

**UNITED STATES - MEASURE  
AFFECTING IMPORTS OF WOVEN WOOL  
SHIRTS AND BLOUSES FROM INDIA**

*Report of the Panel*

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## **I INTRODUCTION**

1.1 In a communication dated 14 March 1996, India requested that a panel be established at the next meeting of the Dispute Settlement Body (DSB) pursuant to Article XXIII:2 of GATT 1994, Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 8.10 and other relevant provisions of the Agreement on Textiles and Clothing (ATC) (WT/DS33/1). This arose from a restraint introduced by the United States in respect of India's exports of woven wool shirts and blouses (US category 440), under Article 6 of the ATC.

1.2 India noted that the matter had remained unresolved in spite of bilateral consultations between India and the United States held under Article 6.7 of the ATC in April and June 1995; the examination of the matter by the Textiles Monitoring Body (TMB) under Article 6.10 of the ATC in August and September 1995; the communication sent to the TMB under Article 8.10 of the ATC, within one month of the TMB recommendation under Article 6.10 of the ATC, explaining the reasons for India's inability to conform to the TMB recommendations; and the review of the matter by the TMB under Article 8.10 of the ATC in November 1995. Consequently, India considered that it had met all requirements in Article 8.10 of the ATC for direct recourse to Article XXIII:2 of GATT 1994. At its meeting held on 17 April 1996, the DSB established a panel pursuant to the request of India, with standard terms of reference, in accordance with Article 6 of the DSU (WT/DSB/M/14).

1.3 On 27 June 1996, the DSB informed Members that the terms of reference and the composition of the panel (WT/DS33/2) were as follows:

### Terms of Reference

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS/33/1, the matter referred to the DSB by India in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

### Composition

Chairman: Mr. Jacques Bourgeois

Panelists: Mr. Robert Arnott  
Mr. Wilhelm Meier

Five Members reserved their rights to participate in the Panel proceedings as third parties; namely Canada, the European Communities, Norway, Pakistan and Turkey.

1.4 The Panel met with the parties to the dispute on 9 and 10 September and on 4 October 1996. The Panel submitted its complete findings and conclusions to the parties to the dispute on 12 November 1996.

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## **II CHRONOLOGY OF EVENTS**

### **United States Requests Consultations under the MFA<sup>1</sup> in December 1994**

2.1 Since the inception of the MFA in 1974, exports of textile and clothing products from India to the United States had been regulated by bilateral textile agreements under Article 4 of the MFA.

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<sup>1</sup>Arrangement Regarding International Trade in Textiles (the "Multifibre Arrangement" or "MFA").

The last bilateral textile agreement between India and the United States expired on 31 December 1994 and, effective from 1 January 1995, trade in textiles and clothing between the two Members has been governed by the ATC.

2.2 In the last bilateral textiles agreement between India and the United States, India's exports of several cotton and man-made fibre product categories had been subject to specific quota limits (Group I) and those product categories that were not so designated, plus all silk-blended garments and vegetable fibre garments, were subject to a group limit (Group II). Wool products (Group III) were not subject to specific or group limits, but were subject to the consultation mechanism in the bilateral agreement.

2.3 On 30 December 1994, the United States issued a request for consultations with India under paragraphs 19 and 20 of the bilateral agreement for the purpose of establishing restraints on India's exports to the United States of woven wool shirts and blouses (category 440 in Group III).<sup>2</sup> The request for consultations, accompanied by a statement entitled "Market Statement, Wool Woven Shirts and Blouses: Category 440", stated that the United States had concluded that the level of imports from India in this category was creating a real risk of disruption in the United States' domestic industry.

2.4 Consultations between India and the United States were held in Geneva on 18 April 1995 pursuant to the request issued in December 1994. India considered that the request for consultations, issued one day before the expiry of the MFA and the bilateral textiles agreement, was no longer valid in April 1995; from 1 January 1995 the framework for international trade in textiles was provided by the ATC and the other WTO agreements.

#### **United States Requests Consultations Under the ATC in April 1995**

2.5 On the same day, 18 April 1995, the United States requested new consultations with India on, *inter alia*, category 440 under the transitional safeguard mechanism in Article 6 of the ATC. The United States withdrew its previous consultation request issued on 30 December 1994 as India considered that the request was no longer valid due to the entry into force of the ATC. The consultation request in the form of a diplomatic note stated that the United States had concluded that the sharp and substantial increase in imports from India in this category "is causing serious damage, or actual threat thereof to the United States industry", and was accompanied by a "Statement of Serious Damage" (hereinafter referred to as the Market Statement) which claimed that a "sharp and substantial increase in imports of woven wool shirts and blouses, Category 440, is causing serious damage to the US industry producing woven wool shirts and blouses. The United States proposed a quota limit for exports of category 440 of 76,698 dozen. The request for consultations was officially published in the US Federal Register on 23 May 1995 (60 Fed. Reg. 27274).

2.6 Further discussions were held between the two delegations in Geneva on 19 April 1995 at the request of the United States. However, as the request for consultations had been issued only on the previous day, India had not had time to complete its review of the Market Statement and, therefore, considered these consultations to be preliminary. In the course of these consultations, India sought clarification from the United States on a number of technical points raised by the Market Statement. Further consultations were held in Washington on 14-16 June 1995 which did not result in a mutual settlement of the matter.

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<sup>2</sup>The action by the United States also covered two other product categories, wool coats etc. for men and boys (category 434 of Group III) and wool coats etc. for women and girls (category 435 of Group III) which are not part of this matter.

### **United States Imposes Restraints on Imports from India in July 1995**

2.7 On 14 July 1995, as no mutual settlement was reached within the 60-day consultation period provided in the ATC, India was informed by the United States that a restraint would be applied on imports from India of the products covered by US category 440, effective from 18 April 1995 and extending through 17 April 1996. The level of the restraint was set at 76,698 dozen for the first 12-month period.

### **Review by the Textiles Monitoring Body**

2.8 Pursuant to Article 6.10 of the ATC, the United States notified the TMB of the restraint. The TMB examined the matter at its sessions from 28 August to 1 September and 12-15 September 1995 and heard presentations from the United States and India.<sup>3</sup> With respect to category 440, the United States submitted to the TMB a document entitled "Other Relevant Information", containing information on the situation of the United States industry producing woven wool shirts and blouses.

2.9 With respect to category 440, the TMB found:

"During its review under paragraphs 2 and 3 of Article 6, of the safeguard action taken by the United States against imports of category 440 from India, the TMB found that the actual threat of serious damage had been demonstrated, and that, pursuant to paragraph 4 of Article 6, this actual threat could be attributed to the sharp and substantial increase in imports from India." (G/TMB/R/3)

### **India Requests Review of TMB Finding in October 1995**

2.10 India sent a communication on 16 October 1995 to the TMB informing that Body of its inability to conform with its recommendations and explaining the reasons therefor, as provided in Article 8.10 of the ATC. India requested the TMB to give a thorough consideration to the reasons it had given and to recommend that the United States rescind the restraint on India's exports in category 440.

2.11 The TMB reviewed the matter raised by India at its meeting on 13-17 November 1995, and made the following statement in its report:

"The TMB reviewed the matter referred to it by India under Article 8.10 in its letter dated 16 October 1995. The TMB heard the presentation made by India and considered the elements put forward. The Body could not make any recommendation in addition

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<sup>3</sup>Restraints were also applied on categories 434 and 435, and at its session on 28 August to 1 September 1995, the TMB examined all three actions. For category 434, the TMB found that "serious damage, or actual threat thereof, had not been demonstrated and recommended that the United States rescind the measure". The United States rescinded the measure. For category 435, the TMB found that serious damage had not been demonstrated, but could not reach consensus on the existence of actual threat of serious damage. The TMB again reviewed the matter relating to category 435 which had been referred to it by India under Article 8.6 of the ATC during its meeting on 13-17 November 1995. However, the Body could not make any recommendations in addition to the conclusions it had reached during its earlier meeting. Since the matter relating to category 435 remained unresolved by the TMB, India brought the matter before the Dispute Settlement Body (DSB). On 23 April 1996, India was informed that the United States had removed the restraints on category 435 through a notification in the Federal Register on 23 April 1996. In the light of this, India terminated further action under the DSU without prejudice to its stand on the inconsistency of the US measure or on the various factual and legal issues outlined by India in its request for establishment of a panel.

to the conclusions it had reached at its meeting on 12-15 September 1995 (G/TMB/R/3, paragraph 26). The TMB therefore considered its review of the matter completed". (G/TMB/R/6)

### **India Requests the Establishment of a Panel in March 1996**

2.12 Since the matter relating to category 440 remained unresolved, India brought the matter before the DSB. India filed a request with the DSB on 14 March 1996 for the establishment of a panel on the restraint, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 8.10 and other relevant provisions of the ATC. India requested that the panel be established with standard terms of reference as set out in Article 7 of the DSU (WT/DS33/1). At the meeting held on 17 April 1996, the DSB agreed to establish the panel in respect of category 440 with standard terms of reference as requested by India (WT/DS33/2).

2.13 On 18 April 1996, the United States announced the continuation of the restraint on category 440 until 17 April 1997.

2.14 On 24 June 1996, the present Panel was constituted. (WT/DS33/2 dated 27 June 1996.)

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## **III CLAIMS OF THE PARTIES**

### **The Request of India**

3.1 In its request for the establishment of a panel (WT/DS33/1), India requested that the Panel consider and find that:

- (i) The restraint introduced by the United States on 14 July 1995 on imports of category 440 (woven wool shirts and blouses) from India effective from 18 April 1995 was inconsistent with Articles 6, 8 and 2 of the ATC.
- (ii) The action of the United States in imposing the restraint on imports of category 440 from India nullified or impaired the benefits accruing to India under the WTO Agreement and under GATT 1994 and the ATC in particular.
- (iii) The Government of the United States should have brought the measure into conformity with the ATC by withdrawing the restraint imposed by it on imports of category 440 from India.

3.2 India also requested a supplementary finding by the Panel that:

- (i) According to the ATC, notably Article 6, the onus of demonstrating serious damage or its actual threat was on the United States, as the importing Member. It had to choose at the beginning of the process whether it would claim the existence of "serious damage" or "actual threat". These were not interchangeable because the data requirement would vary with the chosen situation. It would not be valid to transfer a transitional safeguard to a situation of actual threat when the claim of serious damage had failed to gain acceptance.
- (ii) There was no provision in the ATC under which the United States, as the importing Member, could have imposed a restraint with retrospective effect.

### **The Request of the United States**

3.3 The United States requested the Panel to find that:

- (i) the United States' application and maintenance of a safeguard restraint on woven wool shirts and blouses from India was consistent with Article 6 of the ATC;
- (ii) the restraint was not inconsistent with Article 2 or any other provision of the ATC; and
- (iii) the measure did not nullify and impair benefits accruing to India under the ATC or GATT 1994.

### **Comments on the Request to the Panel**

3.4 The United States referred to India's request to the Panel which appeared to be seeking a specific remedy in this dispute and expressed the opinion that such a remedy fell outside the scope of the Panel's mandate as provided in the DSU. India had requested that the Panel interpret Article 19.1 of the DSU to require removal of a restraint to bring the action "in conformity" with the relevant agreement. The United States had taken issue with India's assertion that bringing a safeguard action into conformity with the ATC or, allegedly, with GATT 1994, to the extent it was relevant, required withdrawing the restraint. What was clear was that the DSU gave WTO panels explicit instructions with respect to the one and only recommendation that properly may be offered if the measures of a Member were found to be inconsistent with its obligations: to bring the measures into conformity with its obligations. The avoidance of granting specific remedies, such as the withdrawal or modification of a measure, was a well-established practice under GATT 1947 and had been codified in Article 19.1 of the DSU, which provided: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement," rather than that the Member "withdraw" the measure.

3.5 India noted the US views in the preceding paragraph with concern and asked the United States which legal options it wished to preserve by presenting them. India stressed that it had not asked the Panel to make a recommendation on the issue of implementation in accordance with Article 19.1, first sentence, of the DSU, but to exercise the discretion that the second sentence of Article 19.1 conferred upon it, namely, that it could, in addition to its recommendations, "suggest ways in which the Member concerned could implement the recommendations". In the view of India, there were no alternatives as to how a safeguard action taken inconsistently with Article 6 of the ATC could be brought into conformity and the United States had not been able to indicate any such alternatives. The rationale of the second sentence of Article 19.1 of the DSU was procedural economy; it was designed to reduce the likelihood of a second proceeding about the implementation of the results of the first. It would thus be perfectly consistent not only with the wording but also the spirit of that provision if the Panel were to find that there were no alternatives to withdrawal in the present case and to suggest, therefore, that the United States implement the Panel's recommendation by withdrawing the measure.

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## **IV THIRD PARTY SUBMISSIONS**

4.1 At the first substantive meeting of the Panel on 10 September 1996, four Members (Canada, EC, Norway and Pakistan) which had indicated their interests in this matter as third parties at the DSU meeting on 17 April 1996 (DS33/2, paragraph 4) made submissions. Turkey had also indicated its third party interests and attended the Panel meeting but did not provide a submission.



### Submission of Canada

4.2 Canada pointed out that it had a substantial interest in several issues relating to the interpretation of the ATC raised by the parties to the dispute; namely, (i) the question of the ability of a Member to maintain a restraint in the absence of an "endorsement" by the TMB; (ii) the appropriate effective date for the application of a restraint measure; (iii) the type of information a Member had to submit to the TMB to justify a request for consultations and the treatment given to additional information provided to the TMB; and (iv) whether the Member making the request had to specify from the outset the basis for the request.

4.3 Canada noted that India had requested, *inter alia*, a supplementary finding by the Panel that because the TMB had not specifically upheld the safeguard action taken by the United States, this implied that the TMB had not found the safeguard action to be justified and, therefore, the United States had a legal obligation to withdraw the restraint. It was Canada's view that such an interpretation was too narrow and would unduly circumscribe the ability of Members to take safeguard actions as provided for in the ATC. While the TMB had a significant role to play in the review of the safeguard actions, there was no requirement in the ATC that the TMB had to "endorse" a safeguard action in order for it to be maintained. On the contrary, during the Uruguay Round negotiations leading to the ATC, several participants had made proposals to require a positive decision of the multilateral reviewing body (now the TMB) in order for a restraint measure to remain in place. Canada noted that none of these proposals had been incorporated into the ATC which reflected an implicit rejection of the approach now advocated by India.

4.4 In the view of Canada, if the TMB was required to specifically approve every safeguard action taken, it would rarely be possible for any Member to avail itself of the ATC safeguard clause because a single TMB member could block a consensus. Such a result would clearly be at odds with the intention of the ATC, which explicitly provided to the Members the authority to make the determination of whether a safeguard action was required.

4.5 Canada recalled that India had submitted that the United States was incorrect in imposing the restraint measure from the date of the request for consultations with India under Article 6 of the ATC. In this regard Canada noted that the ATC was silent with respect to the appropriate effective date of implementation of a safeguard action. In the absence of any specific prohibition, it was open to an importing Member to apply the safeguard action from the date of the request. It was more appropriate to implement the restraint as close as possible to the date of the request so as to avoid the possibility of having the domestic market flooded with imports after the request, but before the consultations were completed. A further element was that the calculation of the restraint level, pursuant to Article 6.8 of the ATC, was based on the MFA formula of the first 12 of the last 14 months preceding the month in which the request for consultations was made. The rationale for this calculation was to avoid including in the base level what was usually the most severe part of the import surge that had led to the request for consultations. The calculation of this formula supported the argument that it was more appropriate to implement any restraint as close as possible to the date of the request for consultations.

4.6 Canada also referred to India's submission that the review by the TMB should have been conducted only on the basis of the information provided to India at the time of the consultation request, rather than on supplementary information provided by the United States to the TMB at the time of its review. In this regard, Article 6.10 of the ATC stated that in examining a safeguard action, the TMB shall have at its disposal the factual data accompanying a request for consultations as provided to the Chairman of the TMB at the time of the request, pursuant to Article 6.7 of the ATC, "as well as any other relevant information provided by the Members concerned". The plain meaning of Article 6.10 of the ATC was that the TMB, in conducting its examination, may consider not only the information that was provided to it pursuant to Article 6.7 of the ATC, but also any additional submissions of a Member concerned. As a practical matter, this allowed the TMB to consider the

most up-to-date data in its examination of the safeguard action, including data that were not available at the time of the request for consultations.

4.7 With reference to India's view that the onus of demonstrating serious damage or actual threat was on the importing Member which must choose at the outset whether it would claim the existence of "serious damage" or of "actual threat thereof" and that these two categories were not interchangeable because each category required different supporting data, Canada noted that no distinction was made between the definition of "serious damage" or "actual threat thereof" in Article 6 of the ATC, nor in the list of factors to be considered by a Member in making a determination under Article 6.2 of the ATC. Accordingly, the practice under the ATC had been for the Member taking such safeguard action to allege "serious damage or actual threat thereof" as a whole and to permit the TMB in its review under Article 6.10 of the ATC to determine whether either element, or both elements of the standard had been satisfied. Canada considered that, when reviewing an allegation of "serious damage or actual threat thereof" the TMB must base its recommendations on the evidence before it. It may find that the evidence supports a determination of "serious damage" alone, of "actual threat" alone, of both, or of neither. However, it did not follow that an importing Member should be required to choose which component of the standard to allege at the commencement of the Article 6 process. To impose such a requirement on an importing Member would unreasonably restrict the scope of its case, and would infringe upon the discretion of the TMB to conduct its examination and base its recommendations on all the evidence before it.

4.8 In a subsequent submission, India disagreed with the point in the first sentence of paragraph 4.3, recalling that, under the MFA, the exporting country had the right to refuse to accept a discriminatory restraint while under the ATC, the exporting Members had lost that right. The counterpart to that loss was the requirement of a TMB examination and recommendation. The recourse available to importing Members under the ATC was, therefore, not significantly different from the recourse available to them under the MFA: the consent of the exporting country was required under the MFA while under the ATC, it was a TMB examination and recommendation that was required.

4.9 On the above point, the United States disagreed with India's assertion as the MFA required TSB examination of unilateral restraints and that the TSB make recommendations, just as required of the TMB.

#### **Submission of the European Communities**

4.10 The European Communities expressed the opinion that a restraint could be justified for either a case of imports having caused serious damage or for a case of imports actually threatening to cause serious damage pursuant to Article 6.2 of the ATC. Nowhere in the ATC was there any obligation on the importing Member to choose at the beginning of the process whether it would claim "serious damage" or "actual threat". This was because any such obligation would create consequences which were clearly not intended by the ATC negotiators, namely: (i) that an importing Member claiming "serious damage" might be persuaded by the exporting Member during their consultations that the situation was really one of "actual threat" but that no restraint could be established simply because the importing Member had initially claimed only "serious damage"; (ii) that importing Members would, therefore, have simultaneously to request two parallel sets of consultations, the first to discuss a restraint based on "serious damage" and the second to discuss one based on "actual threat". Clearly such situations did not follow from the actual wording of the ATC and neither were they intended by the negotiators. At another level, if the consultations resulted in agreement under Article 6.9 of the ATC then presumably the two parties were satisfied on this point. On the other hand, if the consultations did not reach agreement then it would be up to the TMB to "promptly conduct an examination of the matter, including the determination of serious damage, or actual threat thereof pursuant to Article 6.10 of the ATC". In this case it would be the TMB's determination which would matter and the option "chosen" by the importing Member would be irrelevant.

4.11 The European Communities considered the question of the standard of review to be of great importance. The EC reminded the Panel that one of the most thorough discussions of the problems relating to the standard of review in cases involving the legal appreciation of facts in the light of evidentiary requirements laid down in the Tokyo Round Subsidies Code<sup>4</sup>, took place before the panel on the US countervailing duties imposed on lead and bismuth steel originating in France, the UK and Germany. Although that panel report was never adopted, it contained valuable insights into the difference between the issues to which the normal rules of treaty interpretation were to be applied and the issues involving legal appreciation of the facts in the light of evidentiary requirements laid down in the relevant agreement (paragraphs 368 and 369).

4.12 The European Communities also considered it important for the Panel to take account of the fact that the test of reasonableness proposed by the US, even though it was taken from the *Fur Felt Hat* case carried for the US connotations of extreme deference to the judgement of the national government. It should be noted that the panel in *Lead and Bismuth Steel* said that:

"... the criteria for a review by a panel of factual assessments by domestic investigating authorities of signatories against the requirements of the agreement could not be based on a simple transposition of standards applied in domestic administrative law of signatories."

The European Communities attached great importance to an approach in these issues in the spirit of the panel report on *Lead and Bismuth Steel*. It should be clear that in the case of factual assessments by national investigating authorities of Members in the light of the requirements of the agreement (as interpreted in accordance with the customary rules of interpretation of international law), a margin of discretion should be left to these authorities, but the Panel could not borrow from one particular legal system in circumscribing this margin of discretion. In this case the Panel must be inspired by the administrative law systems of the Members.

### **Submission of Norway**

4.13 Norway stated that its concern in this case was primarily of a systemic nature and noted that the Panel was considering a dispute which twice, and with consensus recommendations, had been dealt with by the TMB. It was concerned that the effect of the case might not only be the positive resolution of a dispute, but the undermining of future TMB recommendations and thus the TMB's efficiency. The result of this efficiency so far had been that quotas had been dismantled considerably faster than what would have been possible by way of panels. Norway questioned India's asking the panel to address the issues of "TMB endorsement" and of "serious damage" as opposed to "actual threat of serious damage". On the question of retroactive implementation, it accepted India's request for clarification.

4.14 It was the view of Norway that both the TMB and India were wrong in claiming, with respect to the introduction of a safeguard action, that the ATC did not provide any indication with respect to the effective date of implementation of a measure, although India was right in saying that there was no "explicit authorization in the ATC's transitional safeguard clause to impose the additional burden of retroactive application". Norway was of the opinion that there were sufficient indications to be found and that it was unnecessary as well as unjustifiable to resort to Article XIII:3(b) of GATT 1994. Article 6.10 of the ATC suggested that the term "apply" was distinct from the term "implement". Saying that a Member "... may apply the restraint by date of import or date of export ..." could not be read to mean the same as if the sentence had substituted the word "implement" for "apply". The term "apply" was concerned more with the manner of implementation than with its effective timing. It was perfectly reasonable to require that a measure be applied only after certain procedures had been

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<sup>4</sup>Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

completed and then to allow discretion to implement the same measure in such a way as to give it effect from a different date. This was also indirectly supported by the fact that a measure may be applied "within 30 days following the 60-day period for consultations". In the view of Norway it was, therefore, legitimate to question whether one was, in fact, dealing with a case of retroactive implementation. Another argument, if one were indeed dealing with a retroactive measure, was the fact that there was provision for it in the predecessor agreement, suggesting that an explicit provision to the contrary would have been included in the ATC if negotiators were concerned with making a clean break with the past in this respect.

4.15 Norway also pointed out that Article 6.10 of the ATC should be read in conjunction with Article 6.11. If one were to accept India's arguments, it would in all likelihood undermine the valuable consultation procedure in Article 6.10 of the ATC and encourage importers to introduce quotas without prior consultation, under Article 6.11 of the ATC. Norway also agreed with the US argument that India's position would encourage an exporter to flood the importing market with imports after the request and before consultations were completed. Norway supported India to the extent that the matter needed clarification; however, it disagreed with India's interpretation of the ATC on several points and respectfully asked the Panel to give favourable consideration to the interpretations and arguments it put forward.

