to the extent possible and continued to monitor the industry to ensure that the information that ultimately formed the basis for the Market Statement was accurate.

4.125 The United States is also concerned that Pakistan is attempting to mislead the Panel into questioning the accuracy of production statistics supplied by AYSA by introducing 1998 data released by the U.S. Bureau of Census subsequent to the preparation of the Market Statement. These data were not available to the United States at the time it prepared the Market Statement and should not be considered. Nevertheless, contrary to Pakistan's assertions, the 1998 Census data support AYSA data. Both AYSA and Census data – which compare two different time periods – showed a sharp decline in production in 1998. The fact that the level of decline was different for the two data sets does not indicate that either is incorrect. Rather, they both confirm that the trend was down during 1998 and imply that the greatest downturn in production occurred during the first eight months. Furthermore, Pakistan's assertions regarding the accuracy of AYSA data on profitability and investment are unfounded. The United States verified the profit and investment information to the extent possible and Pakistan provides no reason to question their accuracy.

4.126 The United States also responds to Pakistan's comments regarding AYSA, stating that AYSA is not a lobbying organization formed for the purpose of securing safeguard action in this case and does not represent half of the producers of the combed cotton yarn for sale industry. The AYSA represents the interests of the entire combed cotton yarn for sale industry and has done so since 1967. Reliance on information supplied by the sole voice of the combed cotton yarn for sale industry – information which was subsequently verified – was, therefore, perfectly reasonable and appropriate.

Information on the Status of Certain Manufacturers

4.127 In questions to the **United States**, Pakistan raised a number of points regarding specific manufacturers in the U.S. yarn and textile industries. First, Pakistan submits information previously provided to the TMB by the United States concerning Avondale Mills, specifically, stating that this firm did not produce combed cotton yarn for its own consumption. Pakistan asked, if Avondale Mills is an integrated fabric producer, would this mean that it "sells" all its own manufactured combed cotton yarn production and that it purchases its requirements of combed cotton yarn, for manufacture of fabrics from the "for sale market"? The United States replies that Pakistan's question relies on the faulty assumption that Avondale Mills both produces combed cotton yarn for sale and manufactures fabric from combed cotton yarn. While one establishment of Avondale Mills' yarn division produces combed cotton yarn for sale, its fabric divisions do not use combed cotton yarn in their manufacture of fabric and, therefore, do not purchase combed cotton yarn from the market. The United States goes on to explain that the TMB document in question is completely accurate and was prepared in response to a question from the TMB by the U.S. delegation in consultation with a representative from AYSA. Because Pakistan has repeatedly called AYSA information into question throughout these proceedings, the United States – in preparing the more complete description of Avondale in response to this question – has made personal contact with representatives of Avondale and has relied on an Avondale submission that is required by the federal government (i.e., Avondale's "10-K" submission to the Securities and Exchange Commission) to reconfirm the understanding of the United States of Avondale's operations. This further inquiry fully supports the information presented to the TMB.

4.128 The United States went on to explain that Avondale Mills was organized into three principal business segments: yarns; greige (woven fabric in an unbleached, undyed state as taken from the loom) and specialty fabrics; and apparel fabrics. These three business segments were separate divisions. As the United States explained in its answers to written questions from Pakistan, "division", as it is typically used to refer to business units within a company, refers to an organizational entity that operates in a distinct business area. Typically, it is self-contained and has its own functional departments (for example, its own finance, purchasing, production, and marketing departments). Avondale's three business segments were self-contained and had their own functional departments. Avondale's yarn division produces various types of yarn at several manufacturing facilities. As reflected in the TMB document in question, one of these facilities produces yarn, chief weight of combed cotton spun, for sale. The TMB document also correctly describes Avondale's yarn segment as a separate sales yarn division with its own management and sales force, operating as an independent sales yarn company. All of this combed cotton yarn is sold on the open market.

4.129 The TMB document referred to above also states that "Avondale Mills does not produce combed cotton yarn for its internal consumption". In response, **Pakistan** asks the United States that if Avondale does not produce combed cotton yarn for its own consumption, then are Avondale's combed cotton yarn requirements for the manufacture of fabric met by the purchase of combed cotton yarn from the market? The United States replied that the answer to this question is no. Neither of Avondale's two fabric divisions have any "combed cotton yarn requirements," and, therefore, neither purchases combed cotton yarn. First, as to the greige and specialty fabric division, none of the fabrics produced by this division uses combed cotton yarn, chief weight of cotton. In fact, virtually all of Avondale's cotton fabric produced within this division is carded cotton fabric. The greige and specialty fabric division manufactures undyed, unfinished cotton and cotton-blend greige fabrics that are marketed to apparel, home furnishing and industrial products manufacturers and a variety of specialty fabrics that are marketed to recreational, industrial and military products manufacturers, including coated fabrics for awnings, tents, boat covers and life vests. Second, the apparel fabric division manufactures fabric for use in jeans, utilitywear, sportswear and other apparel, using carded cotton and carded cotton-blend yarn. That is, these cotton and cotton-blend products are produced using yarns other than combed cotton yarn, chief weight cotton spun. The apparel fabric division does not purchase combed cotton yarn. In the rare circumstance that combed cotton fabric is required, the United States has been advised by representatives of Avondale that the apparel fabric division purchases the unfinished combed cotton fabric (not combed cotton yarn) and finishes it to its customers specifications. These facts were confirmed by the United States through a conversation with Avondale representatives.

4.130 Pakistan also refers to a statement by the United States that the AYSA represents the interests of the entire combed cotton yarn for sale industry and has done so since 1967. Pakistan had found companies listed as offering cotton combed yarn for sale whose name did not appear on the list of members of AYSA and manufacturers offering cotton combed yarn for sale that are not members of AYSA. Pakistan asked, in view of these mills offering cotton combed yarn for sale (many of them integrated mills) how can the United States state categorically that AYSA represents the interest of the entire combed cotton yarn for sale industry?

4.131 In reply to this question, the **United States** provided the following information for the four companies for which Pakistan had obtained information from the On-Line Product Directory of American Textile Manufacturers Institute:

(1) *Dan River Inc.* - Dan River is a vertically integrated fabric producer that, at one time, produced woven and knit fabric. In 1996, Dan River shut down its circular knit fabric operations, and was left with excess yarn spinning capacity. Rather than idle the spinning frames, Dan River disposed of (or sold) whatever output it did not consume in its woven fabric operations through brokers.

Any production of combed cotton yarn that is sold by Dan River was part of the *de minimis* amounts of combed cotton yarn that is sold by vertically integrated fabric producers, which were captured by the United States in its investigation. The President of the company described the volume of these sales as "insignificant", i.e., less than 2 per cent of its total combed cotton yarn production. As the company is not substantially engaged in the production of yarn for sale, it is not eligible for AYSA membership.

(2) *Nisshinbo California, Inc.* - Prior to its sale to Mount Vernon Mills in 1999, Nisshinbo was a vertically integrated operation with relatively small amounts of combed cotton fabric production.

(3) *Saunders Thread Company* is a producer of combed cotton sewing thread, not yarn. Cotton thread is not included in Category 301; rather it is included in Category 200, Yarn For Retail Sale, Sewing Thread.

(4) *Titan Textiles Co., Inc.* - Titan Textiles Company imports combed cotton yarn and offers this yarn on the "for sale" market. In the United States, this firm manufactures textured polyester, nylon filament, spun rayon, and spun polyester yarns, but not combed cotton yarn.

ATMI has confirmed to the United States that the listings of Nisshinbo California Inc., Saunders Thread Company and Titan Textiles Co. Inc. in the ATMI on-line product directory as suppliers of combed cotton yarn were in error.

4.132 The United States also notes that the companies identified by Pakistan in the Cotton Council International website are not, as Pakistan claims, manufacturers of combed cotton yarn. Nor does the website from which the information was obtained represent them as such. Rather, this website is a resource designed to assist overseas buyers in locating sources of products, including yarn manufactured from U.S. raw cotton. These sources can include textile products made outside of the United States from U.S. raw cotton. As to the four entries unearthed by Pakistan from the Cotton Council International website: (1) *American Textile Export Company* (AMTEC) is a yarn export trading company for AYSA members. AMTEC has no production of any kind; (2) *Andrex Industries Corp.* is a producer of circular knit fabric. All of its yarn requirements, including cotton, are purchased from the "for sale" market; (3) *Joe Tisdale & Assoc.* is a yarn sales agent; and (4) *L.P. Muller & Co., Inc.* is a commission broker. It does not sell any combed cotton yarn; rather, it sells carded cotton yarn. In sum, the United States correctly established that AYSA is fully representative of the combed cotton yarn for sale industry. The "facts" offered by Pakistan in this question cast absolutely no doubt on the U.S. reliance on AYSA as representative of the interests of the entire combed cotton yarn for sale industry.

4.133 In its comments on the above responses of the United States, **Pakistan** sums up its views on this aspect of the case, saying that it considered that the following facts remained undisputed between the parties to this dispute:

- AYSA gave the United States government incorrect production figures in 1997. The inaccuracy contributed to a damage determination in 1997 intended to favour the membership of AYSA.

- The information on production supplied by AYSA for the period January-August 1998 was unverifiable by Census figures because it related to an eight-month period for which the Census does not collect statistics. The decision of the United States to base its damage determination on changes during eight-month periods rather than calendar year periods gave AYSA the possibility to submit, once again, false data that could not subsequently be proven incorrect by Census figures.

- AYSA incorrectly reported that three of 22 of its members "closed" and incurred "job losses" during January - August 1998, while in fact they had merely switched to the production of carded yarn.

- The United States did not verify whether the allegedly "closed" establishments that had switched to the production of carded yarn had suffered serious damage. The United States simply assumed that switching from combed to carded yarn production entails serious damage.

- The United States also did not verify any of the data on profitability and investment submitted by AYSA. In particular, it did not request data on financial performance directly from the eight firms that had participated in the surveys conducted by AYSA. The contacts with the member companies merely served to "confirm that they had participated in the survey and the aggregate figures reported by AYSA were consistent with their own profitability and investment picture".[70]

- According to the Market Statement, the United States "verified that the closing of [the three "closed"] establishments were the result of imports in discussions with the companies".[71] In fact, the establishments had not closed at all. The method of verification chosen by the United States, thus, did not reveal the truth.

- The United States domestic law does not impose on the Office of Textiles and Apparel any detailed procedural requirements for the conduct of the investigation for transitional safeguard action. The exporting country is not involved in the investigation. It is, in particular, not given any opportunity to comment on the facts collected by the Office. The Office also does not publicly seek comments on the results of its investigation before making its final determination. The Office does not possess subpoena powers to compel the supply of information from outside sources.[72]

4.134 In the view of **Pakistan**, the undisputed facts listed above demonstrate that the data supplied by AYSA, as the sole interested party involved in the investigation, were inherently untrustworthy and that this was known to the United States at the time of the investigation. They further demonstrate that, for the decisive period January-August 1998, the United States relied exclusively on the figures on production, profits, investments, plant closures and job losses that had been supplied by AYSA. Notwithstanding the fact that AYSA had previously supplied incorrect information favouring its members, the United States did not verify these data. The method chosen by the United States to verify AYSA's information on plant closures and job losses - direct telephone discussions with the "closed" companies involved - failed to reveal that the establishments had not closed at all. The domestic law of the United States does not impose any legal requirements on the Office of Textiles and Apparel and the companies or organisations involved in its investigations that are designed to ensure the accuracy and reliability of the data on which its determinations are based. The undisputed facts lead for these reasons to the inescapable conclusion that the Market Statement on which the

[70] Para. 12 of the answers of the United States.
[71] Para. 1.6(b).
[72] See paras. 17 and 20 of the answer of the United States.

United States based its safeguard action does not provide the demonstration required by Article 6:2 of the ATC.

3. The Arguments Concerning Plant Closures

4.135 **Pakistan** argues that, central to the United States' determination of serious damage, was the finding that, during the investigation period, "three of twenty-two producers of the subject yarn closed" due to the adverse impact of imports and that there was "a loss of 423 jobs" in the defined industry. Pakistan's research, however, revealed that the three producers had not been closed during the investigation period but had retooled to produce a different type of cotton yarn and that, therefore, the workers claimed to have lost their job continued to hold jobs in the same plants.

4.136 Pakistan points out that during the TMB examination the United States did not deny the fact that the three producers had not closed but had retooled to produce a different type of cotton yarn and argued that the three plants could be deemed "closed" (and hence presented as having been damaged by imports) because they were no longer part of the defined industry. This argument would be well founded if the purpose of the safeguard investigation was to ascertain whether domestic producers had to restructure in response to a rise in imports. If that were the case, producers that had to switch to alternative activities as a result of import competition could legitimately be deemed to have suffered serious damage. However, in fact, one of the main purposes of the requirement to examine the effect of the rise in imports on the state of the domestic industry is to oblige the importing Member to ascertain whether or not the industry successfully restructured in response to increased import competition. To the extent that it did, imports did not cause serious damage and there was no reason to impose a safeguard action. Articles 1.5 and 6.1 of the ATC make clear that the transitional safeguard mechanism is not to be used to hinder autonomous industrial adjustment and increased competition. If plants that have successfully adjusted to changes in their competitive environment could be deemed to have suffered serious damage, the objective of these provisions would be frustrated.

4.137 Referring to the above information, the **United States** considers that Pakistan makes a number of misleading allegations regarding plant closures and employment trends. The United States correctly determined that, during the period of its investigation, three establishments exited the defined industry and that, as a result, 423 production worker jobs left that industry. That two of these plants continue to operate in another capacity and in other markets is not relevant to the existence of serious damage in the defined industry. Rather, what is relevant is that the deteriorating industry conditions (i.e., dropping production, declining profitability, increasing inventories, etc.) faced by the combed cotton yarn industry at the time of the surge of imports from Pakistan directly caused these mills to exit the combed cotton yarn industry. Because of the situation they faced, they were no longer viable industry participants and were forced either to shut down entirely or to produce different products.

Producers Leaving the Industry in the 1994-98 Period

4.138 The Panel raised a question concerning whether there were producers leaving the industry in the preceding five years for restructuring or modernization, including both sales yarn firms and vertically integrated firms who manufacture yarn for their own consumption in the production of fabric. In reply, the **United States** explains that it did not investigate whether producers had exited the combed cotton yarn for sale industry during the previous five-year period; rather, consistent with the terms of Article 6.7 of the ATC, the United States considered evidence of plant closures during the two-year and eight-month period of its investigation of serious damage and actual threat thereof. Article 6.7 requires that information with respect to the factors in Article 6.3 be "as up to date as possible" and related as closely as possible to the 12-month reference period set out in Article 6.8. The United States considered the information on plant closures to be relevant in the context of Article 6.3, and therefore included in the Market Statement the information that three mills produced

combed cotton yarn for sale which had exited the industry during the period 1996, 1997 and January-August 1997/1998.

4.139 Given the requirements of Articles 6.7 and 6.8, the United States did not examine whether additional mills had exited the combed cotton yarn business in the five years prior to the period of investigation. Nevertheless, the United States was aware that additional mills producing combed cotton yarn exited the industry in the lead up to the period of investigation. However, the United States chose to limit its analysis of firms exiting the industry to the period of investigation and, accordingly, did not consider these developments in its determination of serious damage/actual threat thereof. Furthermore, given that the U.S. investigation focused on the sales yarn industry, the United States focused on vertically integrated fabric producers only to establish that these mills purchase and sell *de minimis* amounts of combed cotton yarn. The United States did not specifically investigate whether these vertically integrated mills stopped manufacturing combed cotton yarn.

4.140 On this same topic, **Pakistan** states that figures for plant closures (i.e. plants exiting from combed cotton yarn manufacture) over the period of 1994-1998 were available to the United States from its own earlier market statements and the figures on combed cotton yarn production during that period from the US Census statistics. The autonomous industrial adjustment that has taken place in the United States combed cotton yarn for sale industry during 1994-1998 is reflected in the figures for the number of combed cotton yarn for sale plants: 1994 (32); 1995 (26); 1996 (22); 1997 (21); and 1998 (19). For these same years, combed cotton yarn for sale production in 1,000 kg was: 1994 (122,785); 1995 (135,985); 1996 (142,346); 1997 (144,401); and 1998 (136,617).

4.141 A comparison of the figures in the above tables indicates that: (a) there were producers leaving the combed yarn industry before 1996, at that time imports from Pakistan were zero (up to 1994) or nominal (in 1995); (b) many of the exiting plants restructured and modernised; (c) the number of plants exiting from combed yarn is meaningless as far as production of yarn is concerned; and (d) production can increase while the number of plants is decreasing for several reasons. These reasons include: (i) through an autonomous industrial adjustment process, different plants are finding different niches for themselves; (ii) some plants are increasing their combed yarn capacity; (iii) some plants switch over to other products like carded, heather dyed, and also from cotton to man-made fibres like polyester or blends; (iv) the same machinery can produce polyester or polyester cotton blend; and (v) some plants are becoming integrated plants through mergers and acquisitions or by adding fabric to their production. All the above phenomena are part of the process of continuous autonomous industrial adjustment referred to in Article 1.5 of ATC. It is worth noting in this context that the total "for sale yarn" (combed carded, heather dyed etc.) showed a growth from 913.45 mkg in 1997 to 975.94 mkg in 1998 (US Census Bureau).

4.142 In commenting on the figures set out above, the **United States** argues that Pakistan attempts to discredit the U.S. finding of serious damage by introducing tables that purport to show that the events in January-August 1998 in the combed cotton yarn for sale industry were merely part of "continuous autonomous industrial adjustment." These figures reveal that, prior to 1998, the combed cotton yarn for sale industry was engaged in a process of "autonomous adjustment" with some establishments leaving the industry and the remaining establishments becoming more efficient. However, these figures show that the situation changed dramatically in 1998. The number of mills exiting the industry reversed the earlier downward trend, doubling in 1998. And, for the first time since 1994, production decreased, nearly to the 1995 level. In 1998, something significant happened to this industry. As reflected in the facts of this case, something is obvious: the dramatic 91 per cent surge in Category 301 imports during the first eight months of that year. In short, the two concepts – "serious damage" and "continuous autonomous industrial adjustment" – are not, as Pakistan suggests, mutually exclusive. An industry may suffer serious damage or actual threat of serious damage at the same time that it is in the process of readjusting or retooling. The ATC explicitly recognizes this fact by providing a transitional safeguard mechanism during the ten-year restructuring period given to the textiles and clothing sector. Far from being incompatible with continuous autonomous adjustment,

the Article 6 safeguard is an essential element in this restructuring process, giving Members the ability to facilitate adjustment in industries seriously damaged or threatened with serious damage by increased imports.

4.143 **Pakistan** stresses that its argument in respect of the plant closures is straightforward and simple: if a mill switches to the production of a new product and thrives in this new activity, it has engaged in successful autonomous industrial adjustment. In this situation no damage occurred because the plant's value has not declined and the workers have not lost their jobs. This demonstrates that "exiting" a narrowly defined industry is not equivalent to incurring serious damage. The United States could, therefore, not simply assume that the so-called "closed" plants had incurred damage. It had to examine whether the change from combed to carded yarn did, in fact, entail damage. The United States did not conduct such an examination because it had been misinformed by AYSA that the plants no longer existed. Consequently, it failed to demonstrate that the "closed" plants had suffered serious damage. That is the only point the Panel needs to address. How expensive it is to switch from combed to cotton yarn production and how much discretion Members have in determining the seriousness of the damage incurred are issues that need not be decided by this Panel.

4.144 The **United States** strongly rejects Pakistan's contention that "retooling" (paragraphs 4.135 and 4.136) should somehow mitigate the serious damage done to the industry by the surge in imports and that an Article 6 transitional safeguard measure is inappropriate if an industry is able to successfully restructure in response to an import surge or if an employee in a failing mill is able to find a job in another industry. Restructuring does not require a situation of serious damage. Rather, it is part of the normal evolution of an industry. The case before the Panel is one of forced restructuring which occurred as the direct result of serious damage to the industry caused by a surge in imports. The fact that some mills went on to restructure and retool in no way detracts from the serious damage facing the combed cotton yarn industry when the United States issued its Market Statement in December 1998. These mills and their employees – although lucky to find a new home in another industry – had no choice but to abandon the combed cotton yarn industry.

4.145 The United States considers the evidence of three mills exiting the combed cotton yarn for sale industry as one of the many factors examined in the damage investigation. Evidence of mills leaving the industry may also point to "continuous autonomous industrial adjustment" referred to in Article 1.5 of the ATC. However, "serious damage" and "continuous autonomous industrial adjustment" are not, as Pakistan suggests, mutually exclusive. An industry may suffer serious damage or actual threat of serious damage at the same time that it is readjusting or retooling. The ATC explicitly recognizes this fact by providing a transitional safeguard mechanism during the ten-year restructuring period given to the textiles and clothing sector. Far from being incompatible with continuous autonomous adjustment, as Pakistan suggests, the Article 6 safeguard is an essential element in this restructuring process. Article 6 gives industries seriously damaged by increased imports the ability to adjust.

4.146 The United States further argues that Pakistan's claim that "serious damage" cannot be found if there was any possibility that individual establishments in an industry could have "retooled" and become participants in another industry is wrong and Pakistan's claim confuses the question of the existence or threat of serious damage with the question of the response to that damage or threat. Pakistan's claim assumes that a single factor – which does not even appear in Article 6.3 – can alone preclude a finding of serious damage. It strains reason to suggest that a factor that is not even included among those enumerated in the ATC could alone preclude a finding of serious damage. Contrary to Pakistan's suggestion, the United States did not base its determination of serious damage and actual threat thereof solely on the fact that three mills and their employees exited the combed cotton yarn industry. While important, the data on employees and firms exiting the defined industry constitute one of the many factors that the United States examined. As discussed above, the United States based its determination on a wide range of additional factors, including production, shipments,

exports, capacity utilization, inventories, unfilled orders, wages, productivity, profits, investment, market share, import share, prices, and the apparent domestic market.

4.147 In sum, in the view of the United States, these factors, taken alone or together, revealed a domestic industry in peril – with declining production and shipments, deteriorating financial performance, rising inventories and falling unfilled orders, dwindling market share, contracting exports, and stagnating investment. Based on careful consideration of all these factors – not just on the number of employees and firms exiting the industry – the United States concluded that the 283.2 per cent surge in imports from Pakistan had caused serious damage and actual threat of serious damage to the domestic combed cotton yarn for sale industry.

Technical Implication in Switch between Combed and Carded Yarn

4.148 The Panel asked, how difficult (technically or financially) is it to switch a plant producing combed cotton yarn into that producing carded cotton yarn? What measures (e.g. investments, replacement of machines, training of employees) are necessary to successfully convert a plant that produces combed cotton yarn into a plant that produces carded cotton yarn? In response, the **United States** explained that the combing process relies on high grades of cotton, requires specialized machinery, and produces a product which is intended for specified, distinct market niches (i.e., higher quality). Fairchilds' Dictionary of Textiles defines "combing" as a step that is subsequent to the carding process in yarn manufacture. In the cotton spinning system, "combing" is used to produce finer, smoother cotton yarns than merely carding. The combing process physically separates the long, choice, desirable fibres from knots, impurities and shorter, weaker fibres in the cotton before it is spun. As a result of the combing process, the combed cotton yarn produced is finer, cleaner, more lustrous, and stronger than carded cotton yarns. By contrast, carded yarn contains a wider range of fibre lengths and, as a result, are not as uniform or as strong as combed yarns. Only better grades of cotton may be combed. Purchases of these better grades of cotton are contracted for, usually in advance of the new harvest for these fibres, at premium prices, 15 per cent (or more) above prices for cotton grades that are used for carding. The domestic market in the United States for carded cotton yarn is roughly five times larger than the domestic market for combed cotton yarns. Carded cotton yarns are generally used in coarser, heavier-weight fabrics (such as denim, canvas, osnaburg, blanketing and heavy knitwear such as sweaters, tube socks, or fleece). Combed cotton yarns are generally used in thinner, lighter-weight, higher quality fabrics (such as fine gauge jersey knits, broadcloth, percale or lawn/batiste).

4.149 The United States considers that Pakistan overstates the ease with which a plant can convert production from combed cotton yarn to carded cotton yarn. Pakistan fails to take into account the amortization cost of idling equipment, lost plant and equipment facility, and marketing cost required to establish a new customer base. Because of the financial risk involved, such conversions are generally not feasible without a substantial re-engineering of the facility. Specifically, conversion of a plant from the production of combed cotton yarn to the production of carded cotton yarn would engender the following serious financial and technical obstacles: (I) the plant would have incurred higher raw material costs for premium grade cotton, contracted in advance of the new harvest for these fibres, at the same time as the output of the plant was reduced in value; (2) the plant would bear the amortization and opportunity costs of idling of expensive additional equipment required for combing operations (in addition, fixed costs for building, air conditioning, warehouse, office space, and auxiliary service equipment would continue to accrue); (3) in the absence of the combing operations, more of the cotton fibre would be available to be spun. Since the installed spindles are "balanced" (that is, from the opening of raw cotton fibre to the packing of the spun yarn) for the smaller quantity of raw materials that would result from a combing process, the plant would need to either install new spindle capacity to pick up the additional cotton fibre, or idle some of the preparatory machinery, increasing costs in either circumstance; (4) the plant may require new construction in order to maintain operating efficiencies; (5) idled equipment would result in the elimination of production worker jobs; and (6) finally, the plant would need to invest in research and

marketing efforts to develop a new customer base in a larger market than combed cotton yarn, subject to greater competitive pressures.

4.150 The conversion from combed to carded yarn offers no assurance of success in the carded yarn market. As the United States noted in its first written submission, one of the three establishments producing combed cotton yarn during the period covered by the U.S. investigation into serious damage and actual threat thereof, China Grove Textiles, attempted the conversion of a plant from combed cotton yarn to carded cotton yarn. The plant was not competitive in the carded yarn market and was closed. The experience of China Grove Textiles exemplifies the point that the attempted conversion from a combed yarn mill to a carded yarn mill is a complicated, expensive and uncertain endeavour, not undertaken lightly or routinely.

4.151 On this question, it was the view of **Pakistan** that, essentially, all spun yarns are carded yarns; combed yarns are a sub-category of carded yarns, that is, carded yarns which have also been combed. For the production of carded yarn, the combing process is by-passed and card sliver goes directly to drawing. There is no re-tooling involved. Most spinning plants produce both carded and combed yarns. In other words, a part of the production goes through combing to produce "combed yarn" and another part does not go through combing and produces "carded yarn". It often happens in the normal course of trade that a mill shuts down all or part of its combers in response to changes in demand. When combers are not in use, their capital cost has to be absorbed. For older mills the capital cost of combers is very small and, therefore, a minor factor in deciding the product mix. For example, the Dixie, Tarboro plant, which was sold to the Pillowtex Corporation, was a very old plant. For this plant the "consumer preference" for carded yarn (the consumer being its new owner) would be a more important factor than the capital costs of idling of old combers whose value had already been written down. For newer plants the capital cost of idling combers may be more important. However, newer plants are efficient and produce good quality. No plant less than 5 to 10 years old has been reported to have exited from combed yarn manufacture. According to Pakistan's research, all the plants claimed to have "closed" or existed from manufacture of combed yarn" were very old plants (more than 30 years old). There are no measures (investment, replacement of machinery, training of employees) required to convert a plant that produces combed cotton yarn into a plant that produces carded cotton yarn or to convert it back into producing combed cotton yarn.

D. DEMONSTRATING THE CAUSAL LINK BETWEEN IMPORTS AND SERIOUS DAMAGE

4.152 **Pakistan** notes that Article 6.2 of the ATC requires the importing Member to demonstrate that there is a causal connection between the rise in imports and the damage suffered by the domestic industry and that the damage caused is serious. As explained in the recent panel report on *Argentina - Footwear Safeguard*, a proper causation analysis consists of an analysis of the relationship between the trend in imports and the trends in the economic variables affecting the state of the domestic industry, such as output, market share, etc. A causal connection between imports and damage can be assumed if the rise in imports coincides with changes in economic variables. This means that, as a rule, the period during which trends are observed must be sufficiently long to permit the importing Member to convincingly demonstrate that the rise in imports was the cause of adverse changes in economic variables and the damage caused was more than temporary and, hence, serious. In the case before the Panel, the United States determined causality on the basis of unfavourable developments that emerged during the first eight months of 1998. Pakistan requests the Panel to find that this period was too short to permit a proper analysis of trends and that, given the absence of any other supporting evidence, the United States has, therefore, not demonstrated causality.

4.153 Pakistan also points out that a significant amount of restructuring has taken place in the United States combed cotton yarn for sale industry between 1994 and 1998: while the number of plants steadily declined from 32 to 19, production rose from 122 to 136 million kg. Against this background, the United States' claim that the adverse changes in all economic variables affecting the

defined industry were attributable to a rise in imports is totally unconvincing. In all likelihood, the changes were in large part a reflection of the process of autonomous industrial adjustment that took place during the 1994-1998 period. This factor, detracting from an affirmative determination of causality, should have been examined and taken into account.

4.154 The **United States** considers that it clearly demonstrated causation, even under the non-ATC framework Pakistan references. The United States examined the relationship between an upward trend in imports and negative trends in economic variables and reasonably concluded, based on this analysis, that the surge in imports of Category 301 combed cotton yarn caused serious damage to the domestic industry. As set forth conclusively in the Market Statement, the United States established that imports from Pakistan were surging at the same time that conditions in the industry were deteriorating and that other factors were not a cause.

4.155 The United States further considers that it has satisfied ATC requirements to provide specific, relevant factual information that is as up-to-date as possible. Pakistan criticizes the U.S. determination claiming that the eight-month time period used by the United States to establish serious damage was too short. Pakistan apparently assumes that, because the United States presented the most current data in an eight-month format, the United States somehow limited its inquiry to eight months. Pakistan is wrong. The Market Statement reflected comprehensive data for two years and eight months – from January 1, 1996 through August 1998, and included import data through October 1998. At the time of the U.S. request for consultations, these data constituted the most up-to-date data available, which for imports were current through October 1998 and for the other variables were current through August 1998. These data revealed that, during the early part of the period under investigation, many industry indicators were relatively flat but others revealed a worrisome trend. Conditions during 1998 – at which time global imports surged 91.3 per cent and imports from Pakistan surged 283.2 per cent – validated early indications of industry distress.

4.156 The United States noted that Article 6.2 of the ATC requires the Member invoking a transitional safeguard to demonstrate that the serious damage or actual threat of serious damage is caused by the increase in imports and not by other causes, such as technological changes or changes in consumer preference. The United States did so, observing that "the market for these yarns has remained constant" during the investigation period, demonstrating that "there has been no change in consumer preference" that could account for the serious damage. The Market Statement also notes that "there has not been any significant new technological changes in the defined industry" during the investigation period. Pakistan makes no effort to challenge the U.S. demonstration that increased Category 301 imports, not other factors, caused damage to the defined domestic industry. Rather, Pakistan claims that causality cannot be established unless the Member undertakes an examination of "the relationship between an upward trend in imports and negative trends in economic variables," without elaborating on how the U.S. failed to do so. Pakistan disregards the Market Statement's clear showing that imports were surging as the economic factors listed in Article 6.3 were deteriorating and has made no attempt to rebut this showing. Similarly, Pakistan did not renew its contention made in its first submission related to causation, namely, that the time period considered by the U.S. was too short to establish causation.