#### **Submission of Pakistan**

4.16 Pakistan pointed out that the ATC represented a balance of rights and obligations between the exporting Members and the importing Members. The ATC was an improvement over the MFA and even during the transitional period the progress made in the negotiation of the ATC could not be nullified. Pakistan urged the Panel to consider the systemic implications of the present case from this perspective and to reach a decision which did not in any way retard the progress already made or impair the benefits accruing to the exporting Members. Pakistan considered that the Panel should look into the element of good faith on the part of authorities initiating a safeguard action, including (a) whether the authorities had based their decision on all available data; (b) whether the analysis of available data was in accordance with normal and generally recognized principles and procedures; (c) whether there was an element of arbitrariness; and (d) whether any action was taken on unsubstantiated presumptions. In examining the different stages of the case it would be important to examine whether the authorities had adopted a consistent position throughout the different stages or whether they had changed their position or introduced new elements at different stages of the process. Good faith could not and should not co-exist with ex-post justifications.

4.17 Pakistan considered that the Panel was required to pronounce on the distinction between "serious damage" and "actual threat of serious damage". While Article 6.2 and 6.3 of the ATC listed the same economic variables to be considered in both cases, it was also true that different analysis and information in respect of the same economic variables would be required to prove either serious damage or actual threat of serious damage, as the case may be. In a case of serious damage, the analysis should clearly demonstrate the damage that had already occurred, while in case of a claim for actual threat of serious damage, the analysis should include the reasons which may lead to serious damage. The Panel should also determine what effect the introduction of new information by parties could have on the legality of the whole proceeding. An important step in the ATC was the consultations, which must be based on the "specific and relevant" information provided by the importing Member to the exporting Member under Article 6.7 of the ATC. Any new information supplied at the TMB's review of the safeguard action would put the exporting Member at a great disadvantage. According to Article 6.10 of the ATC, the TMB may have "any other relevant information provided by the Member concerned", but this could not be interpreted to mean new information. Whenever any new information was introduced, the legal process should start afresh. New information introduced at the time of the TMB's review could be: (i) information pertaining to the period after the request for consultations was issued and should not be relevant to the case in question; (ii) information available earlier but not used, which demonstrated

a lack of serious effort which would not support the contention of good faith; or (iii) information pertaining to the period before the request for consultations was issued but not available at the time of the request. This would also be an ex-post justification and would put the exporting Member at a disadvantage which could be rectified only by issuing a fresh request for consultations.

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## **V MAIN ARGUMENTS OF THE PARTIES**

### **A. Introduction**

5.1 The Panel noted that India had arranged its first submission in a sequence beginning with general points on the safeguard mechanism followed by arguments on burden of proof and standard of review (Part A). This was followed by an argument that the safeguard action on which the United States sought consultations was not the safeguard action endorsed by the TMB (Part B). There then followed the claim that the United States had failed to demonstrate serious damage in the consultations and, therefore, had acted inconsistently with Article 6 of the ATC (Part C); a consideration of supplementary information (Part D) and retroactive application (Part E). In this descriptive part of the Panel's report, much of India's structure has been used, but not fully. Rather, the descriptive part follows the approach adopted by the Panel in setting out its findings which, it was considered, would facilitate in relating the arguments of the parties to the Panel's findings on these arguments.

### **B. Burden of Proof**

5.2 India argued that the United States bore the burden of proving that it had met the requirements of Article 6 of the ATC. The CONTRACTING PARTIES to GATT 1947 had consistently found that exceptions must be interpreted narrowly and that the party invoking an exception bore the burden of proving that it had met the legal requirements justifying the invocation. India referred to two documents in this context (BISD 30S/140 and 36S/345). Based on this principle alone, the Panel would need to find that it was the United States that bore the burden of proving that it had made the determination in accordance with Article 6 of the ATC. Moreover, Article 6.2 of the ATC clearly permitted safeguard action only if it was demonstrated that an increase in imports caused serious damage or actual threat thereof. It was, consequently, up to the Member taking safeguard action to make that demonstration. This followed not only from the general principle of law recognized by panels but also from the text of Article 6.2 of the ATC itself. It permitted safeguard action 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 ..." and goes on to state that "[s]erious damage or threat thereof must demonstrably be caused by such increased quantities ...". The requirement to demonstrate an increase in imports, serious damage and the causal link between the two was clearly a requirement imposed on the Member that chose to apply the safeguard action, not on the Member(s) against which the action was directed.

5.3 India also considered that the Member invoking Article 6 of the ATC had the possibility to make the demonstration by submitting positive evidence on the basis of data it had collected. If the Member against which the action was taken had to bear the burden of proof, it would have to demonstrate the negative, which was often impossible, on the basis of the data available to it which were likely to be more limited than those available to the importing Member. The purpose of Article 6 of the ATC, which was to impose a strict discipline on the use of safeguards could, therefore, not be achieved if the burden of proof was shifted from the importing to the exporting Members.

5.4 The United States argued that, consistent with accepted GATT 1947 dispute settlement practice which had been carried over in the WTO, the burden was on India in the first instance to make a *prima facie* case that the United States' application of a transitional safeguard on imports of woven

wool shirts and blouses from India had been inconsistent with the ATC. The language of Article XXIII of GATT 1994 and practice under GATT 1947 supported this principle. Article XXIII of GATT 1994, as referenced in Article 8.10 of the ATC, provided recourse to a dispute settlement proceeding when a Member considered that any benefit accruing to it directly or indirectly was being nullified or impaired as a result of the failure of another Member to carry out its obligations under that Agreement. In this case, India had the initial burden of demonstrating that the United States had failed to carry out its obligations under the ATC and, in the view of the US, India had failed to sustain that burden.

5.5 The United States further argued that the burden was not on the US to re-demonstrate that its actions were justified. The ATC allowed a Member to impose a safeguard when it had determined that imports were causing or threatened to cause serious damage to its market. It was the view of the United States that the task of the Panel was to determine whether India had advanced facts which provided convincing evidence that it was unreasonable for the United States to determine, in accordance with Article 6.2 and 6.3 of the ATC, that the adverse effects of increased woven wool shirt and blouse imports on the US domestic industry amounted to serious damage or actual threat thereof. If India had not advanced such evidence, then the Panel should find that the determination under Article 6.2 of the ATC had been properly made and was consistent with the United States' obligations under the ATC. A similar examination should be applied with respect to determinations under Article 6.4 of the ATC.

5.6 The United States considered that India's argument that the ATC was an exception to GATT 1994 and that this "inconsistency" was sufficient to place the burden on the defending Member to establish conformity with ATC obligations would overturn the balance of this Agreement and many of the other Multilateral Trade Agreements. In this respect the ATC was similar, for example, to the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade and the Agreement on Safeguards and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

### C. Standard of Review

5.7 In the view of India, there was no standard of reasonableness foreseen in the ATC and given the highly exceptional character of the ATC's safeguard provisions, it would be legally inadmissible to "import" into the ATC the standard of review included at the request of the United States in the Anti-Dumping Agreement<sup>5</sup>. In fact, the Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 clearly implied that this standard was relevant only for the Anti-Dumping Agreement and that it had no general applicability. According to the DSU, the dispute settlement system served, *inter alia*, to clarify the provisions of the WTO agreements "in accordance with the customary rules of interpretation of public international law".<sup>6</sup> According to general principles of international law, every treaty must be performed in good faith.<sup>7</sup> The task of the Panel was, consequently, to ascertain whether the United States had carried out its obligations under Article 6 of the ATC in good faith. India was not requesting the Panel to conduct a *de novo* review of the matter and to replace the United States' determination by its own, but was asking the Panel to objectively assess, in accordance with Article 11 of the DSU, whether the United States had made its determination in accordance with its obligations under Article 6 of the ATC.

5.8 In a response to the Panel, India pointed out that in applying the United States' domestic law, in particular the law governing the review of anti-dumping and countervailing duty actions, courts had

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<sup>5</sup>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>6</sup>Article 3:2 of the DSU.

<sup>7</sup>See Article 26 of the Vienna Convention on the Law of Treaties.

accorded deference to administrative agencies in accordance with the "Chevron doctrine". Courts did not review whether the agency administering anti-dumping or countervailing duties had interpreted the law correctly, but whether its interpretation was reasonable. Similarly, United States courts did not examine whether the agency had applied the law correctly but whether their application was reasonable. The notion of "reasonableness" was, thus, used to define the scope of a legal doctrine that had created considerable scope of discretion for agencies and a significant shift of power from the courts to the executive branch. Article 17 of the Anti-Dumping Agreement was a reflection of the "Chevron doctrine". During the course of the proceedings of this Panel, the United States, without referring to Article 17 of the Anti-Dumping Agreement directly, had presented arguments to the Panel which, if accepted, would constitute an incorporation of the principles of that provision into the ATC.

5.9 The United States argued that all parties to an agreement must apply it in good faith. This was an important principle in treaty and domestic contract law. Making a determination in a reasonable manner and in good faith followed from the first step of applying a treaty in good faith. It did not "replace" the obligation to apply a treaty in good faith. The United States had stated that, in applying the provisions of Article 6 of the ATC in good faith, it had made a reasonable determination after examining relevant data that a transitional safeguard was necessary. It had also followed Article 6.7 of the ATC and ultimately Article 6.10 when no mutual solution was reached with India. The TMB findings required under Articles 6.10 and 8 of the ATC had supported the US application of the safeguard.

5.10 The United States further argued that there was no need for a specific provision on standard of review in the ATC or in any other agreement, although the negotiators of the Anti-Dumping Agreement had seen the need to negotiate a specific standard of review for those cases because of the nature and problems found in the anti-dumping area. The standard of review in Article 17.6 of that Agreement was not relevant in this matter and the United States had not advanced that standard for this case. The US had not cited any anti-dumping or subsidy case law, as India had done. India's assertion that the United States had sought to apply anti-dumping and subsidy standards to this case was incorrect.

5.11 India recalled that the role of panels was, according to Article 3.2 of the DSU, to preserve the rights and obligations of WTO Members. If this Panel were to sanction "reasonable" deviations from the requirements set out in Article 6 of the ATC rather than determine whether they had been observed in good faith or if it were to sanction an exercise of discretion on the grounds that it was "reasonable" rather than determine whether the Member had exercised it in good faith, it would effectively diminish the rights and obligations of Members and, therefore, act inconsistently with that basic principle of the DSU. The text of the ATC clearly delineated the range of discretion available to Members making determinations for the purpose of imposing safeguard actions. If the Panel were to expand that range by applying the notion of reasonableness, it would be acting without any basis in the text of the ATC and contrary to the general principles of international law and it would, therefore, not be finding and confirming the existing WTO law, as was its task. Rather, it would be inventing new law which no Member had accepted. This could not, in India's view, but undermine the Members' confidence in the newly established dispute settlement procedures.

5.12 The United States reiterated that the appropriate standard of review was one of reasonableness and good faith examination of the data. The principle of "good faith" application of treaties was relevant, but it was argued that this principle was integral to the standard of reasonableness. One resulted from the other. The US considered it self-evident that all Members must follow the international law principle of good faith application of treaties and in doing so they must come to "reasonable" conclusions based on the examination conducted. The United States had applied the ATC consistently with that entire precept. Referring first to the relevant Uruguay Round principles other than under the ATC, it was noted that Article 3.1 of the DSU provided that: "Members affirm their adherence to the principles for the management of disputes ... applied under Articles XXII and XXIII of GATT 1947, and the

rules and procedures as further elaborated and modified herein." Article XVI:1 of the Agreement Establishing the WTO also provided that "[e]xcept otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

5.13 The United States also noted that Article 3.2 of the DSU provided, in part, that:

"The Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rules of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

It was, therefore, clear under Article 3.2 of the DSU that while WTO dispute settlement also served to clarify provisions of covered agreements, the process could not add to or diminish the rights and obligations provided in those agreements.

5.14 The United States further pointed out that Article 11 of the DSU provided, in part, that:

"... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

Article 11 of the DSU incorporated paragraph 16 of the 1979 GATT Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.<sup>8</sup> The drafters of the DSU had sought to make the DSU a comprehensive text incorporating all prior codification efforts on dispute settlement. The CONTRACTING PARTIES to GATT 1947 had intended the 1979 Understanding and its annex to reflect customary practice and improvements in practice, including the standard of review enunciated in the 1951 GATT working party report concerning the withdrawal by the United States under Article XIX of a tariff concession on women's fur felt hat and hat bodies (*Fur Felt Hat* case).<sup>9</sup>

5.15 The United States argued that, in sum, an objective assessment by the Panel, in accordance with Article 11 of the DSU, required examining whether the United States had acted consistently with the requirements of the ATC and in good faith and whether the determination was reasonable in light of the data before the investigating authority.

### **The *Fur Felt Hat* Case**

5.16 The United States argued that the *Fur Felt Hat* case provided authoritative guidance from GATT 1947 practice and procedures concerning the standard of review to apply in this case. The standard of review enunciated in that case was also consistent with principles of international law concerning the good faith application of treaties. The *Fur Felt Hat* case suggested that this Panel must determine whether the United States had applied the provisions of Article 6 of the ATC in good faith and had made a reasonable or good faith assessment of the facts to make the determinations required of it under Article 6 of the ATC. Article 6 stated that "[s]afeguard action may be taken ... when, on the basis of a determination by a Member, it is demonstrated...". Clearly the focus of the ATC

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<sup>8</sup>L/4907, adopted 28 November 1979.

<sup>9</sup>GATT/CP/106, report adopted on 22 October 1951, Sales No. GATT/1951-3.



was on a determination made by the importing Member based on data available. While the *Fur Felt Hat* Working Party had examined action taken under Article XIX:1 of GATT 1947, the determination required in that case in GATT 1947 practice was similar to the determination required under Article 6.2 of the ATC.<sup>10</sup>

5.17 In that case the Czechoslovak Government had sought a determination that the United States invocation of Article XIX had been improper and had asserted that the United States had not met certain conditions under Article XIX to take action, seeking revocation of the measure. The Working Party had rejected the Czechoslovak argument and stated:

"... it may be observed that the Working Party naturally could not have the facilities available to the United States authorities for examining interested parties and independent witnesses from the United States hat-making areas, and for forming judgements on the basis of such examination. ...Moreover, the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt."<sup>11</sup>

5.18 The United States argued that, just as in this case, the information examined by the *Fur Felt Hat* Working Party as a basis for its conclusions, although strong, was not perfect; for instance the US authorities had failed to separate figures on production of men's and women's hat bodies. However, the Working Party decided that "the available data support[ed] the view that increased imports caused or threatened some adverse effect on United States producers."<sup>12</sup> The Working Party further determined that the United States' authorities in that case had investigated the matter thoroughly "on the basis of the data available to them at the time of their enquiry and had reached in good faith the conclusion that the proposed action fell within the terms of Article XIX ...".<sup>13</sup> The reasoning of the *Fur Felt Hat* Working Party applied to the standard of review the Panel must follow in the present case.

5.19 In the view of the United States, the regime now governing textile and clothing trade in the WTO was a safeguards regime, just as Article XIX of GATT 1994 and the Agreement on Safeguards was a safeguards regime. Both regimes permitted a Member to restrict trade in fairly traded goods on the basis of a determination made by a Member, subject to certain limitations. The textile regime diverged from Article XIX of GATT 1994 but many of its basic concepts depended on the fundamental concepts behind Article XIX. Where the negotiators had indicated their desire that the two regimes differ, the difference in rights and obligations provided in the negotiated text must be respected. However, the *Fur Felt Hat* case, an accepted precedent which predated the divergence between the two regimes, was persuasive in interpreting the provisions in both, or either, of these regimes concerning the initial decision to take a safeguard action. Guidance from that case did not involve wholesale incorporation of Article XIX of GATT 1994 or Agreement on Safeguards principles or the issue of compensation and non-discriminatory treatment as India would argue.

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<sup>10</sup>In fact, fur felt hats and hat bodies are listed as products covered under the ATC in the ATC Annex. Such products would have, for the United States, been subject to the ATC Article 6 safeguard mechanism, but the United States has integrated the product into GATT 1994 in accordance with Article 2 of the ATC. Article XIX now applies again to those products for the United States.

<sup>11</sup>*Fur Felt Hat* at paragraph 30.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at paragraph 48.

5.20 The United States noted that, in its first submission, India had argued that the standard for the Panel's review should not include any examination of the reasonableness of the determination, but should instead focus on whether the authorities had carried out their obligations "in good faith", as did the Working Party in the *Fur Felt Hat* case. Although the US disagreed with India's position with regard to the role of reasonableness, it did agree that good faith application of the ATC's provision was a relevant yardstick for Panel review. "Good faith" had been defined as "in accordance with standards of honesty, trust, sincerity etc. ...".<sup>14</sup> For the Panel to determine whether the authorities had carried out their obligations "in good faith", it did not need to ascertain whether the Panel would have reached the same determination as the authorities. Instead, the Panel would examine the basis for the authorities' conclusions, including an examination of the data upon which the authorities had relied, in order to determine whether the determination reflected a good faith application of the ATC standards. In this case the US authorities had exercised their discretion and followed the relevant ATC provisions in complete good faith.

5.21 The United States argued, therefore, that the reasoning of the *Fur Felt Hat* case applied equally to the case presented to the Panel. Since the key question was whether the determination by the US Committee on the Implementation of Textile Agreements (CITA) was consistent with the requirements of Article 6.2 and 6.3 of the ATC, the relevant question to be considered was not whether serious damage or threat of serious damage currently existed, but whether CITA had determined reasonably and in good faith that it existed at the time of the CITA determination in April 1995. The CITA determination could, therefore, only be evaluated on the basis of data existing at that time. The data presented later to the TMB in fact had corroborated the analysis done in April 1995.

5.22 India pointed out that no GATT 1947 panel had followed the approach of the *Fur Felt Hat* Working Party. In fact, the panels on *New Zealand - Imports of Electrical Transformers from Finland* and *Canadian Countervailing Duties on Grain Corn from the United States* had fully reviewed the importing countries' actions without applying a standard of review and had imposed on the importing countries the duty to establish all the facts on which they had based their actions. The disciplines applied by those GATT 1947 panels in the cases of actions against dumped and subsidized trade should, as a minimum, be applied in the case of discriminatory actions against exports of textiles and clothing that were neither dumped nor subsidized. India further argued that to transpose the criteria applied in the *Fur Felt Hat* case to action under the ATC would be legally incorrect.

5.23 The United States rejected India's comment, above, that the *Fur Felt Hat* case was legally incorrect in these proceedings. That case involved review of safeguard action at a time when the review would have been similar in the textile context. Certainly dumping cases with a standard of review different from Article 17.6 of the Anti-Dumping Agreement were no longer applicable in dumping cases, and it was questioned why India's use of *New Zealand Transformers* or the principles it wished to interpose in this case, a textiles safeguard case, should be any better. In essence, while the standard in the *Fur Felt Hat* case might be modified by the specific provisions of the Agreement on Safeguards, principles not relevant to actions taken under that Agreement were useful here. Instead, India had resurrected the standard pre-Article 17.6 of the Anti-Dumping Agreement, in a case close to first impression, involving a special safeguard for textiles and clothing.

5.24 Also with respect to the *Fur Felt Hat* case, India considered that its findings had been overtaken by the Agreement on Safeguards, which declared in its Article 4 that injury determinations for the purpose of Article XIX action may only be made if an investigation by the importing Member demonstrated, on the basis of objective evidence, that a rise in imports had caused serious injury. The legal situation in which the *Fur Felt Hat* criteria were developed were, therefore, not analogous to the situation arising under Article 6 of the ATC and not even analogous to the situation arising under

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<sup>14</sup>Webster's Encyclopedic Unabridged Dictionary of the English Language (1989).

Article XIX as interpreted by the Agreement on Safeguards. The analogy the United States wished the Panel to draw was, for these reasons, misplaced. The criteria set out in the *Fur Felt Hat* case were, therefore, no longer part of the law of the WTO. Moreover, the findings of that Working Party related to a safeguard mechanism under which the WTO Members adversely affected by the safeguard action may take compensatory action; the ATC's safeguard mechanism, however, did not authorize textile exporting Members to take compensatory action. It would, for this reason alone, be inappropriate to accord to Members invoking the ATC safeguards provisions, under which no compensation was due, the latitudes they had under Article XIX of GATT 1994. India also considered that it had demonstrated that it would be legally incorrect and illogical if the Panel were to infer, just because both the *Fur Felt Hat* case and the case before it concerned safeguard actions, that the standard of review applied in the *Fur Felt Hat* case must also be applied in the present case.

5.25 In response to these views, the United States argued that this case was close to a case of first impression and it had cited and sought guidance from a GATT 1947 safeguard case that was most comparable to the situation faced in making safeguard determinations under the ATC. It was incorrect for India to state that no GATT 1947 panel had followed the approach of the *Fur Felt Hat* Working Party and that it was no longer part of the law of the WTO. GATT precedent interpreting Article XIX:1 (for instance, as recorded in the chapter on Article XIX in the GATT Analytical Index) consisted almost entirely of the findings and recommendations of this Working Party. Under Article XVI:1 of the Agreement Establishing the WTO, the WTO and its Members were to be guided by the decisions, procedures and customary practices of the GATT 1947 system. Article 3.1 of the DSU stated the same. The *Fur Felt Hat* decision had continuing relevance even after negotiation of the new Agreement on Safeguards.

5.26 The United States further argued that the standards for safeguard action provided in the Agreement on Safeguards reflected a shift in focus incorporating the jurisprudence of the *Fur Felt Hat* case. These standards were not phrased in terms of facts that the importing Member must prove, if necessary, to a panel. Rather, they were phrased explicitly in terms of the investigation to be undertaken by the competent authorities in the importing Member. Thus, a panel's evaluation of measures taken pursuant to the Agreement on Safeguards should follow the approach taken in the *Fur Felt Hat* case.

5.27 The United States also referred to India's point regarding compensation in respect of a safeguard action and noted that pursuant to Article 8.2 of the Safeguards Agreement, there was no right to compensation for a period of three years. It was no coincidence that this was the maximum duration of a restraint pursuant to Article 6 of the ATC. There was no significant loss of "GATT rights" in this respect. India's arguments regarding the need for multilateral approval if a Member wished to take a safeguard action without payment of compensation were simply incorrect. The situation was also the same in respect of dispute settlement. Under both the ATC and the Safeguards Agreement parties had recourse to Article XXIII dispute settlement. Moreover, before the Safeguards Agreement and the ATC, the MFA had permitted recourse to Article XXIII dispute settlement. The US drew the Panel's attention to Article 11.10 of the MFA. Therefore, the legal situation for safeguards under Article XIX of GATT 1994, for purposes of the discreet discussion of standard of review, was no more analogous than any other case law.

#### **D. Article 6 of the ATC**

##### **The ATC Safeguard Mechanism**

5.28 India argued that the transitional safeguard mechanism established under the ATC was an exception to the basic principles of the General Agreement and the general safeguard provisions of Article XIX of GATT 1994 and it must be interpreted accordingly. Article XI of GATT 1994 provided for a general prohibition of quantitative restrictions; one of the exceptions to this general prohibition was Article XIX of GATT 1994, which permitted safeguard actions in the form of quantitative

restrictions. However, such restrictions must be imposed consistently with Article XIII of GATT 1994, that is, non-discriminatorily. The textiles and clothing sector had, however, remained outside the GATT system for a long time and the ATC set out provisions to be applied by Members for the integration of the textiles and clothing sector into GATT 1994 during a transitional period. The scheme of the ATC was that all quantitative restrictions maintained under the provisions of the MFA and in effect on the day before the entry into force of the WTO Agreement would be governed by the provisions of the ATC (Article 2.1) and that no new restrictions would be introduced except under the provisions of the ATC or GATT 1994 (Article 2.4). The ATC envisaged, in respect of safeguard action, that Article XIX of GATT 1994 would apply in respect of products already integrated into GATT 1994, while Article 6 of the ATC would apply in respect of products yet to be integrated into GATT 1994. Article 6 of the ATC established a transitional safeguard mechanism that permitted WTO Members not only to impose quantitative restrictions inconsistently with Article XI of GATT 1994 but also to do so on a "Member-by-Member" basis, which were the terms used in Article 6.4 of the ATC to describe discriminatory actions inconsistent with Article XIII of GATT 1994.