E. ATTRIBUTION OF SERIOUS DAMAGE, OR ACTUAL THREAT THEREOF (ARTICLE 6.4 OF THE ATC)

Article 6.4 of the ATC: "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. 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.".*

**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.*

1. The Attribution of Serious Damage, or Actual Threat Thereof, to Pakistan

4.157 The **United States** argues that its attribution of serious damage or actual threat of serious damage to a sharp and substantial surge in Category 301 imports from Pakistan was fully consistent with the requirements of Article 6.4 of the ATC – which authorizes the imposition of a transitional safeguard on a Member-by-Member basis.

4.158 For the January-August 1997 and January-August 1998 periods, Pakistan's Category 301 imports were surging by 283.2 per cent compared to 73 per cent from other sources; Pakistan's share of domestic production quadrupled and Pakistan's imports as a percentage of total imports doubled. Moreover, prices of Category 301 imports from Pakistan, in comparison with the rest of the world, were substantially lower – 26.2 per cent below the average U.S. price and 20 per cent below the average world price. For a specific subset of Category 301 (where imports from Pakistan were concentrated), imports from Pakistan entered the United States at a value of 28.3 per cent below the average U.S. price and 12.6 per cent below the average world price.

4.159 In the view of the United States, Pakistan does not dispute that, during January-August 1998, the magnitude of its 283.2 per cent surge was greater than any of the leading suppliers to the U.S. market or that its prices (26.2 per cent lower than the average U.S. price and 20 per cent lower than the average world price of imports) were substantially less than any of the leading suppliers to the U.S. market. Instead, Pakistan asks the Panel to strike down the U.S. attribution analysis because the United States did not comply with obligations that the ATC does not impose.

2. The Question of the Need for a Comparative Assessment of Imports from Mexico

4.160 **Pakistan** notes that the panel in *United States - Underwear from Costa Rica* clarified an important point: Article 6.4 of the ATC requires the importing Member to attribute serious damage to the exports of the Member subject to the action on the basis of a "comparative assessment" of the imports from different sources and their respective effects. The United States, however, attributed serious damage and actual threat thereof to rising imports from Pakistan without comparing those imports and their effects with imports from Mexico. It, therefore, did not take into account that the rise in imports from Mexico had been sharper and more substantial than the rise in imports from

Pakistan. Just as in the underwear case, the United States, thus, failed to conduct the comparative assessment required by Article 6.4 of the ATC.

4.161 In this regard, the **United States** claims that Pakistan neither contests the figures nor establishes a violation of Article 6.4 of the ATC. Instead, Pakistan attempts to obfuscate the clear showing of attribution by asserting – without any basis – that Article 6.4 required the United States to undertake a specific comparative analysis between Pakistan and Mexico. Pakistan's suggestion that the United States was required to conduct a specific assessment of another Member's exports has no support in the ATC. Article 6 does not impose such a requirement; rather, Article 6 provides that import levels and trends are one of the several factors to be analyzed. The ATC specifically authorizes Member-by-Member safeguard action based on a sharp and substantial increase in imports from that Member individually and an analysis of imports from other sources generally, as well as market share and price. As the ATC states, no one factor in the attribution analysis "either alone or combined with other factors, can necessarily give decisive guidance".

4.162 Contrary to Pakistan's assertion, the United States argues that it did carefully consider the increase in imports from other sources as a factor in its Article 6.4 attribution analysis. The Market Statement clearly reflects that the U.S. analysis accounted for the increase in imports from its Free Trade Agreement (FTA) partners. The United States concluded that – even though imports from its FTA partners were also increasing – serious damage or actual threat of serious damage was attributable to the 283.2 per cent surge in imports from Pakistan. The Market Statement supports the transitional safeguard related to Category 301 imports from Pakistan, and specific information regarding Mexico was not required. The ATC does not require the Market Statement to include a separate analysis of each exporting Member or of all principal suppliers to the market. Article 6.4 only requires a consideration of the factors enumerated therein, and Article 6.7 requires this information to be as up-to-date as possible.

4.163 In response to a question from the Panel, the United States comments that Article 6.4 of the ATC gives an importing Member the discretion to take a transitional safeguard measure against an exporting Member to whom serious damage is attributable, but simultaneously not to take such measure against another exporting Member whose exports are contributing to the same serious damage. The ATC contemplates that Members will establish transitional safeguard actions only on those Members to whom the safeguard action can be attributed under the strict terms of Article 6.4 and not on all Members whose "exports are contributing to the same serious damage".

4.164 The view of **Pakistan** on this question is that, according to first sentence of Article 6.4 of the ATC, transitional safeguard measures "shall be applied on a Member-by-Member basis". The term "Member-by-Member" needs to be interpreted in its context. Part of its context is Article 4.1, according to which the restrictions applied under Article 6 shall be administered by the exporting Members. The requirement to apply the restrictions on a Member-by-Member basis thus means that the Member invoking Article 6 may not impose a global quota or a quota applicable to imports from several Members because the exporting Members would in that case not be able to administer the restrictions. The Member-by-Member application of restrictions thus means that the restrictions must be country-specific. Another part of the context is the second sentence of Article 6.4, according to which serious damage shall be attributed to Members individually on the basis of a sharp and substantial increase in imports. The Member invoking Article 6 may, therefore, not impose a country-specific restriction on imports from all Members. The restrictions must be applied exclusively on the imports from those Members whose exports increased sharply and substantially. Moreover, the third sentence of Article 6.4 prohibits the application of restrictions to Members already under restraint. This context makes clear that the requirement to impose the restrictions on a "Member-by-Member" basis does not mean that the country-specific restrictions must be imposed on a most-favoured-nation basis.

4.165 Pakistan also considers that, according to Article 1.6 of the ATC, the rights of the exporting Members under Articles I and XIII of the GATT are affected by the ATC only to the extent that the ATC provides otherwise. Nothing in the term "Member-by-Member" and in the context in which it appears, however, implies that an individual exporting Member to whom serious damage is attributable in accordance with the second sentence of Article 6.4 can be exempted from the application of the measure. Pakistan, therefore, disagrees with the United States' claim that the requirement to impose restrictions on a "Member-by-Member" basis constitutes a license to arbitrarily exempt a particular exporting country to which serious damage must be attributed from the application of the transitional safeguard.

4.166 In response to a question from the Panel asking how the United States determined that imports from other sources did not "contribute in a material way" to the serious damage or actual threat thereof found to exist under Article 6.2, the **United States** points out that "contribution" is not the same issue as "attribution". In contrast to Article 6.2 of the ATC, Article 6.4 is not framed in terms of cause or contributing to the serious damage. In the present case, each of the 29 sources listed in Table V of the United States' Market Statement contributed to some greater or lesser degree to the serious damage or actual threat thereof. Article 6.4 is designed to determine to which of the Member or Members – whose imports are a part of the total increase of imports causing serious damage – to assign this serious damage. Article 6.4 defines what must be considered in making this determination. Any requirement that an importing Member go beyond these requirements would be inconsistent with the carefully negotiated balance of the ATC. In this case, the United States carefully considered all these factors – including the increase in imports from other sources – in its Article 6.4 attribution analysis. The United States concluded that – even though imports from other sources were also increasing – serious damage or actual threat of serious damage was attributable to the 283.2 per cent surge in imports from Pakistan. Pakistan's sharp and substantial increase in imports, together with the fact that its imports were priced so much lower than the average world price, made attribution to Pakistan appropriate under the terms of the ATC.

4.167 **Pakistan** addressed a Panel question, "What precautions, if any, should be taken under the ATC in order to assure a transparent and equitable attribution of 'serious damage' or 'actual threat thereof' to a Member or Members?", stating that Article 6.4 of the ATC requires that the attribution of serious damage to individual Members must 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". The panel on *United States - Underwear from Costa Rica* concluded from this that Article 6.4 requires a "comparative assessment" of the imports from different sources and their respective effects.[73] The importing Member is, therefore, required to assess individually and compare all potential sources of serious damage. Pakistan submits that this follows not only from the terms "compared" and "individually" in Article 6.4 but also from the nature of the attribution determination. To attribute damage to a WTO Member means to ascribe the cause of the damage to the imports from that Member. The attribution thus requires a causation analysis. In any proper causation analysis, all factors relevant to the determination of the cause must be taken into account, including the factors that might detract from an affirmative determination. In the present case, the United States was, therefore, required to determine whether imports from sources other than Pakistan were the cause of the alleged damage. Since Mexico and Pakistan are the two largest suppliers to the United States' market, the attribution to Pakistan could not logically be made without a comparison of imports from these two sources.

[73] *United States - Restrictions on Cotton and Man-made Fibre Underwear*, WT/DS24/R, para. 7.49.

4.168 In Pakistan's view, the import statistics annexed to the United States' Market Statement do not indicate the changes in the levels of imports from Mexico but only the total of all imports of combed cotton yarn from countries with which the United States has concluded free trade agreements, that is Canada, Mexico and Israel.[74] The Market Statement, thus, does not indicate that the United States considered the sharp and substantial increase in imports from Mexico as a potential alternative cause in its attribution determination. The United States, thus, failed to take into account a relevant factor detracting from an affirmative determination. Therefore, the United States failed to attribute the alleged damage to Pakistan in a manner consistent with Article 6.4 of the ATC.

4.169 In summing up its arguments, Pakistan submits that the United States cannot reasonably claim that the facts on the record justified the attribution to Pakistan rather than Mexico if the record does not give any figures on imports from Mexico. As the Panel on *United States - Blouses* stated, it is the public record that must indicate that all relevant factors were considered.[75] It is not sufficient to submit those facts subsequently to the Panel. The plain fact remains that the United States did not conduct the source-specific or Member-by-Member analysis required by Article 6.4. Pakistan submitted statistics on the imports from Pakistan and Mexico in its first submission that have remained undisputed by the United States. These statistics clearly demonstrate that the rise in imports from Mexico had been sharper and more substantial than the rise in imports from Pakistan and that the exclusive attribution of serious damage to imports from Pakistan was, therefore, not justified. What happened was that the United States attributed the whole of the alleged damage to Pakistan, while import statistics clearly showed that there was another much more important potential source of that damage. This is plainly unfair and is plainly not what Article 6.4 permits. The Panel on *United States - Underwear* found that the United States could not attribute serious damage to Costa Rica and leave its market wide open to imports from five other countries.[76] It also found that "the fact that the US underwear industry was able to accept and withstand such a huge inroad of products from five other exporting Members suggests that there was no serious damage to the industry in the first place".[77] In the present case, the Panel should similarly find that the United States could not attribute the whole of the serious damage to Pakistan and leave its market open to a much more important supplier of combed cotton yarn. It should also find that the fact that the United States combed cotton yarn industry was able to withstand the sharper and more substantial rise in imports from Mexico suggests that there was no serious damage in the first place.

4.170 In response to a further Panel question, Pakistan expresses the view that the question of whether the United States was entitled to exempt Mexico from the application of the safeguard under Article XXIV is distinct from the question of whether the United States was required to compare the imports from Mexico with those from Pakistan in order to properly attribute the alleged damage to imports from Pakistan. Pakistan decided not to raise the exemption of Mexico from the safeguard action as an issue because this would have required the Panel to examine the relationship between the ATC and Article XXIV of the GATT and, depending on its conclusions on this issue, the applicability of Article XXIV to discriminatory safeguard actions. According to the ruling of the Appellate Body in the *Turkey - Textiles* case, an invocation of Article XXIV of the GATT by the defendant requires the panel to examine the consistency of the regional trade agreement with that provision.[78] Pakistan feared that, if these issues formed part of the present Panel proceeding, substantially more time would be required to resolve the dispute.

[74] U.S. Market Statement, Table V.
[75] WT/DS33/R, paras. 7.28,7.50 and 7.52
[76] WT/DS24/R, para. 7.51.
[77] WT/DS24/R, footnote 24.
[78] WT/DS90/AB/R, para. 108.

The Import Data for Mexico

4.171 The Panel invited the United States to provide the data for combed cotton yarn imported from Mexico equivalent to those for imports from Pakistan provided in each of the Tables of the 1998 Market Statement. In response, the United States supplied five tables as set out and explained hereunder. As an introductory comment, the **United States** recalls that Article 6.4 of the ATC does not require an importing Member to conduct a separate analysis of each exporting Member or of all principal suppliers to the market. Rather, Article 6.4 required an importing Member to base attribution on a sharp and substantial increase in imports from the exporting Member and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic price at a comparable stage of the commercial transaction. As reflected in the Market Statement, the United States carefully considered all such factors in making its attribution to Pakistan. Furthermore, as the United States had discussed in its second written submission, the Market Statement was prepared to support a transitional safeguard action on Category 301 imports from Pakistan. Because Article 6.4 did not require separate and specific information regarding other individual suppliers, the United States did not include a separate analysis of Mexico or any other supplier. However, because Mexico does not appear as a separate heading, this does not mean that the United States did not consider data related to Mexico. As the tables below reveal, the data on Mexico reinforces the U.S. determination to attribute serious damage and actual threat of serious damage to a sharp and substantial increase in Category 301 exports from Pakistan.

4.172 Table I, reprinted from the Market Statement, provides the core economic data regarding the variables listed in Article 6.3 of the ATC and other factors that the United States considers relevant and material to analyze during the two-year and eight-month investigation period. This table demonstrates that during the early part of the period of investigation, many industry indicators were relatively flat, but others (such as imports, inventories, and unfilled orders) revealed a worrisome trend and signaled industry distress. Furthermore, it is clear from the table that the conditions took a dramatic turn for the worse during the January-August 1998 period, at which time global imports surged 91 per cent and imports from Pakistan surged 283.2 per cent.

TABLE I
Economic Data[1] for the Industry Producing
Yarn for Sale, Chief Weight Combed Cotton Spun
Category 301

			January – August		Per cent Change	
	1996	1997	1997	1998	1996/ 1997	Jan. - Aug. 1997/1998
Total Shipments (1,000 kg.)	142,628	141,984	99,818	85,644	-0.4	-14.2
Production (1,000 kg.)	142,346	144,664	98,371	88,337	1.6	-10.2
Imports (1,000 kg.)	19,045	21,347	10,767	20,595	12.1	91.3
Exports (1,000 kg.)	14,014	14,409	10,690	7,168	2.8	-32.9
Apparent Domestic Market (1,000 kg.)[2]	147,659	148,922	99,895	99,071	0.8	-0.8
I/P (per cent)	13.4	14.8	10.9	23.3	n/a	n/a
Domestic Market Share (per cent)[3]	87.1	85.7	89.2	79.2	n/a	n/a
Employment (production workers)	5,258	5,175	5,175	4,835	-1.6	-6.6
Wages ($ per hour)	8.34	8.67	8.67	9.02	4.0	4.0
Man-hours (1,000 hours)	10,831	10,971	7,425	6,937	1.2	-6.6
Capacity Utilization (per cent)	86.3	82.7	84.3	75.7	n/a	n/a
Inventories, end of period (1,000 kg.)	6,120	8,800	4,673	11,493	43.8	145.9
Unfilled Orders, end of period (1,000 kg.)	64,268	49,628	48,865	41,155	-22.8	-15.8
Productivity (output per man-hour)	13.14	13.19	13.26	12.73	0.4	-4.0
Profits (ratio of operating income to net sales)	4.0	3.5	3.9	2.1	-12.5	-46.2

[1]Data for shipments, production, employment, wages, man-hours, capacity utilization, inventories, unfilled orders, and profits supplied by AYSA. Data supplied by AYSA is based on its members which fully represent the output of the defined industry.

[2]Equal to shipments - exports + imports.

[3]Equal to (shipments - exports)/(shipments - exports + imports).

4.173 Table II compares prices between the United States, Pakistan, and Mexico during January-August 1998 for full Category 301 imports and for those specific yarn products where Category 301 imports are concentrated. The data reveals that Pakistan's prices were significantly lower than those of Mexico. As displayed below, for full Category 301, the price of imports from Mexico ($3.96 per kilogram) was 9.1 per cent higher than the price of imports from Pakistan ($3.63 per kilogram). In the specific product classifications where Category 301 imports are concentrated (representing 54 per cent of Category 301 imports from Pakistan and 77 per cent of Category 301 imports from Mexico), the price of imports from Mexico ($3.96 per kilogram) was 16.8 per cent higher than the price of imports from Pakistan ($3.39 per kilogram). In an industry where profit margins are determined by pennies, the difference in price between imports from Pakistan and Mexico was extremely significant.

TABLE II
Average U.S. Producers' Prices and Average Landed Duty-Paid Value of Imports
Yarn for Sale, Chief Weight Combed Cotton Spun
Category 301

	January-August 1998 Unit Value ($ per Kilogram)	% Above or Below Average U.S. Producers' Price
Category 301[1]		
Average U.S. Producers' Price	$4.92	
World	$4.54	-7.8
Pakistan	$3.63	-26.2
Mexico	$3.96	-19.5
HTSUSAS WHICH INCLUDE YARNS OF COUNTS 18-38 SINGLES[2]		
Average U.S. Producers' Price	$4.73	
World	$3.88	-18.0
Pakistan	$3.39	-28.3
Mexico	$3.96	-16.3

[1]The U.S. producers' price for full Category 301. The U.S. producers' price represents the average price for U.S. produced subject yarn, and was obtained in consultation with firms in the defined industry. The import price represents the duty paid landed value for Category 301 computed from U.S. import data.

[2]The U.S. price represents the average price for 18 to 38 singles ring spun combed wholly cotton yarns computed from American Textiles International published data. Import prices represent the average landed duty-paid values computed from HTSUSA numbers 5205.22.0020, 5205.23.0020 and 5205.24.0020. The imports entering under these HTSUSA numbers are wholly cotton, ring spun combed cotton singles yarn with yarn counts ranging from 8 to 47 cotton count (14 to 80 metric number). The bulk of the imports in these HTSUSA numbers are of 18 to 38 cotton counts and represent 46 per cent of total Category 301 imports, 54 per cent of Pakistan's imports of Category 301, and 77 per cent of Mexico's imports of Category 301.

4.174 Table III compares the per cent change in imports during the critical January-August 1997 and January-August 1998 periods and reveals that the magnitude of the surge from Pakistan exceeded the per cent change from Mexico. During this period, Category 301 imports from Pakistan surged 283.2 per cent compared with a 212.5 per cent increase in imports from Mexico.

TABLE III
U.S. Imports from Pakistan and the World
Yarn for Sale, Chief Weight Combed Cotton Spun
Category 301 (Kilograms)

			January – August		
	1996	1997	1997	1998	% Change
WORLD	19,044,740	21,346,787	10,766,564	20,595,066	91.3
PAKISTAN	2,279,348	2,709,192	942,756	3,612,652	283.2
MEXICO	2,066,480	3,603,675	1,450,969	4,534,144	212.5

4.175 Table IV compares the share of the market accounted for by imports from Pakistan and Mexico, as measured against production and total imports. Again, the data reveals that, during the critical January-August period, Pakistan's share of the market was growing at a much faster rate than that of Mexico. Category 301 imports from Pakistan as a percentage of production more than quadrupled, while imports from Mexico as a per cent of production increased by a multiple of 3.4. Similarly, as a percentage of total imports, Category 301 imports form Pakistan doubled while imports from Mexico increased by a multiple of 1.6.

TABLE IV
Pakistan's Share of Production and Imports
Yarn for Sale, Chief Weight Combed Cotton Spun
Category 301

	Per cent of Production				Per cent of Imports			
			January – August				January – August	
	1996	1997	1997	1998	1996	1997	1997	1998
WORLD	13.4	14.8	10.9	23.3	100.0	100.0	100.0	100.0
PAKISTAN	1.6	1.9	1.0	4.1	12.0	12.7	8.8	17.5
MEXICO	1.4	2.5	1.5	5.1	10.8	16.9	13.5	22.0

4.176 Table V provides import data for after the investigation period. The United States includes the information in Table V to ensure, consistent with Article 6.7, that the data provided in the Market Statement was as up-to-date as possible.[79] Table V demonstrated that the volume of imports from Mexico continued to increase after August 1998 as did the volume of imports from Pakistan. However, at this particular point in time, the rate of increase in imports from Pakistan had slowed relative to that of Mexico, but imports from Pakistan were still surging by 164.3 per cent. Furthermore, Table V is limited to import data only and does not reflect any of the other variables set out in Articles 6.3 and 6.4, notably price. The price of imports from Mexico remained substantially higher than the price of imports from Pakistan, which continued to be the lowest-priced unrestrained supplier to the U.S. market.

TABLE V
Major Suppliers' Report
Yarn for Sale, Chief Weight Combed Cotton Spun
Category 301 (Kilograms)

		Calendar Years		Year-Endings		Y/E 10/1998	
	Country	**1996**	**1997**	**10/1997**	**10/1998**	**% Change**	**% Share**
	WORLD	19,044,740	21,346,787	17,929,878	30,282,677	68.90	100.00
	FTAs[1]	2,719,817	4,008,235	2,683,456	7,687,307	186.47	25.39
	MEXICO	2,066,480	3,603,675	2,311,225	7,241,757	213.33	23.91
	CANADA	650,837	404,494	372,165	445,550	19.72	1.47
	PAKISTAN	2,279,348	2,709,192	1,857,294	4,908,794	164.30	16.21
SL	EGYPT	2,443,227	1,866,402	1,672,623	3,466,952	107.28	11.45
SL	THAILAND	1,691,592	2,125,347	1,562,573	2,886,357	84.72	9.53
SL	INDONESIA	2,252,218	1,884,384	1,674,586	2,739,284	63.58	9.05
SL	MALAYSIA	451,842	1,117,351	880,241	1,818,626	106.61	6.01
	EU15[2]	1,782,298	2,964,098	2,903,903	1,577,397	-45.68	5.21
SL	CHINA TAIWAN	878,262	1,167,230	1,065,616	1,076,588	1.03	3.56
SL	KOREAN REP	532,770	612,589	724,619	969,874	33.85	3.20
	PERU	1,241,386	1,431,693	1,513,055	955,966	-36.82	3.16
SL	TURKEY	491,322	265,458	252,604	453,093	79.37	1.50
	SALVADOR	333,870	236,475	187,329	398,648	112.81	1.32
G	PHILIPPINES	32,660	16,330	16,330	369,296	2161.46	1.22
	SWITZERLAND	473,795	335,282	371,404	290,209	-21.86	0.96
	JAPAN	160,980	248,214	247,667	285,593	15.31	0.94
	SRI LANKA	295,413	0	0	128,355	*	0.40
G	INDIA	205,761	199,708	165,989	106,690	-35.72	0.35
SL	CHINA P	40,824	0	0	103,357	*	0.34
SL	BRAZIL	576,046	106,624	85,414	57,737	-32.4	0.19
	CZECH	61	0	0	729	*	0
	LITHUANIA	*	0	0	626	*	0
	TANZANIA	0	0	0	296	*	0
	C RICA	0	46	46	287	523.91	0
	KENYA	0	39,853	39,599	254	-99.36	0
	ARGENTINA	477	37	37	200	440.54	0
	UZBEKISTAN	*	0	0	162	*	0
	COLOMBIA	781	0	0	0	*	0
	AUSTRALIA	21,926	9,533	10,674	0	-100.00	0
	MOROCCO	137,914	0	11,963	0	-100.00	0
	REP SAF	150	2,706	2,856	0	-100.00	0

[1] Free Trade Arrangements: Canada, Mexico and Israel. Israel did not export combed cotton yarn to the United States.
[2] European Community.

[79] As discussed, the information presented and analyzed by the United States in the Market Statement was as up-to-date as possible – reflecting data for 1996, 1997, and the first eight months of 1998 and including the most current import data through October 1998. First written submission of the United States, at para. 146.

4.177 The United States concludes, based on the totality of the factors set out in Article 6.4 – taken alone or in comparison with Mexico – that the U.S. determination to attribute serious damage and actual threat of serious damage to Pakistan was appropriate and fully consistent with the ATC. In the first eight months of 1998:

– Category 301 imports from Pakistan surged 283.2 per cent (compared with a 212.5 per cent increase from Mexico);

– imports from Pakistan as a share of domestic production quadrupled (compared with a 3.4-fold increase from Mexico);

– imports from Pakistan as a share of total imports doubled (compared with a 1.6-fold increase from Mexico);

– the price of Category 301 imports from Pakistan was 26.2 per cent below the average U.S. price (compared with the price of imports from Mexico which was 19.5 per cent below the average U.S. price); and

– for specific yarn products where Category 301 imports were concentrated, the price of imports from Pakistan was 28.3 per cent below the average U.S. price (compared to the price of imports from Mexico which was 16.3 per cent less than the average U.S. price).

4.178 Thus, even if one were to engage in a source-specific analysis – an analysis not required by the ATC – the statistical differences between Pakistan and Mexico were extremely significant and reinforce the appropriateness of attributing serious damage and actual threat thereof to Pakistan and to no other Member.

Pakistan's Comments on the Information in the Tables

4.179 Commenting on the above information provided by the United States, **Pakistan** refers to the following claims made in its first submission: absent altogether from the Market Statement is a comparison of the respective prices and market shares of the imports from Pakistan and Mexico. The Market Statement merely compares Pakistan's imports with total imports and Pakistan's prices with domestic prices and world market prices.[80] During the year ending in October 1997, imports of combed cotton yarn from Pakistan represented 10.4 per cent of total imports. Pakistan's share rose to 16.2 per cent during the year ending in October 1998. However, during the same period Mexico's share in total imports rose by almost twice as much. The Market Statement contains no reference to this fact. The import statistics annexed to the Market Statement do not indicate the changes in the level of imports from Mexico but only the total of all imports of combed cotton yarn from countries with which the United States has concluded free trade agreements, that is Canada, Mexico and Israel.[81] The Market Statement thus does not indicate that the United States considered the sharp and substantial increase in imports from Mexico individually.[82]

[80] Market Statement (Exhibit PAK-1), paras. 7.4 - 7.6.
[81] Market Statement (Exhibit PAK-1), Table V.
[82] Pages 42 and 43.

4.180 In the view of Pakistan, the facts provided by the United States in response to the Panel's question confirm the accuracy of Pakistan claims. The amendments to Table V in the Market Statement now clearly reveal that imports of combed cotton yarn from Mexico were more substantial and rising more sharply than those from Pakistan. Pakistan draws the Panel's attention in particular to the following elements in the amended Table V:

TABLE V (amended)

Source	Year-Endings		Year-Ending 10/1998	
	10/1997 (kg)	10/1998 (kg)	Change (per cent)	Share (per cent)
World	17,929,878	30,282,677	68.90	100.00
Mexico	2,311,225	7,241,757	213.33	23.91
Pakistan	1,857,294	4,908,794	164.30	16.21

The Question of Price

4.181 The Panel also asked the United States if it had determined if there was a long-term price differential between Pakistan and other sources including Mexico. The **United States** replied that Article 6 does not require a Member to conduct an analysis of long-term price differentials between other sources. Rather, Article 6.4 of the ATC requires that a Member examine "import and domestic prices at a comparable stage of commercial transaction" as part of its determination of attribution, and Article 6.7 requires current, relevant and up-to-date information. In complying with these requirements, the United States looked at the average landed duty-paid value of imports of the products in Category 301 from all sources, including Mexico and other FTA partners, and determined that Pakistan was the lowest-priced of the leading, uncontrolled suppliers of Category 301 imports. The Market Statement reflects that the value of Category 301 imports of Pakistan ($3.63 per kilogram) was 26.2 per cent below the average U.S. producers' price ($4.92 per kilogram) and 20 per cent below average world prices ($4.54 per kilogram). As regards Mexico, its statistics reinforced the U.S. determination to attribute serious damage and actual threat of serious damage to a sharp and substantial increase in Category 301 imports from Pakistan. These statistics revealed Mexico's imports over the period of the investigation were also increasing. However, during the first eight months of 1998, the magnitude of Pakistan's surge was greater than Mexico's, and Pakistan's prices were significantly lower than those of Mexico. While imports from Pakistan were surging 283.2 per cent, imports from Mexico increased 212.5 per cent increase. The price of imports from Mexico was 9.1 per cent higher than the price of imports from Pakistan. Where Category 301 imports are concentrated, the price of imports from Mexico was 16.8 per cent higher. In an industry where profit margins are determined by pennies, the difference between imports from Pakistan and Mexico was very significant.

4.182 Pakistan asked the United States what is the reason for higher sales of Mexican cotton combed yarn as compared to Pakistani cotton combed yarn (during year ending in October 1998, Mexican cotton combed yarn was imported into the United States 50% more than Pakistan cotton combed yarn) in spite of the difference in price? The United States responded that, as stated earlier, there could be a variety of reasons why sales of Mexican combed cotton yarn in the U.S. market might be higher than sales from Pakistan, even though combed cotton yarn from Mexico is priced higher than combed cotton yarn from Pakistan. Some of these reasons might include: quickness of delivery, proximity to the U.S. market, reliability, long and established customer relations, and

consistent quality. However, as the United States explained when this question was asked previously, any attempt to isolate a particular reason would be speculative.

4.183 Commenting on this response, **Pakistan** states that the United States tried to justify the attribution of the whole of the damage to Pakistan by the fact that Pakistani yarn was less expensive than Mexican yarn. In its answer to an earlier question (paragraph 4.176), the United States had explained that Table V was limited to import data only and did not reflect any of the other variables set out in Articles 6.3 and 6.4, notably price. The price of imports from Mexico remained substantially higher than the price of imports from Pakistan, which continued to be the lowest-priced unrestrained supplier to the U.S. market.[83] The Market Statement, however, did not compare the prices of Mexican and Pakistani yarn nor did it indicate any reason for the difference in the prices of domestic and Pakistani yarn. Pakistan asked the United States twice why imports from Mexico increased more sharply than those from Pakistan in spite of the fact that Pakistan's prices were determined to be lower (paragraph 4.173).

4.184 In its comments, Pakistan submitted that the United States could not conduct a proper attribution analysis without identifying the reason(s) why importers purchased increased quantities of Mexican yarn in spite of its higher price. If, for instance, the price difference could be explained by differences in quality or proximity to the United States' market or the rules of origin applicable in the trade between NAFTA countries, the lower price of Pakistani yarn would merely compensate the importers for the additional costs incurred in purchasing Pakistani rather than Mexican yarn. From the perspective of the importer, the total costs of importing Pakistani yarn and Mexican yarn would then be the same, notwithstanding the price difference. As a result, the price difference, as such, would not be an indication of the superior competitiveness of Pakistani yarn and, therefore, be no ground for attributing the alleged serious damage and threat of serious damage to Pakistan.