5.29 India further argued that to impose burdens on particular exporters not because they engaged in dumping or benefitted from subsidies but merely because they were more efficient than others was contrary to the basic purpose of the multilateral trading order. There was, therefore, no other provision in the whole of the WTO legal system that permitted the imposition of restraints on imports from a particular WTO Member merely because it caused, or threatened to cause, damage to a domestic industry. The drafters of the ATC had explicitly recognized the exceptional character of the transitional safeguard in Article 6.1 of the ATC, according to which that safeguard "should be applied as sparingly as possible".

5.30 The United States argued that, in the present case, it had faithfully applied the procedures of, and its action was fully consistent with, Article 6 of the ATC. Article 6 should be interpreted in accordance with the ordinary meaning of its terms, in their context and in light of the ATC's object and purpose. Article 31.1 of the Vienna Convention provided 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." Applying these principles, the ordinary meaning of the actual terms of Article 6.2 of the ATC was simply that a safeguard action may be taken based on a Member's determination that demonstrated that the requisite conditions of serious damage or actual threat thereof caused by increased import quantities existed and that the serious damage or actual threat thereof was properly attributable to the Member against which the measure had been applied. There was no basis in the text of Article 6 to assume that it must be interpreted narrowly or as an exceptional provision.

5.31 In the view of India, the highly exceptional character of the transitional safeguard in Article 6 of the ATC must be taken into account in interpreting that provision. GATT 1947 panels had repeatedly recognized that exceptions must be interpreted narrowly (see for instance BISD 30S/140 and 36S/345). This principle must be particularly strictly applied in the case of a provision which constituted not only an exception to the principles set out in Article XI of GATT 1994 but also to those set out in its Article XIII. This implied, *inter alia*, that it would be legally incorrect to weaken the disciplines established under Article 6 of the ATC by extending to the transitional safeguard mechanism, by analogy, legal principles developed under other safeguard provisions of the WTO legal system.

5.32 The United States argued that the safeguard mechanism in Article 6 of the ATC must be viewed as an integral part of the ATC and not as a "highly exceptional" provision. The Uruguay Round negotiators had designed the ATC to balance the interests of predominantly exporting Members and predominantly importing Members until the 10-year transitional period was over. Exporting Members were guaranteed that by 1 January 2005, all textile and clothing products would be subject to normal GATT rules. In addition, they were guaranteed that, where applicable, during the transition, products under quota would enjoy accelerated growth in access. Exporting Members were also guaranteed that

specified percentages of products listed in the Annex to the ATC would be integrated into GATT 1994 in three stages. Once such products were integrated, quotas could not be maintained or placed on them except pursuant to Article XIX of GATT 1994. Importing Members, for their part, were provided with a special mechanism for safeguard actions that could be used during the 10-year transitional period if they were faced with serious damage or an actual threat thereof to their producers as a result of sharply increased imports. This balance of interests between accelerated quota growth and specified integration for the exporting Members and a special safeguard mechanism for the importing Members had enabled all sides to agree to the ATC.

5.33 India disagreed with the US view that importing Members had obtained the right to take safeguard action in exchange for accelerated quota growth and specified integration for the exporting Members. This argument overlooked the fact that the restraints applied under the MFA were inconsistent with the obligations of importing countries under GATT 1947. The removal of quotas provided for under the ATC in the textiles and clothing sector was not trade liberalization. Furthermore, India did not accept that the safeguard mechanism must be viewed as an integral part of the ATC and not as a "highly exceptional" provision; rather, India, while accepting that the safeguard provision was an integral part of the ATC, considered that it was also an exception to the basic principles of the GATT and the general safeguard provisions of Article XIX of the GATT and must be interpreted accordingly by the Panel.

5.34 On this aspect, the United States considered the context, object, and purpose of Article 6 of the ATC to be important. The ability to respond to import surges through the application of a transitional safeguard action was a key concession made in the Uruguay Round negotiations to predominantly importing Members. It counterbalanced the substantial - and irreversible - trade liberalization that was set out elsewhere in the ATC. For this reason, Article 6 of the ATC occupied a central position in the operation of the ATC during the 10-year transitional period. It would not be consistent with the circumstances of the negotiations to unduly circumscribe the manner in which Article 6 was interpreted. The reference in Article 6.1 of the ATC to the fact that the transitional safeguard "should be applied as sparingly as possible" did not alter this result. The phrase did not speak to how Article 6 should be interpreted with regard to a specific instance of serious damage, or actual threat thereof. The term "sparing" comes directly from Article 3.2 of the MFA. Under the MFA and now under the ATC, "sparing" did not and does not amount to abstaining from taking safeguard action when the requirements in Article 6 of the ATC were fulfilled.

5.35 The United States also pointed out that imports of woven wool shirts and blouses from India had increased 414 per cent from the year ending January 1994 to year ending January 1995. There was a definite decline in US domestic production concurrent with this surge in imports which compelled a finding of serious damage or actual threat thereof to the domestic industry. In making that determination, the US had followed all of the necessary procedures in the ATC in good faith - taking into account some of the relevant factors listed in Article 6.3 of the ATC for which published information was available as well as information from contacts with producers on other factors for which published information was not available. The reasonableness of this determination was further illustrated by the fact that the TMB, comprised of members from exporting and importing Members, had reached a consensus supporting the application of a safeguard action by the United States.

#### **Legal Analyses of Serious Damage or Actual Threat Thereof Suggested by the Parties**

5.36 India argued that the onus of demonstrating serious damage or its actual threat was on the importing Member which had to choose at the beginning of the process whether it would claim the existence of serious damage or of actual threat. These were not interchangeable because the data requirements would vary with the chosen situation. Actual threat could only be established by the necessary data on imminent measurable imports, without which, the demonstration of actual threat was likely to be based on conjecture and not on concrete facts.

5.37 The United States argued in response that Article 6 of the ATC did not require it to choose between serious damage or actual threat thereof and there were no criteria, definitions or otherwise that separated the phrase "serious damage, or actual threat thereof". Nor had any such criteria existed under the MFA from which this phrase and the criteria in the ATC came. The tests suggested by India which supplied criteria for serious damage and threat separately did not exist in the ATC. In particular, no separate test for actual threat was negotiated into the text of the ATC. Since the TMB must examine "serious damage, or actual threat thereof.", it was not constrained to make a finding based on whether a Member alleged both or not and the ATC did not require the TMB and the investigating authorities to choose between serious damage or actual threat. The ATC also did not require the TMB to make a finding based on the entire phrase.

5.38 India insisted that the ATC did delineate between serious damage and actual threat thereof. This delineation was reflected in the routine practice of the TMB to distinguish between serious damage and actual threat thereof in its recommendations. Therefore, if the TMB had actually come to the conclusion that a situation of "serious damage" existed, it would have said so in its findings. Since the TMB had not said in its finding that a situation of "serious damage" had been demonstrated, it was obvious that they did not consider that a situation of "serious damage" had been demonstrated. By comparing the manner in which the TMB had given its findings in respect of a number of other cases, it became clear that if the TMB had come to the conclusion that "serious damage" had been demonstrated, it would not have given the finding that "actual threat of serious damage" had been demonstrated.

5.39 India referred to the specific safeguard action on which the United States and India had held consultations in June 1995 and noted that it was an action based on a determination of serious damage while the TMB had endorsed, in August 1995, an action based on alleged actual threat of serious damage. India considered that the United States must have had doubts as to the legal justification of its determination of serious damage and the adequacy of its data because, when the US measure was reviewed by the TMB, it made the claim that imports from India had also presented an actual threat of injury and the United States had presented entirely new data. The TMB endorsed that new claim but not the one on which India and the United States had held consultations. The Diplomatic Note of the United States conveying its request for consultations had included a "Statement of Serious Damage" but it had not included any statement claiming an actual threat of serious damage. The safeguard action on which the United States had held consultations was thus an action allegedly designed to remedy the serious damage to the domestic industry which had already been caused by imports from India. The limited amount of data that had been made available during the consultations all related to the actual state of the industry and the imports that had already taken place. Besides, the Public Notice of CITA, dated 17 May 1995 (published in the US Federal Register on 23 May 1995), only mentioned "serious damage to the US industry producing woven wool shirts and blouses". Under these circumstances, the request by the United States could only be understood by India as a request concerning serious damage and India, therefore, examined the request only from that angle. Not having obtained the TMB's endorsement of the determination on which it had held consultations with India, the United States should have immediately withdrawn its safeguard action.

5.40 India also claimed that since the safeguard action endorsed by the TMB was an action on which the United States had never held any consultations with India, it therefore, never had any opportunity to challenge such action. India was of the view that the TMB had committed a serious error in failing to recognize that a situation of serious damage and a situation of actual threat of serious damage were two entirely different matters. A claim of serious damage must be accompanied by a demonstration that serious damage had already occurred and consequently substantiated according to Article 6.7 of the ATC by "specific and relevant factual information" related to that claim. In the case of serious damage, a retrospective analysis was required and the issue was: what damage had already been caused by imports? A claim of actual threat of serious damage must be accompanied by a demonstration that the domestic industry had reached a vulnerable stage and was on the brink of serious damage, so that

any further sharp and substantial increase in imports would push the industry into a state of serious damage. In the case of actual threat, a prospective analysis must be performed and the issue was: which imports were imminent and what damage were they likely to cause? Different facts had to be demonstrated for each case and a consultation on serious damage could, therefore, not be deemed to comprise a consultation on threat of serious damage.

5.41 Furthermore, in the view of India, the footnote to Article 6.4 of the ATC clarified that the imminent increase in imports shall be measurable and shall not be determined to exist on the basis of allegation, conjecture or mere possibility. There were two elements in this type of situation: "imminence" in terms of time and "measurable" in terms of quantity. Imminent and measurable imports could be deduced from circumstances such as: goods were already on the high seas and due to arrive in the immediate future or when measurable quantities of goods had been delivered at the dockside for shipment or when the goods had been firmly contracted and were awaiting shipment, etc. The measurable quantities should be large enough to satisfy the stipulation of "sharp and substantial increase in imports".

5.42 The United States accepted that the Market Statement had referenced only "serious damage." However, the use of this shorthand phrase in the initial document was of no substantive consequence and was quickly corrected. The United States had expressly informed India in its diplomatic note that the case was based on the existence of "serious damage, or actual threat thereof" and during consultations the United States had explained to India all of the factors for its determination. India had also complained that the US had not expressly examined each and every factor listed in Article 6.3 of the ATC, but had failed to show why the US was required to do so. Article 6.3 referred to "such relevant economic variables as" those listed and that "none of [these factors] either alone or combined with other factors, can necessarily give decisive guidance". The United States clearly had examined factors "such as" the listed factors. The issue was not whether the US had discussed a particular set of factors in its entirety (even where data on some factors might not have been available), but whether the United States' examination was sufficiently meaningful so as to reasonably support the finding and to constitute a good faith application of the Article 6 standard.

5.43 In a response to the Panel, the United States pointed out that at no time before the TMB proceeding had India taken issue with the reference in the US diplomatic note requesting consultations on the basis of serious damage or actual threat thereof or that the shorthand had been used in the text of the Market Statement. India also had not asked the United States to clarify whether it had chosen between serious damage or threat in light of the apparent different reference in the Diplomatic Note and the April Market Statement. India had only asserted this point during the TMB proceeding. The United States Diplomatic Note to India was the official request for consultations. The reference to serious damage or actual threat thereof was always in the Diplomatic Note, therefore, no "correction" was necessary. In response to a question from India, the United States also explained that, in its view, India was aware that the entire phrase was the basis for the call, especially since neither the ATC nor the MFA, which had used the same phrase as a definition of "market disruption," separated the two or provided different criteria for each.

5.44 With respect to the above, India considered that no correction to the terminology in the Market Statement was possible since the Diplomatic Note which preceded the Market Statement transmitted a determination that had already been made and that determination related to serious damage only. The nature of that determination could not be changed through the Diplomatic Note transmitting it. India had to conclude, therefore, that an alleged situation of serious damage and not actual threat thereof, was the basis for the United States' request for consultations and for the substantive discussions during those consultations. The distinction between serious damage and actual threat thereof only became an issue in this case at the time of the TMB review.

5.45 The United States insisted that it had followed all procedures required under Article 6.2 and 6.3 of the ATC. The safeguard standard was "serious damage, or actual threat thereof."<sup>15</sup> Article 6.2 of the ATC provided, in part, that:

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

5.46 The United States further submitted that Article 6 of the ATC provided no separate definition or separate factors applying to actual threat of serious damage as distinguished from serious damage. The phrase "serious damage, or actual threat thereof" was derived from the definition of market disruption in Article 3 of Annex A of the MFA. There, too, no separate factors for the two elements had been provided and the MFA's TSB had never supplied any. Article 6.3 of the ATC set out various factors for determining serious damage or actual threat thereof, resulting from increased quantities in total imports. That Article provided that:

"[i]n 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".

5.47 In the view of the United States, the statement prepared by CITA had included sufficient information to justify its finding. Concerning serious damage or actual threat thereof caused by total imports, Article 6.2 and 6.3 of the ATC, the facts were, as provided in the Market Statement, that when CITA made its determination: (i) there was a surge in total imports of 94 per cent for the year ending January 1995 compared to the year ending January 1994; (ii) there was serious damage or actual threat thereof to US production of woven wool shirts and blouses as a result of that massive increase in total imports; (iii) the products involved were "like" and/or "directly competitive" woven wool shirts and blouses; US manufacturers competed with imports from India and other suppliers and were sold to the same stores; and (iv) there were adverse effects on investments, market share, employment (about 6 per cent of the workers in the woven wool shirt industry lost their jobs from 1994 to 1995 as a result of imports), in this small and volatile US industry. More specifically, the US found that imports of category 440 had surged from 44,363 dozen in 1992 to 141,569 dozen in 1994. At the same time data showed that production, after slightly rising in 1993, had suffered a decline of 8.4 per cent in 1994. Production continued to decline in 1995, 5.3 per cent below the year ending June 1994 level. Market share of domestic manufacturers declined, employment declined, investment, profits and capacity were adversely impacted by imports of category 440.

5.48 In a response to the Panel, the United States further explained that it did not consider that a finding of "actual threat of serious damage" required some sort of data, analysis or argumentation different from that required for a finding of "serious damage". In making its determination, the US

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<sup>15</sup>Article 3 of the MFA provided that action could be taken to limit exports "causing market disruption as defined in Annex A..." Annex A of the MFA set forth a test for "market disruption," which was based on the existence of "serious damage to domestic producers or actual threat thereof". Annex A also sets forth factors for a determination similar to those found in Articles 6.3 and 6.4 of the ATC.



was required to follow Article 6.2 and 6.3 of the ATC which provided the standard and some of the factors important in making a serious damage or actual threat thereof determination. Unlike the Agreement on Safeguards, there was nothing in Article 6 of the ATC providing different conditions to be met for serious damage on the one hand and actual threat thereof on the other hand. There were also no separate criteria. There was no requirement in the ATC spelling out the sort of analysis or argumentation required for serious damage or actual threat thereof. The United States did not believe it appropriate to read into the ATC any particular threat criteria.

5.49 In the view of India, there was a definite differentiation between the existence of serious damage and actual threat thereof and the absence in Article 6 of the ATC of different conditions to be met for one or the other did not remove this clear distinction. The factors contained in Article 6.3 and 6.4 of the ATC must be reviewed to determine whether or not the industry was facing a situation where serious damage existed or a situation where there was a threat of serious damage. The US Market Statement clearly identified the US determination that "serious damage" existed at the time of the request for consultations and there was no indication, or data supplied, that the limited factors reviewed by the US pointed to a condition which could be characterized as "actual threat" of serious damage to the domestic industry.

### **Status of the Market Statement**

5.50 The United States stated that the information contained in the Market Statement constituted the totality of the information used by CITA in making its determination of serious damage, or actual threat thereof. Other relevant information had been supplied during consultations or pursuant to Article 6.10 of the ATC and was provided as updates or upon request to confirm the initial determination. The United States found no guidance in the ATC or DSU on whether the Market Statement should be the sole basis for the Panel to assess whether the US had acted in conformity with Article 6 of the ATC. Article 6 may lead one to conclude that the original data available at the time of the determination was legally relevant concerning the reasonableness of the determination of the importing Member. However, Article 6.10 of the ATC allowed additional or new/updated data for TMB review. Implicitly one would expect that if, during consultations, more data were requested, that data could be supplied, if available, to confirm a determination. Article 6.7 of the ATC only provided for data to accompany the request for consultations. In the context of consultations and Article 6.10 of the ATC, other relevant data and the TMB proceeding in this case, may only be persuasive information during Panel review. The United States believed that the December 1994 Market Statement had no legal status before this Panel since India had rejected the request for consultations based on that Statement and had demanded that the United States re-submit its request under the ATC. The Market Statement was the Statement accompanying the request under Article 6 of the ATC and the only Statement with status in this proceeding. However, some factual information in the December Market Statement was also reflected in the Market Statement in April 1995.

5.51 India argued that the United States had not fulfilled the requirements of Article 6 of the ATC in the Market Statement submitted to India in April 1995 as the basis for consultations on the proposed safeguard action. Furthermore, the US determination in this Market Statement was one of only "serious damage" which conveyed the conditions which the United States believed existed and should have been the limit of any TMB review. Also, the information contained in the Market Statement did not represent data on the "industry" which the United States claimed was experiencing "serious damage" due to increased imports but another, much larger industry and was not relevant to the economic variables to be examined in making the determination.

### **Sources of Data Provided By the United States**

5.52 The United States explained that it had relied as much as possible on official data sources to assess objectively conditions in the domestic textile and clothing industries. Because the industry

producing category 440, woven wool shirts and blouses, was a small one, there were limited published data available to supplement the official data on production and imports that formed the basis of CITA's determination of serious damage or actual threat thereof. Accordingly, in developing the additional information required to make its determination, CITA had relied heavily on information furnished by clothing manufacturers, particularly the two major companies that produced garments in category 440. This information had been collected by CITA through multiple phone calls and telefax exchanges. Because the information was collected from individual companies, it was treated on a business confidential basis. Further, the ATC did not provide a methodology for collecting data; it only noted in Article 6.7 of the ATC that when requesting consultations, the accompanying data must be "specific and relevant factual information, as up-to-date as possible."

5.53 While India accepted that Article 6.7 of the ATC required that the request for consultations be accompanied by "specific and relevant factual information, as up-to-date as possible", the requirement not to ignore the latest information available did not imply that the United States was freed of its obligation under Article 6.2 and 6.3 of the ATC to collect all the key economic data necessary to demonstrate that the domestic industry was suffering serious damage. To accept the argument of the United States on this point would turn the additional requirements set out in Article 6.7 of the ATC into an exemption from the requirements set out in Article 6.2 and 6.3 of the ATC which could not be correct.

5.54 The United States further pointed out that CITA had also used information and data provided by trade associations and labour unions which represented the companies and workers of this industry. The latter two sources were considered to be especially valuable because they had both an overview of industry information and a more objective perspective than the individual companies did not necessarily have. Using the above sources, CITA had identified the companies that manufactured woven wool shirts and blouses among the many manufacturers that produced woven shirts and blouses of all fibres and had questioned them on current business conditions, particularly the economic variables called for in Article 6 of the ATC. This information was then analyzed and detailed in the Market Statement. Because the textile and clothing programme was designed to adopt safeguard action expeditiously, it was not possible for the Office of Textiles and Apparel (OTEXA) to conduct any extensive, formal written surveys of manufacturers to obtain this information. Such formal surveys required advance notice and an extensive public comment period which would have prevented the adoption of a safeguard action in time to prevent serious damage or actual threat thereof to the industry in question.

5.55 India disagreed with some of the information in the preceding paragraph, arguing that official data on imports in category 440 were published in their entirety, including not only the aggregate imports assigned to category 440, but also the quantity, value, date of export, date of import, and country of origin for each of the HTS lines. In terms of the "official data on production", it was limited and there had been no indication that the US had been able to supplement this limited data in order to demonstrate production levels and trends of domestic production that would be comparable to all the products contained in import category 440. The specific and relevant data officially maintained by the United States on exports of products comparable to those contained in import category 440 had also been ignored by the US.

5.56 The United States pointed out, in response to a question from India, that in the case of the woven wool shirt and blouse industry, two firms accounted for a majority of US production, so the information reported was reasonably relied upon by CITA is indicative of conditions in the industry. Some information applied specifically to the woven wool shirt and blouse industry and some, in cases where the overall trend was reflective of conditions in the specific industry in question, reflected a broader scope.

**E. Demonstration of Serious Damage by the United States**

5.57 India argued that the United States had failed in its Market Statement to demonstrate during the consultations that imported woven wool shirts and blouses were causing serious damage to its domestic industry and, therefore, had acted inconsistently with Article 6 of the ATC. Under Article 6.2 of the ATC, a WTO Member may take a safeguard action 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".

In making such a determination, Article 6.3 of the ATC stated that a Member

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

5.58 The United States argued that CITA had determined that high levels and surging imports of woven wool shirts and blouses coincided with a deterioration in the domestic industry's condition in terms of such factors as domestic output, market share, investment, employment, man-hours worked and total annual wages. Therefore, CITA had concluded that the surge in imports of woven wool shirts and blouses had caused serious damage or actual threat thereof to the industry. In the course of CITA's investigation into serious damage or actual threat thereof to the domestic industry producing woven wool shirts and blouses, there was no indication whatsoever that technological changes and/or changes in consumer preferences had resulted in the serious damage or actual threat thereof.

5.59 The United States considered that the first step for the Panel was to decide whether, pursuant to Article 6.2 of the ATC, there was evidence supporting CITA's decision that the domestic industry producing category 440 had been seriously damaged or threatened with such damage by reason of total imports - not imports from India. The United States argued that it had demonstrated that total imports had caused, or actually threatened, serious damage to its highly sensitive industry producing woven wool shirts and blouses. This finding was consistent with Article 6.2 of the ATC, which provided 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 consumer preference. Article 6.3 of the ATC provided that "[i]n making a determination of serious damage or actual threat thereof" the United States must examine the effect of imports on the state of the industry. In so doing the United States was to examine variables such as those listed in Article 6.3 of the ATC, "none of which, either alone or combined with other factors, can necessarily give decisive guidance." Support for the interpretation that the list was illustrative is also found in Article 6.7 of the ATC. There, data was to include "the factors, referred to in paragraph 3 [of Article 6], on which the Member invoking the action has based its determination of the existence of serious damage or actual threat thereof".

5.60 India considered that the list of factors included in Article 6.3 of the ATC was not meant to imply that the initiating Member was provided the liberty to select data for those "relevant economic variables" which were convenient or that the list of "relevant economic variables" was meant to be an exhaustive list of variables to be reviewed. Rather they represented the primary, minimum factors that should be available for review in order to make an informed and demonstrable determination of serious damage or actual threat thereof, to a specific industry.

5.61 India further argued that the issue before the Panel was not whether the ATC prescribed a specific evidentiary standard, but whether the United States had demonstrated a causal link between rising imports and declining production by noting their co-existence. India considered that rising imports and declining production must necessarily be present in all safeguard actions under the ATC, but the co-existence of the two could, therefore, not be sufficient to constitute a determination of a causal link.