Discussion of Technical Aspects of the Yarn

4.185 Pakistan also asked the question, following the second substantive meeting of the Panel, if the United States has determined the average count of ring spun combed cotton yarn imported from Pakistan and that manufactured in the United States? It asserted that the range of counts "18-38" used by the United States in its market statement is a very wide range and yarn prices vary by about 5 cents/count/kg. Thus, in Pakistan's view, if imports from Pakistan are averaged count 20 and the average count manufactured in the United States is count 30, there would be a difference of 50 cents per kg (about 15% of sale price) regardless of other difference, i.e. level of trade, quality, preferential treatment, etc. In response, the **United States** explained that it had established the transitional safeguard measure on combed cotton yarn imports from Pakistan in strict conformity with the ATC and made every effort to ensure that its price comparisons reflected comparable goods. The ATC Annex specifically requires safeguard actions under Article 6 to be taken with respect to particular products, such as combed cotton yarn. Paragraph 2 of the ATC Annex provides that "[a]ctions under the safeguard provisions in Article 6 will be taken with respect to particular textile and clothing products and not on the basis of the HS lines *per se*." Thus, the U.S. action was taken with respect to combed cotton yarn for sale. For purposes of administration of quotas, including actions under the Article 6 safeguard, the various Harmonized Tariff Schedule of the United States of America ("HTSUSA") classifications for combed cotton yarn are grouped into a textile quota category, specifically, Category 301. Since the categories serve to identify "particular textile and clothing products," data for domestic production and other Article 6.3 variables for like and/or directly competitive products were collected and analyzed in the same category framework. Nevertheless, the United States made every effort to ensure that the price comparisons in its analysis and Market Statement reflected comparable goods. Category 301 actually comprises a wide variety of yarn counts, ranging from less than or equal to 14 metric number to greater than 120 metric number,

[83] Para. 31 of the answers of the United States.

which correspond to yarn counts of less than or equal to eight, to 71 and over.[84] As discussed in the Market Statement, the United States identified within this broad category the particular classifications in which imports are concentrated.[85] Once the United States had identified the specific HTSUSA classifications covering the majority of imports from Pakistan, the United States obtained from published data the U.S. producer price corresponding to the same particular "counts," so as to ensure that the price comparison was done on the basis of similar goods. Therefore, as reflected in Table II of the Market Statement, the United States based its price comparisons on the basis of all of Category 301 imports and on those particular yarn counts where imports from Pakistan were concentrated.

4.186 The United States also notes that, in this question, Pakistan makes a number of unsupported suggestions regarding the average yarn count of imports from Pakistan and U.S. domestic production and price variations that may result from differences in yarn counts. Pakistan offers no support, evidentiary or otherwise, for its assertion that the average yarn count of imports from Pakistan is 20 count. Nor does Pakistan offer any substantiation for its assertion that the average U.S.-manufactured yarn is 30 count. Instead, Pakistan asks that we assume that the average yarn count of imports form Pakistan is 20 count and the average yarn count of U.S. domestically produced yarn is 30 count to support its claim related to yarn price. It may assist the evaluation of Pakistan's claim to know that both yarn counts of 20 and 30 are included in this range of HTSUSA classifications in which imports from Pakistan were concentrated. Thus, as discussed above, the United States made every reasonable effort to ensure that the price comparisons used in the Market Statement analysis reflected, as closely as possible, comparable products in terms of yarn counts. Pakistan has provided no basis in its parenthetical comment to its question to suggest that the U.S. pricing analysis was in any way inappropriate or more importantly, violated the ATC.

4.187 The United States went on to respond to a Panel question concerning quality and technical specifications of domestically produced yarn in relation to imports from Pakistan or Mexico. It noted that some variations in quality are characteristic of goods in the marketplace, whether domestically-produced or imported, although quality is somewhat subjective. Generally, however, combed cotton yarn in the marketplace, whether domestically produced or imported (from any source) is of similar and comparable quality. To the best of their knowledge, there are no material differences in the technical specifications of the yarn produced domestically for sale, for internal use and the yarn imported from Pakistan or Mexico.

4.188 The United States also pointed out, in response to a further question from the Panel, that to the best knowledge of the United States, U.S. manufacturers did not make direct investments in combed cotton yarn production in Mexico during the period of investigation.

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[84] A yarn count is a measure of the fineness of yarn. Lower numbers designate heavier or thicker yarns, while higher numbers refer to finer yarns. Phyllis G. Tortora and Robert S. Merkel, *Fairchild's Dictionary of Textiles*, (7th ed, 1996), p. 143. To go from a cotton count to a metric count number, one would use the conversion factor of cotton count x 1.693. For example, a yarn of cotton count 8 would have a metric number of 13.55. Hoechst Celanese, Yarn Number Conversion Formula, *Dictionary of Fibre & Textile Technology*, (1990), p. 209.

[85] Market Statement, at Table II note 2. The United States explained that 46 per cent of total Category 301 imports and 54 per cent of Category 301 imports from Pakistan enter the United States under three HTSUSA classifications (5205.22.0020, 5205.23.0020, and 5205.24.0020). These classifications cover wholly cotton, ring spun combed cotton singles yarn with yarn counts ranging from 8 to 47 count (14 to 80 metric number). The bulk of these imports are of 18 to 38 cotton counts.

F. THE QUESTION OF THE NEED FOR A PROSPECTIVE ANALYSIS TO DETERMINE ACTUAL THREAT OF SERIOUS DAMAGE

4.189 **Pakistan** recalled that, according to the panel on *United States - Underwear from Costa Rica,* actual threat of serious damage can only be determined by what it described as a "prospective analysis": "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 its 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".[86]

4.190 It follows from the above that the United States was required to demonstrate in the published record that, unless the restraint on combed cotton yarn was imposed, the domestic combed cotton yarn industry would suffer serious damage. This demonstration required a quantitative analysis of the likely future impact of the imports. It follows from the above that the parameters of a "prospective analysis" to determine whether there was an actual threat of serious damage required the United States, as a minimum: (a) to demonstrate that a further sharp and substantial increase in imports was possible and likely; (b) to quantify the level of those imports; and (c) to present an assessment of the impact of this increase in imports on all relevant economic variables affecting the state of the domestic industry, including the factors mentioned in Articles 6.3 and 6.4 of the ATC.

4.191 The United States' Market Statement does not present such a prospective analysis; it first describes under the heading "Actual Threat of Serious Damage" the conditions of the domestic industry with reference to the same data used for the determination of actual threat.[87] It then presents under the heading "Analysis of Actual Threat" again the import data and price data used for the determination of actual threat. The only element of a prospective nature is the following statement: "The increase in global imports and the fact that they are and will continue to be priced below domestic prices leads the USG to conclude that the defined domestic industry is threatened with serious damage or the exacerbation of serious damage from increased imports of the subject product".[88] Pakistan submits that a mere assertion that import and price trends will continue does not meet the requirement of a demonstration of actual threat of serious damage.

4.192 The **United States** points out, in response to a question from the Panel regarding the parameters of a "prospective analysis" required to determine whether there is actual threat of serious damage, that Article 6 of the ATC sets forth no specific requirement regarding whether an importer must conduct a separate analysis of actual threat of serious damage and, if so, what the parameters of that analysis should be. Nevertheless, Article 6 requires a Member to base its assessment of actual threat of serious damage on (1) the eleven economic variables set out in Article 6.3 and (2) specific and relevant factual information that is as up-to-date as possible. The United States clearly fulfilled these requirements by conducting a separate analysis focused on the impact that the surge in Category 301 imports would likely have in the immediate future. The United States examined objective and verifiable data for the factors contained in Article 6.3 – particularly data reflecting the months prior to the safeguard action when the surge of Category 301 imports was at its height and most damaging – reflecting the latest available data. Based on this fact-based, up-to-date information, the magnitude of the most recent surge, the low prices of imports compared to the average U.S. price, the likelihood that combed cotton yarn would continue to enter into the United States at such low prices, and the dire condition of the domestic industry, the United States concluded that the economic variables for the industry would continue to decline and that the industry faced an actual threat of

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[86] *United States - Restrictions on Cotton and Man-made Fibre Underwear*, WT/DS24/R, para. 7.55.
[87] Market Statement, paras. 8.1 - 8.3.
[88] Market Statement, para. 8.7.

serious damage and an exacerbation of the current serious damage from the increased imports of combed cotton yarn.

4.193 Accordingly, the United States considers that it has demonstrated, based on a prospective analysis, that imports of combed cotton yarn from Pakistan were causing an actual threat of serious damage to the domestic combed cotton yarn for sale industry. The analysis of the market starkly revealed that every major benchmark of economic performance during 1998 was deteriorating and would likely continue to deteriorate. The data demonstrated that, as imports from Pakistan were surging, output was dropping, productivity was deteriorating, capacity utilization was falling, domestic market share was declining, employment was decreasing, prices were falling, profits were diminishing, investment was stagnating, inventories were increasing, unfilled orders were falling, and mills were exiting the industry.

4.194 In addition, world prices – particularly from Pakistan – were substantially below domestic prices. For all of Category 301, the world price was 7.8 per cent below the average U.S. price; the price from Pakistan was 26.2 per cent below the average U.S. price. In specific areas, where imports were concentrated, the world price was 18 per cent below the average U.S. price and the Pakistan price was 28.3 per cent below the average U.S. price. Because price is a major factor in generating orders, the United States concluded that combed cotton yarn imports – particularly low-priced imports from Pakistan – would continue to rise while domestic production, market share, and return on investment would continue to fall.

4.195 The United States also states that Pakistan neither contests its findings nor advances any arguments that establish a violation of the ATC. Rather, Pakistan confuses the text of Article 6.3 with that of Article 6.4 and attempts, on that basis, to add new unfounded requirements into the analysis of actual threat of serious damage, such as a demonstration of a further sharp and substantial increase in imports and a quantification of that surge. Furthermore, Pakistan introduces highly misleading data regarding Pakistan's import trends subsequent to the investigation which is outside the scope of this proceeding. Developments subsequent to the initial determination were not available to the United States at the time of its investigation and, accordingly, should not be considered. As a footnote to its submission, the United States comments that Pakistan's introduction of new evidence is also highly misleading. Although outside the scope of the Panel's review, the United States notes that a two-month decline in year-ending imports of Category 301 yarn from Pakistan is not a meaningful trend. Imports of Category 301 yarn from Pakistan have a history of high month-to-month volatility, and Pakistan exports the capacity to surge dramatically in a short period of time. Since 1996, monthly imports from Pakistan have ranged from zero to over one million kilograms. As it turned out, imports from Pakistan on a year-ending basis declined through August 1999, but Category 301 imports from Pakistan then surged again to the highest levels ever recorded, and Pakistan ended up actually overshipping the first year limit. The United States goes on to argue that Pakistan also wrongly suggests that the Market Statement did not rely on the most up-to-date information and, therefore, cannot support the U.S. determination of actual threat of serious damage. As discussed above, the United States relied on the most up-to-date information in making its assessment of actual threat of serious damage.

4.196 **Pakistan** also offers comments on the above question, explaining that the text of Article 6.4 makes clear that the threat of serious damage must be "actual" and that it must be determined on the basis of a "sharp and substantial" increase in imports that is either "actual" or "imminent". An "imminent increase shall be a measurable one", according to the footnote to Article 6.4. The Member invoking Article 6.2 must, consequently, demonstrate that the threat is not merely potential or hypothetical and that a sharp and substantial increase in imports from individual Members has already occurred or is threatening to occur immediately. The requirement to limit safeguard actions to situations in which there is "actual" threat and the imminence of increase imports is "measurable" sets a high standard for determinations of actual threat of serious damage.

4.197 In response to the above point, the **United States** comments that without acknowledging that the ATC does not require a Member to conduct a separate analysis of actual threat of serious damage or set forth parameters for that analysis, Pakistan assumes that such an analysis is required and even proposes its own parameters. Without citing any support in the ATC or elsewhere, Pakistan also adds additional requirements of its own to Articles 6.2 and 6.3: "a further sharp and substantial increase" and a requirement to "quantify the level of those [future] imports". Pakistan appears to confuse the text of Articles 6.2 and 6.3 with the text of Article 6.4. Articles 6.2 and 6.3 do not require a showing of a "sharp and substantial increase" for establishing serious damage or actual threat thereof. Rather, a "sharp and substantial increase" is required for attribution to a particular Member under Article 6.4. Articles 6.2 and 6.3 only require a Member to show that a particular product is "being imported into its territory as to cause serious damage or actual threat thereof".

4.198 In the view of the United States, at best, Pakistan has confused the serious damage requirements of Article 6.2 and 6.3 with the attribution requirements of Article 6.4. At worst, Pakistan is inviting this Panel to write into Article 6.2 and 6.3 the different attribution requirement of Article 6.4. It is worth observing that, even though world imports had doubled and Pakistan's own imports had quadrupled in a mere eight months, Pakistan would want to impose on an analysis of actual threat of serious damage a requirement to show a second sharp and substantial surge. As if that were not enough, Pakistan would have the Member invoking the safeguard "quantify" that future surge. If there was already an actual threat to the domestic industry, requiring a Member to demonstrate a second sharp and substantial increase would render a Member's ability to establish actual threat of serious damage a nullity. In addition, to demand, as Pakistan does, that a Member "quantify" that future surge simply invites a Member to engage in speculation, and adds nothing to an analysis of actual threat of serious damage. Pakistan's efforts to question the U.S. analysis of actual threat of serious damage fail.

4.199 The Panel asked if, in the view of the United States, an examination of production capacity in the exporting country would be required for an analysis of actual threat of serious damage. In reply, the United States commented that footnote 6 to Article 6.4 relates to situations when attribution of serious damage/actual threat thereof is made on the basis of an imminent, rather than an actual, increase in imports. In this case, the United States based its attribution of serious damage/actual threat thereof to the domestic industry producing combed cotton yarn for sale on an actual 283.2 per cent increase in imports of Category 301 products from Pakistan, within the meaning of Article 6.4. The United States did not consider available statistics on Pakistan's production capacity at the time that it prepared the Market Statement. Such statistics reveal that Pakistan's production capacity far outstripped that of other exporters and that Category 301 imports from Pakistan have a history of high month-to-month volatility, demonstrating that Pakistan's exports unquestionably had the capacity to surge dramatically in a short period of time.

4.200 The view of **Pakistan** on this question is that the text of the footnote itself does not establish this requirement. However, the exporting Member's production capacity may be a factor relevant to the prospective analysis required under Article 6.4.

G. DISCUSSION OF THE TMB REVIEW OF THIS MATTER

4.201 The **United States** notes that Pakistan has repeatedly claimed that the United States acted improperly by failing to follow the TMB's recommendations in this case, suggesting that the U.S. violated the ATC in this regard. While the TMB has an important overall supervisory role in the implementation of the ATC, TMB recommendations are non-binding and are not dispositive for purposes of these proceedings. The United States did not refer to previous TMB recommendations to suggest that they are binding. Rather, the United States noted that the TMB had previously justified a safeguard, whose identification of domestic industry mirrored that in this case, in order to emphasize that the United States acted reasonably in identifying the domestic industry in a similar manner based on virtually identical facts and circumstances. Article 8.10 of the ATC specifically contemplates that

a Member may disagree with the TMB's findings. In this case, the U.S. had a number of serious, substantive concerns about the TMB review and informed the TMB that the U.S. was unable to conform to the TMB's recommendations. Therefore, the U.S. has carefully followed the ATC both in substantive and procedural terms, just as Pakistan has exercised its rights to request that this Panel hear its claims (paragraphs 4.209- 4.210).

H. THE LATE SUBMISSION OF EVIDENCE

4.202 In providing answers to the questions of the Panel and of Pakistan in connection with the second substantive meeting of the Panel, the **United States** considers that Pakistan failed to justify its late submission of "evidence" on the basis of paragraph 12 of the Working Procedures for the Panel, which provides that: "Parties shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for the purposes of rebuttal submissions, answers to questions, or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comments, as appropriate.".

4.203 The United States points out that Pakistan attached to its written questions to the United States, dated 14 December 2000, three documents. Under paragraph 12 of the Working Procedures of the Panel, Pakistan was required to submit this evidence to the Panel no later than during the first substantive meeting. This evidence was not necessary for, and was not used for, the purpose of rebuttal submission, answers to the questions from the United States or the Panel, or comments on answers provided by the United States. Rather, Pakistan had introduced this evidence as the basis for new questions to the United States – a circumstance that did not fall within the exception in paragraph 12.

4.204 The United States fails to understand how Pakistan could claim that this new evidence was submitted in rebuttal to arguments made by the United States in its second written submission or during the second substantive meeting of the Panel. The points raised by the United States in its second written submission and during the Panel's second meeting were not new arguments. Rather, the United States was responding to Pakistan's repeated claims, which Pakistan failed to support with credible evidence, that the United States relied on false, unverified, unverifiable, untrustworthy, incorrect, and inaccurate data. Pakistan could have and should have submitted its new so-called "evidence" to support the many unfounded assertions it had made throughout this proceeding at the time it made the assertion. Indeed, each of these documents should have been available to Pakistan since well before the beginning of this proceeding.

4.205 Moreover, given that this new "evidence" did not appear necessary to rebut arguments made by the United States, Pakistan should have justified its unseasonably submitted evidence on a showing of good cause pursuant to paragraph 12 of the Working Procedures of the Panel. However, Pakistan had made no effort whatsoever to do so. Accordingly, the United States does not see how Pakistan could claim to have complied with paragraph 12 of the Working Procedures of the Panel in submitting new evidence at this stage in the proceeding regarding claims its has made and should have supported in its first written submission, the first substantive meeting of the Panel, its answers to written questions from the Panel, its second written submission, and the second substantive meeting of the Panel.

4.206 The United States also notes that the new evidence submitted by Pakistan failed to support the many unfounded assertions that it introduced during the course of this proceeding. As the Panel may recall, Pakistan had orally claimed during the Panel's second substantive meeting to have evidence to support Pakistan's many instances of unsupported speculation that the United States listed in footnote 3 of its second written submission. However, Pakistan failed to provide this evidence for the record and also failed to provide evidence to support other unfounded claims that it made during the Panel's second substantive meeting. The United States also noted that Pakistan had similarly failed to

provide any evidence to support many similar groundless assertions made in its second written submission.

4.207 Accordingly, the United States requests that the Panel disregard any so-called "evidence" that Pakistan claims orally to possess but has failed to introduce on a timely basis into the written record. The United States further requests that the Panel disregard all assertions that Pakistan made orally or in its submissions that Pakistan failed to support with actual evidence. Finally, the United States requests that Pakistan should be given no further chances to submit evidence which it should have submitted during the course of this proceeding.

4.208 **Pakistan** provided comments on the views of the United States as set out in the preceding two paragraphs. Pakistan emphasised that it strongly disagreed with each of the United States' claims. In the instances listed by the United States, Pakistan submitted both facts and considerations to establish a *prima facie* case of violation of Article 6 of the ATC. It was for the United States to effectively rebut Pakistan's case. The mere characterisation of these facts and considerations as "speculative" is not an effective rebuttal. In several instances the United States turned a legal argument presented by Pakistan into a factual claim based on unsupported speculation. For instance, in paragraphs 36 and 37 of its second submission, Pakistan argued that the terms of Article 6.2 make clear that the definition of the product subject to the safeguard action controls the definition of the domestic industry. If the United States were permitted to define the domestic industry as the manufacturers of combed cotton yarn for sale, it would consequently have been required to impose its restraint only on combed cotton yarn for sale. However, in fact, the restraint applies to all imports of combed cotton yarn, whether destined for sale in the merchant market or for consumption by a related fabric producer. Therefore, even if the United States industry definition was consistent with Article 6 of the ATC, its safeguard action would not be justified by Article 6. The United States described the above argument in paragraphs 36 and 37 of the second submission as "unsupported speculation concerning the existence of captive imports" and "whether a U.S. fabric producer would want to purchase a yarn plant in Pakistan" even though Pakistan made clear that its argument does not rest on the existence of captive imports but on the current potential for such imports. Pakistan therefore believes that the United States' dismissal of Pakistan's legal claim as unsupported factual speculation does not constitute an effective refutation of that claim.

I. CONCLUDING COMMENTS

4.209 **Pakistan** states that many of the deficiencies in the United States' determinations are similar to those identified by the panels that examined the United States transitional safeguard actions on underwear from Costa Rica and wool shirts from India. It must, therefore, have been obvious to the United States that its action on combed cotton yarn could not be reconciled with the requirements of Article 6. The successive reviews of a safeguard measure by the TMB, a panel and the Appellate Body take a considerable amount of time and during all this time the domestic industry remains protected. Under the WTO dispute settlement procedures, no compensation is due to the exporting Member suffering the damage corresponding to the benefits enjoyed by the protected industry. It is, therefore, with considerable regret and frustration that Pakistan is now asking a third panel to make essentially the same obvious ruling, namely, that the United States may not invoke the transitional safeguard mechanism unless it can demonstrate on the basis of verifiable, correct and complete data that the requirements set out in Article 6 are met.

4.210 Pakistan also comments that the arguments presented by the United States in these proceedings cannot be reconciled with the most basic principles of interpretation and the rulings of the Appellate Body. Some of the positions defended by the United States are inconsistent with the positions adopted by the United States in other panel proceedings. Others cannot be reconciled with its own practices. It is not clear to Pakistan whether we are hearing in these proceedings a voice expressing the overarching interests of the United States or the voice of the AYSA. The conduct of the United States in these proceedings confirms, in the view of Pakistan, that the United States is

using the time-consuming proceedings under the ATC and the DSU not as a means to settle a genuine dispute but to provide protection to the members of AYSA while lengthy proceedings take their course. This is extremely worrisome. If this practice were to continue and to spread to other Members, the WTO dispute settlement procedures would be turned into a mechanism to escape WTO obligations and the ATC would effectively become unenforceable during the last two to three years of its existence. Our hope is that the Panel shares Pakistan's views on the United States' approach and its consequences for the integrity of the WTO dispute settlement system and that it states this in its report.

4.211 In summing up its views, the **United States** observes that this case comes down to two fundamentally different views of Article 6 of the ATC. Like the Appellate Body stated in *United States - Wool Shirts* case, the United States believes that "the transitional safeguard mechanism provided in Article 6 of the ATC is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period". Accordingly, the United States has urged this Panel throughout this proceeding to focus on and give meaning to the plain words of Article 6 interpreted in light of their object and purpose. In the view of the United States, Pakistan has taken the opposite view of Article 6. For Pakistan, Article 6 is not part of the fundamental rights and obligations of the ATC. Rather, at various points during this proceeding, Pakistan has characterized Article 6 as a "waiver," or an "exception," or an "exception within an exception," or more tellingly, as "counter to the basic purpose of the ATC."

4.212 The United States continues, stating that, informed by its view, Pakistan has advanced arguments whose effect would interpret Article 6 out of the ATC. For each issue in contention, Pakistan has asked the Panel to either ignore words clearly present in Article 6 or add new words and requirements that are not. For instance, under Pakistan's approach, the Panel would ignore Article 6.2's plain words "and/or" and "directly competitive" when interpreting the scope of the domestic industry. The result: importing Members would lose the ability afforded by Article 6.2 to focus on those products directly competitive with imports in the marketplace and industries most affected by an import surge. Under Pakistan's approach, the Panel would ignore the factors set out in Article 6.3 and its clear direction that no one of these factors gives decisive guidance. Instead, Pakistan would have the Panel consider readjustment – a factor that is not even listed in Article 6.3 – to the exclusion of all others. The result: importing Members would never be able to find serious damage if an industry attempts to restructure, notwithstanding clear evidence of serious damage or actual threat of serious damage as reflected in the overall deterioration in the Article 6.3 factors. Also, under Pakistan's approach, the Panel would add the obligation to obtain data for all factors from official sources and to refrain from relying on verified data from the private sector because, in Pakistan's view, such data are inherently self-serving, inaccurate and untrustworthy. The result: importing Members would be unable to obtain data for most of the factors listed in Article 6.3. And for those that it could obtain from official sources, an importing Member would have to wait until such data were collected, analyzed and officially released to resort to the transitional safeguard mechanism, even if evidence of serious damage was clear and compelling. If a Member were required to wait until all data forming the basis of its analysis could be compared to official government statistics, then it would be impossible for a Member to respond to the damaging effects of an import surge in a timely manner, and Article 6 would be severely undermined.

4.213 The United States also considered that, under Pakistan's approach, the Panel would add to Article 6.2 and 6.3 new terms regarding actual threat of serious damage to require importing Members to "demonstrate a further sharp and substantial increase" and "quantify the level of those imports".[89] The result: importing Members would face requirements impossible to meet and, in turn, would never be able to conduct a meaningful analysis of actual threat of serious damage. Under Pakistan's

[89]See e.g., Answers of Pakistan to Written Questions from the Panel, at p. 24; Second Written Submission of Pakistan, at p. 33.

approach, the Panel would add drawn-out time lines into the analysis of causation beyond anything required in the ATC.[90] The result: notwithstanding clear evidence of serious damage, importing Members would have to postpone safeguard action while imports continue their damaging surge. Under Pakistan's approach, the Panel would add new terms into Article 6.4 to require an importing Member to "assess individually and compare all potential sources of serious damage" and to conduct a new and separate causation analysis (even after causation has already been established) to determine whether imports from other sources caused serious damage.[91] Pakistan also tries to suggest that the volatility of its imports, which even Pakistan characterizes as extreme, should mitigate the effects of a 283.2 per cent surge.[92] The result: importing Members would face an insurmountable attribution burden and would lose the ability to establish a Member-by-Member safeguard even in the face of a clear finding of serious damage or actual threat thereof.

4.214 The United States considered that these are just a few examples of how Pakistan would like the Panel to rewrite through interpretation the text of Article 6 and thereby disrupt the carefully negotiated balance of rights and obligations set out in the ATC. The United States urges the Panel to reject these efforts and to give full effect to the Article 6 transitional safeguard mechanism based on its plain meaning and the object and purpose it serves. Contrary to Pakistan's mistaken view, Article 6 of the ATC is a fundamental right given to importing Members. The United States would urge the Panel to interpret it as such and, as provided in Article 3.2 of the DSU, not to "diminish the rights and obligations provided in the covered agreements".

4.215 The United States also recalled that it was mindful of guidance from previous panels and the Appellate Body regarding past U.S. transitional safeguard investigations and specifically followed this guidance in this instance by examining and explaining its conclusions regarding all relevant economic factors in Article 6.3; considering at least all the factors in Article 6.3; considering and explaining how the totality of factors supported its conclusion of serious damage or actual threat thereof resulting from increased quantities of imports; establishing a causal link between the increased quantities of imports and the declining conditions in the domestic industry; addressing the specific question of whether changes in consumer preferences or technological changes caused serious damage; relating the data to the particular industry damaged; conducting a separate and future oriented analysis of actual threat of serious damage; and applying the restraint after the consultation process had been concluded, with prospective effect.

V. ARGUMENTS PRESENTED BY THIRD PARTIES

A. PARTICIPATION OF THE EUROPEAN COMMUNITIES

5.1 When the DSB established the Panel on 19 June 2000, the European Communities and India reserved their third party rights to participate in the proceedings. Subsequently, on 8 November 2000, the **European Communities** informed the Panel, "in view of the arguments developed in these submissions, the EC considers that the main issues raised in this procedure are inextricably linked with the factual elements of the case. As a third party, the EC is not in a position to effectively intervene on such issues. Accordingly, it wishes to notify you that it does not intend to file a third party submission in this case.".

[90] *See e.g.*, First Written Submission of Pakistan, at p. 37.
[91] *See e.g.*, Second Written Submission of Pakistan, at pp. 34-37.
[92] *See* Second Written Submission of Pakistan, at p.38.

B. THE SUBMISSION OF INDIA

5.2 In its submission, **India** argues that the core legal issue in this dispute is whether the U.S., when evaluating the effect of imports of combed cotton yarn on the state of its domestic industry, could exclude from its consideration the vertically integrated establishments producing yarn for further processing into fabric (representing about half of the total number of producers of combed cotton yarn and about one-third of total domestic production). This involves interpretation of Article 6 of the ATC.

5.3 On the ground that the ATC does not define "domestic industry", the U.S. defines its cotton yarn industry as "combed cotton yarn for sale industry" i.e., establishments producing combed cotton yarn for sale in the market. Excluded from this definition are the vertically integrated producers, which produce cotton yarn for the production of fabric and not for sale in the market. According to the U.S., it should be so defined because of the uniqueness of the ATC. According to the U.S., the wording "domestic industry producing like and/or directly competitive products" in Article 6.2 of the ATC allows it "to identify an industry producing a product that is: (1) like and directly competitive; (2) like but not directly competitive; or (3) unlike but directly competitive". This interpretation would allow a Member invoking a safeguard measure "to address serious damage and/or actual threat of serious damage to its domestic industry caused by sharp and substantial increases in imports. But, if the domestic products are not directly competitive with imports … the need for safeguard action would not arise.". Therefore, it justifies its action of excluding the vertically integrated producers from the domestic industry.

5.4 India believes that this interpretation is inconsistent with the text and context of Article 6 of the ATC. Article 6.2 of the ATC lays down that a safeguard action could be taken by a Member when "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". Article 6.3 states that in making determination of a serious damage or actual threat thereof, the Member "shall examine the effect of those imports on the state of the particular industry" as reflected in changes in relevant economic variables, such as output, productivity, etc. Here words used are 'particular product' and 'domestic industry producing … product' and no reference is made to selling or marketing. The like products always compete with each other. The product, which is not like but still competes with the subject product should also be covered by Article 6.2. The use of the term "particular" to define both the imported product and the domestic industry in Articles 6.2 and 6.3 makes it clear that the definition of product subject to the safeguard action controls the definition of the 'domestic industry' and the economic variables that must be examined.

5.5 In this connection, the observation of the TMB may be noted: "whether or not combed cotton yarn was sold or further processed within a vertically integrated company did not affect the product characteristics of such combed cotton yarn. Indeed, combed cotton yarn produced by vertically integrated plants bore the same physical characteristics as combed cotton yarn produced for sale … therefore, in the view of the TMB the two products can be considered as 'like' products". Thus, the relevant domestic industry consists of all domestic establishments producing combed cotton yarn, including the vertically integrated producers.

5.6 Therefore, the U.S. definition of domestic industry under Article 6.2 is not supported by ATC provisions and thus is not tenable. Accordingly, its determination, based on such a narrow definition, that imports from Pakistan were causing serious injury or actual threat thereof is inconsistent with the ATC.

5.7 Furthermore, it may be noted that while the U.S. distinguishes between products for sale (in the market) and vertically integrated products for producing fabric only in defining its domestic industry, no such distinction is made with respect to imports of cotton yarn.

5.8 Another issue that this dispute raises is attribution of serious damage or actual threat to imports from Pakistan and not from any other comparable source. Article 6.4 of the ATC requires that safeguard measures under Article 6 should be applied on Member-by-Member basis. However, attribution of serious damage should be done "on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member of 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;". The Panel on *United States – Underwear from Costa Rica* (DS24/R) emphasized the importance of comparative assessment under Article 6.4.

5.9 In the present case, Pakistan and Mexico are the largest suppliers of combed cotton yarn to the U.S. The statistics of the U.S. Department of Commerce indicate that during the relevant period, i.e. between January-October 1997 and January-October 1998, while imports of cotton yarn from Pakistan rose from 10.4 per cent of the U.S. total imports to 16.2 per cent (i.e., 1.7 million kg to 3.9 million kg), the imports from Mexico during the same period rose almost twice (i.e., from 2.1 million kg to 5.8 million kg). But the U.S. did not make any comparative analysis as mandated by Article 6.4. Thus, the U.S. action is not consistent with the ATC and the Panel should find violation by the U.S. of its obligations under the ATC and the WTO.