#### **India's Review of the Economic Variables**

5.62 India argued that Article 6.3 of the ATC required a Member to examine the state of the particular industry, as reflected in changes in eleven factors: output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment. The United States' Market Statement on woven wool shirts and blouses provided figures on only four of these eleven factors: output, market share, wages and employment. In addition, the Statement included "industry statements" providing figures on domestic prices, and anecdotal information on investment and utilization of capacity. This left the Market Statement deficient with respect to four relevant economic variables, namely exports, profits, productivity and inventories.

5.63 India further argued that although Article 6.3 of the ATC indicated an illustrative list of factors, on which data had to be examined, it would be in order if an importing Member also examined other factors while making a determination. However, it would be inconsistent with Article 6.7 of the ATC if all the factors mentioned in Article 6.3 of the ATC were not taken into account by the importing Member. The "other relevant information" provided to the TMB by the US on 28 August 1995 was inconsistent with Article 6.10 of the ATC, because these were not the data supplied to the Indian delegation during the consultations. These data were also not available to the United States when it made its determination.

5.64 The United States noted that India had questioned the validity and relevance of some of the data in the Market Statement and the data furnished to the TMB in August 1995 and considered that these claims were without merit. With regard to India's claims that CITA's determination was invalid because it did not contain data on every factor listed in Article 6.3 of the ATC, the United States argued that CITA had examined factors for which information was available. The list of factors in Article 6.3 of the ATC was illustrative. The information supplied to India, and to the Panel, represented a strong case that would not be affected by data on other factors. Under Article 6.3 of the ATC, the issue was not whether CITA had discussed a particular set of factors in its entirety (even where data on some factors might not have been available), but whether CITA's examination was sufficiently meaningful so as to reasonably support the finding and to constitute a good faith application of the Article 6 standard.

5.65 The United States also pointed out that it had tried to provide information on the other, unpublished factors which India had characterized as anecdotal and unverifiable. Data on domestic prices was available from contacts with individual firms. There were about 15 firms that produced woven wool shirts and blouses in the United States and two firms accounted for at least 60 per cent of total US production. The information presented in connection with this case was based mainly on conversations with these two firms; therefore, that information was relevant and accurate.

#### **United States Review of the Economic Variables**

5.66 The United States argued that, in accordance with Article 6.3 of the ATC, it had reviewed relevant economic data such as output, market share loss, import penetration, employment, man-hours, wages, and domestic prices. It had also looked at other variables such as profits, investment, capacity, and sales. As described in the Market Statement, total imports of woven wool shirts and blouses had surged to 141,502 dozen in the year ending January 1995, nearly double the level of the year ending January 1994. The ratio of imports to domestic production had increased rapidly from 88 per cent

in 1993 to 151 per cent during January-September 1994, thus indicating that imports had far surpassed the level of domestic production.

5.67 The United States further argued that these high and surging imports, at low prices, coincided with a deterioration in the industry's condition in terms of such factors as domestic output, market share, investment, employment, man-hours worked and total annual wages. Among these findings were that:

- (a) US production of clothing in category 440 had declined in the first nine months of 1994 with the level falling to 61,000 dozen - 8 per cent below the 66,000 dozen produced during January-September 1993.
- (b) US producers' share of the domestic market had fallen from 53 per cent in 1993 to 40 per cent in the first nine months of 1994.
- (c) Employment in the industry producing woven shirts and blouses including shirts and blouses made from wool declined 6 per cent between 1993 and 1994.
- (d) Total annual production worker wages in the industry producing woven shirts and blouses including shirts and blouses made from wool had fallen 3 per cent over the same time period.
- (e) Average man-hours worked in the industry producing woven shirts and blouses including shirts and blouses made from wool had dropped 6 per cent between 1993 and 1994.
- (f) Prices for domestically produced woven wool shirts and blouses were substantially higher than imports.
- (g) Profit margins had deteriorated across the woven wool shirt and blouse industry as a result of raw material cost increases and the fact that companies were unable to raise prices because of low-priced imports.
- (h) Investment levels were stagnant throughout much of the industry.
- (i) Production capacity of several companies had declined, with one manufacturer of woven wool shirts and blouses reporting that the dropping of outside contracting represented the equivalent of closing four plants. That company ran at only 70 per cent of its capacity for its own manufacturing plants.
- (j) Most companies had reported sales declines as they lost market share to lower priced imports; some companies reported declines of 20 per cent or more.

### **The Industry and the Products**

#### (i) The Nature of the Wool Sector in the United States

5.68 The United States explained that the wool products sector of the US textile and clothing industry was very sensitive to imports. At each stage of processing, the production of wool products was more expensive and/or more complicated than production of most cotton and man-made fibre products and the sector was, therefore, more vulnerable to low-price import competition. Also, the market for wool products in the United States was very small relative to the market for cotton and man-made fibre products. Of the United States' total consumption of fibre (including the fibre content of imported products), wool accounted for only 1.9 per cent in 1995 compared to 56.9 per cent for man-made fibre

and 38.5 per cent for cotton. The share of fibre consumption represented by US wool products manufacturers was even lower. With such a low share of the total textile and clothing market, US wool products manufacturers were notably exposed to serious damage or threat thereof from imports. While imports of all textile and clothing products averaged 10.0 per cent annual growth between 1990 and 1995, imports of wool products averaged 13.9 per cent annual growth.

5.69 The United States also advised that US firms producing wool clothing were in general much smaller compared to cotton and man-made fibre clothing manufacturers. The small size of wool clothing companies left them especially vulnerable to increased imports. Without the financial reserves of larger firms, wool clothing producers could not as readily withstand a sudden reduction in sales or a drop in prices due to import competition. The United States also noted that the sensitivity of the wool sector of the US textile and clothing industry had been recognized within the framework of the MFA and the ATC. Under the MFA regime, while growth rates for quotas on most man-made fibre or cotton products were traditionally set at 6 per cent per year, the United States had negotiated one per cent growth rates for wool quotas. The Textiles Surveillance Body (TSB) under the MFA allowed this exception to the standard growth rates for other fibre products. The negotiators of the ATC similarly had limited the growth rate to 2 per cent for wool products,<sup>16</sup> whereas all other products were required to be afforded a 6 per cent annual growth rate under Article 6.13 of the ATC. In the view of the US, because of this sensitivity in the wool sector, even a relatively small increase in imports could have a very pronounced and devastating impact on US producers of wool products.

5.70 In the view of India, there were no provisions in the ATC that would merit the wool clothing industry of the United States to be treated more favourably than any other sector of the US industry or the clothing industry of any other Member. The lower growth stipulated for restraint levels introduced under Article 6 for wool products came into operation only after the stage of justifying the restraint to the TMB and arriving at the appropriate level. Moreover, US import duties for woollen clothing were lower than the corresponding duties for woollen fabrics. Thus, it would appear that the US was more concerned about protecting its weaving industry in the wool sector rather than the clothing one. The exporters of India supplying woven wool shirts and blouses to the United States were all smaller in financial size as compared to the woven wool shirts and blouses industry units of the United States. The adverse impact on such suppliers arising from a restraint had much more serious consequences than could occur to the US manufacturers from increased imports.

5.71 India further argued that it was not true that during the MFA regime a 6 per cent growth rate had applied to other textile products and 1 per cent growth rate had applied to wool products. In fact, some of the bilateral agreements of India had growth rates of less than 1 per cent for some items which were not wool products. There were several restraints under India's bilateral agreements with 6 per cent growth rate where woollen products were part of the restraints. Thus, growth rates ranging up to 6 per cent had operated under the MFA regime for several wool products and growth rates of 1 per cent or even less had operated for non-wool products also. While an informal exception had been provided in the growth rate to be provided for restrained woollen products outside the text of the ATC, there was no other formal or informal indication in the context of the ATC that the manufacturers of woollen products were eligible for any other special consideration or exceptional treatment in protection against imports. It was also not correct for the United States to state that it had negotiated 1 per cent growth rates for wool products with all countries under the MFA. For example, the reported growth rates for selected wool clothing products from Colombia and Mexico were many times higher.

5.72 The United States considered that the above views of India did not contradict the essential truth of the US submission which was that the sensitivity of the wool sector of the United States' textile

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<sup>16</sup>See Note for the Record dated 16 December 1993, Chairman Peter D. Sutherland, Trade Negotiations Committee, General Agreement on Tariffs and Trade, reprinted in G/TMB/N/107, 30 June 1995.

and clothing industry had been recognized within the framework of the MFA and the ATC. For US bilateral textile import restraint agreements under the MFA, growth rates for quotas on most man-made fibre or cotton products were traditionally set at 6 per cent per year, while the United States negotiated 1 per cent growth rates for wool quotas. In saying this, the United States was referring to specific limits on individual categories. US wool categories under group limit as in its bilateral agreement with India had a 6 per cent growth rate. None of these categories had specific limits applicable to it alone. Finally, India's last statement was not correct. The previous MFA Agreement with Colombia provided for one per cent growth for all wool clothing categories and the same could be said for the Mexican agreement prior to the NAFTA.

5.73 The United States, in response to a question from India, further argued that it had the flexibility under Article 6.6(c) of the ATC, to give to eligible Members a growth rate of more than 2 per cent, but less than 6 per cent. Thus, even Article 6.6(c) of the ATC recognized the sensitivity of importing Member's wool production to imports. The United States noted, however, that Article 6.6(c) of the ATC clearly did not apply to India since, *inter alia*, India's total textile and clothing exports did not consist "almost exclusively" of wool products. India's volume was not even comparatively small in the markets of importing Members. Further, even this provision did not mandate a 6 per cent growth rate for wool after safeguard action was taken, but allowed importing Members leeway when considering quota levels, growth rate, and flexibility.

5.74 Also in response to a question from India, the United States explained that the MFA had recognized the difficulties faced by importing countries with small markets, high levels of imports and correspondingly low levels of production in both its Annex B, paragraph 2 and in paragraph 12 of the 1986 Protocol of Extension. These paragraphs authorized lower positive growth rates than normally required under MFA Annex B. Although this language did not originate as a result of the US wool textile and clothing market, it had long been apparent that the language applied to this market. As a result, the United States had negotiated restraints on wool textile and clothing exports since the early 1970s, in all cases with one per cent growth rates for all specific limits covering wool textiles and clothing. The United States had negotiated growth rates of less than one per cent for wool textiles, but had never negotiated growth rates above one per cent. These rates had been accepted by the TSB after US explanations of the difficulties facing the wool textile and clothing producers. It was noted that the US' first written submission and oral statement noted that the ATC "limits" the growth rate. To clarify, the ATC, through the Sutherland Note (see footnote 16), provided that the rate shall be "no less than" 2 per cent in the context of Article 6.13 of the ATC. Similarly, Article 6.13 required that for other products the rate could be "no less than" 6 per cent. As such, the US' argument was that the minimum threshold for wool products under the ATC was considerably less than the minimum threshold for other fibres because of the import sensitivity of wool in importing Members, particularly in the United States.

5.75 India stressed that the MFA had not provided any explicit statements concerning the vulnerability of the wool sector to harm caused by even modest increases in imports. The MFA did recognize small markets which did not refer to particular products within the overall market. Therefore, in the absence of any data supporting the US conclusion of the vulnerability of wool products in the US' market, the application of the minimum allowable rate of two per cent and the request for consultations at low levels based on the vulnerability of the wool sector had no validity in the actions taken by the United States on category 440 from India.

(ii) What Constitutes the Domestic Market

5.76 India argued that most of the facts which the United States had submitted first to India during the course of the consultations to support its claim of "serious damage", and subsequently to the TMB to support the later claim of "actual threat of serious damage", did not relate to the state of the industry producing woven wool shirts and blouses, but to the state of the industry producing woven shirts and

blouses generally. These data would be irrelevant because the ATC required the United States to demonstrate that the particular industry producing woven wool shirts and blouses had suffered serious damage or threat thereof. That particular industry, however, represented less than one per cent of the employment in the industry producing woven shirts and blouses generally. The state of that industry gave, therefore, no indication of the state of the particular industry to be protected by the restraints on imports of woven wool shirts and blouses. The United States had submitted only two pieces of data that related to the particular industry designed to be protected by its safeguard action, namely, the data showing that in the first nine months of 1994, imports of woven wool shirts and blouses had increased to 92,000 dozen from a level of 43,000 dozen, i.e. an increase of 114 per cent, while domestic production of these products had marginally declined by 5,000 dozen from 66,000 dozen, that is by 8 per cent. Other information specifically related to the woven wool shirt and blouse industry on which the United States had based its determination was not positive evidence but mere allegation, including the "finding" that "production capacity of several companies had declined" without ascertaining the overall changes in capacity and the fact that it produced 5,000 dozen woven wool shirts and blouses less during a brief period of time.

5.77 India also noted that, with respect to market share loss, the US Market Statement stated that "the share of the US woven wool shirt and blouse market held by domestic manufacturers fell from 53 per cent in 1993 to 40 per cent in 1994". In Table II of the Market Statement, the term "market" was used to describe an artificial construct based on the sum of imports and domestic production, not the total quantity of woven wool shirts and blouses purchased by United States consumers. This resulted in misleading conclusions when a substantial share of domestic production was exported, as was the case for the United States industry. In the view of India, a portion of United States domestic production of woven wool shirts and blouses was exported and, therefore, must be subtracted from production figures to arrive at the portion of domestic production supplied to United States' consumers. In addition to the portion of domestic production that was not exported, domestic consumers may purchase from imported sources. The domestic market (consumption) for woven wool shirts and blouses, therefore, constituted domestic production minus exports plus imports. To determine changes in the share of imports in the domestic market, it was, consequently, necessary to examine not only changes in production and imports but also changes in exports.

5.78 Concerning the above, the United States explained that, for some time, CITA had treated the total market for a textile or clothing category as production plus imports. Similar market share findings by CITA had long been accepted by the TSB in their examination of requests by the United States. CITA had found that the market share held by domestic producers had declined in the face of surging total imports from 53 to 40 per cent. These data were public information in the Department of Commerce's publication on US imports, production, markets, import penetration rates and domestic market shares for textile and clothing product categories. India had contended that the information examined by CITA on market share was irrelevant or otherwise deficient, particularly because the market examined by CITA had not included changes in the quantity of exports. The US had repeatedly informed India, the TMB and the Panel that US export quantity data was unreliable because of the low incentive of exporters to report the data. This fact was neither new nor unique to the United States as the export data from many other Members suffered from the same problems.

5.79 The United States also noted the comparability limitation in all of its wool clothing categories. This situation was long-standing, going back to the creation of the wool clothing category system when it was determined that imported clothing of fibres other than wool but containing greater than 17 per cent by value of wool actually competed in the same market as domestically produced wool clothing, which for production data purposes had always been defined as 51 per cent or greater of wool by weight. When the United States adopted the Harmonized Tariff Schedule (HTS) in January 1989, this definition was retained in shifting from a chief value to a chief weight system by altering the definition for imported wool clothing to those containing 36 per cent or greater of wool by weight. With full awareness of the anomaly in the data, CITA had considered the situation in the domestic woven wool shirt and blouse



industry, as described in the definition of the US domestic industry production data it examined, i.e. woven wool shirts and blouses with 51 per cent or greater wool content. Although the import data included like and competitive products with a wool content as low as 36 per cent, there was no indication, in the record before CITA, the TMB or the Panel that imported lower wool content products did not compete with or negatively impact upon the domestic industry. The United States also noted that products from India were actually chiefly 51 per cent or more wool and the US industry was not producing less than 51 per cent wool.

(iii) Products Manufactured Domestically

5.80 India considered that the US has mischaracterized the industry that CITA had claimed as comparable to imports in category 440. In the US Market Statement, that industry was characterized as producing woven shirts and blouses of wool fabric. However, according to the US Correlation describing products assigned to imports in category 440, it was noted that woven shirts and blouses of man-made fibre fabric were included if the fabric contained 36 per cent or more by weight of wool. These man-made fibre woven shirts or blouses accounted for 15 to 25 per cent of all US imports in category 440 but none of these blended man-made fibre/wool shirts or blouses were included in the US production or employment data. According to the official Department of Commerce export data, over 35,000 dozen of the man-made fibre shirts containing 36 per cent by weight of wool were exported in 1993. The complete exclusion of export data in conjunction with the production and market data in relation to category 440 made any conclusion regarding the linkage between imports and production for the domestic market extremely questionable.

5.81 In this regard, the United States argued that it had not mischaracterized the industry producing woven wool shirts and blouses and that it was comparable to imports in category 440. As the US had pointed out, CITA was well aware of this comparability limitation in all of its wool clothing categories. The background of this situation was well documented in the US submission. It was important to point out that the current definitions underlying the import category system have been in place for many years, was well known to all of the major participants in international textile trade and had been explicitly accepted and agreed under the MFA and the ATC. India fully understood the US category system and was thoroughly familiar with the data that CITA employed to arrive at its determinations. It was disingenuous for India to suggest that the United States "has mischaracterized the industry" and that the information the United States provided contained "significant oversights". Furthermore, given the definition of wool clothing for production data purposes, there had never been any attempt to collect domestic production data on woven man-made fibre shirts and blouses containing 36 per cent or more by weight wool. Moreover, the United States has previously stated that the US industry, as defined by the production data corresponding to category 440, did not and had never manufactured this clothing. This fact was not controverted by the existence of a US export classification that identified man-made fibre clothing containing 36 per cent or more by weight of wool. Likewise, India's use of these export data, elsewhere shown by the United States to be erroneous, did not alter the conclusion that the US industry, as defined, did not produce such clothing.

5.82 The United States further explained that US domestic manufacturers of woven wool shirts and blouses did not produce this clothing in blends of greater than 36 and less than 50 per cent by weight of wool. The majority of the woven wool shirts and blouses produced in the US was 100 per cent wool; the few products with man-made fibre blends were of more than 50 per cent by weight of wool. Therefore, the production data provided in the Market Statement related only to "wool rich" woven shirts and blouses. Official data on export quantities could not be relied upon while estimates by industry sources indicated that less than 10 per cent of US woven wool shirt and blouse production was exported. Therefore, since the domestic manufacturers produced only chief weight wool woven shirts and blouses, it could be concluded that no shirts of 36 per cent or more but less than 50 per cent or more by weight wool were exported. US imports of woven shirts and blouses containing 36 per cent or more by weight

of wool were deemed to be wool garments, as such, they competed directly with other domestically produced or imported woven wool shirts and blouses in category 440.

**Data on Domestic Production**

5.83 India noted that, in contrast to the declining production in the wool segment of the industry, production in the industry as a whole had risen from 30,509 thousand dozen in 1993 to 32,767 thousand dozen in 1994, an increase of 7.4 per cent. Declining production in the wool sector might, in fact, be explained by the rising production in shirts and blouses made from fibres other than wool, as machines were shifted from wool production lines to other lines. A plausible explanation for the shift in production within the woven shirts and blouses industry was the commercial attraction of other product lines and not increased imports. If the United States industry had been unable or unwilling to respond to the upsurge in United States consumer demand for woven wool shirts and blouses, this was not an indication of "serious damage" from imports. Also, if high capacity utilization in the production of other fibres had made more commercial sense to the woven shirt and blouse industry than the production of wool shirts and blouses, a market which had been shrinking for twelve years, then the marginal decline in the production of wool shirts and blouses could not possibly be attributed to increasing imports. According to Article 6.2 serious damage or actual threat thereof must demonstrably not be caused by "such other factors as technological change or changes in consumer preference". The statement of serious damage clearly did not constitute a good faith effort to fulfil that requirement.

5.84 In a response to the Panel, India explained its view that there was a demonstrable lack of correlation between changes in imports and changes in US domestic production and that, in general, the level of US domestic production had not changed in proportion to the level of imports. It was not correct, in India's view, to assume that this decline was caused by an increase in imports. In the Market Statement it was stated that "there are approximately 748 establishments in the United States that manufacture woven shirts and blouses including shirts and blouses made from wool". The official data on US production indicated that the total production of woven shirts and blouses had increased from 29.6 million dozen in 1992 to 30.8 million dozen in 1993, an increase of 4 per cent, and production in 1994 had grown by 5.9 per cent over the 1993 level to 32.6 million dozen. These data would indicate that the US industry producing woven shirts and blouses had increased production during the period from 1992 to 1994. India argued that a decision by these establishments as to the selection of fibre and fibre blends might have changed, but the fact that the actual production of these woven shirts and blouses had increased could not be denied.

US Production, Total Imports and Imports from India  
Woven Wool Shirts and Blouses  
Category 440  
(Dozen)

	1993	1994	Year Ending June		
			1994	1995	95/94 Per cent Change
Production	81,000	74,000	76,000	73,000	-3.9
Imports					
Total	72,302	141,569	80,456	144,034	79.0
India	14,787	76,809	22,994	70,856	208.2

Source: US Submission, 20 September 1996

5.85 India noted with respect to the above Table that the United States had excluded the data for 1992 which was available at the time of the Market Statement. The 1992 data would show that production had increased from 1992 to 1993 as had imports. Thus, the correlation between production

declines and import increases was not demonstrated. Furthermore, if the US were to have included the export data as well, there would be significant changes in CITA's reported size of the market and perhaps different conclusions concerning the impact of declining exports on the level of US production. In India's opinion, based on the available official US data, the declining export levels would have had a greater impact on this sub-industry than any other feature. In addition, the US should have noted that the production data presented in its Table did not include any man-made fibre woven shirts and blouses containing 36 per cent or more by weight wool, while between 15 to 25 per cent of the import data contained these particular products.

5.86 In response, the United States explained that the 1992 production data for woven wool shirts and blouses that was available at the time of the April 1995 request was preliminary data. Since the preliminary data was being reviewed at that time and final 1992 production numbers would be published shortly thereafter, the United States chose not to include the preliminary 1992 production number in the Market Statement. Production data for wool clothing categories was small compared to production data for other clothing categories. Given the small quantities of wool clothing production, even minor revisions to the preliminary production numbers could result in significantly different final production numbers. However, in the particular case of category 440, woven wool shirts and blouses, the final 1992 production number was the same as the preliminary number: 80,000 dozen.

5.87 Commenting further on the above points, the United States considered that India was introducing US export data identifying shipments of man-made fibre shirts containing 36 per cent or more wool as evidence of US production of these shirts and in support of its argument that a decline in exports of these shirts accounted for the observed decline in woven wool shirt and blouse production by the US industry. The United States pointed out that it had previously stated that the US industry under consideration in this case did not and had never manufactured the clothing of low wool content defined by this export classification. Moreover, the United States had repeatedly pointed out the unreliability and inaccuracy of US export data in quantity terms, making this information unsuitable for analytical purposes.

5.88 India noted that the US had rejected its contention that a given decline in production might have been the result of reduced export demand but insisted that the decline in US exports was official and indicated a precipitous decline from 1992 to 1993 to 1994. These data appeared not only in the US Department of Commerce, Bureau of Census data, but also in the US Department of Agriculture data.

5.89 The United States replied to a question by India concerning the decline in domestic production of 5,000 dozen units in the first nine months of 1994 while imports more than doubled to 92,000 dozen in the same period in relation to the trend of the past decade when domestic production had not varied in proportion to imports. In the US view, the production data for category 440 was not comparable with data prior to 1992. However, the data made available to the TMB in August 1995 showed that for the three comparable, consecutive calendar years of production and import data, the proportion of imports to domestic production had more than tripled, increasing from 56 per cent in 1992 to 191 per cent in 1994.

5.90 The United States also replied to a question from India that the decline in production of 5,000 dozen units could be explained by a loss of export orders rather than an increase in import competition. The US rejected India's view that a given decline in production might have been the result of reduced export demand. CITA had found ample evidence of damage or the threat of damage occurring to US producers of woven wool shirts and blouses due to import competition and had received no information that there had been a decline in export orders. The United States also pointed out that, because of the relatively small number of woven wool shirts and blouses produced in the US, after rounding, the preliminary and final 1992 production data reflected in December 1994, April 1995, and currently were the same - 80,000 dozen.

### Data on Exports

5.91 India argued that, to determine whether the share of imports of woven wool shirts and blouses into the United States' market rose or fell in 1994, it was necessary for the United States to collect data on exports that were comparable to those for imports and production. The United States Market Statement had not included such data.<sup>17</sup> It was the responsibility of a Member that decided to impose a safeguard action to be in a position to provide all data relevant to an assessment of serious damage or actual threat thereof, and in particular exports. Otherwise, a safeguard action could not be taken consistently with Article 6 of the ATC. India had obtained figures on United States exports of woven wool shirts and blouses from official United States publications.<sup>18</sup> According to these data, virtually all the United States production of woven wool shirts and blouses was exported, leaving imports to satisfy demand. This suggested that imports had satisfied a domestic market that had not been supplied by domestic producers and that changes in the level of imports could consequently not cause damage to the domestic industry.

5.92 In addition, India considered that, in order to determine whether, and to what extent Indian shirts and blouses were actually competing with US-made shirts and blouses in the United States market, the US would need to examine, *inter alia*, which portion of US production was sold domestically and which portion was sold abroad. The United States had refused to do so, claiming that its official export data were unreliable and that it could proceed on the basis of the "best data available". However, under the ATC, the United States must base its determination on a demonstration that it was the increase in imports and not other factors that had caused the serious damage and the United States must, therefore, collect the data necessary to make that demonstration. If the best information available did not include export statistics, while these statistics were necessary to make that demonstration, then the United States could not take the safeguard action.

5.93 In response to India's claims that the domestic industry could not be damaged by imports because domestic producers had chosen to export virtually their entire production, the United States explained that because of the known inaccuracy of the US export data, which had been pointed out at the time of the TMB proceeding in August 1995, official US export data could not be used to calculate the volume of the US market. The point made by India, that the entire production of the US woven wool shirt and blouse industry had been exported, was completely false and needed to be corrected. Official data on export quantities was highly suspect and could not be relied upon to assess conditions in the industry. Estimates by industry sources indicated that approximately 10 per cent of US woven wool shirt and blouse production had been exported.

5.94 The United States expanded upon the above points, explaining that it already knew from the two largest manufacturers in the industry that only 10 per cent of their production was exported. This information had been collected on a business confidential basis and no random sampling or scientific analysis was required or could be read to be required in the ATC. Nor was it necessary in this case where only 15 firms comprised the entire domestic industry. The data covering 60 per cent of the industry was excellent coverage and certainly CITA's reliance on this data was reasonable. In terms of exports, other sources were better than the official US data and this was also a problem with export data of other countries. India was wrong in stating that if it were true that there was a weak incentive

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<sup>17</sup>In its August 1995 submission to the TMB, the United States provided data on the dollar value of exported wool woven shirts and blouses. These data cannot be compared to the data provided on imports and production. The reason is that the export data supplied by the United States is in value (dollar) terms while the data on imports and production is in quantity terms (dozens). The United States explained in a footnote that export quantity data are questionable due to reporting inconsistencies.

<sup>18</sup>1993: Production 82,000 and Exports 85,000. 1994: Production 76,000 and Exports 76,000.

to report export data accurately, this was true also of production and import data. In the United States reporting of production data from manufacturers was required by law and better reporting of import data was also required by law for duty collection and quota monitoring purposes in particular. This was not the case for exports.

5.95 The United States also explained that it had not provided India with the table referred to in paragraph 43 of India's first submission to the Panel; India had evidently developed the table on its own. The US reiterated that it had pointed out during consultations with India and during the August TMB proceedings that US export quantity data could not be used to calculate the volume of the US market because of the known inaccuracies of the export data. Even after all the shortcomings of the export quantity data were explained by the US in detail during the TMB review, India continued to use the inaccurate export data it obtained to incorrectly point out that the entire production of the US wool woven shirt and blouse industry was exported.

5.96 India reiterated that official US export data were available and was published not only by OTEXA, but also by the US Department of Commerce, Bureau of Census and the US Department of Agriculture. The detailed, and official export data of the United States allowed for a review of the quantity, value, and trends of exports of very specific and particular products including those that would be comparable to the import data contained in category 440. The facts, as presented in the official export data, indicated a clear decline in US export levels of products comparable to those in category 440. In particular, HS number 6205.30.15.00 identified exports of man-made fibre shirts containing at least 36 per cent by weight of wool and even if, as CITA contended, the data were not accurate, it at least indicated that a significant decline in the export of these products occurred between 1992 and 1994.

5.97 In response, the United States further advised that estimates obtained by CITA from the two largest individual domestic producers indicated that no more than 10 per cent of US woven wool shirt and blouse production was exported. If the market was adjusted for exports, assuming exports accounted for 10 per cent of the domestic production, the domestic market share in 1993 would decline from 53 to 51 per cent and for the first nine months of 1994 would fall from 40 to 37 per cent. As a result, the import market share in 1993 would increase from 47 to 49 per cent and for January-September 1994 would increase from 60 to 63 per cent. More generally, in characterizing the US data as unreliable, India was apparently contending that an importing Member could not resort to its ATC Article 6 rights to take a safeguard action without first obtaining all of the data necessary to respond to any conceivable challenge the exporting Member might make, and that all of these data must be publicly available. Acceptance of this argument would require that the data presented by importing Members in justification be limited only to information obtainable from public sources, however limited or inapplicable that information might be. In fact, there was no such limit in the ATC.

5.98 In summing up its argumentation, India claimed that the responsibility for compiling, examining and supplying to the exporting country the relevant data in respect of factors referred to in Article 6.3 of the ATC was entirely that of the importing Member. In the present case, the US had not supplied any information to India either in the consultation request or during the consultations, relating to one very important element to determine the state of the US industry *vis-à-vis* the exports effected by the US industry in category 440. India had collected US export data from the figures published by the US Department of Commerce. The US termed its own published data as "inaccurate" and "unreliable" but were not in a position to furnish any more reliable and accurate export data. If the published US data could not be used to assess the volume of US exports then there was no other way of correctly doing so. Different figures on production and exports as published by the US have been tabled by India and these figures have shown that a quantity equal to the entire production of the US in category 440 was exported. The US presentation claimed that the published official data of the United States on export quantities was highly suspect and suggested that "estimate by industry sources indicate that approximately 10 per cent of wool shirts and blouses production is exported". India

submitted that the estimate of approximate quantities by the industry sources could not be held more reliable than the official data published by the US.

5.99 In the view of India, the US submission also failed to explain whether the exports of man-made fibre/wool blended shirts containing between 50 per cent and 64 per cent of man-made fibre had been taken into account while estimating wool shirt and blouse exports, while for import purposes, these were considered under category 440. It was India's understanding that in the absence of any specified procedure for culling out the export data, these were classified as man-made fibre shirts for export purposes. US data on the export of these blended fibre shirts had been submitted to the Panel in India's response to questions on 20 September 1996 and these data had shown that the entities exporting these products had experienced a significant decline in 1994 whether reported in dollars, dozen, or raw fibre equivalents. It was, therefore, more than reasonable to assume that this decline in exports would have more of an impact on the industry data supplied by the United States than any increase in imports.

5.100 The United States also summed up its position which had consistently been that US export quantity data was unreliable and could not be used in assessing conditions in the US industry. India had persisted in using this flawed evidence not only to support its untrue assertion that most of US production in category 440 was exported but also to denigrate the US production data and market share calculations. The deficiency of the export data stemmed from the low incentive of exporters to properly report the data and the absence of procedures to verify its accuracy. As pointed out in an attachment to the first US submission to the Panel, the Trade Data Division of OTEXA and the Bureau of the Census conducted an investigation of US exports of woven wool shirts and blouses and found that in 53 of the 201 exportations, the quantity reported was either zero or unrealistic; the Census Bureau talked with two US exporters who said they exported clothing but had no idea of its fibre content. The 6-digit Schedule B number was reported incorrectly in 4 of the 6 records examined and the correct Schedule B number could not be determined. More recently, in response to questions raised by India regarding US exports under Schedule B number 6205.30.1500, men's and boys' shirts of man-made fibre, containing 36 per cent or more by weight of wool, the Trade Data Division had conducted a shipment-by-shipment investigation of this export data. This investigation covered 1994 shipments of 7,554 dozen shirts which were made in 32 separate shipments. Most of the shipments were small and from different companies to different countries. However, four shipments were made by the same company to Honduras and represented 51 per cent of the total exports in this particular Schedule B number, i.e. 3,840 dozen. The Trade Data Division requested the Foreign Trade Division of the Bureau of the Census to review the data reported in these shipments. They found that all the shirts in these export shipments were in fact cotton woven shirts and were incorrectly classified. The 3,840 dozen shirts should have been classified under Schedule B number 6205.20.3000, men's and boys' woven shirts of cotton, not 6205.30.1500, for wool.

5.101 In the United States' view, the results of this investigation supported OTEXA's previous investigations and determinations that US export quantity data were not reliable. India's assertion that the estimate of approximate quantities of exports obtained by "industry sources cannot be held more reliable than the official data published by the United States Government" was wrong. Investigations conducted by OTEXA and the Bureau of the Census clearly indicated that US export quantity data were unreliable and inaccurate, making this information unsuitable for analytical purposes. CITA had, as mentioned above, obtained estimates from the two largest individual domestic producers of woven wool shirts and blouses, representing at least 60 per cent of domestic production, and they had indicated that no more than 10 per cent of US woven wool shirt and blouse production was exported. There was no basis to contend that information specifically requested from and supplied by companies about an important component of their sales would not be more reliable than unverified data that had been proven incorrect.

5.102 India argued that the calculation of export levels should have been made on the basis of reliable data when the determination of serious damage was made, and not subsequently in response to a query

by India in the context of a panel proceeding. The recalculations of the United States only served to highlight the point made by India that export data were essential for the calculation of market share, and that data and other information used in a determination of serious damage must be verifiable to constitute the basis of the demonstration required under Article 6 of the ATC.

5.103 India also noted the United States had claimed that it was consistent with the requirements of Article 6.2 and 6.3 of the ATC to collect data on total production by directly contacting the producers benefitting from the safeguard action and at the same time it claimed that the data on the exports of domestic production was not available because the official export statistics were not reliable. It was questioned why the United States considered it consistent with the ATC to collect the information favourable to domestic producers (total production) informally through direct contacts, but it was only after its determination of serious damage that the United States informally contacted two of the fifteen producers to obtain information on the share of its production exported. Why was this not done before making the determination?

#### **Data on Employment<sup>19</sup>, Man-hours and Wages**

5.104 India pointed out that, with respect to employment, man-hours and total annual wages, the information provided in the Market Statement referred to the "748 establishments in the US that manufacture woven shirts and blouses including shirts and blouses made from wool". The Statement made reference to the fact that "employment in the industry producing woven shirts and blouses including shirts and blouses made from wool had declined to 31,929 production workers in 1994, six per cent below the 1993 level and a loss of 2,125 jobs". If the loss of 2,125 jobs was placed in relation to a decline in United States production of woven shirts and blouses from wool of 5,000 dozen between January-September 1993 and January-September 1994, it implied that a decline in production of 3 dozen woven shirts and blouses on an annual basis led to the loss of one job, clearly an absurd inference. The Statement went on to claim that "the average annual man-hours worked dropped" and total annual production worker wages fell", even though both claims referred to the industry producing all woven shirts and blouses, not the portion producing woven wool shirts and blouses. The fact that data on the industry producing all woven shirts and blouses was entirely irrelevant to the sub-sector making woven wool shirts and blouses was confirmed by the information submitted by the United States to the TMB in August 1995 under "Other Relevant Information". In the August 1995 submission, it was made clear that 200 workers were employed in the production of woven wool shirts and blouses in 1994, as compared to 215 workers in 1993, a total loss of 15 positions. India considered that data on employment, wages and man-hours at a more disaggregated level for the specific industry producing woven wool shirts and blouses should have formed part of the Market Statement provided to India as the basis for the consultations in April 1995, and were requested by India at the time. Employment figures submitted by the United States in April 1995 and August 1995 were:

Year	April 1995			August 1995		
	Workers	Average annual man-hours	Total annual wages	Workers	Average annual man-hours	Total annual wages
1993	34054	62500000	\$423100000	215	413000	\$2713000
1994	31929	58900000	\$411200000	200	382000	\$2590000

Sources: April 1995 employment data from Table III of United States statement of serious damage; August 1995 employment data from Table III of United States submission to TMB.

<sup>19</sup>See also paragraphs 5.154 to 5.156.

5.105 India also noted that the data on employment in the wool shirt and blouse sector was specifically requested during the consultations and the Indian delegation was informed that such data did not exist. However, the data on employment in the wool shirt and blouse industry was included in the so-called "other relevant information" provided to the TMB on 28 August 1995.

5.106 India further pointed out that if the figures on employment provided by the United States in August 1995 were placed in relation to those provided by the United States in its April 1995 Market Statement, they indicated that the wool sub-sector accounted for 0.6 per cent of employment in the woven shirt and blouse industry. Since the sub-sector was an extremely small, if not negligible, portion of employment in the domestic woven shirts and blouses industry, the figures provided by the United States on employment, man-hours and wages in its Market Statement were totally irrelevant.

5.107 With respect to the above point, the United States claimed that it had indicated to India during consultations that employment data relating specifically to category 440 were not available, meaning only that such data could not be obtained directly from published sources nor was it regularly compiled for CITA. Data on employment and wages were published only at a higher level of aggregation than the woven wool shirt and blouse industry and at the time of the request the data given in the Market Statement was the most detailed that CITA was able to provide. It was not true, as India was implying, that the United States deliberately withheld such data from the Indian delegation during consultations. In actuality, when it became apparent that the justification for the request was being questioned by India because of the lack of this data and after indications from the TMB that such data would be a necessary element of their consideration of the case, CITA pursued ways of developing the requested information. Only after developing a methodology to further disaggregate the available data was OTEXA later able to provide, at the insistence of India during consultations and in accordance with the wishes of the TMB, more specific estimates based on additional information obtained from official and industry sources, which confirmed the downward trend of the broader category data reflected in April 1995.

5.108 In response to the points raised by India, the United States commented that it was correct that the employment-related information from the Market Statement was applicable to the industry producing woven shirts and blouses. CITA believed the more aggregated data to be generally indicative of the trend in the woven wool shirt and blouse industry at that time and received information from industry sources confirming this fact. OTEXA was later able to provide more specific estimates based on additional information obtained from official and industry sources.

5.109 India commented that the US had not explained why the more aggregated data of the total woven shirt and blouse industry was not indicative of the trend in terms of production, prices, profits, exports, imports, or any of the other relevant economic variables that should be reviewed prior to making a determination of serious damage or actual threat thereof. The increased production in the total woven shirt and blouse industry appeared to be ignored at the aggregate level because it contradicted the conclusion made by the United States concerning the trend in production data.

5.110 The United States referred to the above claim of India that the figures supplied by the United States on employment, man-hours, and wages were irrelevant because they covered the entire woven shirt and blouse industry and not just the woven wool shirt and blouse industry. The US pointed out that employment data presented in the Market Statement encompassed the entire US woven shirt and blouse industry and were derived from official Bureau of Labour Statistics (BLS) data covering even higher clothing production aggregates. This was the best information available at the time of the request for consultations. As a result of questions during consultations mandated by Article 6 of the ATC and as indicated by the TMB, the United States had provided the TMB with a breakdown of employment for category 440, woven wool shirts and blouses. CITA believed the more aggregated data to be generally indicative of the trend in the woven wool shirt and blouse industry at that time and received information from industry sources confirming this fact. CITA did not look at the trend



in production for the woven shirt and blouse industry since CITA already had production data relevant to the wool sector of this industry.

5.111 The United States pointed to India's claim that because later data had shown that the number of jobs lost in the woven wool shirt and blouse industry was estimated at only fifteen jobs, there was no basis for the US determination of serious damage or actual threat thereof. In this regard the US recalled that the domestic industry in category 440 was very small, representing only 15 firms. Even though the loss of 15 jobs may, at first glance, appear small in absolute terms, it represented almost a 7 per cent decline in the number of production workers in one year. It would be difficult to argue that this was not a significant relative loss of employment. Furthermore, the United States found no indication in the language of Article 6.2 and 6.3 of the ATC that the term "domestic industry" was reserved for larger groupings of companies with greater numbers of workers. Indeed, the language of Article 6.2 of the ATC referred to "safeguard action" and the "domestic industry producing like and/or directly competitive products." This language placed no legal barriers on the maintenance of a safeguard action where the product may be narrowly defined or the industry small.

5.112 In response to a question from India asking if the number of production workers certified as eligible to apply for Worker Adjustment Assistance (220 workers) was more than nine times the decline of production workers (24 workers) during the April 1993-April 1995 period, the United States explained that the 220 workers employed in facilities producing woven wool shirts and blouses, that were certified as eligible for Workers Adjustment Assistance during the two and a half year period, January 1993-July 1995, included production workers as well as those workers employed in administrative, sales, and distribution positions associated with such production. Not all workers certified as eligible for Workers Adjustment Assistance had permanently lost their jobs; in many cases, workers were partially separated or temporarily laid off. (See also paragraphs 5.157 to 5.159.)

### **Information on Prices**

5.113 India questioned if the information on domestic prices in the Market Statement could be considered to be representative of the situation of the particular segment of the industry producing woven wool shirts and blouses. According to the Market Statement, the industry statements were "based on information supplied by individual US firms domestically producing shirts and blouses", and "in general ... applies to companies producing men's and women's woven wool shirts and blouses". In other words, the information had been obtained from enterprises that manufactured woven wool shirts and blouses as part of their production of woven shirts and blouses. It was also questioned if it was appropriate to use informal surveys of enterprises as the basis for taking an action against the imports of a trading partner. During the bilateral consultations held in April and June 1995, India's delegation had sought clarifications from the United States' delegation regarding the underlying methodology that had been used. The United States delegation had confirmed that there was no procedure for regular or periodic compilation of price data. Data relating to price and the disaggregation of employment data for specified product segments such as woven wool shirts and blouses etc. were based on informal surveys of a limited number of firms producing these items. There was no scientific random method or a stipulated sample size for such surveys. It was also noted that the firms responding to such surveys were always aware that the purpose of the survey was to initiate a safeguard action to protect that segment of the industry.

5.114 In the view of India, the informal methods used to survey enterprises might explain the wide variations of the results of such surveys reflected in the different industry statements furnished by United States. For example, in the December 1994 request for consultations, the average producers' price was reported as \$215-225, while in the Market Statement, the average producers' price was reported as \$525-550. Since it was unlikely that producer prices would double in such a short period of time, this discrepancy between the two Statements by the United States cast doubt on the consistency of information collected by informal surveys.

5.115 The United States explained that the difference in the two prices was not caused by an increase in domestic prices; rather, the two prices represented the average prices of two different groups of products. Prices as reported in the December 1994 market statement for category 440 under the MFA reflected the average domestic producer prices for wool shirts comparable to wool shirts imported from India which were concentrated in one of the 24, 10-digit product classifications in the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) that made up category 440. This had been done because MFA determinations were based on sharp and substantial increases in products by country. The US had compared the average, landed duty-paid value of wool shirts imported from India classified under HTSUSA 6205.10.2010 - men's wool shirts, other than hand loomed and folklore shirts - with the average price of domestically produced men's woven wool shirts. The average US producers' price in the Market Statement issued in April 1995 under the ATC represented the average domestic price for all woven wool shirts and blouses produced in the US which competed with all woven wool shirts and blouses imported from every country in category 440. Under the ATC, the initial determination was on total imports in the category. Therefore, the \$525/\$550 per dozen average import price in the Market Statement was examined based on the United States' reading of Article 6.2 of the ATC requirement of an examination of "total imports". By contrast, the \$215/\$225 average import price in December 1994 was based on a particular product from a particular country (i.e. India) which was the analytical approach required by the MFA.

5.116 The United States, in response to a question by India whether the substantial price differences could be explained by quality differences (low priced imports and high priced domestic production), responded that the average landed duty-paid import value for total US imports of category 440, woven wool shirts and blouses, was \$US 187.23 per dozen while such imports from India were valued at \$US 133.85 per dozen or 75 per cent below the average US producers' price for domestically produced woven wool shirts and blouses, and 29 per cent below the category 440 average landed duty-paid value for total US imports of woven wool shirts and blouses. The price difference between domestically produced woven wool shirts and blouses and imports (including those from India) was primarily the result of differences in labour costs that varied among all countries producing woven wool shirts and blouses. Quality differences reflected in prices of woven wool shirts and blouses included differences in hand tailoring, the quality of wool fabric, fibre content, fibre blending, detail included, etc. which varied among all countries that produced woven wool shirts and blouses. The domestic price for woven wool shirts and blouses reflected the average price of all domestically produced woven wool shirts and blouses and was compared with the average landed, duty-paid import values at the category level (all products imported in the category) from each country supplying the US market and the average import value for all supplying countries. The United States did not accept India's assumptions that in a single market prices of competing products would "normally tend to converge" or that products of different quality and which were sold at varying retail prices could not "compete".

5.117 In response to the above point, India noted that the US had established a number of "quality differences" for these woven wool shirts and blouses, but offered no data on the various quantities that were produced among these various quality differences. It would have been interesting to see the trend in production of those shirts which in December 1994 were at \$225 per dozen for comparable shirts being imported from India, whereas the average US price for all woven wool shirts and blouses was \$550 per dozen. This would have indicated that not only was there a wide quality difference among the shirts produced in the United States, but also that those shirts which were directly comparable and competitive with the shirts from India may have increased or producers may have shifted to the higher value shirts. There must have been some discrimination in the presentation of price and production data that would indicate that US data were comparable to those products in category 440 which were claimed to be seriously damaging or actually threatening serious damage to US producers of "like and/or directly competitive products".

5.118 The United States noted in this regard that quality differences, as reflected in prices of woven wool shirts and blouses varied among all countries that produced woven wool shirts and blouses. The

domestic price for woven wool shirts and blouses reflected the average price of all domestically produced woven wool shirts and blouses and was compared with the average landed, duty-paid import values at the category level from each country supplying the US market and the average import value for all supplying countries. Domestic producers of woven wool shirts and blouses in the relatively narrow category 440 competed with imports from India and from all the other suppliers.

### **Information on Investment and Capacity**

5.119 India noted that the Market Statement had included information on investment and utilization of capacity based on industry statements. As follows:

Variable	Information provided in the April 1995 Market Statement
Investment	"Investment levels are stagnant across much of the industry."
Utilization of capacity	"Several companies reported a decline in capacity. One company reported ending all outside contracting production (formerly about 25 per cent of their manufacturing), representing the equivalent of closing four plants. The company's own manufacturing plants are now running at only 70 per cent of capacity. Furthermore, this company also operates several woollen fabric mills which supply the apparel manufacturing plants, and these mills are now running at about 65 per cent of capacity."

5.120 This information was, in the opinion of India, anecdotal and unverifiable. It was also unclear whether the information referred to the particular segment of the woven shirt and blouse industry producing garments made from wool. For example, the fact that "several companies reported a decline in capacity" did not appear to be significant in the context of an industry reported by the United States in its Market Statement as comprising 748 establishments. It was also argued that one company reported dropping of contracts or reduced capacity utilisation which was not an appropriate indication of the capacity utilisation for the entire industry. If the production capacities of several companies that had actually declined were related to the wool shirt and blouse industry, the decline in domestic production during 1994 should have been much more than an estimated 8 per cent. Other information provided in the Market Statement, (and reproduced below) was equally anecdotal and unverifiable. The information on "profits" was in fact on "profit margins", leaving it unclear whether total profits had declined or increased. India argued that the United States had provided no proof for the assertions in the industry statement regarding the role of "lower-priced" imports in industry developments.