5.10 The U.S. argues that the ATC (and its Article 6) is unique and special. It is different from other non-transitional agreements of the WTO. It "derives" from no other WTO Agreement, rather the ATC is a carefully negotiated successor to the MFA (GATT Multifibre Arrangement). Therefore, the MFA "rather than any other agreement – (should) serve as the model for the ATC.".

5.11 It may be noted that despite its transitory nature and unique provisions of the bilateral safeguard mechanism, the ATC is a "covered agreement". The rules of treaty interpretation as expounded and applied by the Appellate Body in *United States – Gasoline* (DS2) and subsequent cases are applicable to the interpretation of the ATC. Accordingly, Articles 31 and 32 of the Vienna Convention on the Law of Treaties are applicable. Article 31 states that a treaty should be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the light of its object and purpose". Under Article 32 negotiating history could be resorted to as a secondary means of interpretation, either to confirm the textual meaning or in case the textual interpretation under Article 31 leaves ambiguity or results in absurd and unreasonable meaning.

5.12 As to the claim that the MFA should be the model for interpretation of the ATC, India invites the attention of the Panel to the Appellate Body rulings in *Argentina – Footwear* (DS121) and *Korea – Dairy Products* (DS98) cases, where it refused to consider arguments based on past history that the text (first clause – "unforeseen developments") of Article XIX of GATT 1994 was subsumed into Article 2 of the Agreement on Safeguards.

5.13 Another legal issue is whether the Panel should consider only those facts taken into account by the Member at the time of applying the safeguard measure and refuse to take into account, even in the case of actual threat of serious damage, which requires prospective analysis of the effects imports, the facts emerged subsequent to the application of the safeguard measure. In this connection, India draws the Panel's attention to the finding of the Panel *United States – Import Measures* (DS165), where the events subsequent to the measure at issue were examined to understand and clarify the measure at issue.

VI. INTERIM REVIEW[93]

A. GENERAL

6.1 On 30 March 2001, Pakistan and the United States requested an interim review by the Panel of certain aspects of the interim report issued to the parties on 23 March 2001. Neither party requested an interim review meeting, and thus, as provided for in the Working Procedures of the Panel, both parties were permitted to submit further comments on the other party's interim review requests. Pakistan did not submit any further comments, while the United States submitted further comments on 6 April 2001.

B. COMMENTS OF PAKISTAN

1. Standard of Review

6.2 **Pakistan** made the following comments on the standard of review which the Panel had applied to this case: "Pakistan is … concerned about the 'justifiability' standard that the Panel applied when examining the question of whether the United States had demonstrated serious damage (see in particular paragraphs 7.116, 7.110 and 7.120. The concept of 'justifiability' is a new concept that can be found neither in the text of the ATC nor in the WTO jurisprudence regarding the standard of review to be applied under Article 11 of the DSU. The Panel does not explain what the treaty basis and scope of this standard are. In the view of Pakistan, the Panel applies this standard in a manner that reduces substantially the value of the disciplines set out in Article 6 of the ATC and the practical relevance of Panel's rulings on industry definition, attribution and actual threat. The effect of the Panel's approach is [to] relieve the United States of the obligation set out in Article 6 to demonstrate serious damage and causality and to shift the burden of meeting this obligation to Pakistan."[94]

6.3 **The Panel** would like to emphasize that in the interim report, footnote 127, "[w]e consider th[e] term ["justifiable"] to be *descriptive of the current jurisprudence*, rather than any addition or deletion thereto" (emphasis added), and accordingly, has moved this statement into the text of paragraph 7.35. In contrast to the argument of Pakistan, we do not consider that this standard would reduce the value of the disciplines set out in Article 6 of the ATC. As we explained in subsection VII.D.3, in particular, paragraph 7.32, this standard is not introduced from without the WTO Agreement, but derived from the text of Article 11 of the DSU. As both the DSU and the ATC are integral parts of the WTO Agreement, the standards set out in the DSU are applicable in interpreting the ATC. In addition, we disagree with the argument that this standard improperly shifts the burden of proof to Pakistan. As we pointed out, in line with the jurisprudence, it is Pakistan rather than the United States that bears the burden of establishing a *prima facie* case that the United States did not demonstrate serious damage and causality.

2. Comments Specific to Claims

(a) General

6.4 **Pakistan** also commented "that some of its legal claims and some of the undisputed facts relevant to its claims were not examined by the Panel in reaching its conclusions on serious damage."

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[93] Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the following section entitled Interim Review is an integral part of the Findings of this Panel Report.

[94] Pakistan's comments on the interim report, para. 1.

6.5 **The Panel** is of the view that it has properly examined all the legal and factual claims of Pakistan, as indicated in Section VII (in particular, subsection F) below. Nevertheless, for purposes of further clarification, we will discuss several points in greater depth.

(b) Claim on the reliability of AYSA data:

6.6 **Pakistan** provided the following comments on the Panel's finding regarding its claim concerning the reliability of AYSA data:

> (a) "The Panel reaches its conclusions without discussing the undisputed facts on which Pakistan based its *prima facie* case. Pakistan respectfully requests the Panel to do so in its final report and to indicate how, in its view, the United States had demonstrated that it had verified the data supplied by AYSA.
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> (b) The Panel states in paragraph 7.95 that the data AYSA supplied in 1997 'might not have been fully accurate', while they were demonstrated to be false. In fact, in the next paragraph the Panel describes these data as "incorrect". The data should in both paragraphs be described as incorrect.
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> (c) In paragraph 7.96, the Panel notes the authorities' positive reaction to the submission of incorrect data by AYSA in 1997. However, the issue in this paragraph is not the good faith of the authorities but the reliability of the AYSA data. It is therefore not clear to Pakistan why the Panel considers the authorities' reaction to the submission of false data by AYSA to be relevant in this context.
>
> (d) The Panel examines in paragraph 7.95 whether the data provided by AYSA were inherently untrustworthy. It states that the data of interested trade organisations are not *per se* unreliable but that this was a question of verification and judgement. This statement is no doubt correct but does not deal with the facts and arguments submitted by Pakistan. Pakistan had argued that the data of an interested trade association that had previously supplied incorrect data to obtain a safeguard measure were inherently untrustworthy. The Panel therefore does not examine the specific facts on which Pakistan had requested findings.
>
> (e) Pakistan had demonstrated that the United States had failed to verify the data supplied by AYSA. The Panel, while recognising that the data of interested trade association required verification and judgement, does not examine whether the data had been verified.
>
> (f) The Panel states in paragraph 7.96 that the United States verified the 1996 and 1997 production data supplied by AYSA by comparing them with official statistics. However, as Pakistan had pointed out, this particular verification was completely irrelevant because the United States based its determination on 1998 production data, which were not verified by comparing them with official statistics …. This point is not addressed by the Panel."[95]

6.7 Also, with respect to paragraph 7.97, Pakistan commented that "[i]t is not clear from this paragraph under which norm the Panel subsumes which facts and how it distributed the burden of proof."[96] Furthermore, Pakistan claims that the Panel is not required to prescribe methodologies for information gathering and verification, but should find that the US methods did not yield the required

[95] *See ibid*., para. 8. (emphasis in original)
[96] *Ibid*., para. 10.

demonstration in this case. Pakistan again argues that the United States failed in its demonstration because "the data supplied by AYSA could be used without verification."[97]

6.8 The **United States** responded to Pakistan's argument concerning the burden of proof by stating that "[a]ccording to well settled principles of WTO jurisprudence,[98] Pakistan, as the party claiming a breach of the ATC, must assert and prove its claim and put forward evidence and argument sufficient to demonstrate that the transitional safeguard was inconsistent with the ATC".[99]

6.9 The United States also responded to Pakistan's arguments regarding the reliability of AYSA data by stating the United States had demonstrated throughout this proceeding that it had verified the accuracy and reliability of the data in this case. The United States disputed Pakistan's suggestion that it is "undisputed" that the data supplied by AYSA in 1997 were "incorrect", noting that in the process of conducting ongoing verification of data contained in the 1997 market statement on combed cotton ring spun yarn, the United States had "discovered evidence that called the 1997 market statement into question." At no point did the United States conclude that AYSA data were false, incorrect, or inherently untrustworthy. Accordingly, the United States objects to Pakistan's request that the Panel refer to this data as incorrect and requests that the Panel strike reference to "incorrect data" in paragraph 7.96 of the interim report.[100]

6.10 First, **the Panel** would like to emphasize that when finding that Pakistan did "not establish" its claim, for example, in paragraph 7.101, it meant that Pakistan had not established a *prima facie* case that the transitional safeguard measure in question is inconsistent with Article 6 of the ATC. This is clear from reading the paragraphs with our finding on the burden of proof, in particular in paragraph 7.23. In this sense, we agree that what Pakistan should do was "the presentation of a *prima facie* case that the United Stated … failed to [demonstrate serious damage]."[101] We note, however, that exactly because we did not find that Pakistan had presented such a *prima facie* case, we rejected some of Pakistan's claims. In other words, the United States must demonstrate the basis for its safeguard action. The United States presented its 1998 Market Statement for this purpose. Pakistan then has the burden of establishing a *prima facie* case that the United States did not in fact make such a demonstration. The reference to "demonstrated" in Article 6.2 does not refer to a shift of the burden of proof within the context of dispute settlement.

6.11 In this connection, we note that Pakistan claimed that the "question before the Panel was whether the United States had demonstrated serious damage",[102] rather than "whether Pakistan had established that the data supplied by AYSA are inherently untrustworthy."[103] In support of this proposition, Pakistan referred to the language of Article 6.2 of the ATC, which provides that "[s]afeguard action may be taken under this Article when … it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage … to the domestic industry…".[104] In accordance with the WTO jurisprudence on the burden of proof, we examined whether Pakistan established that the United States had not demonstrated serious damage, as stated above. We do not accept Pakistan's request that "the Panel … indicate how, in its view, the United States had demonstrated that it had verified the data supplied by AYSA",[105] because this request would mean to shift the burden of proof to the United States, the respondent, in contrast to the

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[97] *Ibid*., first bullet.

[98] The United States referred to Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997, pp. 16, 19-20.

[99] US comments on Pakistan's comments on the interim report, para. 1.

[100] *See ibid*., paras. 2-3.

[101] *See* Pakistan's comments on the interim report, para. 5.

[102] *Ibid*.

[103] *Ibid*., para. 10, first bullet.

[104] *Ibid*., para. 4.

[105] *Ibid*., para. 8, first bullet.

WTO jurisprudence on this issue. Rather, as noted in Section VII.D.2 below, in examining the consistency of a transitional safeguard measure with Article 6 of the ATC, the Appellate Body stated that "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[106] In this line, we considered that Pakistan, the complainant, bears the burden of proof for establishing a *prima facie* case that the subject transitional safeguard measure is inconsistent with Article 6, and subsequently, found that Pakistan did not discharge this responsibility for its claim on serious damage.

6.12 Second, Pakistan requested that "[t]he data [supplied by AYSA in 1997] should in both paragraphs 7.95 and 7.96 be described as incorrect",[107] as in paragraph 7.96, "the Panel describes these data as 'incorrect'",[108] but we do not accept this request. To the contrary, we did not find the data "incorrect". The evidence before us only shows that the US investigation authority decided not to rely on the data supplied by AYSA in the 1997 proceedings,[109] because it "discovered evidence that called the 1997 statement into question."[110] We accordingly deleted the term "incorrect" in the second sentence of paragraph 7.96.

6.13 Third, we would like to point out that, as opposed to Pakistan's comments, the Panel actually examined "the specific facts on which Pakistan had requested findings"[111], as shown in paragraphs 7.95-7.97 below. There, we concluded that Pakistan did not establish that the data supplied by AYSA in the proceedings for the transitional safeguard measure in question were "inherently untrustworthy", taking into consideration the fact that the data supplied by the AYSA in the 1997 proceedings were called into question, and the other fact that the AYSA is a trade association consisting of domestic producers which are requesting trade remedies.[112]

6.14 Also, we noted that "the United States pointed out that it verified the production data for 1996 and 1997 supplied by AYSA for the transitional safeguard measure at issue by comparing them with the official statistics …".[113] Further, we point out the following statement of the United States: "In addition to relying on official statistics for verification purposes, the United States engaged in direct discussions with individual firms to verify AYSA data",[114] for example, regarding profit and investment, and "the number of mills that exited the combed cotton yarn for sale industry, and the number of jobs lost."[115] In this connection, Pakistan stated that the verification of the production data for 1996 and 1997 is irrelevant because the United States based its determination on 1998 production data.[116] We acknowledge that the United States did not specifically state that it verified the 1998 production data. Nevertheless, we must note that the United States verified a large part of data submitted by AYSA, including 1998 data on profit and investment. In our view, the question is the reliability of the overall data. It is unrealistic to require that every single element of data be verified. Furthermore, this is not required by the treaty language. We however would like to emphasize that we do not mean that the national investigation authority has an unfettered discretion in fact-finding, since this Panel has a mandate under the DSU to make "an objective assessment of the facts of the case".

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[106] Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, p. 17. (emphasis in original)

[107] Pakistan's comments on the interim report, para. 8, second bullet.

[108] *Ibid.*

[109] *See* paragraph 7.87.

[110] US First Submission, para. 158.

[111] *See* Pakistan's comments on the interim report, para. 8, fourth bullet.

[112] *See* paragraph 7.95.

[113] Paragraph 7.96.

[114] US Answers to Panel's Questions, 22 December 2000, para. 11. *See also* 1998 Market Statement, US Ex. 3, Section II.

[115] *Ibid.*, para. 14.

[116] *See* Pakistan's comments on the interim report, para. 8, fifth bullet.

6.15 Also, it appears that Pakistan's argument incorrectly implies that there is only one method of "verification" and that is matching with official statistics. There is no basis for this implication, for if it were so, questionnaires (either written or verbal) would be irrelevant and investigations would be required to be on the basis of periods for official statistics and only after a time-lag to take account of official statistics.[117]

6.16 Furthermore, in our view, Pakistan's comments in numerous places, in effect, add a new substantive element to Article 6, namely, "verification". Pakistan asked the Panel to explain how the United States "demonstrated that it had verified the data".[118] That is not what the treaty requires. The United States, in its investigation, must demonstrate that there was serious damage caused by increasing imports. The United States is not required to demonstrate that it verified the data. Adequate verification procedures may be part of supporting the demonstration, but they are not themselves what must be demonstrated. There are no treaty standards for verification. Indeed, the word does not appear in the ATC. Moreover, the Panel inquired of the United States how it verified the data underlying the determination. The United States explained its methodology. In light of all the explanations and facts before us, we concluded that, on balance, it was not established that the United States had failed to demonstrate the elements required by Article 6.2.

6.17 Fourth, we disagree with Pakistan's argument that the fact that the aforesaid decision of the US authority in the 1997 proceedings is irrelevant to the issue of the reliability of the data supplied by AYSA in the 1998 proceedings.[119] In our view, this fact suggests, as indicated in paragraph 7.96 below, that in the proceedings for the transitional safeguard measure at issue as well, the US authority tried to make an objective fact-finding, and, thus, did not unquestioningly rely on the data supplied by AYSA. In addition, as referred to in the preceding paragraph, the United States pointed out that the US authority had made verification; Pakistan provided no major factual argument to counter the US statement. We would like to emphasize that the question before us is not whether the data supplied by AYSA is inherently untrustworthy, but whether the US fact-finding is justifiable, *i.e.* has been "demonstrated" as that term is interpreted in light of the relevant jurisprudence.

6.18 With respect to Pakistan's comments on paragraph 7.97, we must first state that we find Pakistan's premise incorrect. The AYSA data were not used without verification. Pakistan has argued previously that the United States must demonstrate that it verified the AYSA data, that the US treatment of the earlier AYSA data was irrelevant, that Pakistan had demonstrated that the United States failed to verify the AYSA data, and that the 1998 production data used by the United States were not verified by comparing them with official statistics. In fact, the United States verified the data. Pakistan's mere assertion here to the contrary is insufficient to establish otherwise. As discussed above, the US obligation was to demonstrate serious damage and causation, not to demonstrate verification. We have examined all of the facts before us, including the US treatment of the 1998 AYSA data in light of its previous submissions, including the steps taken for verification by the United States, and Pakistan's arguments made in its submissions and restated here. The norm which we use is that Pakistan, in light of *all* the facts before us, did not establish a *prima facie* case that the United States did not demonstrate serious damage and causation thereof. We further note that Pakistan by its claim that verification must be done by comparison with official statistics is indeed asking the Panel to prescribe methodologies. We decline to do so and for the reasons stated in the Findings (inclusive of this Interim Review Section) find that Pakistan did not establish that the

[117] In addition, we note that we examined Pakistan's challenge against the US fact-finding based upon a discrepancy with the 1998 official statistics, and found that "this discrepancy is not sufficient for us to conclude that the factual situation was not 'demonstrated' within the meaning of Article 6.2." *See* paragraph 7.98 below.

[118] Pakistan's comments on the interim report, para. 8, first bullet.

[119] *See* Pakistan's comments on the interim report, para. 8, third bullet.

methodologies actually used by the United States did not demonstrate serious damage and causality thereof.[120]

3. Treatment of Establishments Retooled to Produce Other Products

6.19 **Pakistan** also commented that "[t]he Panel … does not examine Pakistan's claims that the United States failed to examine whether:

(a) the retooling entailed damage,

(b) the retooling was autonomous or forced upon the industry by imports, and

(c) the damage was serious."[121]

6.20 The **United States** responded to Pakistan's claim that the US verification "did not reveal the truth regarding the state and activities of the plants reported to be closed,"[122] and directed the Panel's attention to its submissions.

6.21 **The Panel** would like to emphasize that it stated that "the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry".[123] In our view, it is not decisive in this case whether "one plant had not closed at all during the investigation period"; rather, it is more important whether the plant "changed its products to those which are neither like nor directly competitive products". It is not disputed that the establishment at issue was producing carded cotton yarn rather than combed cotton yarn at the time of the US determination. Pakistan has not argued that carded cotton yarn is a like or directly competitive product with combed cotton yarn, which is the subject product in this case.[124] Therefore, we must suppose otherwise (*i.e.* that carded cotton yarn is neither a like product nor a directly competitive product) in evaluating Pakistan's claim, because Pakistan bears the burden of establishing a *prima facie* case. Thus, it might run counter to the common usage and meaning of the terms "close" and "closure" when the US authority found that the three plants "closed" during the investigation period. However, this was not the language used by the Panel, we merely stated that the establishment ceased producing combed cotton yarn and has not been producing any "like and/or directly competitive products".

6.22 With respect to Pakistan's point (b), this of course is a question of causation rather than damage. We examined the evidence of how the United States linked the fact of these establishments ceasing to produce combed cotton yarn to the increased imports. In our view, the United States adequately showed this as part of its overall demonstration of causation. We also listened carefully to Pakistan's arguments that this element of the US investigation was not supportable. On balance, we found that Pakistan did not establish a *prima facie* case that the United States had not demonstrated causation, including this element of the US investigation. We further note that Pakistan, here as elsewhere, has merely restated what it argued in its main submissions and claims that the Panel did not listen. We did listen; we simply did not agree.

6.23 With respect to Pakistan's point (c), we think it is misplaced. The question is not whether the establishments' exit from the industry constituted serious damage. We have re-examined the 1998 Market Statement and cannot find where the United States so claimed. Rather, the exit of these

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[120] We recall that the Findings in regard to this issue must be read, *mutatis mutandis*, with our finding that the United States did not properly identify the domestic industry. *See* paragraph 7.93.

[121] *See* Pakistan's comments on the interim report, para. 12. (emphasis in original)

[122] *See* US comments on Pakistan's comments on the interim report, para. 4.

[123] Paragraph 7.105.

[124] *See also* footnote 237 below.

establishments was one element of a broader demonstration of serious damage. We found the evidence to be an appropriate element of such demonstration.

4. Investigation Period, Including Period for Determining Serious Damage and Causation

6.24 **Pakistan** provided the following comments on the Panel's finding on its claim concerning the investigation period:

(a) The Panel bases its conclusions in part on factual assertions of the United States that Pakistan has demonstrated to be incorrect, in particular assertions as to the "closure of plant" and "job losses" (see paragraph 7.118(a) and (b) of the report).

(b) The legal claim submitted by Pakistan was not that the United States' choice of the investigation period, as such, was inconsistent with the ATC. The Panel therefore makes a ruling on an issue that Pakistan did not raise in this form.

(c) Pakistan claimed that the United States had not conducted the trend analysis required by the terms of Article 6 of the ATC nor otherwise demonstrated a causal link. The interim report however does not address the questions of whether:

(i) Article 6.2 requires a trend analysis,

(ii) such an analysis has been conducted by the United States, and

(iii) an eight-month period lends itself to such an analysis.

(d) More generally, the interim report does not indicate how the Panel objectively assessed whether the United States has met its obligation under Article 6.2 to demonstrate in its Market Statement that the rise in imports and change in economic variables were not merely coincidental but causally linked.

(e) By stating that Pakistan has not established that the United States failed to demonstrate "serious damage" to the domestic industry, the Panel appears to impose on Pakistan a burden of proof that clearly falls on the United States: It is the United States that must according to Article 6.2 of the ATC demonstrate that there was a causal link. Nowhere in the interim report is there any indication on which basis the Panel concluded that the United States had met this requirement.

(f) The Panel applies the standard of "justifiability", which has no treaty basis.

(g) Panel refers to the "changes in all relevant economic variables between 1996 and 1997" as one of the bases of its conclusions even though these changes did not point to any serious damage. Pakistan recalls that the changes during that period were minimal and provided a chart to that effect.[125]

6.25 The **United States** responded to Pakistan's argument concerning the burden of proof, stating that "[a]ccording to well settled principles of WTO jurisprudence,[126] Pakistan, as the party claiming a breach of the ATC, must assert and prove its claim and put forward evidence and argument sufficient to demonstrate that the transitional safeguard was inconsistent with the ATC".[127]

[125] Pakistan's comments on the interim report, para. 19.

[126] The United States referred to Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997, pp. 16, 19-20.

[127] US comments on Pakistan's comments on the interim report, para. 1.

6.26 The United States also claimed that it "established, based on clear evidence, that the surge of low-priced imports on the domestic industry unmistakably caused serious damage and actual threat thereof."[128] The United States further argued that it "demonstrated that other possible factors – such as changes in consumer preference and technological changes – were not responsible for such serious damage and actual threat thereof."[129]

6.27 First, **the Panel** notes that subsection 3 above addressed Pakistan's claim (a) above.

6.28 Second, with respect to Pakistan's claim (b), we would like to point out that we expressly noted the parties' agreement that "Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports."[130] This statement is quite clear that the panel looked at two distinct points: (1) the period of investigation; and (2) the period for determining whether there is serious damage or causation thereof. We included the first point because much of the language in Pakistan's submissions referred to the period of investigation. However, the focus of our discussion and findings was on the second issue as is made quite clear in paragraphs 7.115-7.117. Thus, we cannot accept this argument by Pakistan.

6.29 Third, with respect to Pakistan's claims (c) and (d), we note that our finding on Pakistan's claim concerning the investigation period was in accordance with the following findings of the Appellate Body on *Argentina – Footwear*, under the Safeguards Agreement, to which Pakistan referred in support of its argument:

> "We also agree with the Panel that, in an analysis of causation, 'it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.'[131] (emphasis added) Furthermore, with respect to a 'coincidence' between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should 'normally' occur if causation is present.[132] The Panel qualified this statement, however, in the following sentence:
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> > 'While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.'[133]".[134]

6.30 Following this statement, the Appellate Body explicitly rejected the appeal of Argentina that the panel erroneously "required that an upward trend in imports must *coincide* with a *downward* trend in the injury factors", stating "Argentina mischaracterized the Panel's interpretation and reasoning."[135]

6.31 Keeping in mind the finding of the Appellate Body as quoted in paragraphs 6.29 and 6.30 above, we consider that the analysis of the relationship between the movement in imports and the movements in injury factors would be "central" to a causation analysis, but not required under

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[128] *Ibid*., para. 5.
[129] *Ibid*.
[130] Paragraph 7.116.
[131] (footnote in original) *Ibid*.
[132] (footnote in original) Panel Report., para. 8.238.
[133] (footnote in original) *Ibid*.
[134] Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, para. 144. (emphasis in original)
[135] *Ibid*. paras. 143 and 145. (emphasis in original)

Article 6 of the ATC. Pakistan demands a ruling on whether a "trend analysis" is required. Such a term is not contained in Article 6. Therefore, literally speaking, the answer is "no". We have used the test contained in Article 6.2 utilizing the guidance of the Appellate Body cited above. In this line, as indicated in subsection VII.G of the interim report, we evaluated the US analysis contained in the 1998 Market Statement, and consequently, concluded that the US fact-finding on serious damage and causation is justifiable, in light of its factual basis, including the changes in economic variables of the US domestic industry and those in imports from Pakistan and all other sources during the investigation period – from January 1996 to August 1998, for the purpose of injury and causation determination. In the interim report, in support of our conclusion, we put an emphasis on the (negative) direction and magnitude of changes in economic variables of the US domestic industry, and the surge in imports from Pakistan between January-August 1997 and January-August 1998. Thus, we consider that Pakistan's comment (c) has been already addressed in the interim report, but for clarification, we have made changes to subsection VII.G below. We believe that such changes naturally respond to Pakistan's comments (d) and (g) above. In regard to (g), we would specifically point out that we of course took into consideration "changes in all relevant economic variables between 1996 and 1997", to which Pakistan again called our attention, but we must examine the case from a broader perspective. Thus, taking into consideration *not only* these changes *but also* the negative changes in economic variables of the US domestic industry, and increase in imports between January-August 1997 to January-August 1998, we concluded that the US fact-finding is justifiable.

6.32 Fourth, we believe that Pakistan's comments (e) and (f) above have already been addressed in paragraphs 6.10-6.11 above and subsection 1, respectively.

6.33 Lastly, Pakistan requested that we revise the heading of subsection VII.G.[136] We considered this request and have revised the heading as follows: "Investigation Period, including Period for Determining Serious Damage and Causation", in response to Pakistan's request.

5. Attribution

6.34 **Pakistan** requested that the Panel not mention "Mexico" in paragraph 8.1(b) because "the Panel's ruling effectively does not concern only Mexico".[137]

6.35 "The **United States** objects to this suggestion. Pakistan's arguments regarding attribution focused entirely on imports from Mexico, not other unrestrained sources. The Panel's findings and conclusions are consistent with these arguments. Accordingly, Pakistan's suggested change could broaden the findings of the Panel beyond the facts of this case."[138]

6.36 **The Panel** notes that in its first submission, Pakistan claimed that the United States "attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and *Mexico* and their respective effects",[139] and did not refer to any other exporting Members. Furthermore, the conclusion is already generalized by the parenthetical in paragraph 8.1(b). Thus, we do not accept the request of Pakistan.

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[136] *See* Pakistan's comments on the interim report, para. 20. On this point, the United States commented that "[w]hile the United States understands the basis for the suggestion, a more appropriate change to address the concern is to move the text under the title above 7.114 to Section IV.D, not have two sections of the report with the same heading." US comments on Pakistan's comments on the interim report, para. 6, first tiret.

[137] *Ibid*., para. 22.

[138] US comments on Pakistan's comments on the interim report, para. 6, second tiret. (footnote omitted)

[139] Pakistan First Submission, p. 43. (emphasis added)

6. Other Drafting Suggestions

6.37 Pakistan made a drafting suggestion regarding paragraph 7.84,[140] which we decline to accept. Also, Pakistan suggested moving footnote 220 into the text.[141] We agree with this suggestion.

C. COMMENTS OF THE UNITED STATES

1. General

6.38 The Panel accepted some of the US comments, and revised Section VII below, specifically, paragraphs 7.45, 7.83, 7.96, and 7.118 and footnote 132. The following is our response to the other comments.

2. Issue of Descriptive Part

6.39 The United States made numerous comments concerning the Descriptive Part of the Panel Report. The primary comment was that the Descriptive Part was unbalanced in that it addressed several portions of Pakistan's arguments in full because the executive summaries provided by Pakistan were not available or were inadequate, while the US arguments were presented only in the summary form drawn from the more complete US executive summaries. The United States therefore proposed that this Panel adopt the practice of other panels and attach the full submissions to the Report. Should the Panel not agree with this suggestion, then the United States offered extensive additions to the existing Descriptive Part.

6.40 We cannot agree with the suggestion that we attach all the submissions to the Report for the reasons discussed in the Findings. We will not elaborate further here. As we say in the Findings, we commend the parties for doing a good job overall on the executive summaries. This is a new process with which parties to disputes as well as panels and the Secretariat will need to gain experience. In this case, we have used the summaries as the basis for the Descriptive Part of the Report, but we have also made adjustments where we thought them necessary.

6.41 We disagree with the overall complaint of the United States that there is an imbalance in the Descriptive Part in favour of Pakistan. While we are reluctant to refer to mere word or paragraph counts, we do note that there are 123 paragraphs of the Descriptive Part discussing the US arguments and 92 discussing Pakistan's arguments. More importantly, we are of the view that substantively the Descriptive Part accurately reflects the arguments of the parties. We continue to disagree with the US argument that it has been prejudiced in any way. As we note in the Findings, the Panel's deliberations Findings and Conclusions were based on its assessment of the **full** submissions and oral arguments of the parties, not on the executive summaries.

6.42 The United States has noted that Pakistan's first executive summary was merely the introduction to their submission. This is true and that executive summary was only six pages long. But the separately submitted executive summary of the United States for its first submission was only eight pages. We used both as the bases for that portion of the Descriptive Part and made some additions where necessary.

6.43 The United States also notes that Pakistan did not submit any summary for its first set of answers to panel questions, while the United States did. According to the United States this led to another imbalance because the Panel used the full Pakistan answers while relying on the US summaries. The United States raised this complaint during the proceedings. At that time, we declined the US request that we require Pakistan to submit an executive summary of its answers. We

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[140] *See* Pakistan's comments on the interim report, para. 21.
[141] *See ibid*., para. 23.

noted that during the first substantive meeting of the Panel with the parties, the Chairman provided guidance to the parties to the effect that they were encouraged to provided summaries if their answers were longer than 20 pages in total. It is the case that Pakistan's answers were somewhat longer than that, but taking into account that they were not much longer and that Pakistan restated the questions each time thereby adding length to their document, Pakistan was not required to make a summary of those answers.

6.44 Deciding how to deal with answers to panel questions is indeed difficult. They are not easily summarized because, unlike the primary and rebuttal submissions, they generally are not woven into a single coherent whole. They tend to be a series of responses to distinct inquiries that may or may not be susceptible to summarization. This is an issue that has caused us some difficulties in writing the Descriptive Part and that panels in future disputes may need to address. In the present dispute, in response to the US request, we have included much fuller accounts of the answers to questions of both parties.

6.45 In its comments on the Interim Report, the United States provided a further explanation of the concerns expressed in its Descriptive Part comments. In light of this most recent explanation by the United States, we have made a large number of changes to this section of the Report. Thus, given the extensive nature of the amendments we will not attempt to identify specific paragraphs of this section of the interim report which have been changed.

3. Standard of Review

6.46 The United States requested the deletion or revision of footnotes 126 and 130 which point out that the ATC does not ensure that exporting Members may participate in the national investigation procedures for transitional safeguard measures, for example, because the United States provided this opportunity to Pakistan in this case. We accepted this point, and revised those footnotes accordingly.

4. Definition of Domestic Industry

6.47 The **United States** requested that the second sentence of paragraph 7.38 be replaced with the following language:

> "Vertically integrated fabric manufacturers spin combed cotton yarn not for sale in the open market but for their internal consumption in the subsequent production of a fabric, apparel, or home furnishing. Consequently, the combed cotton yarn manufactured by these firms is not directly competitive with combed cotton yarn imported from Pakistan."[142]

6.48 **The Panel** accepted this request except for the use of the term "spin". We would like to point out that the United States used the term "manufacture[]" in the relevant paragraph in its First Submission.[143]

6.49 The **United States** argued that its position on the interpretation of the term "like and/or directly competitive products" is consistent throughout this procedure,[144] and accordingly requested a revision of the Panel's finding that "the United states took a different position in its rebuttal submission."

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[142] US comments on the interim report, p. 6.
[143] US First Submission, para. 49.
[144] *See* US comments on the interim report, pp. 7 and 8.

6.50 **The Panel** points out that the US Answers to the Panel's first set of questions indicates as follows: "Therefore, the ordinary meaning of the phrase 'like and/or directly competitive' permits a Member, in analyzing a domestic industry, to choose from three potential definitions of domestic industry. First, the industry producing *like* products. Second, *like and directly competitive* products. Third, the industry producing *directly competitive* products that are not *like*."[145] On its face, it is difficult to definitively conclude that the first category means "products which are like but not directly competitive", which is one of the three categories that the United States clearly presented in its first submission, but we accepted the US request.

6.51 The **United States** requested the deletion of footnote 176 in the interim report, because "[t]he factual record provides no basis to infer that vertically integrated fabric producers were interested in selling or made offers to sell."[146]

6.52 **The Panel** does not accept this request. In that footnote, we do not suggest that "vertically integrated fabric producers were *interested* in selling or made offers to sell." (emphasis added) Instead, we were looking for evidence that there had been an inquiry as to whether there were or were not such offers. It is in the offers where competition occurs. Shipments only serve as an indirect indication of competition. Thus, in our view, in order to determine whether combed cotton yarn produced by those manufacturers is "directly competitive" with combed cotton yarn sold in the market, it may be more important whether and how often combed cotton yarn produced for the internal consumption was *offered* for sale in the market, and combed cotton yarn sold in the market was sought by vertically integrated fabric manufacturers as alternatives for combed cotton yarn they produce for their internal use. It is the very lack of evidence of an investigation of offers for sale, and therefore competition, which we noted.

6.53 The **United States** also requested the deletion of footnote 180 in the interim report (footnote 246 in the final report), because it "did not suggest that the concept of *de minimis* sales was treaty based."[147]

6.54 **The Panel** disagrees. We have never indicated that the United States made the aforesaid suggestion. Our point is that the United States argued that vertically integrated fabric manufacturers sell or purchase combed cotton yarn in the open market but only in a *de minimis* amount, and thus, combed cotton yarn produced by them for their internal consumption is not "directly competitive" with combed cotton yarn imported from Pakistan.[148] It is obvious that in this context, the term "*de minimis*" was used not only as a description of the fact, but also as a threshold for determining whether certain domestic products are "directly competitive" with subject imports. We find nothing in Article 6 that includes the concept of "*de minimis*" in determining the scope of "directly competitive products".

5. Attribution

6.55 The **United States** contested the summary of its argument contained in paragraph 7.122 regarding the issue of attribution. Among other things, the United States is claiming that it "did not argue that the requirements of Article 6.4 'could be satisfied by a simple comparison of Pakistan to a grouping of all other exporters.'"[149] Also, the United States contested the Panel's summary, stating that "the United States did not argue that a measure may be applied to 'any, but not all, Members that are the cause of serious damage'."[150]

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[145] US Answers to Panel's Questions, 28 November 2000, para. 70.
[146] *See* US comments on the interim report, pp. 7-8.
[147] *See ibid*., p. 8.
[148] E.g. US First Submission, para. 69.
[149] US comments on the interim report, p. 11.
[150] *Ibid*., p. 12.

6.56 The **Panel** disagrees with these arguments. First, indeed, the United States pointed out that Article 6.4 of the ATC enumerates a number of factors that should be considered, and provides that "none of these factors – including volume – is dispositive," as the United States argued.[151] However, the central question we are confronted with under Article 6.4 is whether or not that Article requires the analysis of impacts of imports from Mexico (and possibly other suppliers) individually. In its Oral Statement at the first substantive meeting with the Parties, the United States made the following statement:

> "[T]he ATC specifically authorizes Member-by-Member safeguard action based on a sharp and substantial increase in imports from that Member and *an analysis of imports from all other sources generally* as well as market share and price."[152]

Also, in its First Submission, the United States stated that it had "compared this surge in imports from Pakistan *to imports from other sources*, market share and price." The United States then went on in separate sub-paragraphs to examine: "Imports from Pakistan versus all imports"; "Market share of Pakistan versus market share of all imports", and "Price from Pakistan versus price from other sources".[153] Also, the United States stated in its Rebuttal Submission that "the ATC does not impose on an importing Member such a source-specific analysis."[154]

6.57 Second, we note that the United States stated that "Article 6.4 of the ATC gives an importing Member the discretion to take a transitional safeguard measure against an exporting Member to whom serious damage is attributable, but simultaneously not to take such measure against another exporting Member whose exports are contributing to the same serious damage."[155] We do not find any error in our summary of the US argument that "a safeguard measure may be applied to any, but not all, Member or Members that are a cause of the serious damage."[156] On the other hand, we accept the other comments of the United States on paragraph 7.122, and have revised it accordingly.

6.58 The **United States** contested the finding of the Panel on Pakistan's claim concerning the US attribution analysis, repeating its argument that the US investigation authority assessed data regarding Mexico in conducting its attribution analysis.[157]

6.59 In the view of **the Panel**, the evidence before it reveals that the US investigating authority did not assess the impact of imports from Mexico *individually*, in contrast to the US argument. In this regard, we added explanation to subsection VII.H below. The only mention of Mexico is in one chart that has a line item of "FTA's" that includes Mexico.

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[151] *Ibid*., p. 11, referring to US Rebuttal Submission, paras. 74-75.
[152] Oral Statement of the United States at the First Meeting with the Panel, para. 15. (emphasis added)
[153] US First Submission, para. 131. (emphasis added)
[154] US Rebuttal Submission, para. 73.
[155] US Answers to Panel's Questions, 28 November 2000.
[156] Paragraph 7.122.
[157] *See* US comments on the interim report, p. 10, referring to US Rebuttal Submission, para. 78.

VII. FINDINGS[158]

A. CLAIMS BY THE PARTIES

7.1 The subject measure is the transitional safeguard (quantitative restriction) imposed by the United States on imports of combed cotton yarn (Category 301[159]) from Pakistan as of 17 March 1999,[160] and extended on 17 March 2000 for a further year.[161] The United States explained that it had taken this action based on an investigation[162] conducted to determine whether the surge in imports from Pakistan had caused serious damage or actual threat of serious damage to its domestic combed cotton yarn for sale industry.[163]

7.2 **Pakistan** requests the Panel:

(a) to find that the United States failed to demonstrate, before taking its safeguard action on combed cotton yarn from Pakistan on 17 March 1999, that imports of combed cotton yarn caused serious damage and actual threat thereof to its domestic industry producing such yarn and that such damage and threat was attributable to Pakistan because the United States:

- did not examine the state of the entire domestic industry producing combed cotton yarn;
- based its determinations on the state of the domestic industry on unverified, incorrect and incomplete data;
- based its determinations on the causal link between imports and serious damage on changes in economic variables during an eight-month period only;
- did not conduct a prospective analysis of the effects of imports to determine whether they were causing a threat of serious damage; and
- attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects;

(b) to rule, on the basis of the above findings, that the safeguard action imposed by the United States on combed cotton yarn from Pakistan is inconsistent with the United States' obligations under Article 6 of the ATC;

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[158] Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the preceding section entitled Interim Review is an integral part of the Findings of this Panel Report.

[159] *See* US Ex. 1.

[160] Committee for the Implementation of Textile Agreement ("CITA"), Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 5 March 1999, 64 FR 12290. (US Ex. 4)

[161] CITA, Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 14 March 2000, 65 FR 14544. (US Ex. 6) Further, the transitional safeguard was extended again for a further year as of 17 March 2001. CITA, Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 5 March 2001, 66 FR 13307.

[162] Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale Category 301, December 1998 (the "1998 Market Statement") (US Ex. 3).

[163] US First Submission, para. 1. *See* CITA, Request for Public Comments on Bilateral Textile Consultations with the Government of Pakistan, 31 December 1998, 63 FR 72288. (US Ex. 2)

(c) to rule further that the United States has nullified or impaired benefits accruing to Pakistan under the ATC since, according to Article 3.8 of the DSU, the infringement of an obligation is considered to constitute a *prima facie* case of nullification or impairment;

(d) to recommend, in accordance with Article 19.1, first sentence, of the DSU, that the DSB request the United States to bring its safeguard action into conformity with its obligations under the ATC; and

(e) to suggest, in accordance with Article 19.1, second sentence, of the DSU, that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith as has been recommended by the TMB already, in June 1999.

7.3 The **United States** requests the Panel, based on an objective assessment of the facts, to conclude that it acted consistently with the ATC in (i) defining the domestic combed cotton yarn for sale industry, (ii) determining that a sharp and substantial increase in imports of combed cotton yarn caused both serious damage and actual threat of serious damage to the industry, (iii) attributing the serious damage and actual threat of serious damage to the 283.2 per cent surge of low-priced imports of combed cotton yarn from Pakistan, and (iv) relying on the best available and most up-to-date data. For these reasons, the United States submits that its transitional safeguard measure applied to imports from Pakistan of combed cotton yarn satisfies US obligations under the ATC. Pakistan's claims to the contrary are without merit and the Panel should reject them.

B. DESCRIPTIVE PART ISSUE

7.4 In its comments on the draft Descriptive Part of the Report, the **United States** has requested that the Panel fundamentally alter its approach to the "Arguments of the Parties" section. Pursuant to paragraph 16 of the Working Procedures of this Panel, the parties were to submit executive summaries of their arguments at each stage of the proceedings. The Panel stated that its intention was to use these summaries as *the basis for* the relevant section of the Report. We have proceeded in this manner by relying on the parties summaries, but making changes as appropriate to more accurately reflect the overall arguments.

7.5 The United States argues that the Descriptive Part is uneven. Among other things, the United States notes that Pakistan did not submit summaries for its answers to questions and used its introduction to its first submission as its summary for that document. The United States complains that, as a result, large portions of the actual submissions by Pakistan were included while only the summaries of US submissions were included. The united States claims that it is prejudiced by the Descriptive Part of the Report.

7.6 The United States then goes on to make several specific arguments concerning flaws it found in the draft Descriptive Part and the Interim Report. Many of these points relate to matters of emphasis that the United States argues were made differently in its full submissions as compared to the executive summaries, or at least that it now appears so in the draft Descriptive Part.

7.7 The **Panel** has reviewed in full the individual points raised by the United States and Pakistan in their comments on the draft Descriptive Part and Interim Report. We have made a number of changes which are reflected in the Final Report. However, in view of the broader issues raised by the United States it is necessary that we address those issues as part of the Findings of the Panel.

7.8 We do not agree with the US argument that the Descriptive Part of the Report results in prejudice to the position of the United States. As the United States was informed when it raised a question earlier in this proceeding, the Panel has reviewed in great detail each and every one of the

substantive submissions of the parties. The Panel has analyzed with great care all of the testimony at the two substantive meetings with the parties. Our Findings and Conclusions are based on those full submissions and testimony. Thus, the United States has in no way been prejudiced; all US arguments were fully considered.

7.9 According to the United States, the preferred alternative to using the executive summaries would be to go along with the "practice of attaching submissions to the report".[164] It is the case that several panels have adopted the approach suggested by the United States; however, most other panels have proceeded otherwise and constructed a more conventional Descriptive Part which summarizes the parties' arguments without resorting to verbatim attachments. Furthermore, even where the attachment method has been used, it has only been with the agreement of the parties and no such agreement was reached here.

7.10 In the present dispute, this Panel at the outset declined to follow the attachment method. Using the attachment method would increase the Descriptive Part of the Report to approximately 400 single-spaced pages from the approximately 70 it now is. We do not consider this to be a viable approach. We are aware that the WTO dispute settlement system is struggling under the burden of massive translation requirements arising from the multi-hundred page Reports that result from the attachment method Using such a method here would also result in significant delays in issuing the Final Report.[165] We take note of Article 12.2 of the DSU, which provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while *not unduly delaying the panel process*".[166] Furthermore, while our responsibility is to decide the case before us, we also feel constrained not to take steps that would damage the dispute settlement system as a whole.[167]

7.11 The only actual alternative to the executive summary approach would have been for the Panel to draft its own concise summary of the parties' arguments. Such a summary would most likely have been a shorter summary than what is presently found in the Descriptive Part. It is unclear how this would answer the US complaint. The purpose of the proposal to use executive summaries was to break the dynamic of the litigation process that has caused Descriptive Parts of Reports to grow to elephantine proportions. In the absence of any direct information as to which party will prevail at the point when they first see the Descriptive Part, parties often responded by requesting that the Descriptive Part be a virtual reproduction of their arguments, presumably in order to prevent any later criticism of their argumentation once the substantive results are known. Under this pressure, panels have often opted for increasing the Descriptive Part by adding more and more of the parties' arguments until they reached the extreme situation where the only acceptable "description" for some parties is actual inclusion of every word written or spoken. This has led to Reports of hundreds of pages for relatively straightforward disputes.

7.12 In our view, the Reports of panels that have attached all submissions and testimony unedited to the Findings result in huge documents that are virtually unreadable. We also note that the United States has informed the Panel at the organizational meeting that it intended to make all its submissions

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[164] *Ibid.*

[165] In this regard, we take further note of the extraordinarily short time-period provided in Appendix 3 of the DSU for translation of the Final Report prior to circulation to Members. While we are aware that this time-period is seldom met, we are not inclined to accept a procedure which would virtually disregard the provision.

[166] Emphasis added.

[167] The United States has noted its surprise at the Panel's rejection of the attachment method "in light of the fact that this is the approach contained in an amendment to the DSU sponsored by 13 Members and currently under consideration by the General Council." This Panel obviously would follow the requirements of any treaty language. However, no such language now exists in the DSU and this Panel will offer no comment on, nor presume to prejudge, any negotiations for amendment to the DSU text. We also note that the United States is not among those Members sponsoring the amendment.

public. We are of the view that this is the right way to proceed should the United States be concerned that the full arguments of the parties have not been reflected in the Descriptive Part.[168] For those wishing to read in full detail the US arguments, its submissions are available for analysis. For those wishing to have a thorough overview of the arguments, the Descriptive Part based on the executive summaries is more manageable. We recall that this section of the Report is still over 70 single-spaced pages. This is hardly a cursory treatment of the issues. The purpose of taking the path we chose was precisely to allow the parties to succinctly express their views themselves because they are the best judges of their own arguments. This is a new approach and it will require adaptation along the way. We commend the parties for their efforts and are of the view that, overall, they have done a good job in making their summaries.

7.13 We must also note that the Descriptive Part of the Report cannot be read and evaluated in isolation; it forms a whole with the Findings part and the full weight and importance of certain facts and arguments advanced by the parties emerges fully only in that section, where the panel returns in detail (and repeats again) the facts and arguments from both sides in order fully to evaluate them, discuss them on their merits and finally decide on them. The present Panel Report, read as a whole, demonstrates that the Panel has fulfilled the standard of Article 11 of the DSU (*i.e.* "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").

7.14 In summary, we disagree with the US argument that it has somehow been prejudiced by the Panel's approach in using the executive summaries as the basis for the Descriptive Part. However, we have made a number of changes to the Descriptive Part in response to the comments of both parties, although keeping largely within the parameters we originally set out.

C. RELEVANT PROVISIONS OF THE WTO AGREEMENT

7.15 Articles 6.2 to 6.4 are the major provisions of the ATC which are relevant to our analysis:

> "2. 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 factors as technological changes or changes in consumer preference. (footnote omitted)
>
> 3. 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.
>
> 4. 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

[168] Pakistan declined the US request that it make its full submissions public and, instead, stated that it would supply non-confidential summaries (which are distinct from the executive summaries which remain confidential). This is the right of Members under the rules of the DSU and we imply no criticism of Pakistan in this regard.

> imminent[6], 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.
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> > (original footnote) [6] 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."

D. GENERAL ISSUES OF INTERPRETATION

1. Guidelines for Interpretations of the WTO Agreement

7.16 Before addressing the parties' arguments in detail, the **Panel** believes it necessary and appropriate to clarify the general issues concerning the interpretation of the relevant provisions and their application to the parties' claims.

7.17 First, Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves … to clarify the existing provisions of those agreements [i.e. the WTO covered agreements] in accordance with customary rules of interpretations of public international law." With respect to the "customary rules of interpretation of public international law", the Appellate Body repeatedly refers to Articles 31 and 32 of the Vienna Convention on the Laws of Treaties (the "Vienna Convention") as interpretative guidelines.[169] Paragraph 1 of Article 31 provides that "[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." In *US – Shrimps*, the Appellate Body accordingly stated as follows:

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive,

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[169] For example, in *Japan – Taxes on Alcoholic Beverages*, the Appellate Body stated as follows: "Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the *WTO Agreement* 'in accordance with customary rules of interpretation of public international law'. Following this mandate, in *United States – Standards for Reformulated and Conventional Gasoline*, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation 'has attained the status of a rule of customary or general international law'. There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status." Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, p. 10. (emphasis in original; footnotes omitted). *See also*, with respect to Article 31, *e.g.* Appellate Body Reports on *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 17; *India – Protection for Pharmaceutical and Agricultural Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 45-46; *European Communities - Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 84; and *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 42.

or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[170]

7.18 Paragraphs 2 to 4 of Article 31 of the Vienna Convention, to the extent that may be relevant to this case, are cited below:

"2. The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7.19 Further, Article 32 of the Vienna Convention provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

7.20 On this point, in *EC – Computer Equipment*, the Appellate Body noted as follows:

"The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads

[170] Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("*US - Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, para. 114. *See also* Panel Reports on *United States - Sections 301 - 310 of the Trade Act 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.22; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, adopted 22 September 1998, para. 7.18; *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*US – Underwear*"), WT/DS24/R, adopted 25 February 1997, para. 7.18; and Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear*"), WT/DS121/AB/R, adopted 12 January 2000, para. 91.

to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

> '... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'

With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."[171]

2. Burden of Proof

7.21 With respect to the burden of proof concerning transitional safeguard measures under the ATC, in *US – Shirts and Blouses*, the Appellate Body considered that the burden of proof is incumbent on the complainant, stating as follows:

> "… The *ATC* is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the *ATC* is an integral part of the transitional arrangement manifested in the *ATC* and should be interpreted accordingly. As the Appellate Body observed in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* with respect to Article 6.10 of the *ATC*, we believe Article 6 is 'carefully negotiated language ... which reflects an equally carefully drawn balance of rights and obligations of Members ... .'[172] That balance must be respected.
>
> The transitional safeguard mechanism provided in Article 6 of the *ATC* is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. …"[173]

7.22 The Appellate Body and subsequent panels endorsed this principle that a complainant bears the burden of proof.[174] For example, the Appellate Body, in *EC – Hormones*, states as follows:

> "… The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*, which the Panel invokes and which embodies a rule applicable in any adversarial proceedings."[175]

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[171] Appellate Body Report on *EC – Computer Equipment*, op. cit., para. 86. (footnote omitted) *See also* Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., p. 10.

[172] (original footnote) AB-1996-3, adopted 25 February 1997, WT/DS24/AB/R, p. 15.

[173] Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses* ("*US – Shirt and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, pp. 16-17. (emphasis in original)

[174] *E.g.* Appellate Body Reports on *EC Measures Concerning Meat and Meat Products* ("*EC - Hormones*"), WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, paras. 98 and 104; and *Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, paras. 141.

[175] Appellate Body Report on *EC – Hormones*, op. cit., para. 98. (emphasis in original; footnote omitted)

7.23 In this line, we consider that Pakistan, the complaining party, bears the burden of proof for establishing a *prima facie* case that the subject transitional safeguard measure is in violation of Article 6.[176]

3. Standard of Review

7.24 The parties made extensive arguments concerning the standard of review the Panel should use in this case. They agreed that the Panel should not make a *de novo* review, but they are in disagreement on the scope of review that the Panel should exercise.

7.25 With respect to the US fact-finding, **Pakistan** argued that "*[t]he core issue before the Panel is … whether the Market Statement constitutes a logical proof that the requirements set out in Article 6 were met.*"[177] Pakistan further argued that the US determination was based upon "unverified, incorrect and incomplete data" in a number of respects,[178] and improper methods of evaluation of facts.[179]

7.26 The **United States** argued in support of the correctness and accuracy of its fact-finding contained in the 1998 Market Statement. In addition, the United States contended that Pakistan had attempted to "introduce[] new evidence of Pakistan's import trends *subsequent* to the investigation that is outside the scope of this proceeding."[180] The United States further argued that the Panel is requested to review only whether the US measure was "based on the best available data as contained in the 1998 Market Statement at the time that the United States conducted its determination", citing the panel report on *US – Shirts and Blouses*.[181]

7.27 In response, **Pakistan** agreed that the Panel cannot examine evidence for the purpose of reinvestigating the market situation, but argued that this does not mean that the Panel cannot examine evidence presented by Pakistan for the purpose of determining whether the market situation was investigated consistently with the requirement of Article 6. According to Article 11 of the DSU and the established WTO jurisprudence endorsed by the Appellate Body, the Panel must make an objective assessment as to whether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determination made. Pakistan is thus entitled to submit facts that were available to the United States at the time of the investigation, but that it failed to consider in the 1998 Market Statement. Pakistan is also entitled to submit facts demonstrating that the data used by the United States were unreliable and incorrect because it would otherwise be prevented from proving that the Market Statement is inconsistent with the requirements of Article 6 of the ATC. In support of its proposition, Pakistan referred to the difference between the ATC and other WTO Agreements; in case of ordinary safeguard measures, countervailing duties or antidumping duties, exporters subject to investigation shall be given an opportunity to present evidence to national investigative authorities, but the ATC does not set forth any such procedural requirement.[182]

7.28 The **Panel** first notes that the ATC does not have any particular provision concerning the standard of review, and thus, Article 11 of the DSU should be used by panels assigned to review measures taken by a Member under the ATC as the basis for their standard of review. Article 11 of

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[176] *See* Appellate Body Report on *US – Shirts and Blouses*, op. cit., pp. 13-14. *See also* Appellate Body Report on *EC – Hormones*, op. cit., para. 98.

[177] Pakistan First Submission, p. 14. (emphasis in original) (*Also* paragraphs 4-12-4.13.)

[178] *See* Pakistan First Submission, pp. 30-36. (*Also* paragraphs 3.1 and 4.95-4.101.)

[179] *See* Pakistan First Submission, pp. 36-42. (*Also* paragraphs 4.110 and 4.112.)

[180] US First Submission, para. 124. (emphasis in original) *See also ibid*. para. 91, 152 and 155-159. (*Also* paragraphs 4.8, 4.104, 4.124 and 4.202-4.207.)

[181] US First Submission, para. 124. (*Also* paragraph 4.102.)

[182] Pakistan Rebuttal Submission, paras. 8-10. (*Also* paragraph 4.208.)

the DSU requires panels to "make … an objective assessment of the facts of the case …".[183] We further note that the Appellate Body, in *EC – Hormones*, stated that "[m]any panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review."[184]

7.29 On the issue of the standard of review to be applied in cases involving the ATC, the panel on *US – Underwear* rejected both total deference to the findings of national authorities and a *de novo* review. The panel stated as follows:

> "…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.
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> …
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> … 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. 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.
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> 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. 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."[185]

7.30 Further, with respect to the question as to what is included within the scope of the factual examination by panels, in *US – Shirts and Blouses*, the panel stated as follows:

> "… Unlike the TMB, a DSU panel is not called upon, under its terms of reference, to reinvestigate the market situation. When assessing the WTO compatibility of the

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[183] The Appellate Body has stated that Article 11 of the DSU is applicable to all the WTO Agreements except for the Anti-Dumping Agreement. *See* Appellate Body Reports on *EC – Hormones*, op. cit., paras 114-119; *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, para. 2.67; *Argentina – Footwear*, op. cit., para. 118; and *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, para. 150.

[184] Appellate Body Report on *EC – Hormones*, op. cit., para. 117.

[185] Panel Report on *US – Underwear*, op. cit., paras. 7.10, 12 and 13. (footnote omitted) This approach has been endorsed by the Appellate Body in *EC – Hormones*, op. cit., paras. 115-117.

> decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination."[186]

7.31 Moreover, in *US – Underwear*, the panel restricted its review to an examination of the fact-finding of the national authority on which the subject transitional safeguard measure was proposed. In that case, the United States provided the panel with the Statement issued by the US authorities on 23 March 1995 (the "March Statement") on which it proposed the transitional safeguard measure in question, and another Statement it later provided to the complainant in the TMB review proceedings (the "July Statement"). The panel stated as follows:

> "… 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."[187]

7.32 We agree with the aforesaid finding of the panel on *US – Shirts and Blouses* that panels should not reinvestigate *de novo* the market situation when reviewing decisions made by national investigative authorities. Article 13 of the DSU provides that panels "have the right to seek information and technical advice from any individual or body which it deems appropriate." However, panels are less equipped and might have less expertise in fact-finding than national authorities.[188] In this overall context of the DSU, and in light of the above-quoted jurisprudence, we conclude that "an objective assessment" under Article 11 generally means a more limited factual examination than a *de novo* review.

7.33 We will next consider whether we should examine evidence submitted by Pakistan, which was not examined by, or not available to, the United States at the time of investigation. As the panel on *US – Underwear* indicated, the task of panels is not to determine whether or not to take transitional safeguard measure based upon all facts presented in the panel proceeding in accordance with the national legislation, but to review the consistency of decisions by national authorities with the ATC.[189] Thus, we shall not examine any evidence for the purpose of reinvestigating the market situation, but we should examine any evidence, without regard to whether it was available or considered at the time of investigation, for the purpose of evaluating the thoroughness and sufficiency of the investigation

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[186] Panel Report on *US – Shirts and Blouses*, WT/DS33/R, adopted 23 May 1997, para. 7.21.

[187] Panel Report on *US – Underwear*, op. cit., para. 7.26.

[188] *See also* Appellate Body Report on *EC – Hormones*, op. cit., para. 117, as cited in paragraph 7.28 above.

[189] Panel Report on *US – Underwear*, op. cit., para. 7.12.

underpinning the decision of the US authority.[190] We do not find any provision in the ATC or the DSU that limits the authority of panels to collect factual data in order to review the fact-finding of national authorities in this manner.[191]

7.34 We further recall that in *Argentina - Footwear*, the Appellate Body concluded that the panel had discharged its duties of making an "objective assessment of facts" in accordance with Article 11 of the DSU, stating as follows:

> "… the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. …".[192]

7.35 Therefore, we will examine whether the US fact-finding is justifiable[193] in light of all the facts submitted by the parties, including those which were not considered by, or not available to the US authority at the time of investigation. We consider this term "justifiable" to be descriptive of the current jurisprudence, rather than any addition or deletion thereto. Of course, the Appellate Body did not mean that panels should reverse a fact-finding of a national investigation authority if the authority did not consider a marginally relevant fact that was not provided by any party to the authority, or that was not available at the time of investigation. In contrast, it also would not be correct if panels were unable to reverse a fact-finding of a national authority even if the authority overlooked a crucial or

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[190] In this connection, we recall that as cited in paragraph 7.30 above, the panel on *US – Shirt and Blouses* stated that panels shall "not consider developments subsequent to the initial determination". Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21. Our conclusion is consistent with this statement; it does not mean to take into consideration any development that occurred to the US domestic industry or subject imports, for example, change in sales volume, after the 1998 Market Statement had been made.

[191] We also note that the ATC does not ensure that exporting Members may participate in the national investigation proceedings for transitional safeguard measures, thereby leaving such Members possibly unable to contest the fact-finding of the importing Member at that stage; however, exporting Members have the opportunity to contest the fact-finding of an importing Member prior to the introduction of a transitional safeguard measure, through consultation contemplated by Article 6.7. In addition, we are informed that the United States provided a public notice and accordingly, gave Pakistan and any other interested party an opportunity to comment on its own fact-finding prior to the establishment of the transitional safeguard measure at issue. (See US comments on the interim report, p. 5.)

[192] Appellate Body Report on *Argentina – Footwear*, op. cit., para. 121. *See also* Appellate Body Report on *US – Wheat Gluten*, op. cit., para. 153. *Compare* Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21, in which the panel stated that panels shall "limit themselves to the evidence used by the importing Member in making its determination to impose the measure", as cited in paragraph 7.30. We understand that this finding of the panel implies that panels shall examine any evidence not for the purpose of reinvestigating the market situation, but for the purpose of evaluating the thoroughness and sufficiency of the investigation underpinning the decision of the national investigation authority, in light of the finding of the Appellate Body in *Argentina – Footwear.*

[193] We note that the *New Shorter Oxford English Dictionary* defines the term "justifiable" as: "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible". *New Shorter Oxford English Dictionary* (Clarendon Press 1993), p. 1466. By using the term "justifiable", we do not imply that there is a burden on the respondent to justify itself to a panel, thereby incorrectly shifting the burden of proof. Instead, we refer to the requirement that an investigating authority take into consideration the relevant facts and then adequately explain its reasoning. We have recourse to this term also in order to avoid terms such as "reasonableness" or "wide margin of discretion" which are used in national systems of administrative law and which inevitably carry with them many connotations from these national legal systems.

decisive fact simply because it was not presented to the authority at the time of investigation[194]; this would mean that the more poorly the investigation procedures are designed, the more likely a deficient fact-finding of a national authority could withstand the scrutiny of panels.[195] Further, it also could not be correct that panels have to uphold a fact-finding of a national authority when the authority "adequately explained how the facts supported [its] determinations …", however, excluding a crucial or decisive fact from the explanation. Thus, under Article 6 of the ATC, we deem it necessary and appropriate to review whether a national authority's fact-finding and decision was justified in light of the relevant facts before us.