Variable	Information provided in the April 1995 Market Statement
Employment	"Several companies reported declines in their employment, some of which were specifically attributed to the impact of competitive goods. Some employment declines were in the range of 25-30 per cent."
Sales	"Most companies reported sales declines as they lost market share to lower priced imports. Some companies experienced sales declines of 20 per cent."
Prices	"Prices of domestic product, manufactured mainly from US made fabric, are substantially higher than import competition."
Profits	"Profit margins have been eroded across the board in the wool shirt industry as raw materials costs increased while companies were unable to raise prices because of low-priced import competition."

5.121 In response to India's assertion that one company reporting dropping of contracts or capacity utilization was not an appropriate indication of the capacity utilization for the entire industry, the

United States argued that, given the small size of the woven wool shirt and blouse industry, the decline in capacity utilization from this one company alone was highly indicative of what was going on in the entire woven wool shirt and blouse industry. India had also alleged that the decline in domestic production during 1994 should have been more than an estimated 8 per cent; however, the loss in capacity utilization did not necessarily correlate with a commensurate drop in production during the same time-period. Rather, the loss in capacity utilization was an indication of deteriorating conditions in this industry that would lead to more severe production declines in the future.

**F. Causal Link Between Increased Imports and the Domestic Industry Situation**

5.122 According to India, the Market Statement submitted by the United States in April 1995 stated that "the sharp and substantial increase in imports of woven wool shirts and blouses, category 440, is causing serious damage to the US industry producing woven wool shirts and blouses". Since the figures on market share, employment and wages were, as argued by India, irrelevant, and the figures on domestic prices and information on other relevant economic variables were based on questionable survey methods and were unverifiable, the only real evidence provided by the United States in support of its assertion of serious damage was the fact that imports of category 440 had increased in 1994 by 69,296 dozen to nearly double the previous year's level, while domestic production had dropped marginally by 5,000 dozen during January-September. While it had been claimed by the US that production had declined due to imports, no analysis was provided to link the two. Nor was the decline in production proportionate to the increase in imports. In the industry statement, there were claims of loss of employment, closure of plants, loss of profits etc. arising from imports; however, no attempt had been made to link these developments to imports. The Market Statement submitted by the United States in April 1995 never went beyond assertions.

5.123 The United States argued that the causation requirement in Article 6.2 of the ATC, linking serious damage, or the threat thereof to total imports, had been met in this case. As evidenced in the information provided in the Market Statement and later to the TMB: (i) imports had not only increased, but surged; there were negative industry indicators occurring contemporaneously with those surging imports; (ii) about 7 per cent of the workers in the woven wool shirt industry had lost their jobs from 1993 to 1994 (from 1994 to 1995 there was a loss of 5.9 per cent); later data supported this trend that the adverse impact of imports on employment was evidenced by the US trade adjustment assistance certifications (by US law a connection has to be made to imports to be eligible for certification); and (iii) US market share had declined as imports increased and production declined at the same time that imports increased.

5.124 In the view of the United States, CITA had demonstrated in the Market Statement and at the TMB proceeding the causation required under the ATC. Although India has asserted on this issue that "positive evidence" was required, the United States found no evidentiary standard in the ATC and could only conclude that India was adding to the text of the ATC provisions that were not negotiated and were not intended as an interpretation of the Agreement by the US.

5.125 The United States considered that India was seeking to modify the ATC by creating a proportionality requirement to establish a causal link. India had claimed that the United States must demonstrate that the decline in production evident before CITA was "proportionate to the increase in imports". The United States found no such test in Article 6.2 or 6.3 of the ATC. Nor was there a factual or economic justification that would require a finding that serious damage to the domestic woven wool shirt and blouse industry by imports would be reflected by exactly proportional changes in production and imports. The United States' imports of woven wool shirts and blouses from a number of countries were limited by quotas. There was also a sharp seasonal variation in these imports as well as differences in the timing of production and import activity.

5.126 India stated that it had never proposed a proportionality requirement, but had remarked that US production had never varied previously with imports and that this lack of correlation suggested that factors other than imports must have influenced the level of domestic production and, in particular, developments on the export market. India agreed that factors such as sharp seasonal variations in imports and differences in the timing of production and import activity made it impossible to conclude from the mere co-existence of rising imports and declining production that the two were causally linked.

5.127 India further argued that a demonstration that there had been a rise in imports and a decline in production was not a demonstration that there was a causal relationship between the two; logically, additional facts and data were necessary. Article 6.2 of the ATC explicitly stipulated that a demonstration that there had been an increase in imports and serious damage or threat thereof was not sufficient but must be supplemented by an additional demonstration that the increase in imports and not other factors were causing the serious damage or actual threat thereof. This demonstration of causality had not been attempted by the United States.

5.128 Concerning the lack of a causal link, India referred to the data on the dollar value of exports submitted by the United States to the TMB in August 1995 which indicated that the value of exports of woven wool shirts and blouses from the United States had increased by 41 per cent in 1993 and by nearly 30 per cent in 1994. Since a major portion of domestic production of woven wool shirts and blouses was exported, the domestic industry was, in fact, experiencing a significant improvement in the period prior to the imposition of the safeguard action in July 1995. Also, in its submission to the TMB in August 1995, India had pointed out that imports from India of category 440 were steadily dropping in 1995. This statement was confirmed by figures on imports submitted by the United States. During the first six months of 1995, imports from India had amounted to 2,887 dozen, 67 per cent below the earlier year's figure. The condition of increased imports was therefore not met in July 1995 when the United States unilaterally imposed restraints on imports of category 440 from India. During the period 18 April 1996 to 2 August 1996, i.e. the first three months of the second year of the continuation of the restraints, the actual imports from India had been less than one per cent of the restraint level imposed by the United States. Thus the subsequent data and import statistics proved beyond any doubt that the attribution of actual threat of serious damage to the domestic industry to imports from India had been grossly misplaced and the finding of the TMB on this point was, therefore, wrong.

5.129 India further argued that the absence of a causal link between increased imports and declining production of woven wool shirts and blouses was demonstrated by figures over a longer time period. From 1985 to 1992, imports of woven wool shirts and blouses had fallen consistently and substantially, from 262,000 dozen in 1985 to 44,000 dozen in 1992. During the same period, production had also declined substantially, from 445,000 dozen to 80,000 dozen. Thus, declining production was accompanied by declining imports for the period 1985-92. In 1993, the United States market for woven wool shirts and blouses had begun to recover, with both production and imports rising. In 1994, imports nearly doubled, while production declined by 7.5 per cent. Since a major portion of United States production was exported, the increase in imports was obviously related to expanding domestic demand for woven wool shirts and blouses. The United States industry producing woven shirts and blouses had probably not anticipated this development in the wool segment since the market had been declining for a number of years. One explanation for a lack of correlation between imports from India and US domestic production was that Indian and US products were not actually competing with one another in the US market because they fell into different price and quality categories. Another possible explanation was that, while India supplied the US market, the US producers supplied both the domestic and the export markets. India's exports, therefore, varied solely with the demand in the US market; US production varied also with the demand in other countries.

5.130 India noted that, in respect of the import data going back to 1983, these data related to the imports and production of products defined in category 440, were derived by the United States

Department of Commerce, OTEXA, and were contained in their periodic publications. The import data for 1983 and 1985 were the total reported imports of woven wool shirts and blouses that were in chief value wool while the reported imports from 1989 through 1994 were for woven shirts and blouses in chief weight wool and in chief weight man-made fibre if they contained 36 per cent or more by weight of wool. There was no publicly available data for production and it was assumed that this data relating to category 440 by OTEXA was derived by that agency for use by CITA in assessing the US domestic market for these products.

5.131 The United States considered that the reference by India to production and import data going back as far as 1983 was an effort to deflect attention away from the surge in imports from India that had occurred in the time leading up to the issuance of the request for consultations. India's proposed time series dating back to 1983 was technically flawed as the production data cited covered a time period that included two census survey benchmark years, 1987 and 1992. Data prior to those years were not comparable to the subsequent years' data due to differences in the composition of the survey sample. Import data were likewise not comparable over the period of years given, because, beginning in 1989, the United States had shifted to the Harmonized Tariff System classification. This shift involved a change in the wool shirt definition from a "chief value wool" basis to a "chief weight wool" basis, that caused the data prior to 1989 to be not comparable with subsequent years' data. On India's assertion that a major portion of US production was exported and its subsequent assumption that as a result the domestic industry was in fact experiencing improvement, the United States noted that the assertion and the assumption were false because export data was extremely unreliable. The United States had already illustrated that point by confirming that only 10 per cent of the production was exported by the industry representing 60 per cent of US production and that there were misclassifications of cotton exports under the wool heading.

5.132 India considered that the US' view in the first sentence of the preceding paragraph was a misrepresentation of the arguments made by India, which referred the Panel to the absence of a consistent relationship between changes in imports and changes in domestic production. This argument would remain valid irrespective of the shift in the United States data collection methods. For instance, between 1985 and 1989, a period in which data on imports and production were presumably collected on a consistent basis, both imports and production declined substantially. Starting from 1990, there was again no consistent pattern between changes in imports and domestic production, undoubtedly reflecting developments in the domestic and export markets. It was for this reason that India had asked for information on exports.

5.133 The United States argued that India's assertion that between 1985 and 1989, data on production had been collected on a consistent basis was not true. As stated in the US' first submission, India's data covered a time period that included one census survey benchmark year, 1987. Data prior to that year was not comparable to the subsequent years' data due to differences in the composition of the survey sample.

5.134 In response to these arguments, India submitted that the reliability or comparability of production data could not differ significantly from one census survey to another if all the census surveys were objectively and scientifically done. In assessing the role of imports in influencing or not influencing the production trends, it was not only justified but essential to look at the relation between imports and production during as long a period as possible. These data established the fact, over a significant period of time, that changes in import levels were not correlated proportionately or otherwise to the changes in domestic production. In terms of the US shift to the Harmonized Tariff System, the US submission was factually incorrect. The wool shirt definition prior to the Harmonized Tariff System had been based on a chief value determination. Under the Harmonized Tariff System, the classification was based on a chief weight determination, but the US had developed statistical breakdowns for both exports and imports to identify shirts and blouses in chief weight man-made fibre but containing 36 per cent or more by weight wool. The statistical breakdowns were developed and implemented

in order to identify those woven shirts and blouses in chief weight man-made fibre, but, on the basis of estimates by the United States, similar to those woven shirts and blouses that were in chief value wool. Thus, these chief weight man-made fibre shirts and blouses were included as part of category 440 even though they were in fact man-made fibre shirts and blouses.

5.135 In response, the United States argued that India's assertion was incorrect that the reliability and comparability of production data could not differ significantly from one census survey to another. First, there was no issue of reliability but only of comparability. Comparability was lost because, in the process of revising the five-year Census of Manufacturers, new firms were identified and a new sample and sample size was established which included a different group of firms than the previous survey. As a result, the five-year Census of Manufacturers established a new benchmark, and data generated by this new survey were not directly comparable with previous years' data which were generated from reports of the old sample of firms. The Bureau of the Census production data in its quarterly Current Industrial Report (CIR) were based on data collected from firms identified in the five-year Census of Manufactures. Starting with production data collected for 1992 in the CIR, the number of firms originally identified in the 1992 Census of Manufactures was revised every year with the Annual Survey of Manufactures, which was taken during the intermediate census years. The annual revisions to the sample size were reflected in the CIR production data. This data collection process was not in effect prior to 1992.

5.136 Regarding India's statement on the US shift to the HTS, the United States stated that it did develop statistical breakdowns to identify wool garments that prior to the HTS were based on a chief value determination. When the wool clothing category system was created, it was determined that imported clothing of fibres other than wool but containing greater than 17 per cent by value wool actually competed in the same market as domestically produced wool clothing, which for production data purposes had always been defined as 51 per cent or greater of wool by weight. When the United States adopted the Harmonized Tariff Schedule (HTS) in January 1989, this definition was retained in shifting from a chief value to a chief weight system by altering the definition for imported wool clothing to those containing 36 per cent or greater wool by weight. The 36 per cent determination was done for all wool clothing categories, not just woven wool shirts and blouses. The fibre content that prevailed in tailored clothing had the dominant influence on the conversion from the chief value concept to the chief weight concept. For the reasons outlined above, it was not valid to compare data across time periods containing these breaks in the continuity of the reported data, even with the caveats that India proclaimed.

#### **G. Attribution to India**

5.137 The United States argued that, having properly established both (a) the existence of serious damage or actual threat thereof, and (b) the causal relationship between such damage or threat by reason of total imports, the next step was for CITA to determine to which Member or Members the cause of serious damage or actual threat thereof could be attributed. There was no requirement under Article 6.4 of the ATC for the US to make a determination that India was the sole cause of the serious damage or actual threat thereof. Indeed, that finding would already have been established under Article 6.2 of the ATC before it would be possible to proceed to the analysis under Article 6.4. Rather, the United States was required to determine to which of various Members' imports to attribute the damage or threat. The United States rejected any interpretation that would suggest that the test in Article 6.2 of the ATC was integral to or folded into the test in Article 6.4 of the ATC. That would not be a legitimate reading of the text in accordance with principles of international law found in Article 31 of the Vienna Convention on the Law of Treaties.

5.138 The United States further argued that it had followed the requirements under Article 6.4 of the ATC in attributing the serious damage or actual threat thereof to India.<sup>20</sup> Article 6.4 of the ATC provided that, after a Member had determined that serious damage or actual threat thereof existed, the Member must attribute that damage or threat to a Member or Members, on the basis of a sharp and substantial increase in imports from the Member, actual or imminent, and other factors. It was clear here that the phrase "actual or imminent" accompanied Article 6.4 of the ATC reference to "sharp and substantial" increases of imports from a Member or Members - not the "serious damage, or actual threat thereof" examination required under Article 6.2 and 6.3 of the ATC as offered by India.

5.139 The United States noted that imports from India, by any relevant benchmark, had increased sharply and substantially. India was the largest supplier of woven wool shirts and blouses (category 440), to the United States during the year ending January 1995, with 54 per cent of total US imports. Imports from India had reached 76,698 dozen for the year ending January 1995, five times the 14,914 dozen imported in the year ending January 1994. In addition, imports from India for the year ending January 1995 had exceeded the quota levels the United States had in place with three other suppliers. Further, the United States had examined the levels of imports from India compared to imports of woven wool shirts and blouses from other sources, market share and import and domestic prices at a comparable stage of commercial transaction. The data had shown that imports from India for the year ending January 1995 were equal to total US production of woven wool shirts and blouses in the year ending September 1994. In 1993, imports from India in category 440 had been 20 per cent of total 1993 US imports of category 440 and was 18 per cent of US production in 1993. This information, coupled with the persistent decline in production up to that point and reports from the industry that production had continued to fall, reinforced the perception that further damage to the industry was imminent. As described in the Market Statement, the US had found that US imports of woven wool shirts and blouses from India in category 440 during 1994 had entered at an average landed duty-paid value of \$133.85 per dozen, 75 per cent below the US producers' average price for woven wool shirts and blouses. The US' examination of such factors had fully supported its determination that serious damage or actual threat thereof was attributed to India's exports to the United States. Other relevant information provided to the TMB, some of which was provided as a result of inquiries from India during bilateral consultations, further buttressed the case for attribution. By the time the United States had presented its case to the TMB more up-to-date data showed that imports from India were 49 per cent of total US imports; 33 per cent of the total market in 1994; and 96 per cent of US domestic production in 1994 (this share increased to 98 per cent of US domestic production in the year ending June 1995). Therefore, the trend and current status described in the Market Statement was fully supported by the time of the TMB review.

#### **TMB Review of the United States Action**

5.140 The United States pointed out that it had presented its case to the TMB as provided in Article 6.10 of the ATC and had fully responded to all requests by the TMB for information. Furthermore, as expressly set out in Article 6.10 of the ATC, the US had provided the TMB with other relevant data on the industry's condition. The TMB had held hearings over a period of days at which the matter was addressed in considerable detail. India had presented extensive arguments and at the end of its proceedings, the TMB had determined that "actual threat could be attributed to the sharp and substantial increase in imports from India".

5.141 The United States considered that the TMB finding upholding the US determination and rejecting India's challenge was consistent with Article 6 of the ATC. If the consultations provided for in Article 6.7 of the ATC did not result in a mutual solution, the importing Member must exercise its

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<sup>20</sup>An attribution of serious damage or actual threat thereof was also made against Hong Kong in respect of this produced category.



option to take action to limit the relevant imports within 30 days after the 60 day time-frame noted in Article 6.10 of the ATC. Once that action was taken, Article 6 of the ATC required automatic review by the TMB. The TMB must review the case, determine whether the safeguard action was justified and make appropriate recommendations to the Members concerned. In addition to the data supplied in accordance with Article 6.7 of the ATC, Article 6.10 of the ATC also provided that the TMB "shall have available to it any other relevant information provided by the Members concerned". Importing Members must notify the Chairman of the TMB with relevant factual data at the same time the request for consultations was made. Subsequent and additional data supplied to the TMB supported the original determination and were entirely appropriate under the ATC.

5.142 In the view of India, the TMB had not upheld the US action; rather, the US action had been based on a situation of "serious damage" and the TMB did not find that a situation of "serious damage" was demonstrated by the data presented by the US Government.

#### **H. Status of Other Relevant Information**

5.143 In the view of India, the TMB had made a serious error in permitting the United States to submit information in August 1995 designed to justify its claim before the TMB that its safeguard action was based on "actual threat of serious damage" though "actual threat of serious damage" had not formed the basis for the consultations held with India. Article 6.7 of the ATC required the importing Member seeking consultations to supply to the exporting Member "specific and relevant" information pertaining to the reference period in regard to factors on which it had based its determination of serious damage or actual threat. Once the 60-day consultation period was over, any new information could only be introduced by cancelling the request for consultations and submitting a new request for consultations on the basis of the new information; otherwise, the requirement to supply specific and relevant information during the consultation period would be meaningless.

5.144 India pointed out that, according to Article 6.10 of the ATC, the TMB, when reviewing the safeguard action after the expiry of the 60-day consultation period, shall have before it not only the information supplied by the Member seeking consultations in accordance with Article 6:7 but also "any other relevant information provided by the Members concerned". This "other relevant information" could, for instance, be a narrative report by the importing Member relating to the restraint imposed but could not be new data introduced to justify the determination on which the consultations had been sought. This possibility could not be construed to permit the Member initiating the action additional time after its action to develop further data. If certain information or data had either not been available to CITA or had not been considered by CITA at the time of its determination of serious damage, such information or data could not be introduced by CITA at a later stage as "other relevant information" to justify *ex post*, the application of a safeguard action.

5.145 The United States, in response to India's allegation that information not available to CITA or not considered by CITA at the time of its determination of serious damage could not be introduced by CITA at a later stage to justify the application of a safeguard action, stated that it had provided a submission of "other relevant information", as permitted in Article 6.10 of the ATC, in order to provide updated data to reflect the most current conditions in the domestic market and as regards imports, and also to respond specifically to concerns raised in bilateral consultations and not to "justify" the decision. The United States directed the Panel to Article 6.10 of the ATC which provided that the TMB shall have available to it not only the data submitted at the time of the request, but in addition, "any other relevant information". Further, there was no definition of that phrase.

5.146 India considered that, if the TMB were to give the importing Member the right to introduce new data at the time of the review by the TMB, it would effectively deny the exporting Member the right to challenge that information in prior bilateral consultations and would accord the importing Member the right to skip an important step in the procedures that had to be followed under Article 6 of the

ATC before a safeguard action may be taken. Thus, by allowing the introduction of new data at the time of its review, the TMB would effectively be waiving the importing Member's obligations. The TMB, however, did not have the authority to accord Members the right to derogate from the ATC. As the TMB did not give any reasons for its decisions on the safeguard actions, it was not known why it endorsed a safeguard action based on alleged "actual threat" of serious damage on which no prior consultations had been held, and to consider information that was not the subject of consultations. India considered that this decision deprived it of the right to hold consultations with the United States, based on relevant and specific facts, on the specific safeguard action endorsed by the TMB.

5.147 India repeated that the data submitted to TMB on 28 August 1995 was entirely new in some of the elements such as the number of establishments, employment, wages, etc. for the woven wool shirts and blouse segment of the woven shirt and blouse industry. The United States' Market Statement furnished in April 1995 did not include any data on exports. In its August 1995 submission to the TMB, the United States provided data on the dollar value of exported woven wool shirts and blouses. In other factors many of the figures were revisions to what had earlier been supplied to the Indian delegation. Therefore, the fresh data presented before the TMB did not amount to "other relevant information" as defined in Article 6.10 of the ATC.

5.148 The United States disagreed with this view and pointed out that the "other relevant information" was provided in direct response to issues raised in bilateral consultations, and as petitioned by the TMB. No data on the number of establishments was made available in the submission of "other relevant information".

5.149 In a response to the Panel, the United States argued that Article 6.10 of the ATC expressly provided that the TMB "shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7 [Article 6.7 of the ATC], as well as any other relevant information provided by the Members concerned". There was no definition of "other relevant information" and no limitation on how much or what kind of information could be supplied to the TMB. The only stipulation was that the information be "relevant". Therefore, the United States interpreted the ATC to allow new or additional data to confirm the data available at the time of the determination.

5.150 In response to the preceding, India argued that revisions to the data which formed the basis for the determination would require a re-examination of the basis for the determination and result in either the withdrawal of the action, or the initiation of a new action. The new data submitted by the US had not been used by it in making its initial determination, nor could it be characterized as data which clarified or confirmed the data used by the US to determine and demonstrate that its actions were consistent with Article 6 of the ATC. Article 6.7 of the ATC was very clear in requiring that the Member seeking consultations shall, at the time of requesting consultations, "communicate to the Chairman of the TMB the request for consultations, including all the relevant factual data outlined in paragraphs 3 and 4, together with the proposed restraint level". The submission of "other relevant information" could not be used to justify the absence of "all the relevant factual data" required to be submitted at the time of the request for consultations, nor could it be substituted in the review to determine if the situation of serious damage, or actual threat thereof, had been demonstrated in accordance with the criteria of Article 6 of the ATC.

5.151 India pointed out that with the exception of import data, there appeared to be no reliable published official sources indicating any of the data regarding a woven wool shirt and blouse industry in the United States. India further argued that even if the supplementary information submitted by the United States after the consultations was taken into account, the United States could not be deemed to have met the requirements of Article 6 of the ATC. It was the position of India that the TMB review of the United States' safeguard action should have been conducted only on the basis of the documentation provided to India in April 1995 at the time of the consultation request. The information submitted to the TMB was, therefore, irrelevant for the proceedings of the Panel. However, even if this

information was taken into account, the United States could not be deemed to have fulfilled the requirements set out in Article 6.2 and 6.3 of the ATC.

5.152 The United States reiterated that, following the issuance of the Market Statement, there were consultations, questions were asked during consultations and during the TMB review. At the end of this extended process in July, there were additional data that CITA did not have access to in April 1995; some of the employment and employment-related data reflected in the Market Statement was not focused on the woven wool shirt and blouse industry. Some of the evidence obtained after consultations and for the TMB process was different, some of the data were more focused on the domestic industry producing woven wool shirts and blouses, but all of the data pointed in the same direction as the data originally outlined in the Market Statement (i.e. that the domestic industry was seriously damaged or actually threatened thereof as a result of total imports and that imports from India were contributing to the condition). Where there were data that clearly did not meet the test of reliability, such as exports, it was not used by CITA in reaching its determination. Even the factors that were more indicative of trends or the situation at the time, according to Article 6.3 of the ATC, did not have to be alone or together determinative for CITA. CITA had followed its normal practice and procedures in using and deriving information from reliable published official sources. CITA had also followed its normal practice by consulting with the key producers, representing a substantial percentage of domestic production, on a business confidential basis, to verify certain information.