E. DEFINITION OF DOMESTIC INDUSTRY

1. Identification of Issues

7.36 Article 6.2 of the ATC requires that, in order to take a transitional safeguard measure, a Member must demonstrate 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*." (emphasis added)

7.37 **Pakistan** argued that Article 6.2 provides that the subject "domestic industry" consists of domestic manufacturers that produce: (a) like products; (b) directly competitive products; or (c) like products and directly competitive products, with subject imports. In violation of this provision, in relation to the transitional safeguard measure on imports of combed cotton yarn from Pakistan, the United States excluded from the scope of the domestic industry the vertically integrated manufacturers that produced combed cotton yarn for their own use. Combed cotton yarn produced by domestic producers, whether for sale in the market or for internal use, is a directly competitive product with combed cotton yarn imported from Pakistan. The US position is inconsistent with the practice on the scope of a domestic industry concerning safeguard measures under GATT Article XIX, countervailing duties or antidumping duties.[196]

7.38 In rebuttal, the **United States** argued that the text of Article 6 would allow a Member to identify an industry producing a product that is (a) like and directly competitive; or (b) like but not directly competitive; or (c) unlike but directly competitive.[197] According to the United States, vertically integrated fabric producers manufacture combed cotton yarn not for sale in the open market but for their internal consumption in the subsequent production of a fabric, apparel, or home furnishing. Consequently, the combed cotton yarn manufactured by these firms is not a directly competitive product with combed cotton yarn imported from Pakistan.[198] Thus, it is proper to exclude this captive production from the scope of the domestic industry. In support of this proposition, the United States argued that the objective of the ATC is to integrate gradually the textile and clothing sector into the disciplines of the GATT, and thus, the MFA rather than the GATT or any other WTO

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[194] In this connection, we note that the Appellate Body, in *US – Wheat Gluten*, stated that "[t]he competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*." Appellate Body Report on *US – Wheat Gluten*, op. cit., para. 55.

[195] We note again that the ATC does not ensure that exporting Members may participate in the investigation proceedings for transitional safeguard measures, thereby leaving such Members possibly unable to contest the fact-finding of the importing Member at that stage; however, exporting Members have the opportunity to contest the fact-finding of an importing Member prior to the introduction of a transitional safeguard measure, through consultation contemplated by Article 6.7. *See also* footnote 191 above.

[196] *See* Pakistan First Submission, pp. 21-27. (*Also* paragraphs 4.10-4.11 and 4.18-4.20.)

[197] *See* US First Submission, para. 49. (*Also* paragraphs 4.34-4.37.)

[198] *See* US First Submission, para. 50. (*Also* paragraphs 4.21-4.25.)

Agreement should serve as the model for the ATC. The United States referred to Annex A to the MFA, which used the term "like and/or directly competitive products".[199]

7.39 **Pakistan** asserted that the US position was illogical in that it resulted in a mismatch between imports and domestic products. "If the United States were permitted to define the domestic industry as the manufacturers of combed cotton yarn for sale, it would consequently have been required to impose its restraint only on combed cotton yarn for sale. However, in fact, the restraint applies to all imports of combed cotton yarn whether destined for sale in the merchant market or for consumption by a related fabric producer."[200] Pakistan also argued that the US position is inconsistent with GATT/WTO jurisprudence on the definition of the terms "like" and "directly competitive" wherein "like" is a subset of "directly competitive", in that it presupposes that like but not directly competitive products exist.[201]

7.40 The **Panel** understands that the issue before it is whether the text of Article 6.2 permits the US exclusion of production of combed cotton yarn by vertically integrated fabric manufacturers for their internal use from the scope of "the domestic industry".[202] The issue consists of the following two interpretative questions regarding Article 6.2[203]:

(a) Does the term "directly competitive products" cover those products which are produced by vertically integrated fabric manufacturers for their internal consumption; is the term limited to products that are *actually competing* with subject imports?[204]; and

(b) Should Members examine the "domestic industry" consisting of all manufacturers producing (i) like products, or (ii) directly competitive products, or (iii) both like products and directly competitive products[205]; or are they permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly

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[199] *See* US First Submission, paras. 37-43, in particular, para. 41. (*Also* paragraph 4.58.)

[200] Pakistan Rebuttal Submission, para. 36. *See also* Pakistan First Submission, pp. 21-22. (*Also* paragraphs 4.18-4.20 and 4.40.)

[201] *See* Pakistan Rebuttal Submission, para. 31. (*Also* paragraphs 4.38-4.41 and 4.43-4.44.)

[202] The 1998 Market Statement defined the domestic industry as "domestic establishments (or 'mills') engaged in the production of the subject yarn *for sale* to other firms." US Ex. 3, para. 1.3. (emphasis added) "The USG investigation … considered only the domestic market combed cotton far sale, chief weight combed cotton spun, as defined by Category 301, and not such yarn produced by vertical integrated firms. The 1998 Market Statement further states that "[v]ertically integrated firms do not sell the yarn they produce in the domestic market, and their production does not compete directly with imports in the U.S. 'yarn for sale' market." *Ibid.* para. 3.1. (footnote omitted)

[203] We note that in addition to those two points, the parties are in disagreement on the interpretation of the term "producing" in Article 6.2; Pakistan argued that the vertically integrated fabric manufacturers "produce" combed cotton yarn while the United States argued that they "produce" not combed cotton yarn, but subsequent products, *e.g.* fabric, apparel or home furnishings for sale, within the context of Article 6.2. *See* Pakistan Rebuttal Submission, paras. 19-25 and US Oral Statement at the First Substantive Meeting, paras. 9-11. In our view, it is obvious that the term "producing", in light of its ordinary meaning, to mean the production not only final products but also intermediary products which are to be used as input for the production of final products. Also, in the WTO Agreement, the term "production" is distinctly used from the term "sale". *See e.g.* GATT Article III:1, which provides as follows: "The Members recognize that internal taxes … affecting the internal *sale* … of products … should not be applied … so as to afford protection to domestic *production*." (emphasis added) To the contrary, the US interpretation of the term "producing" would in effect equate "producing" with "selling".

[204] With respect to Pakistan's position, *see e.g.* Pakistan Rebuttal Submission, paras. 35-36; with respect to the US position, *see e.g.* US First Submission, paras. 50-51.

[205] This is Pakistan's position. *See e.g.* Pakistan First Submission, pp. 22-23. (*Also* paragraphs 4.38-4.41.)

competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive?[206]

7.41 In addition, it is necessary to examine the factual question of whether combed cotton yarn produced by vertically integrated fabric producers for their own consumption is a directly competitive product with combed cotton yarn imported from Pakistan; both parties agree that these products are "like products".[207]

2. Interpretation of "directly competitive products"

(a) Text and context

(i) Article 6.2 of ATC and the WTO Agreement

7.42 **Pakistan** argued that "'directly competitive products' are products with common characteristics that give them the potential of satisfying the same need or taste."[208] In support of its proposition, Pakistan referred to the Appellate Body's finding in *Korea – Alcoholic Beverages*, which it summarizes as "[i]n examining whether a product is competitive *both latent and extant demand* must therefore be considered."[209] Combed cotton yarn produced by vertically integrated fabric manufacturers for their internal consumption share similar technical specifications with imported combed cotton yarn, and as a result, they are "directly competitive" with each other.[210] "All the WTO agreements, including the ATC, are integral parts of the WTO Agreement, which was negotiated and concluded as a single undertaking. It is, therefore, legitimate and common practice for panels to seek guidance for the interpretation of the terms of a WTO agreement from the rulings on similar terms in other agreements."[211]

7.43 The **United States** responded that "combed cotton yarn spun by vertically integrated fabric producers for their own consumption is not intended for release on the marketplace and is not directly competitive with … imports [of combed cotton yarn]."[212] The Appellate Body's finding cited by Pakistan concerns the term "directly competitive or substitutable products" in Ad Article III:2 of the GATT, which is different from the term "directly competitive products" in Article 6.2 of the ATC.[213] According to the United States, the term "'directly competitive' reflects the actual state of affairs in the market place."[214] Further, the United States urged "the Panel to remain, as the Appellate Body has discussed, within the 'four corners' of the ATC and interpret Article 6 as it applies to the facts of this case based upon the unique text of Article 6 considered in light of the object and purpose of the ATC."[215]

7.44 **Pakistan** also pointed out that vertically integrated fabric producers purchase combed cotton yarn on the merchant market. Thus, Pakistan argued that combed cotton yarn offered on the merchant

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[206] This is the US position. *See e.g.* US First Submission, para. 49. (*Also* paragraphs 4.34-4.37.)
[207] Pakistan First Submission, p 23, and US Rebuttal Submission, para. 26. (*Also* paragraph 4.43.)
[208] Pakistan Rebuttal Submission, para. 33. *See also* Pakistan's Answers to Panel's Questions, 28 November 2000, p. 5. (*Also* paragraphs 4.39 and 4.47-4.50.)
[209] Pakistan Rebuttal Submission, para. 32. (emphasis in original) (*Also* paragraph 4.39.)
[210] *See e.g.* Pakistan Rebuttal Submission, para. 33. (*Also* paragraph 4.39.)
[211] Pakistan Rebuttal Submission, para. 13. (*Also* paragraphs 4.10-4.11.)
[212] US Rebuttal Submission, para. 26. (*Also* paragraphs 4.51 and 4.55.)
[213] *See e.g.* US Rebuttal Submission, para. 36. (*Also* paragraphs 4.56-4.57.)
[214] US Rebuttal Submission, para. 37. (*Also* paragraphs 4.56-4.57.)
[215] US Answers to Panel's Questions, 28 November 2000, para. 3. (footnote omitted) In support of its argument, the United States referred to Appellate Body Report on *US – Underwear*, WT/DS24/AB/R, adopted 25 February 1997, pp. 12-13.

market is in fact competing with the yarn produced by the vertically integrated fabric producers for their internal use.[216]

7.45 In response, the **United States** indicated that vertically integrated fabric producers purchase roughly two per cent of their combed cotton yarn from the merchant market and sell roughly one per cent. "*De minimis* purchases of combed cotton yarn made by vertically integrated fabric producers are not, as Pakistan suggests, evidence of actual or potential competition. … The fact that vertically integrated fabric producers may sell roughly one per cent on the market does not mean that the other 99 percent – which never enters the market – is directly competitive with Category 301 imports."[217]

7.46 The **Panel** first notes that the parties are in disagreement on whether the GATT/WTO jurisprudence on any WTO Agreement other than the ATC is relevant to the interpretation of Article 6 of the ATC; Pakistan cited the finding of the Appellate Body on GATT Article III in support of its argument, while the United States urged "the Panel to remain, as the Appellate Body has discussed, within the 'four corners' of the ATC…". As indicated in Article 31(2) of the Vienna Convention, the "context" within the meaning of Article 31(1) comprises "the text" of the *treaty* itself, including its preamble and annexes. The treaty in question here is the WTO Agreement, of which the ATC is an integral part.[218] Thus, it is the WTO Agreement in its entirety, including GATT Article III, that provides the context of Article 6 of the ATC. As the International Law Commission explained in its commentary to the final set of draft articles on the law of treaties, with regard to Article 31(1) of the Vienna Convention[219]:

> "… the ordinary meaning of a term is not to be determined in the abstract but *in the context of the treaty* and in the light of its object and purpose. These principles have repeatedly been affirmed by the [International] Court [of Justice]. …
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> …
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> And the Permanent Court in an early Advisory Opinion stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:
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> > 'In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'"[220]

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[216] *See e.g.* Pakistan Rebuttal Submission, paras. 34-35. (*Also* paragraph 4.26.)

[217] US Rebuttal Submission, para. 40. (*Also* paragraphs 4.22 and 4.27-4.28.)

[218] WTO Agreement, Article II:2.

[219] Article 27(1) of the Final Draft Articles of the International Law Commission.

[220] Report of the Commission to the General Assembly, Part I, Report of the International Law Commission on the work of the second part of its seventeenth session, [1966] 2 Y. B. Int'l L. Comm'n 169, U.N. Doc. A/6309/Rev.1., p. 221, citing *Competence of the ILO to Regulate Agricultural Labour, P.C.I.J.* (1922), Series B, Nos. 2 and 3, p. 23. (emphasis added) Doctrinal writings also indicate that the "context" is the treaty as a whole, not merely a paragraph, an article, a section, or a part of the treaty. *See* Sinclair, Sir Ian, KCMG, QC, *The Vienna Convention on the Law of Treaties*, Second edition, 1984, p. 127 ; Jennings, Sir Robert, QC and Watts, Sir Arthur, KCMG QC, *Oppenheim's International Law*, Ninth Edition, 1992, p. 1273 ; Yasseen, Mustafa Kamil, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités, Recueil des Cours*, Tome 151, 1976 – III, p. 34; Nguyen Quoc Dinh, Daillier, Patrick, et Pellet, Alain, *Droit international public*, quatrième edition, 1992, pp. 252-253. *See also* Brownlie, Ian, QC, DCL, FBA, *Principles of Public International Law*, Fourth edition, 1990, p. 629.

In this case, the "treaty as a whole" is the WTO Agreement and all its annexes; it is not just the ATC.[221] Therefore, we consider that the interpretation on the term "directly competitive or substitutable products" under GATT Article III is relevant in interpreting the term "directly competitive products" under Article 6 of the ATC.

7.47 We note that the United States pointed out that in *US – Underwear*, the Appellate Body rejected certain finding of the panel, indicating that "the Panel went outside the four corners of the *ATC*."[222] In that case, in examining whether or not the retroactive application of transitional safeguard measures is permissible, the panel stated that "[s]ince the ATC is silent on this question, we will first examine how the matter is treated under the provisions of the GATT 1994 …", and found that "Article X:2 of GATT 1994 is the relevant provision …".[223] The aforesaid statement of the Appellate Body was made to reject this finding of the panel,[224] however, because as opposed to the panel, the Appellate Body did "not … believe that Article 6.10 [of the ATC] does not substantively address that issue."[225] Contrary to the US argumentation, nothing in the Appellate Body Report on *US – Underwear* prevents us from using any WTO covered agreement other than the ATC as the "context" of Article 6 of the ATC within the meaning of Article 31(1) of the Vienna Convention.

7.48 Second, we recall that panels and the Appellate Body have often consulted dictionaries as a starting point in analyzing the ordinary meaning of terms used in the WTO Agreement in accordance with Article 31(1) of the Vienna Convention.[226] In this case, we note that the term "competitive" is defined as "of, pertaining to, involving, characterized by, or decided by competition."[227]

7.49 Our attention is next directed to the most immediate context of the term "competitive" in Article 6.2, *i.e.* the qualifier "directly". In our view, if the term "competitive" were to have only a narrow meaning, for example, *actually competing*, the qualifier "directly" would be rendered meaningless; the function of defining the scope of the term "competitive" has been left to the term "directly".

7.50 Accordingly, we go on to examine the meaning of the term "directly". It is obvious that under Article 6.2, the term "directly" excludes those products which are in remote competition with a subject textile or clothing product, from the scope of a subject domestic industry. In this connection, we note that competition can exist in some sense between any two products. This is particularly

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[221] Also, the Appellate Body, in *US - Shrimp*, stated that "[t]he preamble of the WTO Agreement … informs not only the GATT 1994, but also the other covered agreements …". Appellate Body Report on *US – Shrimp*, op. cit., para. 129.

[222] Appellate Body Report on *US – Underwear*, op. cit., p. 12.

[223] Panel Report on *US – Underwear*, op. cit., para. 7.64.

[224] Appellate Body Report on *US – Underwear*, op. cit., p. 12.

[225] *Ibid.* p. 14. (emphasis in original)

[226] For a few recent examples, Appellate Body Reports on *US – Wheat Gluten*, op. cit., para. 53; *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and QWT/DS169/AB/R, adopted 10 January 2001, paras. 111 and 120; and *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45.

[227] *New Shorter Oxford English Dictionary*, op. cit., p. 459. Further, the term "competitive" is defined in the *New Shorter Oxford English Dictionary* as: (1a) "The action of competing or contending with others"; (1b) "Striving for custom between rival traders in the same commodity"; (2) "An event in which persons or teams compete; a match; a contest; a trial of ability"; (3) "The person or persons competing with one; the opposition in a contest". *Ibid.* The United States also referred to the definition of "competitive" in the *New Shorter Oxford English Dictionary*. *See* US Rebuttal Submission, fn. 30 and para. 37. *Webster's New Encyclopedic Dictionary* defines the term "competitive" as "relating to, characterized by, or based on competition," and in turn, "competition" as: (1) "the act or process of competing"; (2) "a contest between rivals …"; (3) "the effort of two or more persons or firms acting independently to secure business by offering the most favorable terms"; (4) "active demand by two or more organisms or kinds of organisms for some environmental resource in short supply." *Webster's New Encyclopedic Dictionary* (Black Dog & Leventhal Publishing Inc. 1994 ed.), p. 201.

obvious in case of consumer products; for example, a number of consumers would make comparison between cashmere sweaters and silk neckties as a birthday present, and in that sense, they are competing with each other. Keeping in mind the aforesaid relevance of the jurisprudence with respect to GATT Article III, we note that in relation to the interpretation of "directly competitive or substitutable products" under GATT Article III, the panel on *Korea – Alcoholic Beverages* stated as follows:

> "At some level all products or services are at least indirectly competitive. Because consumers have limited amounts of disposable income, they may have to arbitrate between various needs such as giving up going on a vacation to buy a car or abstaining from eating in restaurants to buy new shoes or a television set."[228]

7.51 The foregoing analysis is suggestive of the role of the term "directly" in qualifying "competitive" under Article 6. Without the qualifier "directly" in Article 6, for example, in order to decide whether a transitional safeguard measure should be imposed on imports of cashmere sweaters, a Member would need to examine the situation of domestic producers of not only cashmere sweaters, but also silk neckties and a wide range of other consumer products. If it were necessary to consider this remote competition under Article 6, the scope of a subject domestic industry would be too broad. Thus, the qualifier "directly" of "competitive" under Article 6 limits the scope of a subject domestic industry by excluding such remote competition.

7.52 The panel on *Korea – Alcoholic Beverages* also found that "an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste."[229] The Appellate Body agreed with this standard, stating that "according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'."[230] Therefore, we consider that this interpretation of "directly competitive or substitutable products" is of relevance in interpreting the term "directly competitive products" under Article 6 of the ATC, because GATT Article III constitutes part of the "context" of Article 6 of the ATC within the meaning of Article 31(1) of the Vienna Convention, as indicated in paragraphs 7.46-7.47 above.

7.53 We will then recall the factual arguments of the parties on the products in question. First, both parties admitted that imported combed cotton yarn and domestically produced combed cotton yarn, whether for sale or internal use, share basically the same technical specifications.[231] Second, Pakistan claimed and the United States acknowledged that vertically integrated firms are purchasing combed cotton yarn in the market presumably with the same objective.[232] This indicates that the vertically integrated fabric producers recognize combed cotton yarn offered in the open market and combed cotton yarn they produce for their own consumption "as alternative ways of satisfying a particular need …". Imported combed cotton yarn is also offered for sale in the market, and thus, should be presumed to be actually competing with combed cotton yarn produced by vertically integrated fabric producers for their internal consumption. In our view, it is obviously unreasonable to exclude captive production from the scope of a domestic industry on the ground that it is not "directly competitive products".

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[228] Panel Report on *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R and WT/DS84/R, adopted 17 February 1999, para. 10.40.

[229] *Ibid.*

[230] Appellate Body Report on *Korea – Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R, adopted 17 February 1999, op. cit., para. 115.

[231] *See* US Answers to Panel's Questions, 28 November 2000, para. 91 ("To the best of our knowledge, there are no material differences in the technical specifications of the yarn produced domestically for sale, for internal use and the yarn imported from Pakistan or Mexico."), and Pakistan Rebuttal Submission, para. 33. (*Also* paragraphs 4.12 and 4.187.)

[232] US Rebuttal Submission, para. 40. (*Also* paragraphs 4.21-4.23.)

7.54 Here, it is necessary to address further arguments of the United States. The United States argued that the Appellate Body's aforesaid finding in *Korea – Alcoholic Beverages* relies on the term "substitutable", which is missing in Article 6 of the ATC. According to the United States, the absence of this term indicates that the relationship between "like products" and "directly competitive products" under Article 6 of the ATC is different from that between "like products" and "directly competitive or substitutable products" under GATT Article III:2.[233] Also, the statement of the Appellate Body is based upon the object and purpose of GATT Article III, which is different from that of Article 6 of the ATC.[234]

7.55 The Panel notes that, indeed, the finding of the Appellate Body appears to rely on the term "substitutable" as well as "competitive". In *Korea – Alcoholic Beverages*, the Appellate Body also stated as follows:

> "The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word 'competitive' which means 'characterized by competition', and from the word 'substitutable' which means 'able to be substituted'. The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another.
>
> Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable[235] or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'.[236] Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand.
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> The words 'competitive or substitutable' are qualified in the *Ad* Article by the term 'directly'. In the context of Article III:2, second sentence, the word 'directly' suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word 'directly' does not, however, prevent a panel from considering both latent and extant demand."[237]

7.56 Also, in *Korea – Alcoholic Beverages*, the Appellate Body relied on the objective of GATT Article III as follows:

> "In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable.' The object and purpose of Article III confirms that the scope of the term 'directly

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[233] US Rebuttal Submission, paras. 30 and 35-37. (*Also* paragraphs 4.56-4.57.)

[234] US Answers to Panel's Questions, 28 November 2000, para. 8. (*Also* paragraphs 4.56-4.57.)

[235] (footnote original) Appellate Body Report on *Canada – Measures Concerning Periodicals*, WT/DS31/AB/R.

[236] (footnote original) Panel Report on *Korea – Alcoholic Beverages*, op. cit., para. 10.40.

[237] Appellate Body Report on *Korea –Alcoholic Beverages*, op. cit., paras. 114-116. (emphasis in original)

> competitive or substitutable' cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit."[238]

7.57 However, we note that the case on *Korea – Alcoholic Beverages* dealt with questions of substitutability of *unlike* products while in the case at hand we are dealing with the competitiveness of *like* products, and thus, the situation at hand is even clearer than that in the above-quoted case. In *Korea – Alcoholic Beverages*, the subject products, Korean *soju*, and imported products such as gin and whisky, were different in some respects, while our question is whether the like products (*i.e.* captively produced combed cotton yarn and imported combed cotton yarn) are "directly competitive" with each other. In our view, there is no question that these two like products before us are "directly competitive" even if they are not actually competing with each other for any given sale. The definitions of "like products" and "directly competitive products" may vary depending on the provision,[239] but it is worth noting that under GATT Article III, in *Korea – Alcoholic Beverages*, the Appellate Body stated that "'like' products are a subset of directly competitive or substitutable products…."[240] While the precise scope of "directly competitive products" may be different, it is instructive to note the relationship between the terms (*i.e.* one as a subset of another).

7.58 Further, we would like to emphasize again that in the case before us, vertically integrated fabric producers purchase combed cotton yarn and also sell combed cotton yarn they produce, in the market, which includes imported combed cotton yarn, even though their amounts are small. In our view, these facts reveal that combed cotton yarn produced by the integrated producers for their own use is "directly competitive" with imported combed cotton yarn. Manufacturers' decisions as to whether to buy materials in the market or to rely exclusively on internal production, or whether to sell their intermediary products in the market or use them to manufacture downstream products, are an economically driven choice made by individual companies. Such decisions are much more particular in nature than the decision that we have to make as to whether two like products are "directly competitive". Vertically integrated manufacturers make a business decision on these points based primarily on profit maximization. No such decision will be necessary for either the non-integrated purchaser (*i.e.* a fabric producer, which does not have a make/buy decision) or the non-integrated combed cotton yarn producer (which does not have a sell/use decision). Thus, it is arguable that an investigating authority might weigh the evidence differently with regard to the two types of combed cotton yarn producers, but that is a matter of evaluating damage to producers, not whether the products are "directly competitive" with each other.[241]

7.59 In our view, the interpretation to be given of the term "directly competitive" in Article 6 is of a more general and objective nature, without taking account of factors specific to each and every producer or consumer. The focus initially is on the *products.* Thus, the alleged fact that vertically integrated fabric producers do not intend to sell combed cotton yarn in the market would not prevent us from finding that captively produced combed cotton yarn and imported combed cotton yarn are

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[238] Appellate Body Report on *Korea – Alcoholic Beverages*, op. cit., paras. 119-120.

[239] Cf. Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., fn. 44, referring to Panel Report on *Japan – Alcoholic Beverages*, op. cit., para. 6.20.

[240] Appellate Body Report on *Korea – Alcoholic Beverages*, op. cit., para. 118.

[241] In addition, we note that the 1998 Market Statement only reflects statistics on actual completed sales. There is no evidence that *offers for sale* were investigated. This latter point would be necessary to be established even under the US method of defining "directly competitive". It would be reasonable to infer that there must be offers for sale several times as many as actual completed sales, even assuming that vertically integrated fabric manufacturers do not purchase or sell combed cotton yarn in the open market for business. It would be rather unreasonable to consider that they are always able to purchase or sell combed cotton yarn whenever they wish. Taking this into consideration, the US general statement that the vertically integrated manufacturers did not intend to sell their products in the market would appear to be conjecture rather than a fact demonstrated in the 1998 Market Statement.

"directly competitive" with each other. In other words, the US interpretation would require an unacceptably novel reading of Article 6 to permit the definition of *products*, in terms of *producers* rather than the reverse, which is the natural reading of the language and that most consistent with GATT/WTO practice.

(ii) Article 6.2 within the ATC

7.60 **Pakistan** argued that the US interpretation of "directly competitive products" would run counter to the exceptional nature of the transitional safeguard, and in its support, referred to Article 6.1, which provides that "[t]he transitional safeguard should be applied as sparingly as possible, consistently with … the effective implementation of the integration process…".[242] Also, in a further support of its argument, Pakistan referred to the Appellate Body Report on *US – Underwear*, which used Article 6.1 as a basis for rejection of retroactive application of transitional safeguard measures.[243]

7.61 The **United States** responded that "Article 6 exists for the purpose of providing importing Members meaningful recourse to a safeguard mechanism during the transition period in which the textiles and clothing sector is integrated into the GATT. Accordingly, this provision is a fundamental aspect of the carefully negotiated balance struck in the ATC. It is not, as Pakistan claims, a measure 'running counter to the basic purpose of the ATC.' To disregard the ordinary meaning of 'domestic industry producing like and/or directly competitive products' and limit the availability of an Article 6 safeguard only to physically 'like' products would prevent the Panel from giving meaning to words clearly in the text and would amount to rewriting the ATC's carefully negotiated balance of rights and obligations."[244]

7.62 On this point, **the Panel** agrees that Article 6.1 is part of the immediate context of Article 6.2. The last sentence of Article 6.1 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."

7.63 Indeed, we acknowledge that the last sentence of Article 6.1 could be interpreted as an exhortation that Members exercise restraint in the frequency with which they *apply* transitional safeguard measures, rather than limiting the scope of the interpretation of the language itself. However, it is more natural to read Article 6.1 as encouraging Members to restrict transitional safeguard measures in a more general manner. The Preamble of the ATC notes that "negotiations in the area of textile and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT/WTO on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade". It would be inconsistent with this Preamble if Article 6 were to set forth an overly broad authority of Members to take transitional safeguard measures.

7.64 Moreover, in this connection, we note that the US interpretation of the term "directly competitive" would also permit transitional safeguard measures to be taken to address the following cases:

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[242] *See* Pakistan Rebuttal Submission, paras. 38-42, in particular, para. 41. (*Also* paragraphs 4.2, 4.54 and 4.70.)

[243] Pakistan referred to Appellate Body Report on *US – Underwear*, op. cit., p. 15. (*Also* paragraph 4.70.)

[244] US Rebuttal Submission, para. 23. (footnote omitted) (*Also* paragraph 4.36.)

(a) A US manufacturer of combed cotton yarn had been acquired by a vertically integrated fabric producer during the investigation period but continues to produce the same product, but now only for the internal use of the integrated firm. According to the US interpretation, even if the acquired manufacturer had maintained the same number of employees and facilities and the same level of production (or even increased them), it should be deemed to have "exited" the industry merely because of the change in ownership, and, among other things, could be an indicator of "serious damage" to the domestic industry.[245]

(b) The integrated fabric producers sell more combed cotton yarn in the market, thereby achieving a market share greater than *de minimis*[246] (say, 10%) before the investigation period. Then the integrated firms maintain the same level of production during the investigation period, but switch a significant amount to their own internal use sufficient to drop below the *de minimis* threshold. According to the US interpretation, the integrated firms should be deemed to have "exited" the industry to the extent that they ceased to sell their products in the market in order to use them for their internal consumption, and hence, their resulted loss of shares in the sales market, among other things, could be an indicator of "serious damage" to the domestic industry.[247]

7.65 It would be manifestly absurd to find serious damage to a domestic industry in these situations, and therefore, to impose a transitional safeguard measure when the domestic production of combed cotton yarn has been maintained at the same level. It is difficult to see how a mere change of ownership or a transitory change in make/buy decisions could support a finding of "serious damage",[248] and permit the Member to impose a transitional safeguard measure on imports. In our view, the language encouraging general restraint in Article 6.1, which constitutes part of the context of Article 6.2, supports the interpretation of the term "directly competitive products" as including combed cotton yarn produced by vertically integrated fabric manufacturers for their internal consumption, in order to avoid unjustifiable use of the safeguard mechanism as illustrated by the situations in the preceding paragraph.

(b) Object and purpose of the ATC

7.66 We recall that Article 31(1) of the Vienna Convention provides that "[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*." (emphasis added) We will thus examine whether the aforesaid product-based (as opposed to producer-based) interpretation of the term "directly competitive products" is consistent with the object and purpose of the ATC.

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[245] This is not an extravagant hypothesis. See US First Submission, para. 162, 3d bullet. (*Also* paragraphs 4.144-4.148.)

[246] We further note that an illustration of the artificiality of the US definition is that the United States has had recourse to the concept of *de minimis* sales which has no basis in the treaty language.

[247] In response to the Panel's question as to whether the United States would find "damage" to the domestic industry in these cases, the United States did not provided any clear-cut answer, but did not deny the possibility of finding serious damage based upon the given set of facts. US Answers to Panel's Questions, 28 November 2000, paras. 75-82. (*Also* paragraphs 4.144-4.148.)

[248] Further, it would be improper to adopt any interpretation that would lead to absurd results. *See* Appellate Body Report on *EC – Computer Equipment*, op. cit., para. 86.

7.67 **Pakistan** argued that the object and purpose of the ATC is to ensure that the textiles and clothing sector will eventually be integrated into the GATT 1994, in response to the Panel's question as to how the object and purpose of the ATC demands Pakistan's interpretation of the scope of a subject domestic industry under Article 6, and excludes the US interpretation. In this line, Pakistan claimed that this leads to Article 1.5, which requests Members to "allow for continuous autonomous industrial adjustment and increased competition in the markets", and further, Article 6.1, which provides that "the transitional safeguard should be applied as sparingly as possible…". Further, the US definition of the subject domestic industry cannot be reconciled with the object and purpose of the ATC, because it allows Members to take transitional safeguard measures to protect domestic producers that are most likely to suffer serious damage from competition with imports. This would greatly facilitate the use of transitional safeguard measures, which would seem contrary to the whole purpose of progressively integrating the textiles and clothing sector into the GATT/WTO.[249]

7.68 In response to a similar question, the **United States** indicated that "[t]he ATC sets forth a careful balancing of interests between exporting and importing Members to guide the textiles and clothing sector through the delicate ten-year transition from a regime of special quotas to GATT rules."[250] Further, it claimed that "[f]or importing Members, a fundamental aspect of this bargain was the ability to address damaging surges in imports of non-integrated products through a special safeguard provision *separate from* Article XIX of GATT 1994 and the WTO *Agreement on Safeguards* …."[251] Also, the United States criticized Pakistan's interpretation in that it "denies the relevance of the marketplace for purposes of transitional safeguard action."[252]

7.69 In a further rebuttal, **Pakistan** claimed that the United States attempts to turn an "exception in the ATC into the expression of the basic object and purpose of the ATC."[253]

7.70 The **United States** further stated that "[t]he Article 6 transitional safeguard mechanism represents a fundamental part of the ATC's carefully negotiated text; it is *not* … a measure running counter to the basic purpose of the ATC."[254]

7.71 In **the Panel's** view, in order to address the issues at hand, it is not necessary to answer the general question of whether or not transitional safeguard measures are *exceptionally* permitted under the ATC. We believe that in the final analysis the parties do not disagree that integration of the trade in textile and clothing into GATT/WTO system is the object and purpose of the ATC as stated in its Preamble. This object and purpose is referred to again in the last sentence of Article 6.1. As indicated above, the interpretation of the term "directly competitive products" in the light of this sentence and also the object and purpose of the ATC would rather favour the traditional product-based interpretation[255] as is usual under the GATT/WTO, *inter alia*, in GATT Articles III and

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[249] *See* Pakistan Answers to Panel's Questions, 28 November 2000, pp. 8-10, and Pakistan Rebuttal Submission, paras. 44-46. (*Also* paragraphs 4.92 and 4.54.)