5.153 India argued that it followed from the above that a Panel reviewing whether a safeguard action met the requirements of the ATC could also rely only on the information made available by the importing Member to the exporting Member during the consultations, that is, the Market Statement. If the Panel were to proceed otherwise, it would effectively deny the exporting Member the right to hold meaningful consultations on the basis of the information that had formed the basis of the determination and this would create a serious moral hazard as the importing Member would then no longer have an incentive to submit to the exporting Member all the information available to it at the time of the consultations. Moreover, it would enable importing Members to initiate a safeguard action merely on the basis of conjecture and then maintain it if subsequent information were to confirm the facts. India cited the two following instances where the US had attempted to introduce information in August 1995 that was not presented at the time the initial action was taken.

#### **Employment in "Other Relevant Information"**

5.154 India noted that in the first instance, the US data for employment (Table III of the Market Statement) included employment data for all production workers producing woven shirts and blouses. In August 1995, the US had presented an "updated Table III" which purported to identify those production workers producing woven shirts and blouses that were primarily engaged in producing woven wool shirts and blouses. These "newly identified" workers constituting the "woven wool shirt and blouse industry" represented 0.6 per cent of all production workers engaged in the woven shirt and blouse industry. These new data were derived from the 1992 Census of Manufacturers, Apparel Current Industrial Reports, Bureau of Labour Statistics, and industry survey. As these data were not publicly available in the Census publications, or from the Bureau of Labour Statistics, it was presumed that these data came from an industry survey that was not prescribed and possibly was not available when the determination to request consultations was made in April.

5.155 In response to the points on employment in the preceding paragraph, the United States explained that the processes used by CITA demonstrated the fallacy of India's argument. As a general policy, after a request was made, the efforts to collect data and other relevant information were not discontinued. CITA was satisfied that it had sufficient information at the time of the request to take action based on the existence of serious damage or actual threat thereof to the domestic woven wool shirt and blouse industry. However, during and after the consultation period, additional enquiries and analysis had been conducted to refine the existing information and to furnish more data pertaining to the case,

especially after it appeared that the adequacy of CITA's information was being challenged. Unlike other regimes, there was no bar or requirement under the ATC concerning this action by CITA. By providing more information, CITA was not trying to justify its action after the fact, but rather to make this information available in response to questions from India during consultations and in an effort to reach a mutually satisfactory agreement in this case. The United States also was later informed that the TMB felt it needed employment-related data on a more specific category level basis in considering the matter.

5.156 The United States further explained that, regarding the US employment data made available in this case, at the time CITA requested consultations it had data on the number of workers in the woven shirt and blouse industry and information from consultations with industry sources indicating that the declining trend of employment at the broader industry level was reflective and representative of the situation in the more narrowly defined woven wool shirt and blouse industry. After further analysis and more discussions on a business confidential basis with the two major manufacturers of woven wool shirts and blouses, an employment number was computed indicating the number of employees specifically producing woven wool shirts and blouses and these data were presented as part of the other relevant information at the TMB session in August 1995.

#### **Establishments in "Other Relevant Information"**

5.157 The second instance cited by India involved the location of the establishments producing woven wool shirts and blouses. In the Market Statement, the "Industry Profile" stated that the establishments producing woven wool shirts and blouses were located mainly in Oregon, Washington, Nebraska, and Iowa. Nonetheless, the new data provided by the United States in its August Market Statement included, for the first time, a listing of workers certified for trade adjustment assistance in the "woven wool shirt and blouse" area. Of the 200 or so production workers that constituted a presumed "woven wool shirt and blouse industry", the United States presented data that indicated 220 workers had been certified for trade adjustment assistance between 25 April 1993 and 15 April 1995. Of interest in the US presentation was the fact that these workers were from Tennessee, Utah, Pennsylvania, and South Carolina. These States were almost a full continent removed from where the establishments producing these woven wool shirts and blouses were located. This raised significant questions as to whether or not the data reviewed by the United States in April 1995 was accurate and/or relevant in light of this new data presented in August 1995.

5.158 In regard to India's views on the location of the establishment, the United States noted that the two major producers of woven wool shirts and blouses, accounting for more than 60 per cent of domestic production, had wool clothing manufacturing facilities in Oregon, Washington, Nebraska, Iowa and Pennsylvania. These two manufacturers also contracted out the production of woven wool shirts and blouses. One of these producers of woven wool shirts and blouses had to end all outside contracting production due to the impact of imports. This was reported to be the equivalent of closing four plants. This reduction in contract work could account for the Workers Adjustment Assistance certification for workers at the production facilities in Tennessee, Utah and South Carolina. The other major producer of woven wool shirts and blouses had production operations in Pennsylvania, which would account for the Workers Adjustment Assistance certification for workers at the production facility in Pennsylvania.

5.159 The United States referred to India's arguments in this section and noted that data available to CITA in April 1995 had shown, among other things, very high levels of increased imports and declining US production and the subsequent and additional data supplied by the United States to the TMB had confirmed the validity of the original determination and constituted "relevant" data that were expressly allowed for TMB review under Article 6.10 of the ATC - which was clear after the 60-day consultation period.

**I. Consultations and Endorsement of Actions by TMB: Additional Procedural Requirements**

5.160 India argued that the safeguard action on which the United States had held consultations had not been endorsed by the TMB and the safeguard action which had received the endorsement of the TMB had not been the subject of consultations. Therefore, the safeguard action did not meet the procedural requirements in Article 6 of the ATC, which were that the safeguard action must have been the subject of bilateral consultations and have been endorsed by the TMB. As the TMB had not endorsed the safeguard action, the United States should have withdrawn it. This requirement of an endorsement by the TMB of the safeguard action ensured a multilateral examination of the conformity of the safeguard action with the provisions of the ATC; both the right to consultations and the right to a multilateral examination were extremely important shields against abuse of the ATC safeguard provisions.

5.161 India based its argument in this regard on the nature and purpose of the ATC and the circumstances of its conclusion. India essentially invited the Panel to interpret Article 6 in such a manner as to give effect to the pivotal role of that provision in preserving the balance of rights and obligations under the ATC. A contextual- and purpose-oriented interpretation of Article 6 of the ATC must lead the Panel to the conclusion that the creation of a right to discriminatory safeguard action without any offsetting right to compensation or retaliation nor any multilateral endorsement would put exporting Members into a legal position under the ATC worse than what they had under the MFA and would consequently be contrary to the basic objectives of the ATC. India did not believe that these arguments could be dismissed merely on the ground that the ATC referred to "recommendations" and not to "decisions" when it required the TMB to act. Further, if, notwithstanding the fact that the ATC obliged WTO Members to submit all their safeguard actions to the TMB and that the TMB clearly had the obligation to examine the ATC-conformity of all safeguard actions and to make recommendations on all of them, the Panel were to rule that a failure to make a recommendation had no legal consequence, the Panel would fundamentally upset the balance of rights and obligations under the ATC. The TMB would become the only body of the WTO whose decision whether or not to make a recommendation was legally irrelevant.

5.162 The United States referred to India's arguments on TMB endorsement and expressed its view that CITA's determination had been based on a showing of "serious damage, or actual threat thereof", and there was no requirement that the TMB "endorse" a measure for it to be maintained. The TMB had reached consensus that the finding of actual threat of serious damage attributable to India in this case was justified. It made no finding for or against "serious damage" *per se* and the TMB was only required under the ATC to make "appropriate" recommendations after examining serious damage or actual threat thereof. Whatever a TMB finding or recommendation was, Members were only required under Article 8.9 of the ATC to "endeavour to accept in full the recommendations of the TMB." There was no further obligation concerning the maintenance of a safeguard in the ATC on that matter. For a Member to maintain a transitional safeguard, TMB approval was not required.

5.163 The United States also referred to India's assertion that there was no difference between "recommendations" of the TMB and this Panel, the DSB and the Appellate Body. The texts of the ATC and DSU clearly demonstrated the error of this argument. The report of this Panel or an Appellate Body Report adopted by the DSB required action on the part of a complaining party receiving a recommendation to bring its measures into conformity with its obligations. The DSU in Articles 21 and 22 specified those actions and the consequences of inaction. As already pointed out, Article 8.9 of the ATC only required with respect to TMB recommendations, that Members "endeavour to accept in full". There was no requirement in the ATC concerning TMB findings and observations. Moreover, pursuant to Article 8.10 of the ATC, Members then had recourse to GATT Article XXIII and DSU procedures.

5.164 Also concerning the need for TMB endorsement of a determination, India noted that under Article 1.6 of the MFA, all rights of the contracting parties under GATT 1947 had been fully reserved

and, notwithstanding the existence of the MFA, they had not been legally entitled to take safeguard actions inconsistent with Article XIX of GATT 1947. If an exporting country did not agree with the determination of an importing country, it could invoke its rights under GATT 1947 and thereby force that country to take non-discriminatory action under Article XIX of GATT 1947. That possibility, though hardly made use of, was part of the checks and balances under the MFA. Given that legal situation, the TSB could only perform conciliatory functions. Under the ATC, however, the exporting Member's rights under GATT 1994 were legally curtailed. Importing Members were now legally entitled to take discriminatory safeguard action without having to compensate the exporting Member concerned. The textiles exporting Members could no longer invoke their right to non-discriminatory treatment and to compensation under Articles XIII and XIX of GATT 1994 if they disagreed with the determinations on which the importing Member had based its safeguard action. This significant loss of GATT rights had been compensated by the requirement of a formal review and endorsement by the TMB of all invocations of the ATC's safeguard provisions as well as an explicit reference in Article 8.10 of the ATC to the right of a Member to bring the matter before the DSB and invoke Article XXIII:2 in case the matter remained unresolved even after completion of the TMB process. This requirement did not take away from the importing Members any of the rights they had under the GATT or under the MFA. If the importing Member did not obtain the TMB's approval, it could exercise its right to integrate the product concerned into GATT 1994 and invoke Article XIX to protect its industry. The requirement of a TMB approval, therefore, did not mean that importing Members could take safeguard action only with multilateral approval; it meant that they needed multilateral approval if they wished to do so on a discriminatory basis and without offering any trade compensation to the exporting Member.

5.165 In response, the United States disputed India's claims that the US characterization of the MFA was wrong. India had claimed that the MFA was not an exception to the GATT and Article 1.6 of the MFA, saying that the MFA would not affect the rights and obligations of participating countries under the GATT. India, however, neglected to mention paragraph 7 of that same Article, which provided "[t]he participating countries recognize that, since measures taken under this Arrangement are intended to deal with the special problems of textile products, such measures should be considered as exceptional, and not lending themselves to application in other fields." It was this paragraph that the United States had in mind when it stated earlier that the MFA was established as an exception to the GATT rules regarding application of quantitative restrictions.

5.166 India further emphasized that the safeguard mechanism in the ATC was a compromise reached during negotiations with a stipulation that it should be applied as sparingly as possible and with disciplines which would reduce the risk of misuse. The "two-tier approach" with regard to determination as well as the requirement for review by the TMB, contained in Article 6 of the ATC, was meant to reduce the risk of misuse of the transitional safeguard mechanism. According to Article 6.9 to 11, all safeguard actions must be submitted to the TMB for examination and may be introduced or maintained by the importing Member only if they had been endorsed by the TMB. The required examination by the TMB would be meaningless and the purposes of Article 6.10 of the ATC could not be achieved if unilateral safeguard action could be taken or continued without the endorsement of the TMB. The ATC incorporated the necessary balance in Article 6 of the ATC by giving importing Members the possibility to resort to safeguard action during the transitional period and by giving the exporting Members the protection of a review of the safeguard action by the TMB, and if necessary, by a panel. This balance would be lost if the Panel were to find that the United States was entitled to take the safeguard action notwithstanding the lack of endorsement by the TMB of the specific action it proposed to take when it requested India to consult.

5.167 India further pointed out that, in order to be consistent with the ATC, a safeguard action must meet the procedural requirements of Article 6 of the ATC. For actions other than agreed restraints, these requirements were essentially the following:

- (i) "The Member proposing to take safeguard action shall seek consultations" (Article 6.7).
- (ii) This request "shall be accompanied by specific and factual information" (Article 6.7).
- (iii) If the consultations fail and an action is taken, the TMB "shall promptly conduct an examination" (Article 6.10).
- (iv) Following that examination, the TMB "shall ... make appropriate recommendations to the Members concerned" (Article 6.10).

By using the term "shall" in all of the above-cited provisions, the text of Article 6 of the ATC made clear that a safeguard action would be consistent with the ATC only if all of the above requirements, including the requirement that the TMB make a recommendation on the safeguard action, were fulfilled. In the case before the Panel, the TMB had made no recommendation on the safeguard action on which the United States had made a determination and on which it had consulted with India and the procedural requirements listed above had, therefore, not been met.

5.168 The United States argued that although the TMB had an important role in reviewing safeguard actions and Members were required to endeavour to comply with its recommendations, there was no requirement that the TMB "endorse" a measure for it to be maintained. Furthermore, there was no requirement that the TMB make a finding on both serious damage and actual threat. Article 6.10 of the ATC provided that the TMB "conduct an examination of the matter, including the determination of serious damage, or actual threat thereof, and its causes, and make appropriate recommendations ...". Contrary to India's claim, there was no requirement that the TMB produce a consensus finding on the US' complete determination of "serious damage, or actual threat thereof". The TMB had not made any comment on the existence of serious damage with respect to category 440, but instead had noted that there had been a consensus in the TMB on the existence of actual threat and that such actual threat could be attributed to the sharp and substantial increase in imports from India (G/TMB/2 and G/TMB/R/3). Therefore, it was not appropriate to assume that there was any finding or conclusion by the TMB concerning serious damage one way or the other. The United States referred to India's claim that the ATC had specifically assigned to the TMB legal functions that had not been assigned to the TSB. The US, however, was of the view that Article 6.9 and 6.10 of the ATC virtually mirrored, to the extent of TSB responsibility, Article 3.4 and 3.5 of the MFA, respectively. Therefore, India's contention that the drafters of the ATC had given the TMB powers beyond those accorded to the TSB was without merit.

5.169 India pointed out that the ATC was not the only WTO agreement that attached legal consequences to the existence or non-existence of a recommendation of a WTO body. The General Council may adopt a budget only if the Committee on Budget Finance and Administration submitted a "recommendation" to it (Article VII of the WTO Agreement). The Ministerial Conference may adopt an interpretation of the GATT only on the basis of a "recommendation" by the Council for Trade in Goods (Article IX of the WTO Agreement). A WTO Member may suspend concessions under Article 22 of the DSU only if the "recommendations" of a panel or the Appellate Body were not implemented within a reasonable period of time. India concluded from this that the argumentation of the United States invited the Panel to take an extraordinary step, namely, to declare the TMB to be the only WTO body whose decision to make or not to make a recommendation would not have any legal consequence and this in spite of the fact that the ATC had specifically assigned an important legal task to this body.

5.170 India rejected the characterization of the TMB by the United States as a "special board and conciliation type body" similar to the TSB and the United States' contention that a safeguard action may be taken under the ATC even if the TMB failed to make a recommendation on it. India pointed out that, according to Article 8 of the ATC, the TMB was to

"... supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement ..."

while the corresponding provision of the MFA, (Article 11) stated that the task of the TSB was to "... supervise the implementation of this Arrangement".

5.171 According to India, there was no reference in the above provision for a TSB examination of the MFA-consistency of all safeguard actions. Moreover, the TSB merely had the task to review, "... at the request of any participating country, ... promptly any particular measure or arrangements which that country considered to be detrimental to its interests ...". The complaints submitted to the TSB could, therefore, be complaints of a non-legal, economic nature. It clearly followed from the above that the TMB had a legal function because its central task was to examine the ATC-conformity of all safeguard actions, while the TSB had merely a conciliatory function because it was to become active only if countries requested it to consider measures detrimental to their interests. By declaring that the TMB had functions equivalent to those of the TSB, the United States had simply ignored the fact that the mandates of the TMB and the TSB were defined in completely different ways in the legal instruments establishing them.

5.172 India indicated, while fully reserving its position on the question of endorsement, that in the case before the Panel the question of whether the TMB must approve the safeguard action need not necessarily be answered. Given the absence of any decision of the TMB on the safeguard action on which the United States had consulted with India, it would be sufficient for the Panel to rule that a safeguard action under the ATC may only be taken if the TMB had made a recommendation and to leave aside the question of whether approval was required. This would enable the Panel to rely exclusively on the explicit wording of Article 6.10 of the ATC ("The TMB shall ... make appropriate recommendations") rather than on the contextual and purpose-oriented interpretation of that provision that India considers to be the appropriate one. Therefore, in case the Panel were to conclude that a TMB endorsement was not required or if it were to conclude that the case did not require a ruling on this point, India subsidiarily requested the Panel to find that the safeguard action of the United States was inconsistent with its obligations under the ATC because the TMB, contrary to the explicit requirement set out in Article 6.10 of the ATC, had not made any recommendation on the action on which the United States had consulted with India.

5.173 The United States questioned whether India could *post hoc* amend its pleadings in this case as it had done in the preceding paragraph. There, India has made a subsidiary request of the Panel not found in its original request. This was inconsistent with the DSU and WTO and GATT practice as seen in the Appellate Body Report on Reformulated Gasoline. In that dispute, the Appellate Body had refused to address issues that Venezuela did not raise in a request for appeal.

#### **J. Date of the Safeguard action**

5.174 India argued that the United States' retroactive application of the safeguard action violated Article XIII of GATT 1994 and was not justified by Article 6.10 of the ATC. On 14 July 1995, India was informed by the United States that a restraint would be applied on imports from India, *inter alia*, in category 440, during the period beginning on 18 April 1995 and extending through 17 April 1998. The United States, therefore, had decided that the period of restraint would begin on the date of its request for consultations with India under Article 6 of the ATC. This meant that, in determining the amount of permitted imports during the period of restraint, the imports that took place during the period of consultations were to be deducted to the detriment of Indian exporters.

5.175 In the view of India, Article 1.6 of the ATC specifically reserved the rights of the WTO Members under GATT 1994 "unless otherwise provided in this Agreement" (ATC). The restraint imposed by



the United States was inconsistent with Article XIII of GATT 1994 and was consequently justified only if, and to the extent, permitted under the ATC. Article XIII:3(b) did not permit a retroactive application of import restraints. The GATT panel on *EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile* therefore considered that "backdated quotas, that is, quotas declared to have already been filled at the time of their announcement, did not conform to the requirements of Article XIII:3(b) ...".<sup>21</sup> The ATC did not provide for an exception to that principle. Its Article 6.10 merely provided that "the Member which proposed to take safeguard action may apply the restraint by date of import or date of export" if, "after the expiry of the period of 60 days from the date on which the request for consultations has been received", no agreement has been reached. There was nowhere in the ATC any indication that the restraints may be back-dated.

5.176 The United States referred to India's rationale as to why the *Dessert Apples* case was comparable to what the US had done in this matter and found it illogical. There was a distinct difference between declaring a quota to be totally filled and one partially filled. Thus, it did not comprehend India's reasoning in this matter. The US case was not the same or similar to the one in *Dessert Apples*. Therefore, the case was not even persuasive here.

5.177 India replied that it was true that this panel had examined an extreme case, namely a case of backdating with the effect that the total quota declared to be available for future trade had already been totally filled at the time of the announcement. However, the reasoning of the panel also applied in the case in which a quota declared to be available at the time of its announcement would be already partially filled.

5.178 The United States also argued that the application of the transitional safeguard from the date of the request for consultations was consistent with the ATC. The US had applied the safeguard restraint on woven wool shirts and blouses from India from the date the request for consultations was made. The ATC did not bar such a choice. Even the TMB had noted that "with respect to the introduction of a safeguard action, the [ATC] does not provide any indication with respect to the effective date of implementation of that measure."<sup>22</sup> Thus, in the absence of any provision to the contrary, the United States was not prohibited from applying the safeguard action from the date of the request. Indeed, application as from the request date was a practical necessity as such a request would trigger speculative trade. If traders believed that imports before completion of the consultation process would not be counted against a prospective restraint, speculative imports would aggravate the damage or bankrupt the remaining industry. Although imports in many instances continued to increase following the notification of a request, traders were informed by the US Federal Register notice that any unilateral quota established would be applied to cover exports since the date of the request. The US maintained that even though the request for consultations was officially published after the date of the request itself, the United States did not "enforce" the restraint until well after publication, albeit applying to shipments from the time of the request. Entry of those shipments would not be affected until after the restraint was enforced (after publication) and the quota for India would not be deducted until later, or after publication.

5.179 The United States stressed that it did not accept India's interpretation of Article 6.10 of the ATC and Articles XIII and X:2 of GATT 1994 on the issue of the effective date of a safeguard. It added to the points in the preceding paragraph made above that with respect to Article X:2 it believed that it was questionable if an ATC transitional safeguard fell under the "general application" requirement.

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<sup>21</sup>BISD 36S/93

<sup>22</sup>G/TMB/R/2

As both parties agreed, ATC textiles safeguards were applied on a Member-by-Member basis and were not subject to the non-discriminatory application of quantitative restrictions under GATT 1994. Even so, the United States maintained that it had not "enforced" the safeguard within the meaning of GATT 1994 Article X:2 until after publication. As such, Article X:2 of GATT 1994 was likely not applicable.

5.180 India noted that the MFA specifically determined the beginning of the 12-month restraint period to remove any uncertainty during consultations following a request for consultations and there was no option provided in the MFA for the country to apply the restraint from any other date than the date specified in the MFA. The ATC, unlike the MFA, allowed for a restraint to be applied for three years and explicitly stated that the application of that restraint must occur at a time, to be determined by the importing country, during the 30 days following the 60-day consultation period. It was factually incorrect for the United States to present the ATC as allowing Members the option of selecting the date upon which the 12-month restraint period would become effective.

5.181 The United States reiterated that in some cases, as in the case of woollen products, seasonality of shipments indicated less imports, not an unwillingness to ship when a request was announced. Nevertheless, if shipments exported after the request were not counted against the quota that would almost guarantee a surge in the trade for months immediately following the request with no subsequent price to be paid for causing additional damage to the domestic industry. If the Panel prohibited this practice, which was not prohibited by the ATC, the Panel would be signalling to traders that they could flood the market with imports before consultations were completed.

5.182 In sum, India argued that the United States had submitted no evidence that "speculative exports" would occur following a request for consultations. There may, or may not, be a real or imagined incentive to ship products quickly in order to export goods prior to the start of a quota, but no evidence was given demonstrating that this was, in fact, the case. The US data on shipment time was considered to be, in this instance, meaningless. In the view of India, it only indicated that transit time between India and the United States was somewhere between 48 hours and 50 days. A more meaningful examination would review the time between the placing of an order or opening an irrevocable letter of credit, receiving the appropriate export documentation, actual date of export, and date of import. None of these were indicated to have been reviewed by the United States in order to discern "actual shipping patterns" of goods prior to the start of a quota, or after the start of a quota.