[250] US Answers to Panel's Questions, 28 November 2000, para. 16. (*Also* paragraph 4.9.)

[251] US Answers to Panel's Questions, 28 November 2000, para. 16. (emphasis in original) *See also* US Rebuttal Submission, para. 13. (*Also* paragraph 4.9.)

[252] US Answers to Panel's Questions, 28 November 2000, para. 18. (*Also* paragraph 4.51.)

[253] Pakistan Rebuttal Submission, para. 44. (*Also* paragraph 4.54.)

[254] US Rebuttal Submission, para. 13. (emphasis in original) (*Also* paragraphs 4.211-4.215.)

[255] We recall our discussion in paragraph 7.59 above, where we noted that traditionally the domestic producers are defined in term of directly competitive products rather than defining the products in terms of who produces them.

XIX.[256] This is consistent with our finding in paragraph 7.46 above that GATT Article III constitutes part of the context of the term "directly competitive" in Article 6.2 of the ATC.[257]

(c) Issue of the MFA

7.72 The **United States** argued that the MFA constitutes part of the context of Article 6 of the ATC, with reference to the Appellate Body Report on *US – Underwear*,[258] which states that "[w]e turn to another element of the context of Article 6.10 of the ATC: the prior existence and demise … of the MFA."[259]

7.73 In contrast, **Pakistan** argued that "[i]n the *Underwear* case the Appellate Body used the MFA *only to confirm* an interpretation it had reached in accordance with Article 31 of the Vienna Convention."[260]

7.74 **The Panel** first notes that Article 31(2) of the Vienna Convention sets forth as follows:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrumented related to the treaty."

This clearly indicates that the MFA cannot be part of the "context" of the ATC within the meaning of Article 31(2) of the Vienna Convention. The MFA is not an integral part of the WTO Agreement, and was not made "in connexion with the conclusion of" this treaty. We further note that the Appellate Body Report on *US – Underwear* mentioned as part of the "context" of Article 6.10 of the ATC, not the MFA itself, but "the prior existence and demise … of the MFA".[261] They are occurrences rather than "any agreement" or "any instrument". Clearly, in our view, the Appellate Body used the MFA

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[256] The panel on *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*") recently touched on this issue. In relation to Article 4.1(c) of the Agreement on Safeguards, which defines a "domestic industry" as "the producers as a whole of the like or directly competitive products ... or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products", the panel found that it is inconsistent with this provision to include input producers (growers and feeders of live lamb) in the scope of the domestic industry producing lamb meat. Panel Report on *US – Lamb*, WT/DS177/R and WT/DS178/R, circulated 21 December 2000 and appealed 31 January 2001, section 4(a), in particular, para. 7.118. In support of this finding, the panel referred to GATT Panel Reports on *United States – Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, SCM/71, BISD 39S/436; *New Zealand – Imports of Electrical Transformers from Finland*, adopted 18 July 1985, BISD 32S/55; *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, SCM/85. *See* Panel Report on *US – Lamb*, op. cit., paras. 7.78-7.109.

[257] We note that our interpretation of Article 6 of the ATC is consistent with the object and purpose of the WTO Agreement, as described in its Preamble, as well as the object and purpose of the ATC.

[258] US Answers to Panel's Questions, 28 November 2000, paras. 26-28, stating that "[t]he MFA is relevant as providing context for the interpretation of "like and/or directly competitive products" for the purpose of Article 6." (*Also* paragraph 4.62.)

[259] Appellate Body Report on *US – Underwear*, op. cit., p. 16.

[260] Pakistan Rebuttal Submission, para. 47-51, in particular, para. 50. (emphasis in original) (*Also* paragraph 4.63.)

[261] Appellate Body Report on *US – Underwear*, op. cit., p. 16.

not as part of the "context" of the ATC within the meaning of Article 31(1) of the Vienna Convention, but as part of the circumstances of the conclusion of the ATC.[262]

7.75 In any event, the US position would not be supported by referring to the fact that the same term "like and/or directly competitive products" was used in the MFA. This reference was made to support its proposition that in interpreting the term under Article 6 of the ATC, the Panel should not apply the interpretation of similar terms used elsewhere in the WTO Agreement (*e.g.* "like or directly competitive products" under GATT Article XIX and the Safeguards Agreement). Also, the United States argued that, in light of MFA practices, the term under Article 6 should refer to products which compete in the marketplace.[263]

7.76 The United States is correct that the term "and/or" does not appear elsewhere in the WTO Agreement for the purpose of determining the producers of products in question. Nevertheless, this would not necessarily support the US justification for the exclusion of captive production from the scope of "directly competitive products" under the proper interpretation of the language of the ATC as discussed above.

7.77 We further note that the MFA required a finding of "market disruption … based on the existence of serious damage to domestic producers", as distinct from "serious damage to the domestic industry producing like and/or directly competitive products" under the ATC. Also, under the MFA, "and/or" referred to "technical changes or changes in consumer preference which are instrumental in switches" in production.[264] This is different terminology from Article 6.2, which adopts the forms used elsewhere in the WTO (*i.e.* defining an industry based upon products and then assessing the impact of the imports on such an industry), albeit with somewhat different wording. Further, we do not accept the relevance of the MFA pursuant to Article 32 of the Vienna Convention because the interpretation under Article 31 of the Vienna Convention is enough, but even if we had, for the United States, to merely point out that the MFA used the term "and/or" does not help support the US interpretation of the ATC in light of the other more significant distinctions between the treaties' texts.

(d) Practicability

7.78 The **United States** pointed out that it is difficult to examine the factors enumerated in Article 6.3 in respect of vertically integrated producers.[265]

7.79 **Pakistan**, however, responded that it is possible to do so under the ATC as under the Anti-Dumping Agreement, and that the United States did so under its antidumping law.[266]

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[262] *See* paragraph 7.20 above. In this connection, please also note that in its Rebuttal Submission, the United States did not specifically argued that the MFA constitute part of the "context" of the ATC, as that term is used in the Vienna Convention. *See* US Rebuttal Submission, para. 31, in particular, fn. 22. The US answer to the Panel's question about the legal relevance of the MFA does not specifically characterize the MFA as such. The US Answers to Panel's Question, dated 22 December 2000, paras. 1-6.

[263] *See* US Answers to Panel's Questions, 28 November 2000, paras. 26-28. (*Also* paragraph 4.58.)

[264] Both parties agreed that Annex A to the MFA, which used the term, clarified that safeguard measures could be invoked to protect domestic producers of certain textile products, *e.g.* cotton fibres, from imports of not identical but directly competitive products, *e.g.* non-cotton vegetable fibres such as ramie. The text of Annex A and the materials the parties cited seem to support their arguments. Pakistan Answers to Panel's Questions, 28 November 2000, p. 14 and US Answers to Panel's Questions, 28 November 2000, para. 25. (*Also* paragraphs 4.59-4.61.)

[265] *See* US First Submission, para. 48 and US Rebuttal Submission, para. 22. (*Also* paragraphs 4.21-4.23 and 4.25.)

[266] Pakistan Rebuttal Submission, paras. 22-25. (*Also* paragraph 4.16.)

7.80 **The Panel** notes that under the Anti-Dumping Agreement, the importing Member is required to examine all relevant economic variables of the domestic industry, "including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices …; actual and potential negative effects [of dumping] on cash flow, inventories, employment, wages, growth, ability to raise capital or investments",[267] which cover almost all the economic variables that are required to be examined under Article 6.4 of the ATC. It may be the case that some factors, such as profits, may be difficult to assess for captive producers. However, other factors such as labour, productivity, inventory, wages, capacity utilization, production levels, etc. would be very similar to assess.[268] Thus, the examination of the captive producers may be somewhat different and the weighting of such assessment may require further analysis on a case-by-case basis, but that certainly does not mean that it cannot be done.[269]

3. Interpretation of "and/or"

7.81 The interpretations of the parties are also in a sharp contrast with each other regarding the meaning of "and/or" in Article 6.2. As noted above, according to **Pakistan**, a subject domestic industry consists of producers of (i) like products, or (ii) directly competitive products, or (iii) both like products and directly competitive products.[270] In contrast, the **United States** argued that Members are permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive.[271]

7.82 **Pakistan** rebuts the US argument by arguing that the category "like but not directly competitive products" is inconceivable in light of the jurisprudence concerning GATT Article III that like products are a subset of directly competitive products.[272]

7.83 The **United States** further responded that the connecting word "and/or" between "like" and "directly competitive products" suggests that the "like products" should not be constructed as a subset of the "directly competitive products". If "like products" is a subset of "directly competitive products" under Article 6 of the ATC, Pakistan's interpretation would contravene the principle of effectiveness in treaty interpretation, because the words "like and/or" would be unnecessary to define a domestic industry under Article 6.2.[273]

7.84 In **the Panel**'s view, it is difficult to envisage products that are like but not directly competitive and as a factual matter we have found the products in this dispute to be both. However, we cannot ignore the existence of the term "and" in Article 6.2. It may be the unintended result of unfortunate drafting, but the term "and" is there nonetheless. Thus, we shall carry our analysis through on this basis.

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[267] Antidumping Agreement, Article 3.4.

[268] In this connection, we note that the United States did not contest Pakistan's argument that the United States has done this successfully with respect to vertically integrated producers in the antidumping proceedings. *See* Pakistan Rebuttal Submission, para. 24 and fn. 25.

[269] Further, we note that the US interpretation would not remove its alleged difficulties; if vertically integrated fabric manufacturers had sold in the market combed cotton yarn in the amount greater than *de minimis*, the United States presumably would have had to examine these factors only for the production of such combed cotton yarn, as distinct from all the establishment's production.

[270] *See* Pakistan First Submission, pp. 22-23. (*Also* paragraph 4.39.)

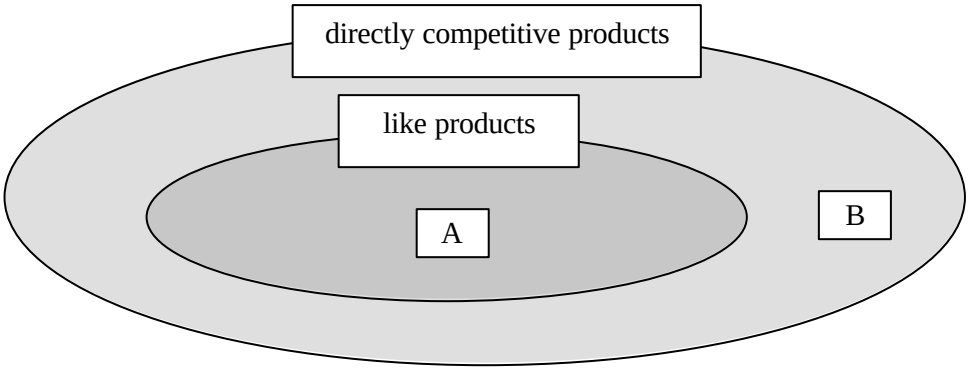
[271] *See* US First Submission, para. 49. *See also* the discussion in paragraphs 7.38-7.40 above. (*Also* paragraphs 4.34-4.35.)

[272] *See* Pakistan Answers to Panel's Questions, 28 November 2000, p. 4. (*Also* paragraphs 4.43-4.44.)

[273] *See* US Rebuttal Submission, paras. 31-34. (*Also* paragraph 4.45.)

7.85 The following diagram might help illustrate the position of Pakistan.[274] In the view of Pakistan, the category of "like products" (A) is always a subset of "directly competitive products" (B); therefore, "like products" plus "directly competitive products" = "directly competitive products" ($A \cup B = B$). Consequently, the choice is, in effect, limited to two possibilities: "like" or "directly competitive".

Diagram 1



7.86 Also, the following diagrams help illustrate our understanding of the US position. The category of "like but not directly competitive products" is A; the category of "unlike but directly competitive products" is B; therefore, products that are both "like and directly competitive" is C. As mentioned in paragraph 7.83 above, the United States contended that the category of "like products" is not a subset of "directly competitive products", and hence, it must presuppose that illustration in Diagram 3.

Diagram 2

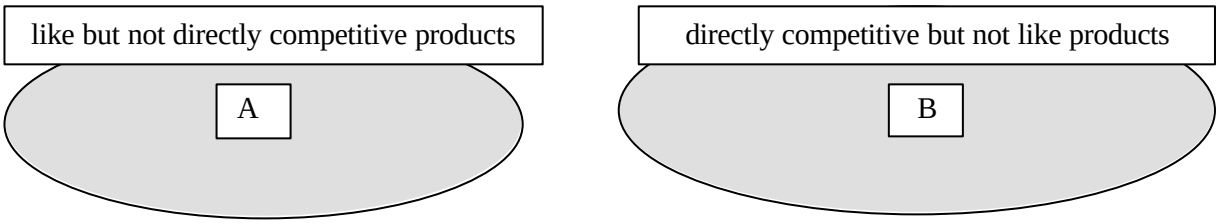
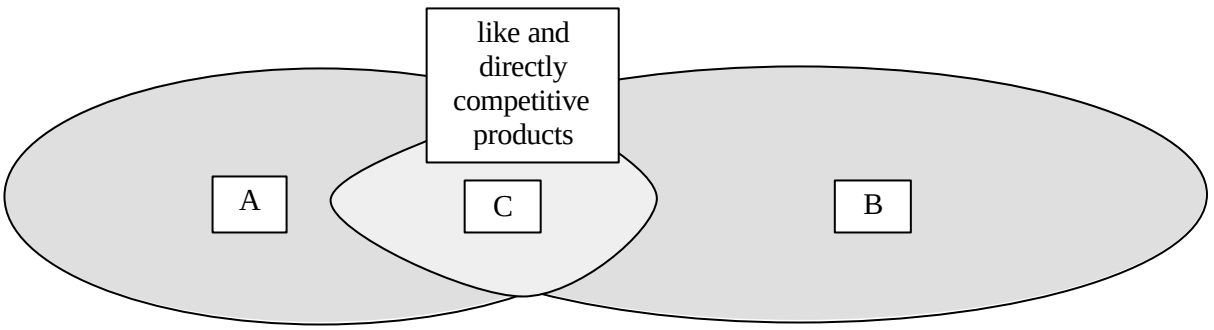


Diagram 3

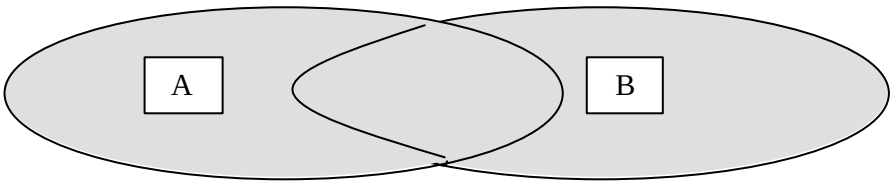


[274] This and the following diagrams are illustrative only and not according to scale.

7.87 Both of the parties' interpretations of the term "and/or" are grammatically possible. However, in our view, the chart shows that the US interpretation is flawed in that among other things, one of the categories of a domestic industry, *i.e.* the producers of product A in the chart above, is a meaningless alternative. Imports of any textile product cannot damage producers of "like but not directly competitive products" through market competition. The United States itself conceded that "if the products of domestic producers are *not* directly competitive with imports – such as in the case of yarn manufactured by vertically integrated producers for their internal consumption – the need for safeguard action would not arise."[275] Indeed, not only would the need not arise, but the case could not be made because causation could not be demonstrated. Thus, the treaty would give a meaningless right. In this respect, the US interpretation is inconsistent with the principle of effectiveness in treaty interpretation.[276]

7.88 In the case, which would be difficult to envision, where "like products" (A) is not a subset of "directly competitive products" (B), the more logical description of the category of "like and directly competitive products" would be A ∪ B (A plus B), *i.e.* the broader grouping, rather than the narrow US suggestion of A ∩ B (both A and B, which is shown in the previous illustration as "C"). This is the more logical reading of the language and is consistent with the usage everywhere else in the WTO Agreements. In our view, the correct illustration of "like and directly competitive" is as follows:

Diagram 4



[275] US First Submission, para. 50. (emphasis in original) (*Also* paragraph 4.21.)
[276] Appellate Body, in *US – Gasoline*, stated as follows:

> "… One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

Appellate Body Report on *US – Gasoline*, op. cit., p. 23. *Also* Appellate Body Reports on *Japan – Alcoholic Beverages*, op. cit., p. 12; *US – Underwear*, op. cit., p. 16; *Argentina – Footwear*, op. cit., para. 95; and *Korea – Dairy*, op. cit., para. 81.

Thus, the category "like *and* directly competitive products" should consist of A *plus* B (A ∪ B), rather than the mere overlap of the two (A ∩ B).[277]

7.89 Further, in our view, the US interpretation is problematic in permitting Members to impose transitional safeguard measures for domestic producers of "unlike but directly competitive products". This means that "serious damage" would be found based upon the examination of the situation regarding these producers, without taking into consideration the situation regarding producers of "like and directly competitive products", which are *core* products competing with subject imports. To give an example of the absurdity of the potential result from the US formulation, take the following example of an investigation with respect to an industry producing directly competitive but unlike products. In such a case the imported products could be combed cotton yarn as in the present case, but the domestic industry would not be the cotton yarn industry; rather, it could be the synthetic yarn industry if such products were found to be directly competitive. But because the chosen category is unlike but directly competitive, then the combed cotton yarn producers would be excluded from the investigation.[278] This would leave open the possibility of finding serious damage and causation thereof even where the domestic combed cotton yarn industry was flourishing, but the synthetic yarn industry was in trouble. This would seem to be in direct conflict with the requirement of the treaty language in Article 6.2 that "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 customer preferences*." (emphasis added)

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[277] We note that the term "and/or" is used in the following places in the WTO Agreements: (i) DSU: Article 8.1; (ii) TRIPS: Articles 45.2 and 61; (iii) GATS: Articles V:1, XXVII(b)(ii) and XXVIII(f)(i); Annex on Air Transport, paragraph 6(d); (iv) SCM: Articles 8.2(c) and 25.3; Illustrative List, item (k); Annex V, para. 6; (v) Licensing: Articles 3.3, 3.5(a)(iv), and 3.5(b); (vi) Rules of Origin: Articles 9.2(c)(iii) and 9.3(a); (vii) Agriculture: Annex 5, Section A, para. 1; (viii) Textiles: Articles 5.1, 5.2, 5.3, 5.6, 6.2 and 6.13; (ix) Antidumping: Articles 2.2.1.1 and 9.5; (x) Preshipment Inspection: Articles 1.3 and 2.17; and (xi) Valuation: Articles 2.1(b) and 3.1(b); Annex I, Note to Article 2, para.3 and Note to Article 3, para. 3.

In the instances enumerated above, the items linked by the "and/or" are discrete factors not dependent on each other for their definitions. The "and/or" term allows the person applying it flexibility as to which of the factors to include. Either one may be used individually or both may be included collectively. A useful example may be found in Annex I to the Customs Valuation Agreement. It is provided there as a note to Article 2 as follows:

> "2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:
>
> (a) quantity factors only;
>
> (b) commercial level factors only; or
>
> (c) both commercial level and quantity factors.
>
> 3. The expression 'and/or' allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above."

While the use of the term "only" might superficially seem to support the US position, a closer look shows that, among others, the third category is constructed with "and" as a broad, inclusive meaning rather than referring to a narrow overlap.

[278] While the United States did not explain the full functioning of their proposed system of applying the categories of domestic production, it could be argued that this category of directly competitive but unlike would only be applied if there were no like products. First, there is no basis in the treaty language for such an assertion. Second, this interpretation would mean that there would be no option of examining an industry producing directly competitive products when, as a factual matter, the like products were found to be a subset of directly competitive products (which as we have stated is by far the most common, if not the exclusive case). Thus, instead of the treaty language presenting options to the importing Member, the US approach would *dictate* which of the three possibilities must be used in a particular factual situation. And the most common factual situation where like products are a subset of directly competitive would be eliminated as one of the options.

7.90 Therefore, in our view, we agree with Pakistan's interpretation on "and/or", and find that the United States is in violation of Article 6.2 of the ATC in excluding the captively produced combed cotton yarn from the scope of the domestic industry.

F. FINDING OF SERIOUS DAMAGE

1. Reliability of AYSA Data

7.91 **Pakistan** claimed that the United States based its determination on the state of the domestic industry on the data supplied by the American Yarn Spinners Association (AYSA), which data, however, were unverified, incorrect and incomplete. Pakistan claimed that the data supplied by AYSA were inherently untrustworthy because this organization had previously supplied incorrect data. Pakistan recalled that combed cotton yarn, ring spun, from Pakistan had been subject to a request for restraint by the United States in 1997, and that the Market Statement[279] presented on that occasion included data supplied by AYSA which turned out to be inconsistent with official data that were subsequently published. The US official statistics had not been available when the 1998 Market Statement was finalized in December 1998, and thus, without verification using any official statistics, the United States relied the data supplied by the AYSA, which is composed of domestic producers of combed cotton yarn, and thus, has an interest in the safeguard measure in question.[280] The Census figures published subsequent to the finalization of the Market Statement cannot be reconciled with the data provided by AYSA for the period January-August 1998. While AYSA had reported a 10.2 per cent decline in production between January-August 1997 and January-August 1998, the Census figures show only a drop of 5 per cent between the calendar years 1997 and 1998. According to Pakistan, this confirms that the data provide by AYSA could not be trusted.[281]

7.92 In response, the **United States** first argued that the Census data were not available to the US authority at the time of investigation, and as such, should be disregarded. Further, the aforesaid 1997 Market Statement is for ring spun yarn which is additional evidence outside the scope of our review. Should it be deemed relevant, it would enhance the integrity of the data contained in the 1998 Market Statement, because in the case of combed cotton ring spun yarn, the United States discovered evidence that called the 1997 Market Statement into question, and consequently, did not impose a transitional safeguard measure at that time.[282] Further, the United States stated that it decided on the reliability of the AYSA data by confirming that the 1996 and 1997 production data supplied by the AYSA were consistent with its official statistics;[283] both the AYSA data and the official statistics showed a decline in domestic production despite the alleged discrepancy between them.[284] Further, the United States pointed out that it verified the AYSA data not only by comparing them with official data but also by engaging in direct discussions with individual firms.[285]

7.93 On the issue of the reliability of the AYSA data, the **Panel** first notes that in Section E above, we already found that the United States excluded the captive production of combed cotton yarn from the scope of the domestic industry, and the measure at issue is inconsistent with Article 6.2. This is enough to recommend that the DSB find the US measure at issue inconsistent with the ATC.

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[279] Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Yarn for Sale, 85 Per cent or More by Weight Combed Cotton Ring Spun Category 301 Part, April 1997 (the "1997 Market Statement"), PAK Ex. 2.

[280] *See* Pakistan First Submission, pp. 30-31, and Rebuttal Submission, paras. 52-53. (*Also* paragraphs 4.95-4.98.)

[281] *See* Pakistan First Submission, p. 31. (*Also* paragraph 4.96.)

[282] *See* US First Submission, paras. 157-158, and US Oral Statement at the Second Substantive Meeting with the Panel, para. 10. (*Also* paragraph 4.124.)

[283] *See* US First Submission, para. 150. (*Also* paragraph 4.125.)

[284] *See* US First Submission, paras. 152-153. (*Also* paragraph 4.125.)

[285] *See* US First Submission, paras. 150 and 154. (*Also* paragraph 4.121.)

However, in order to provide the full explanation to the parties, we have declined to exercise judicial economy and have proceeded to examine the other claims of Pakistan.

7.94 Next, we have to decide, based on the correct standard of review, whether certain evidence submitted by Pakistan should be disregarded or not. Our conclusion, in paragraph 7.33 above, was that we can and should examine any evidence, not for the purpose of reinvestigating the market situation, but only for the purpose of reviewing the thoroughness and sufficiency of the decision of the US authority. Accordingly, in our view, the 1998 calendar year US Census data should be examined by the Panel, even though they were not available to the US government at the time of investigation, in order to confirm whether the reliance by the US investigation authority on the AYSA data is justifiable. Pakistan presented the data in order to contest the reliability of the AYSA data, rather than to claim that the decision of the US authority is unjustifiable in light of "developments subsequent to the … determination."[286]

7.95 First, keeping this in mind, we will proceed to examine the parties' arguments, and we note that data supplied by AYSA in the 1997 investigation proceeding for a transitional safeguard measure on combed cotton ring spun yarn might not have been fully accurate. However, it would be exaggerated to conclude that because of that, data supplied by AYSA in the proceeding for the transitional safeguard measure at issue were "inherently untrustworthy." If evidence is supplied by a party which has interest in the proceeding, such evidence should be more carefully examined for reliability. However, this does not lead to a generalization that evidence supplied by trade associations consisting of domestic producers which are requesting trade remedies such as transitional safeguard measures is *per se* unreliable. It becomes then a question of verification and judgement by the investigating authority.

7.96 Second, we note that there is evidence the US investigation authority did seek to make an objective fact-finding in this regard. This is exemplified by the reaction of the United States to data supplied by AYSA in the 1997 proceeding; the United States pointed out as follows: "In the process of conducting ongoing verification of the data, the United States discovered evidence that called the 1997 statement in question. As a result, … the United States did not impose an Article 6 safeguard with respect to combed cotton ring spun …".[287] Further, we note that the United States pointed out that it verified production data for 1996 and 1997 supplied by AYSA for the transitional safeguard measure at issue by comparing them with the official statistics, as shown in paragraph 1.4(b) of the 1998 Market Statement.[288]

7.97 In light of the foregoing, we consider that Pakistan has not established that data supplied by AYSA are inherently untrustworthy. It is not for panels to prescribe precise methodologies for information gathering and verification. In our view, the US methods used in this proceeding are not unjustifiable, even though we recognize that there may be other approaches.

7.98 With respect to Pakistan's challenge to data supplied by AYSA for January-August 1998, we do not agree that the US fact-finding based upon the data supplied by AYSA is unjustifiable. Pakistan pointed out that there is a discrepancy between the data and the official statistics, but in light of the difference for the subject period (*i.e.* AYSA data - the eight-month period for January-August 1998 and the Census data - the one-year period for 1998), in our view, this discrepancy is not sufficient for us to conclude that the factual situation was not "demonstrated" within the meaning of Article 6.2.

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[286] Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21.

[287] US First Submission, para. 158. (*Also* paragraph 4.124.)

[288] US Ex. 3, para. 1.4(b). *See also* US Answers to Panel's Questions, 28 November 2000, para. 84 and fn. 64. (*Also* paragraphs 4.104, 4.107 and 4.106.)

7.99 On this point, **Pakistan** further argued that if both sets of data were correct, monthly production by domestic producers during the period from September to December 1998 was nine per cent higher than the average monthly production during the period from January to August 1998 despite the fact that there were fewer establishments operating during the September to December period.[289]

7.100 The **United States** responded that this shows a decline in domestic production in 1998 and that the decline was most severe in the earlier part of the year, and accordingly, supports its position.[290]

7.101 In **the Panel**'s view, Pakistan's calculation does not establish that AYSA data were incorrect, because a nine per cent increase in monthly production does not necessarily sound unrealistic, and Pakistan has not so proven. Thus, we do not find the US determination unjustifiable in this regard.

2. Treatment of Establishments Retooled to Produce Other Products

7.102 **Pakistan** also argued that the United States should not have treated as indicia of damage to the domestic industry the fact that establishments producing combed cotton yarn had been retooled to produce carded cotton yarn or any other products. In support of this proposition, Pakistan referred to Article 1.5 of the ATC, which provides that, in order to facilitate the process of integration of the textiles and clothing sector into the GATT disciplines, "… Members should allow for continuous autonomous industrial adjustment…".[291] In this connection, Pakistan argued that in the 1998 Market Statement, the United States erroneously mentioned that "three establishments which are producers of the subject yarn *closed*," because these establishments had not ceased operation during the investigation period.[292]

7.103 In rebuttal, the **United States** argued that the retooled establishments were now producing entirely different products, and thus, had exited the combed cotton yarn industry. Accordingly, this can be used as an indicator of "serious damage" to the domestic industry. In support, the United States pointed out that the ATC allows the textiles and clothing sector to restructure over a ten-year period.[293] Also, in response to Pakistan's claim that the 1998 Market Statement is erroneous in stating that three establishments ceased operation during the investigation period, the United States noted that they ceased producing combed cotton yarn, and then switched to carded cotton yarn.[294]

7.104 In the **Panel**'s view, this issue concerns the interpretation of the term "damage" under Article 6.2. Transitional safeguard measures are permitted to protect the domestic industry producing – rather than individual companies which are producers of – "like and/or directly competitive products" from import competition. Pakistan itself argues that the scope of the domestic industry is determined not by producers but by products.[295] Otherwise, changes in ownership of domestic enterprises producing "like and/or directly competitive products" could be deemed as an indicator of "serious damage" to the "domestic industry".

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[289] Pakistan Rebuttal Submission, paras. 55-57, as corrected later by Pakistan's Answers to Panel's Questions, 14 December 2000, p. 4.

[290] US Letter dated 15 December 2000 to the Chairman of the Panel.

[291] Pakistan First Submission, pp. 31-35. (*Also* paragraph 4.92.)

[292] Pakistan First Submission, pp. 32-34 (emphasis in original), and Rebuttal Submission, para. 64. (*Also* paragraphs 4.98, 4.101 and 4.133.)

[293] *See* US First Submission, paras. 163-166. (*Also* paragraphs 4.142 and 4.144-4.146.)

[294] US First Submission, paras. 161-162. (*Also* paragraph 4.137.)

[295] Pakistan First Submission, pp. 4-5. (*Also* paragraphs 4.18-4.20.)

7.105 In this connection, we recall that Pakistan argued that "if a plant produces carded instead of combed yarn, thrives in its new capacity and retains its workforce, the increase in imports obviously did not cause *grave injury that impaired its value or usefulness*."[296] However, we disagree with this argument. Assume that, in reaction to import surge, domestic producers of certain textile products merged into companies in another industry; and the establishments of the acquired producers, after retooling to produce totally different products, achieved the same level of production, sales, profit, employment, etc. In this situation, indeed, the "value" of the retooled establishments may not have been impaired in some overall sense, but it would be obviously unreasonable that no transitional safeguard measure would be permitted since the "domestic industry" producing the textile products was driven out by the import surge. In our view, the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of "serious damage" to a subject domestic industry.[297]

7.106 This is a corollary to our findings regarding the relevance of ownership in paragraphs 7.63-7.65 above. If the industry is defined by the *producers* of the *products*, then it follows that if the producers change products, they are no longer in the industry, and accordingly, the fact can be treated as indicia of "damage" to the industry.[298]

7.107 We further note that this conclusion is consistent with Article 1.5, in contrast to Pakistan's argument. Indeed, it might be a good example of "autonomous industrial adjustment" that plants were retooled to produce different products. However, Article 6.2 provides that Members may take transitional safeguard measures in order to react to "serious damage" to a domestic industry. Insofar as damage experienced by a domestic industry is not "serious", no transitional safeguard measure will be permitted and, accordingly, the importing Member must allow for "autonomous industrial adjustment" which the domestic industry will make to deal with the damage. In other words, it is a matter of degree. If a limited number of establishments exit the industry, that might be an indicator of some sort of damage, but of an amount consistent with "autonomous industrial adjustment." But if a larger number of establishments exit, it can be an indicator of serious damage. Thus, the exit of establishments is a relevant factor as long as properly weighted, and we do not find the US determination here to be unjustifiable in this regard.

3. Other Factual Claims

7.108 **Pakistan** contested the US fact-finding on employment and investment. First, according to Pakistan, the employment and production figures concerning combed cotton ring spun yarn for the year 1996 contained in the 1997 Market Statement seem inconsistent with those concerning combed cotton yarn for the same year contained in the 1998 Market Statement. Second, the 1998 Market Statement erroneously states that "investment in recent years has been to update and replace

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[296] Pakistan Rebuttal Submission, para. 65. (emphasis in original) (*Also* paragraph 4.91.)

[297] We note that in support of its proposition, Pakistan emphasized that it is not difficult to switch from the production of combed cotton yarn to that of carded cotton yarn. *See* Pakistan Rebuttal Submission, para. 67. In our view, it might be relevant to the determination on "serious damage" how easy it is for establishments retooled to produce carded cotton yarn or any other product to resume the production of combed cotton yarn. However, the arguments of the parties on this point suggest that it costs more or less to switch from the production of combed cotton yarn to that of carded cotton yarn, and *vice versa*. *See* Pakistan's Answers to Panel's Questions, 28 November 2000, pp. 17-20 and US Answers to Panel's Questions, 28 November 2000, paras. 41-47. We further note that the US finding of "serious damage" does not rely exclusively on the fact that the two establishments ceased to produce combed cotton yarn. *See* US Ex. 3, para. 8.3. Thus, in our view, Pakistan has not established that the US finding of "serious damage" is unjustifiable in this respect.

[298] In this connection, we further note that Pakistan did not include in the terms of reference a claim that the other products in question (*e.g.* carded cotton yarn) are like or directly competitive products.

equipment rather than to create new productive capacity,"[299] in light of the fact that between 1993-1997, the units producing combed cotton yarn decreased by 37 per cent, but combed cotton yarn production rose by 44 per cent.[300]

7.109 Initially, **the Panel** recalls that the 1998 Market Statement found that the US industry suffered serious damage based primarily on the comparison of relevant economic variables between the period of January-August 1997 and that of January-August 1998.[301] Pakistan's figures regarding employment and production in the 1997 and 1998 Market Statements are not based on equivalent segments; in the 1997 Market Statement, for ring spun combed cotton yarn for sale while in the 1998 Market Statement, for all combed cotton yarn for sale.[302] The figures are not sufficient for us to conclude that the US fact-finding is unjustifiable. We also note that there are many ways of explaining changes in production; new machinery may be more efficient; labour may be employed more effectively, etc. In order to reach the conclusion Pakistan requests, we would need to engage in a *de novo* review of the factual situation.

7.110 In our view, Pakistan's aforesaid factual claims described in this section are not enough to sustain a challenge to the overall justifiability of the US fact-finding.

G. INVESTIGATION PERIOD, INCLUDING PERIOD FOR DETERMINING SERIOUS DAMAGE AND CAUSATION

7.111 **Pakistan** contested the US causation analysis.[303] The correlation of an upward trend in imports and negative trends in the relevant economic variables of the domestic industry must be central to the causation analysis. But such correlation can be found only in the comparison of relevant economic variables on an eight-month basis, *i.e.* between the period of January-August 1997 and that of January-August 1998. Pakistan argued that the analysis on an eight-month basis is not enough, referring to the recommended guidelines adopted at the Committee on Anti-Dumping Practices for time period for investigation, which states that "the period of data collection for injury investigation normally should be *at least three years*." Pakistan also pointed out that "five-year investigation periods are common" under Article XIX of the GATT.[304]

7.112 In response, the **United States** pointed out that the ATC does not provide for a specific minimum time period for investigation. Article 6.7 of the ATC only requires that the Member proposing to take safeguard action provide "specific and relevant factual information, as up-to-date as possible…", which "shall be related, as closely as possible …" to the 12-month period to be referenced under Article 6.8 to determine the level of restraints. When the United States made a request for consultation in December 1998, the data for the period of January-August 1998 was the best available data. Also, the United States based its determination on the comparison of relevant

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[299] US Ex. 3, para. 5.15.

[300] *See* Pakistan First Submission, pp. 35-36. (*Also* paragraphs 4.99-4.153.)

[301] *See* US First Submission, paras. 81-82. (*Also* paragraphs 4.5 and 4.85-4.88.)

[302] *See* Pakistan First Submission, p. 35. (*Also* paragraph 4.124.) The 1997 Market Statement indicates that the US investigation authority "excluded from its investigation other combed cotton yarn for sale, including … yarn produced by the open-ended spinning method", because it "distinguished ring spun from open-end because such products are not like and/or directly competitive products with the subject yarn due to their physical characteristics, commercial applications and price structure." 1997 Market Statement, PAK Ex. 2, para. 1.2. In contrast, the 1998 Market Statement does not exclude ring spun from the scope of the investigation. *See* 1998 Market Statement, US Ex. 3, paras. 1.1-1.2.

[303] We note that this issue also included the proper period for assessing serious damage and we have considered it in this sense, as well.

[304] Pakistan First Submission, pp. 36-39. (*Also* paragraph 4.152.)

economic variables between 1996 and 1997 as well, and as a result, on the two year and eight month investigation.[305]

7.113 **The Panel** first notes that Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports. The parties agreed on this point.[306]

7.114 Second, Article 6.7 of the ATC requires that when the Member invoking a transitional safeguard measure seeks consultations with the Member or Members which would be affected by such action, it shall provide the Member or Members with "specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors … on which the Member invoking the action has based its determination of the existence of serious damage or actual threat of damage; and (b) the factors … on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned." Also, that Article provides that "the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8", which period is defined under paragraph 8 as "the 12-month period terminating two months preceding the month in which the request for consultation was made." In our view, Article 6.7 does not address, directly or indirectly, the length of either investigation periods or periods during which damage occurs. For example, the requirement that the information to be provided to the exporting Member or Members "be related, as closely as possible, to the [12-month] reference period" does not give any guidance as to how long the investigation period should be or how long damage should continue in order to constitute "serious damage" and causation thereof.

7.115 In this respect, we recall Pakistan's argument that "since the damage must be determined to be 'serious', the period must be adequately long to discern that the effect of imports was more than just temporary."[307] However, it is unclear how this general consideration demands that the period during which the serious damage occurred must be longer than the eight months utilised by the United States. In our view, whether or not the chosen period is justifiably long would depend on, at least partly, the extent of the damage suffered by a subject domestic industry during that period. Thus, we deem it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC.

7.116 In light of this, we interpret Pakistan's claim as requesting the Panel to examine the factual question of whether the US fact-finding on serious damage and causation is accurate, rather than to address the legal issue of whether Article 6 of the ATC requires that the period during which the damage occurs be longer than the period the United States focused on in this particular case.[308] Thus, we will make an "objective assessment of facts" on this point using the "justifiability" standard discussed in Section 3 above.

7.117 We further note that Pakistan also contested the US focus on the eight-month period in finding serious damage and causation, based on the specific set of facts in this case. Pakistan argued that economic variables of the domestic industry during a longer period would present a much more positive picture of the US domestic industry, noting that the domestic production declined only between 1997 and 1998 after having reached unprecedented heights in 1997.[309] Pakistan also claimed that the "focus on the evolution during an eight-month period only made it impossible to segregate the effect of rapidly declining exports from the effect of imports"; the decline in exports between 1997

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[305] US First Submission, paras. 101-107. (*Also* paragraph 4.103.)

[306] *See* Pakistan First Submission, p. 37 and US First Submission, para. 101. (*Also* paragraph 4.103.)

[307] Pakistan First Submission, p. 37. (*Also* paragraph 4.152.)

[308] In this respect, we recall that Pakistan indicated that "Article 6 of the ATC does not explicitly impose a specific minimum period for which data must be collected, nor has such a period been established by jurisprudence." Pakistan First Submission, p. 37. (*Also* paragraph 4.100.)

[309] Pakistan First Submission, pp. 38-39. (*Also* paragraphs 4.96-4.98.)

and 1998 "is due to the fact that Mexico, which as recently as 1996 had accounted for two-thirds of United States exports of combed cotton yarn, is now producing this yarn itself."[310]

7.118 We note that in support of its conclusion that "the increase in imports in 1998 has caused serious damage to the industry," the 1998 Market Statement found and considered, among others, the following changes in the situation of the US domestic industry, the domestic market and imports from all sources, between the calendar years 1996 and 1997, and between January-August 1997 and January-August 1998:

(a) Three out of twenty-two establishments had closed since 1996, and two of them closed during January-August 1998;

(b) there was a loss of 423 jobs in the domestic industry from 1996 through August 1998, of which 340 jobs were lost in January-August 1998;

(c) US production increased by 1.6 per cent between 1996 and 1997, and decreased from 98,371,000 kilograms to 88,337,000 kilograms (10.2 per cent lower) between January-August 1997 and January-August 1998;

(d) US shipments decreased by 0.4 per cent between 1996 and 1997, and also decreased from 99,818,000 kilograms to 85,644,000 kilograms (14.2 per cent lower) between January-August 1997 and January-August 1998;

(e) US exports increased by 2.8 per cent between 1996 and 1997, and decreased from 10,690,000 kilograms to 7,168,000 kilograms (32.9 per cent lower) between January-August 1997 and January-August 1998;

(f) Capacity utilization decreased by 3.6 per cent between 1996 and 1997, and also decreased from 84.3 per cent to 75.7 per cent (8.6 percentage points lower) between end of August 1997 and end of August 1998;

(g) End-of-period inventories increased by 43.8 per cent between 1996 and 1997, and also increased by 145.9 per cent between January-August 1997 and January-August 1998;

(h) Unfilled orders increased by 22.8 per cent between the year-end 1996 and the year-end 1997, but decreased 15.8 per cent between the end of August 1997 and the end of August 1998;

(i) The average number of employees decreased by 1.6 per cent between 1996 and 1997 and also decreased by 6.6 per cent between January-August 1997 and January-August 1998; the number of hours worked increased by 1.2 per cent between 1996 and 1997, and decreased by 6.6 per cent between January-August 1997 and January-August 1998; and hourly wages increased from $8.34 to $8.67 between 1996 and 1997 and also increased from $8.67 in January-August 1997 to $9.02 in January-August 1998[311];

(j) Profitability ratio decreased from 4 per cent to 3.5 per cent between 1996 and 1997, and also decreased from 3.9 per cent to 2.1 per cent between January-August 1997 and January-August 1998;

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[310] Pakistan First Submission, p. 39. (*Also* paragraph 4.169.)

[311] The 1998 Market Statement explains that "[t]he increase in the average hourly wage rate was attributed to the upward pressure exerted by exogenous factors outside the control of the companies in this industry including the influence of the mandated rise in the US minimum wage, …". US Ex. 3, para. 5.10.

(k) New investment in productive capacity was stagnant;

(l) Imports from all sources increased 12.1 per cent between 1996 and 1997, and also increased by 9,828,000 kilograms or 91.3 per cent between January-August 1997 and January-August 1998, to 20,595,000 kilograms;

(m) The apparent domestic market remained relatively constant during the period increasing by 0.8 per cent between 1996 and 1997, and decreasing by 0.8 per cent in January-August 1998 from the January-August 1997 level;

(n) US producers' market share decreased from 87.1 per cent to 85.7 per cent (1.4 percentage points lower) between 1996 and 1997, and also decreased from 89.2 per cent to 79.2 per cent (10 percentage points lower) between January-August 1997 and January-August 1998;

(o) The ratio of imports to domestic production increased from 13.4 per cent to 14.8 per cent between 1996 and 1997, and also increased from 10.9 per cent to 23.3 per cent between January-August 1997 and January-August 1998; and

(p) The average landed duty-paid value of imports was $4.54 per kilogram during the period January-August 1998, 7.8 per cent below the average US producers' price.[312]

7.119 Further, in support of its conclusion that "serious damage to this industry is directly attributable to a sharp and substantial increase in imports of the subject yarn from Pakistan,"[313] the 1998 Market Statement found and considered, among others, the following changes in imports from Pakistan of combed cotton yarn between January-August 1997 and January-August 1998:

(a) Imports from Pakistan, in volume, increased from 942,756 kilograms to 3,612,652 kilograms (283.2 per cent higher);

(b) Pakistan is the second largest supplier;

(c) Imports from Pakistan, as a percentage of total imports, increased from 8.8 per cent to 17.5 per cent, and as a percentage of US production, increased from 1.0 per cent to 4.1 per cent, between January-August 1997 and January-August 1998; and

(d) The average landed duty-paid value of imports from Pakistan was $3.63 per kilogram during the period January-August 1998, 26.2 per cent below the average US producers' price.[314]

7.120 In light of the magnitude of the aforesaid changes in economic variables of the US domestic industry,[315] the surge in imports from Pakistan between January-August 1997 and January-August 1998, and the price-undercutting of imports from Pakistan, together with changes in all relevant economic variables between 1996 and 1997, in our view, Pakistan has not established that the US choice of the period is unjustifiable. The "period of investigation" was sufficiently comprehensive,

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[312] 1998 Market Statement, US Ex. 3, Sections V and VI. *See also* US First Submission, para. 115. (*Also* Table 2, paragraph 4.173.)

[313] 1998 Market Statement, US Ex. 3, para. 7.1. (*Also* paragraphs 3.2, 4.5 and 4.157-4.159.)

[314] 1998 Market Statement, US Ex. 3, paras. 7.2-7.5. *See also* US First Submission, para. 131. (*Also* paragraph 4.158.)

[315] In light of the specific data set out here, we wish to recall our finding that the United States did not properly identify the domestic industry. The specific facts would thus be different if a proper definition were used.

and the question of whether an eight-month period of damage caused by imports was sufficiently long to find serious damage and causation is a case-by-case determination.

7.121 In this case, for the reasons discussed above, we conclude that in respect of the length of the investigation period and the period in which serious damage occurred, Pakistan has not established that the United States failed to demonstrate "serious damage" to the domestic industry, and the causal link between the serious damage and imports from Pakistan.[316]

H. ATTRIBUTION

7.122 The **United States** argued that Article 6.4 of the ATC authorizes Members to apply safeguard measures on a Member-by-Member basis. According to the United States, this is consistent with the requirement that a sharp and substantial increase in imports be assessed on an individual Member basis. The requirement is only that a Member subject to investigation have its exports compared to "all other sources", that is, to the basket of other exporters. The United States asserted that the breakdown of exporters, as done in Table V of the 1998 Market Statement, goes further than is required by Article 6.4, which requirements could be satisfied by a simple comparison of Pakistan to a grouping of all other exporters. It then follows that a safeguard measure may be applied to any, but not all, Member or Members that are a cause of the serious damage.[317]

7.123 **Pakistan** responded that a proper attribution analysis cannot be done if the largest exporter, in this case Mexico, is simply ignored. Mexico's exports of the subject product had increased rapidly and from a higher base. It is inconceivable that the United States could do a proper attribution analysis without also individually examining Mexico's exports.[318]

7.124 In **the Panel**'s view, it is clear from Article 6 of the ATC that safeguard measures need not be applied on an MFN basis. They are to be applied only to those imports causing serious damage, not to all imports. Furthermore, they are not to be imposed on imports already subject to restraint. However, we do not agree that this means that restraints can be imposed only on some of the imports which may be responsible for causing serious damage. We think that that approach stretches both the logic and the language of Article 6.4 too far.

7.125 In our view, the analysis should proceed in the following manner. First, there is an assessment of the state of the domestic industry. This can be seen as determining the level of actual damage caused to the industry. Next, it must be determined if this actual damage constitutes "serious damage". If there is serious damage to the domestic industry, the next step is to determine pursuant to paragraphs 2 and 3 of Article 6 whether imports are causing such damage. Damage from other factors such as technological changes or changes in consumer preferences must not be attributed to imports in assessing whether such imports have caused serious damage.

7.126 However, unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, the analysis cannot stop there. The Member imposing a safeguard under the ATC must then do a further attribution analysis and narrow the causation down to only those Members whose exports are causing the serious damage. This does not mean, however, that a Member imposing a safeguard restraint can then pick and choose for which Member(s) it will make an attribution analysis. The attribution cannot be made only to some of the Members causing damage, it must be made to all such Members. The language of Article 6.4 leads to this conclusion. The

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[316] We recall that this must be read *mutatis mutandis* with our conclusion that the United States did not properly define the domestic industry.

[317] *See* US First Submission, paras. 125-141 and Rebuttal Submission, paras. 73-79. (*Also* paragraphs 4.161-4.163.)

[318] *See* Pakistan First Submission, pp. 41-42 and Rebuttal Submission, paras. 85-94. (*Also* paragraphs 4.160, 4.164, 4.165 and 4.167.)

first sentence contains a requirement that safeguard measures shall be applied on a Member-by-Member basis. However, this is a reference to the *application* of the measure, not the attribution analysis of which Members are subject to such measure(s). That is covered by the second sentence which specifically speaks of "attribution" of causation of serious damage in contrast to the first sentence which describes how the measure is to be "applied". The second sentence reads:

> "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 the import and domestic prices at a comparable stage of commercial transaction. . ."

7.127 Obviously, we first look to this language of the treaty itself. The reference is to the Member or Members to whom serious damage is attributed and it refers specifically back to the previous two paragraphs which describe the obligations in making such a determination of serious damage. This explicit linking back to the serious damage determination, in our view, requires that *all* the Members causing the serious damage must have it so attributed.[319] Thus the question is which Member(s)' exports caused the serious damage as determined pursuant to paragraphs 2 and 3, rather than identifying some new sub-group that is not specified by the treaty language. The rest of the sentence merely describes a methodology. It does not permit a reading to the effect that only one of such Member or Members to whom causation of serious damage is attributed may be subjected to restraints. As a factual matter, it may end up being only one to whom causation is properly attributed, but that can only be determined *after* a proper attribution analysis is done, not *before* as the United States has done in the present investigation.

7.128 As always, we should examine the context and the object and purpose of this language for guidance in interpreting its meaning. We recall that the four corners of the treaty is the WTO Agreement as a whole. As we discussed above, we do not agree with the US argument that the ATC should be interpreted in isolation from the rest of the GATT/WTO.[320] It is distinct where it specifically states that it is such in the treaty language, but it must be interpreted in the context of the WTO Agreement as a whole when there is a question as to its meaning. We also recall that the Preamble of the ATC provides that the ATC is meant to be an agreement embodying the progressive integration of the sector into GATT/WTO on the basis of strengthened GATT/WTO rules and disciplines. In our view the method most consistent with the WTO Agreement', including the Safeguards Agreement's, requirements of MFN treatment and with the ATC's object and purpose is to require attribution to *all* Members found to be causing serious damage, not just one or some of such Members. Such an ability to pick and choose Members as proposed by the United States would be the least consistent with an MFN approach and, therefore, would be the least conducive to the progressive integration of the sector into the WTO system.

7.129 A further review of the context of applying safeguards measures under Article 6, even on a non-MFN basis, supports this conclusion. Article 5.1 of the Safeguards Agreement provides that: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and facilitate adjustment." While we recognize the distinction between general safeguard actions and safeguard measures applied pursuant to the ATC, we consider this particular statement one of general applicability. Applying this logic to Article 6 of the ATC implies that a safeguard restraint will be imposed at such a level presumably to alleviate the serious damage. If this were not the case, *i.e.* a solution sufficient to cure the problem, it would hardly make sense to impose any

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[319] This is supported by the French and Spanish texts of the agreement which use definite articles in referring to the serious damage determination, namely "le préjudice grave" and "el perjuicio grave", respectively, both of which refer directly to the earlier determination.

[320] *See* the discussion in paragraphs 7.46-7.47 above.

restraint. However, if the restraint could be imposed on only one Member contributing to the serious damage, then such a Member would suffer a disproportionate level of the pain for the remedy. If, however, an appropriate attribution analysis is undertaken, then the restraint will be spread appropriately to all Members whose exports have caused the serious damage.

7.130 Thus, the correct interpretation of Article 6.4 requires an analysis of the imports from individual Members, but it does not mean that such analysis may be limited to only some of the Members of those which are the cause of the serious damage. The treaty language of the second sentence of Article 6.4 provides the method for proceeding; compliance with this method is mandatory, as indicated by the term "shall" used in this provision. The first step is that there must be an examination of the imports from all the Members which have shown the characteristics of a sharp and substantial increase. We take the term "sharp" to refer to the percentage increase and the term "substantial" to refer to the absolute increase. Thus, for example, it would not be necessary to examine the imports from a Member which showed a sharp percentage increase if such imports were from a low base because they would not then represent a substantial increase in imports. This obviously must be done on an individual Member basis or there could be a blurring of the two criteria and it could result in sweeping in Members whose exports possibly met one but not both of the criteria. But to say it needs to be done individually does not imply that it can be limited only to some individual Members. Then the required second step of the attribution analysis is to take all the Members whose exports have met the criteria of the first step and examine them according to the other listed criteria in Article 6.4, namely, a comparative assessment of levels of imports from other sources, market share and import and domestic prices at a comparable stage of commercial transaction. Only at this point can the investigating authority come to a justifiable conclusion as to which Member or Members the causation of serious damage can be attributed. To simply stop after finding that one Member is contributing to serious damage does not satisfy the obligations of Article 6.4.

7.131 Thus, there are three categories of exporters in each case: (1) those causing the serious damage and not subject to existing restraints; (2) those to which the serious damage is not attributable; and (3) those already subject to restraints. New restraints may only be imposed on individual Members in the first group.[321] Identifying that first group means certain examinations on an individual Member basis, as discussed above. It also means imposing the restraint on a Member-by-Member basis, as restraints in this sector are administered by the exporting Member, not by the importing Member. However, it does not mean that only some of the Members in the first category will be subject to the restraint while others in that same category are excluded from the restraint.

7.132 In the 1998 Market Statement, the United States compared the impact of Pakistan's exports only to those of the rest of the world, which included Mexico. However, the United States clearly did not assess the impact of Mexico's exports individually in such a manner.[322] In this case, we do not see how that can be avoided. Imports from Mexico showed a signficant percentage increase in shipments during the period of investigation and, therefore, the increase appeared to be sharp. Mexico was also the largest exporter and, therefore, the increase could reasonably be considered substantial. There was also some evidence that Mexico met the criteria of the second step. We must be clear, however, that we are not suggesting that the serious damage[323] must also be attributed to imports from Mexico

[321] We note that the United States grouped Mexico in a category labelled "FTA's". The United States did not assert that Mexico was exempt from investigation based on its membership of an FTA with the United States, so we do not need to reach that issue here.

[322] We note the US argument that it assessed imports from Mexico. US Rebuttal Submission, para. 78. However, the 1998 Market Statement does not state that the US investigation authority assessed the impact of imports from Mexico *individually*, where no specific reference is made to the import amount or price from Mexico. *See* US Ex. 3.

[323] Once again, we must note that this statement must be read in light of our finding that the United States did not properly demonstrate the existence of serious damage due to the incorrect definition of the industry.

because panels are not to make *de novo* reviews of that sort. It may be the case that Mexico did not contribute to serious damage to a properly defined domestic industry. It may not always be the case that the largest exporter will be found to be contributing to the serious damage. However, there is adequate evidence in the record to show that this assessment of imports from Mexico (and any other appropriate assessments of imports from other Members) must be done by the investigating authority and it was not done in the present case.[324]

I. ACTUAL THREAT OF SERIOUS DAMAGE

7.133 **Pakistan** argued that the United States should have made a "prospective analysis" of relevant economic variables in order to find "actual threat of serious damage, referring to the finding of the panel on *US – Underwear*, which required a prospective analysis. Pakistan also argued that the United States should have considered the prospective increase in imports from Mexico in order to find actual threat of serious damage. In particular, "a mere assertion that import and price trend will continue does not meet the requirement of a prospective analysis."[325]

7.134 In response, the **United States** contended that it is not clear whether "serious damage" and "actual threat of serious damage" are distinct concepts, and that the panel on *US – Underwear* did not require a prospective analysis in all cases.[326] Further, the United States conducted a prospective analysis by considering the correlation between the increase in imports from Pakistan in 1998 and negative trends in relevant economic variables of the domestic industry, and the price differences between imports from Pakistan and domestically produced products.[327]

7.135 **The Panel** notes that on these issues, the panel on *US – Underwear* stated as follows:

> "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. The March Statement contains no elements of such a prospective analysis. In our view, even if the mention of 'actual threat' in 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."[328]

7.136 Also, we note that Article 6.4, second sentence, reads as follows:

> "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 …"

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[324] It is not the case that *each and every* exporter necessarily needs to be examined individually in such a comparative manner. For example, some Members' exports may be low or dropping and, therefore, may not meet the criteria in the first step of the Article 6.4 analysis.

[325] Pakistan First Submission, p. 39. (*Also* paragraphs 4.189-4.191.)

[326] US First Submission, paras. 109-112. (*Also* paragraphs 4.192-4.195.)

[327] US First Submission, paras. 113-117. (*Also* paragraphs 4.192-4.195.)

[328] Panel Report on *US – Underwear*, op. cit., para. 7.55. (footnote omitted)

The footnote to this sentence refers to "imminent" and states as follows:

> "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."

7.137 In our view, the US finding on actual threat of serious damage contained in the 1998 Market Statement is essentially a finding that the existing "serious damage" to the domestic industry would continue if imports were to continue as before.[329] It would seem a reasonable inference to assume that if the trend in imports were to continue, the trend in domestic sales would continue, and consequently, the existing "serious damage" would continue. Under the terms of Article 6.4, there seems to be no basis for demanding any further "prospective analysis" than taking into consideration the prospect that the price-undercutting of imports from Pakistan would likely continue, in contrast to Pakistan's argument.

7.138 However, this US finding of "actual threat of serious damage" in the 1998 Market Statement is totally dependent on the finding of serious damage. It is based on a finding that there is current serious damage and extrapolates to a conclusion that there is an actual threat of the serious damage continuing. This means that it does not serve as an independent (or alternative) determination of actual threat of serious damage. It is a redundant exercise and that means that if there is a fatal flaw in the serious damage determination, the actual threat determination necessarily falls, too. If the United States were to make an independent finding of actual threat of serious damage, further analysis would need to be done to substantiate the finding. In other words, a prospective analysis is required if an independent finding of actual threat is to be made rather than a redundant and dependant one as was effectively made by the United States in the 1998 Market Statement.

7.139 As an example of what we mean, Article 6.4, and footnote thereto, indicate that it is insufficient to look only at foreign production capacity to determine actual threat. Specifically, Articles 6.4 contains a reference to "a sharp and substantial increase in imports, actual or *imminent*" (emphasis added). The footnote is to the word "imminent" and it reads as follows:

> "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."

7.140 It is a clear implication that a determination of production capacity in exporting Members would normally be a useful step, albeit an insufficient one. Other steps to substantiate the possibility of continuation or increased magnitude of increasing import trends could also be done, such as determining the likelihood of continued or increased price undercutting by imports (perhaps through a forward review of offers for sale). We do not mention these points to suggest there is a prescribed manner of doing a prospective analysis to substantiate an independent finding of actual threat of serious damage. The treaty language does not provide a specific list of factors that must be addressed; therefore, it is left to a case-by-case assessment of what is a justifiable determination. Instead, we are merely highlighting what was not done in the present case.

7.141 A review of the 1998 Market Statement makes it clear that the United States did not demonstrate the existence of an actual threat of serious damage from imports of combed cotton yarn. An adequate prospective analysis could serve as the basis for such an independent determination,[330]

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[329] *See* US First Submission, paras. 115-116, and the 1998 Market Statement, US Ex. 3, paras. 8.1-8.2. (*Also* paragraphs 4.192-4.195 and 4.197-4.199.)

[330] We specifically note in this regard that the industry must be properly defined before a justifiable determination can be demonstrated. We do not wish to imply that a prospective analysis in this case could have salvaged a determination of actual threat without first properly defining the relevant industry.

but no such analysis was done here. Therefore, because the finding of serious damage has been found to be flawed, we also conclude that the US determination of "actual threat" was not justifiable.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings made in Section I above, the Panel concludes that the transitional safeguard measure (quantitative restriction) imposed by the United States on imports of combed cotton yarn from Pakistan as of 17 March 1999, and extended as of 17 March 2000 for a further year is inconsistent with the provisions of Article 6 of the ATC. Specifically, we find that:

(a) Inconsistently with its obligations under 6.2, the United States excluded the production of combed cotton yarn by vertically integrated producers for their own use from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn.

(b) Inconsistently with its obligations under Article 6.4, the United States did not examine the effect of imports from Mexico (and possibly other appropriate Members) individually.[331]

(c) Inconsistently with its obligations under Articles 6.2 and 6.4, the United States did not demonstrate that the subject imports caused an "actual threat" of serious damage to the domestic industry.

8.2 With respect to the other claims, we find that Pakistan did not establish that the measure at issue was inconsistent with the US obligations under Article 6 of the ATC.[332] Specifically, we find that:

(a) Pakistan did not establish that the US determination of serious damage was not justified based on the data used by the US investigating authority.

(b) Pakistan did not establish that the US determination of serious damage was not justified regarding the evaluation by the US investigating authority of establishments that ceased producing combed cotton yarn.

(c) Pakistan did not establish that the US determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof.

8.3 Pursuant to Article 3.8 of the DSU which provides that "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 and impairment", we conclude that the said US measure nullified and impaired the benefits of Pakistan under the WTO Agreement, in particular under the ATC.

8.4 We note that Pakistan requested that the Panel suggest in accordance with Article 19.1, second sentence, of the DSU that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith. Article 19 reads as follows:

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[331] The findings in Items (b) and (c) in this paragraph are provided on the basis that the United States defined the domestic industry in conformity with Article 6.2 of the ATC. *See* paragraph 7.93 above.

[332] As discussed in the relevant sections of our findings, these conclusions must be read in light of our findings that the United Stated did not properly define the domestic industry.

> "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."

8.5 In this case, we recommend that the Dispute Settlement Body request that the United States bring the measure at issue into conformity with its obligations under the ATC. We suggest that this can best be achieved by prompt removal of the import restriction.

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