#### **Article XIII:3(b) of GATT 1994**

5.183 India argued that the TMB had correctly noted that "with respect to the introduction of a safeguard action, the [ATC] does not provide any indication with respect to the effective date of implementation of that measure."<sup>23</sup> However, it would be completely erroneous to conclude from that fact that the importing Members had the right to apply their restraints retroactively. Exactly the opposite was true in the opinion of India. Because there was no explicit authorization in the ATC's transitional safeguard clause to impose the additional burden of retroactive application, the general prohibition of retroactive import restraints set out in Article XIII:3(b) of GATT 1994 applied and importing Members were therefore not entitled to impose that burden. The perception that appeared to be implicit in the TMB's statement was that everything that was not prohibited by Article 6 of the ATC was permitted. That perception turned the relationship between the general principles of GATT 1994 and the highly exceptional provisions of Article 6 on its head. The lack of a provision in the ATC permitting retroactivity had not been an oversight. Article 3.5(i) of the MFA explicitly stated that, if, after a period of 60 days from the date on which the request for consultations had been received, no agreement had

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<sup>23</sup>G/TMB/R/2

been reached, the importing country could impose restraints at a specified level "for the twelve-month period beginning on the day when the request was received by the participating country". All the negotiators of the ATC were familiar with the MFA and nevertheless it was decided not to include a corresponding provision in the ATC.

5.184 India considered that the date of publication of the request for consultations was irrelevant in the context of Article 2.4 of the ATC and Article XIII of the GATT and stressed that the requirement of advance public announcement of Article XIII would not be met if the importing Member were to make, at the time of the request for consultations a public announcement of the quantity or value of the products that may be imported in a specified future period if the government were to decide to restrict imports subsequent to the consultations. The very purpose of Article XIII was to achieve predictability in trade relations by obliging WTO Members to indicate clearly the future trading regime. This interpretation would also frustrate the intent of Article X:2 of GATT 1994 because it would allow governments to enforce measures before they had announced their eventual decision to apply them.

5.185 India also considered the requirement of advance publication of quotas under Article XIII of GATT 1994 and the requirement of Article 6.10 of the ATC that a safeguard action may only be taken within the 30 days following the 60-day period for consultations must be interpreted consistently with one another. If the requirement of an advance publication of the quota under Article XIII could be met by merely announcing the possibility of a quota rather than the quota itself, then it would logically have to be considered to be consistent with Article 6.10 of the ATC to merely announce during the 30-day interval the possibility of a quota rather than the quota itself. These considerations made it clear that allowing WTO Members to meet their advance publication requirements under the WTO agreements by permitting them to announce the possibility of a trade action *ex ante* and the decision to actually impose it *ex post* would have far-reaching consequences undermining the role of the WTO agreements as sources of law and predictability in international trade relations. The Panel should not, therefore, arrive at a compromise between the position of India and that of the United States by declaring the date of the publication of the request for consultations as the date to which a quota may be backdated.

5.186 The United States cited India's argument concerning Article XIII:3(b) of GATT 1994, and argued that Article XIII was outside the terms of reference of this Panel. India had stated in its request that the Panel find that "[t]here was no provision in the ATC under which the United States ... can impose a restraint with retrospective effect". In its request for Panel review, India had made no claim under GATT 1994 concerning this issue and as such, India's argument should not at this time be addressed under GATT 1994. In any event, in the view of the United States, application of the measure in this instance would be fully consistent with the provisions of Article XIII:3(b) of GATT 1994 as public notice had been given of the total quantity (not less than 76,698 dozen woven wool shirts and blouses) that would be permitted from the date of the request for consultations, in the event that no mutual solution would be reached with India. The United States had also provided public notice that products exported or *en route* after the date of the request, but entering before the effective date of the restraint (which was 90 days after the date of the request) would not be excluded from entry, but would be charged against the earlier announced quota amount.

5.187 India referred to the argument of the United States that Article XIII of GATT did not form part of the Panel's terms of reference and recalled that in paragraph 12 of its request for the establishment of a Panel it had requested it to find that "There is no provision in the ATC under which the United States, as the importing Member, can impose a restraint with retrospective effect." In this regard India argued that the ATC was an exception to the basic rules of GATT 1994 and any WTO Member requesting consultations with the claim that a certain measure did not conform to the ATC was, in effect, claiming that the ATC did not justify the deviation from the basic GATT provisions. India's request for a Panel finding must, therefore, have been understood by the United States and other WTO

Members as a request for a finding by the Panel that, given the absence of a rule in the ATC permitting the retroactive application of safeguard actions, India was entitled to the non-retroactive application prescribed by GATT 1994. The text of a request for the establishment of a Panel should be interpreted like any other legal text, that is, by examining not merely the words used but also their context and purpose. India considered that its request for a Panel finding on retroactivity, in the context in which it was made and given the purpose it served, must be interpreted to comprise a request for a finding under GATT 1994 in respect of the issue of retroactivity.

5.188 In response to a question as to which provision of the WTO Agreement, the GATT and the ATC, if any, India was referring to in paragraph 11.2 of its request for a panel (WT/DS33/1), India noted that Article 6.2 of the DSU stated that the request for the establishment of a panel shall "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". This Article did not require that the complaining Member should indicate specific provisions of the covered agreement(s) invoked nor was this customary for Members. Article 7 of the DSU would appear to indicate that parties to the dispute were required to cite the names of the covered agreements and the Panel would examine the matter in the light of the relevant provisions in the covered agreements cited. The manner in which brackets had been used in the standard terms of reference contained in Article 7 of the DSU also appeared to confirm this. Paragraph 11.2 of India's request for establishment of a Panel and paragraph 79(ii) of India's first written submission requested the Panel to find, in accordance with Article 3.8 of the DSU, the safeguard action of the United States nullified or impaired the benefits accruing to India under the WTO Agreement, under the ATC and under GATT 1994 in particular. The phrase "WTO Agreement" referred to "Agreement Establishing the World Trade Organization" as per the standard list of abbreviations. According to Article II:2 of the WTO Agreement, the Agreement and the associated legal instruments included in Annexes 1, 2 and 3 were integral parts of the WTO Agreement. In brief, the term "WTO Agreement" also included "the Multilateral Trade Agreements". Under these circumstances, paragraph 11.2 of India's request for the establishment of a Panel and paragraph 79(ii) of India's first written submission should be understood by the Panel as a request that the Panel find in accordance with Article 3.8 of the DSU that the United States' actions, being inconsistent with the provisions of the ATC and GATT 1994, which were Multilateral Trade Agreements included in the "WTO Agreement", nullified or impaired benefits accruing to India under the provisions of these Agreements.

### **Speculative Rise in Imports**

5.189 India further pointed out that the United States had indicated that it considered the retroactive application of restraints necessary to prevent a speculative rise in imports after the request for consultations. If traders believed that imports before the completion of the consultations were not counted, so they argued, the request for consultations would trigger speculative trade that would aggravate the damage to the domestic industry. In the view of India, this argument was not based on commercial realities. Most textile and clothing products were made to order and it was generally impossible to complete the process of contracting, manufacturing and shipping within a period of only 60 days. The reality was that requests for consultations, because of the uncertainty they created, more often discouraged trade and, therefore, had a commercial impact equivalent to the restraints the importing Member was proposing to take.

5.190 In a response to the Panel, India expanded upon its claim that it was generally impossible to produce and ship textile products on such notice as 60 days. It explained that, in India, quotas were distributed on the basis of a policy notification by the Government. During the years 1994 to 1996, one of the systems of quota allotment was called the First Come First Served (Small Order) system which was designed to provide the quickest turnaround time for servicing of export orders. Quotas were allotted against Letters of Credit obtained from the importers for small orders with the stipulation

that the quantities allotted under this system should be utilized within a period of 60 days of allotment. There were persistent representations from the clothing exporting industry that the period of 60 days was insufficient for processing the export orders. Therefore, it had become necessary for India to stipulate a validity period of 75 days from 1996 onwards. Furthermore, there had been representations from the exporters of woollen clothing for extending the validity to 90 days since even the 75 days' period appeared to be insufficient for processing the export orders for woollen clothing. India's exports of woven wool shirts and blouses to the United States consisted almost entirely of regenerated wool products, that is, products made from woollen rags which required extracting and regenerating their fibre content, and converting it into yarn, fabrics and then clothing. Since export orders were for specific fabric and clothing designs most of these processes had to be carried out after receipt of the export order for clothing. It was thus obvious that for woven wool shirts and blouses to be exported to the US, the time required was even more than what was required for export of other clothing.

5.191 In a response to the Panel, the United States expressed the view that when a request for consultations was announced in the Federal Register, interested parties were informed that if no agreement was reached in consultations, the United States may decide to establish a limit for the 12-month period beginning from the date of the request for consultations. If the United States did not so inform the public, there would be an incentive to ship products quickly in order to export goods prior to the start of a quota. In situations of rapidly rising imports, the goal for importers to ship quickly was to avoid having their goods caught in a quota embargo. India's claim that it would take more than 60 days for importers to receive any such imports from India was contrary to the facts of actual shipping patterns. A review of shipments of category 440 exported from India during the 12-month period of 18 April 1995 to 17 April 1996, the first control period of the Article 6 action, showed a different situation. Of approximately 200 entries, 25 per cent had arrived within 48 hours of exportation from India using an air carrier. There was only one entry that had taken longer than 50 days to arrive in the United States, with most entries arriving within three to four weeks from the date of export from India. In this era of instantaneous communication, it takes very little time to handle the relatively simple business transactions for an ongoing programme. Regardless of the time needed to begin a new purchase transaction, there could be an incentive for "speculative exports" to avoid the imposition of a quota for orders already placed and waiting to be shipped. Once it was learned that there may be a quota imposed within 60 days, the concerned business entity could seek to speed up the shipping of an order or could have it shipped by air, as evidenced by the data presented above.

5.192 India considered, with respect to the preceding views, that a more meaningful examination of shipment time would review the time between the placing of an order, or opening an irrevocable letter of credit, receiving the appropriate export documentation, actual date of export, and date of import. None of these were indicated to have been reviewed by the United States in order to discern "actual shipping patterns" of goods prior to the start of a quota, or after the start of a quota. India explained that it had never claimed that goods could not be shipped from India to the United States by air freight within a very short period of time. India had claimed that textiles products were generally made to order and that the period between the placing of the order and the exports from India was normally longer than 60 days. The United States pointed out that it looked at the shipping pattern during the time most relevant to this issue, which was the time of the first control period of this action or between 18 April 1995 and 17 April 1996. That examination revealed that of approximately 200 entries, 25 per cent had arrived within 48 hours of export from India using an air carrier. Most entries arrived three to four weeks from the date of export from India.

#### **Unusual and Critical Circumstances**

5.193 India noted that the ATC provided for highly unusual and critical circumstances in which a delay in the application of restraint could cause damage that would be difficult to repair and it was

not excluded that such circumstances might arise as a result of the traders' reaction to a request for consultations. In that case the importing Member had the right to resort to Article 6.11 of the ATC, and subject to the strict conditions set out in that provision, apply a safeguard action provisionally prior to the lapse of the consultation period. The circumstances that the United States invoked to justify the introduction of a new right for importing Members under the ATC were thus specifically dealt with in that provision. If the Panel were to recognize the existence of a general right to impose restraints retroactively to deal with speculative imports aggravating the damage to the domestic industry, it would effectively permit importing Members to escape the strictures of the very ATC provision that allowed Members to deal with such situations.

5.194 With respect to India's argument that safeguard action in critical circumstances under Article 6.11 of the ATC addressed the issue, the United States disagreed, arguing that Article 6.11 of the ATC was designed to respond to true emergency cases and not to the problem of speculative trade that existed in virtually all cases. Even under the MFA, a "critical circumstances" action was not relevant to the issue of the effective date of a safeguard action. The same provision existed in the MFA along with an express provision on application of restraints from the date of the call in regular safeguard circumstances. There was no substantive change announced in the ATC that the critical circumstances mechanism "replaced" the freedom to apply the restraint from the call date.

5.195 The United States further referred to India's claim that critical circumstances safeguard action under ATC Article 6.11 of the ATC was designed in any way to solve the problem addressed by the application of a restraint from the date of the request. Article 6.11 of the ATC was not a provision created for the first time under the ATC or introduced as a new concept under the ATC to address the speculative trade issue. It was merely, like some other provisions of the ATC, a carryover from the MFA for real critical circumstances safeguard cases - such as cases that truly could not wait for the parties to decide on the date and place for consultations. While Article 3 of the MFA addressed the problem by expressly recognizing a country's ability to apply the safeguard in that manner, the MFA also contained Article 3.6, the predecessor to Article 6.11 of the ATC. Therefore, even under the MFA "critical circumstances" action was not relevant to the issue of when a regular safeguard could be applied and the issue of addressing speculative trade when consultations under regular safeguard action took place.

#### **K. Article 2 of the ATC**

5.196 India noted that Article 2.4 of the ATC prohibited the introduction of new restraints except under the provisions of that Agreement or relevant GATT 1994 provisions. The restraints referred to in these provisions were the measures prohibited by Articles XI and XIII of GATT 1994. Any new restraint inconsistent with Articles XI or XIII and covered neither by the provisions of the ATC nor those of GATT 1994 were, therefore, also inconsistent with Article 2.4 of the ATC. In response to the argument of the United States, India requested the Panel to find that the retroactive application of the United States safeguard action was inconsistent with Article XIII of the GATT and Article 2 of the ATC or, if the Panel were to consider Article XIII of the GATT not to form part of its terms of reference, that the retroactive application was inconsistent with Article 2 of the ATC.

5.197 The United States argued that since the safeguard action on imports of woven wool shirts and blouses from India was fully consistent with Article 6 of the ATC, there was no violation of Article 2 of the ATC.

5.198 In sum, India requested the Panel to find that the retroactive application of the United States' safeguard action was inconsistent with Article XIII of the GATT and Article 2 of the ATC or, if the

Panel were to consider Article XIII of the GATT not to form part of its terms of reference, that the retroactive application was inconsistent with Article 2 of the ATC.

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## **VI INTERIM REVIEW**

6.1 On 22 November 1996, the United States and India requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 12 November 1996. Both India and the United States agreed not to request the Panel to hold a meeting for that purpose. We reviewed the arguments presented by the parties in their written submissions and issue our final report accordingly.

6.2 We note that the United States stated that the restraint, which is the object of the present dispute, was to be withdrawn “due to a steady decline in imports of woven wool shirts and blouses from India and the adjustment of the industry”. This was confirmed in a Federal Register notice dated 4 December 1996 (61 FR 64342). In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate, as referred to in paragraph 1.3 of this report, notwithstanding the withdrawal of the US restraint. A number of GATT panels have done so<sup>24</sup>.

6.3 Concerning the interpretation of Article 6.2 and 6.3 of the ATC, the United States argued that under the MFA it was never required to “demonstrate” at least all of the factors therein referred to; that India had admitted that Article 6.3 contained an illustrative list of such factors; and that the interpretation by the Panel of Article 6.3 of the ATC turned the provision on its head. We are of the view that the ATC is a different agreement from the MFA; that India did not make such an admission<sup>25</sup>; and that the wording of Article 6.3 of the ATC is clear.

6.4 Concerning the comments made by the United States regarding the US government’s lack of reliable export data, we reiterate 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.

6.5 Concerning the requirement under Article 6.2 of the ATC that the importing Member must positively confirm that the state of the particular industry of the importing Member was not caused by “such other factors as technological changes and changes in consumer preference”, we refer simply to the clear wording of Article 6.2 of the ATC. The absence of adequate reference to the issue of

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<sup>24</sup>See for instance the Panel Report on “EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile” (adopted on 22 June 1989, BISD 36S/93), the Panel Report on “EEC - Restrictions on Imports of Apples, Complaint by the United States” (adopted on 22 June 1989, BISD 36S/135), the Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” (adopted on 22 February 1982, BISD 29S/91) or the Panel Report on “EEC - Measures on Animal Feed Proteins” (adopted on 14 March 1978, BISD 25S/49).

<sup>25</sup>As noted in paragraph 5.63 of this report in referring to an explicit allegation by India: “... Article 6.3 of the ATC indicates an illustrative list of factors, on which data had to be examined, it would be in order if an importing Member also examined other factors, while making a determination. However, it would be inconsistent with Article 6.7 of the ATC if all factors mentioned in Article 6.3 were not taken into account by the importing Member. ...”

technological changes and changes in the consumer preference in a determination necessarily implies that the importing Member did not address this aspect of the causation requirement.

6.6 Concerning India's argument that Article 11 of the DSU entitles India to a finding on each of the issues it raised, we disagree and refer to the consistent GATT panel practice of judicial economy. India is entitled to have the dispute over the contested "measure" resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute.

6.7 Concerning India's comment about the burden of proof, it was for India to submit a *prima facie* case of violation of the ATC, namely, that the restriction imposed by the United States did not respect the provisions of Articles 2.4 and 6 of the ATC. It was then for the United States to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC.

6.8 Concerning India's comments on the "two-track approach" in paragraphs 7.18 to 7.21, we are not taking any position as to whether the TMB process must be exhausted before a panel process can be initiated. Concerning the different roles of the TMB and panel processes, we expand our discussion in paragraph 7.19.

6.9 Concerning India's argument that it did question US production statistics, we amend our text accordingly.

6.10 India and the United States also made other suggestions concerning language changes, which we accept and introduce in our final report.

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## **VII FINDINGS**

### **A. Introduction**

7.1 The principal facts that led to the present dispute are the following: On 18 April 1995, the United States requested consultations with India pursuant to Article 6.7 of the ATC regarding the proposed safeguard action on imports of woven wool shirts and blouses, category 440. The request for consultations consisted of a Diplomatic Note and a document entitled "Statement of Serious Damage: Category 440", dated 18 April 1995 (hereinafter referred to as the Market Statement). The Diplomatic Note stated that the sharp and substantial increase in imports from India of the products in the category 440 was "causing serious damage or actual threat thereof to the US industry producing wool woven shirts and blouses"; the accompanying Market Statement stated that "the sharp and substantial increase in imports of woven wool shirts and blouses, Category 440, is causing serious damage to the US industry producing woven wool shirts and blouses". On 23 May 1995, the United States published a notice in the US Federal Register stating that "the sharp and substantial increase in imports of woven wool shirts and blouses, Category 440, is causing serious damage to the US industry producing woven wool shirts and blouses", and that

"if no solution is agreed upon in consultations with the Government of India ... , the Committee for the Implementation of Textiles Agreements may later establish a limit for the entry and withdrawal from warehouse for consumption of wool textile products



in Category 440 ... and exported during the twelve month period April 18, 1995 through April 17, 1996, at a level of not less than 76,698 dozen ... ”.

7.2 The parties held bilateral consultations in Geneva on 19 April 1995, and in Washington D.C. on 14-16 June 1995. The consultations did not result in a mutually agreed solution and on 14 July 1995, the United States implemented a restraint on imports of woven wool shirts and blouses (category 440) from India, with the restraint being effective as of 18 April 1995 for one year. At the same time, the United States referred the matter to the TMB in accordance with Article 6.10 of the ATC. The US restraint was later extended through 17 April 1997.

7.3 As required under Article 6.10 of the ATC, the TMB examined the matter at its third and fourth meetings on 28 August - 1 September 1995 and 12-15 September 1995 and concluded that, regarding the safeguard action taken by the United States against imports of category 440 from India, "... the actual threat of serious damage had been demonstrated, and that, pursuant to paragraph 4 of Article 6, this actual threat could be attributed to the sharp and substantial increase in imports from India"<sup>26</sup>. Pursuant to Article 8.10 of the ATC, India requested the TMB to review its decision concerning the US safeguard action against imports of category 440 from India. The TMB reviewed this matter on 13-17 November 1995 and concluded that it "could not make any recommendation in addition to the conclusions it had reached at its meeting on 12-15 September 1995 .... The TMB therefore considered its review of the matter completed"<sup>27</sup>. On 14 March 1996, pursuant to Article 8.10 of the ATC and Article 6 of the DSU, India requested the DSB to establish a panel on the matter in dispute. The present Panel was established on 17 April 1996.

## **B. Claims of the Parties**

7.4 India's main claim is that the US safeguard action against imports of woven wool shirts and blouses was imposed in violation of the requirements of Articles 6, 8 and 2 of the ATC. India requests that the Panel suggest that the United States withdraw the measure in question.

7.5 The United States claims that it respected its obligations under the ATC when applying and maintaining the restraint on imports of woven wool shirts and blouses from India. Consequently, the United States requests that the Panel dismiss India's claim.

7.6 In particular, India's claim is that the United States did not comply with the procedural and substantive requirements of Article 6 of the ATC when it imposed the safeguard measure. India argued that the conditions for application of Article 6.2, 6.3, 6.7 and 6.10 are three-fold: first, there is a substantive requirement that the importing Member demonstrate that an increase of imports of a particular product is causing serious damage or actual threat thereof to the domestic industry producing like or directly competitive products. According to India, the United States failed to demonstrate this in its Market Statement since, on its face, the data contained in the US Market Statement were flawed. Second, India asserted that there were also procedural requirements regarding the nature, quality and extent of the consultations. India argued that the United States failed to consult on the specific proposed safeguard action for which the request for consultations was made and that in the consultations with India, the United States failed to demonstrate, with relevant and specific information, that imports of woven wool shirts and blouses were causing serious damage to the domestic industry producing like or directly competitive products. Third, India argued that in order to impose and maintain a safeguard

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<sup>26</sup>G/TMB/R/3 paragraph 26.

<sup>27</sup>G/TMB/R/6 paragraph 14.

action, the United States had to obtain the endorsement of the TMB. India labelled these last two procedural requirements as a “two-tier obligation”.

7.7 In addition, India claims that the application of the safeguard action by the United States, from the date of the request for consultations, is inconsistent with Article 2 of the ATC and Article XIII of GATT 1994.

7.8 The United States claims that it did comply with the requirements of Article 6 of the ATC in that CITA did demonstrate that the particular product was being imported into the United States in such increased quantities as to cause serious damage or actual threat thereof to the domestic US industry producing like and/or directly competitive products. Although not in agreement with the two-tier approach of India, the United States argued that the TMB’s conclusions confirmed that the United States was faced with an actual threat of serious damage. The United States also argued that the date of application of the restraint is consistent with the ATC and that India’s claim under Article XIII of GATT 1994 does not fall within the terms of reference of this Panel. The United States, in any case, claims that Article XIII is only relevant for non-discriminatory measures whereas Article 6 restraints must be applied on a Member-by-Member basis.

### **C. General Interpretative Issues**

7.9 Before turning to India’s main claim that the US determination of serious damage or actual threat thereof is flawed and does not comply with the substantive and procedural requirements of Article 6 of the ATC, we examine the issues of the burden of proof of the parties, the standard of review of this Panel and the respective roles of the TMB process and the dispute settlement mechanism of the DSU.

#### **1. Burden of Proof**

7.10 India’s main claim is that the United States failed to demonstrate the existence of serious damage to the US industry, as required by Article 6.2 and 6.3 of the ATC. India argued that the United States bore the burden of proving that it had complied with the requirements of Article 6 of the ATC. For India, since safeguard actions are exceptional, they are to be interpreted narrowly and it was for the United States to prove that it had respected all the conditions of application mentioned in Article 6 of the ATC.

7.11 On the issue of burden of proof, the United States responded that, traditionally, in GATT practice, it was for the complaining party to present a *prima facie* case of violation before a panel. Thus, the United States argued, it was for India to advance facts which provided convincing evidence that it was unreasonable for CITA, on the basis of the available evidence, to determine that the adverse effects on the US domestic industry of increased woven wool shirt and blouse imports amounted to “serious damage or actual threat thereof”.<sup>28</sup>

7.12 The parties seem to have addressed two different aspects of what one might call the “burden of proof” issue. We believe that a distinction should be made. First, we consider the question of which party bears the burden of proof before the Panel. Since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put forward factual and legal arguments in order to establish that the US restriction was inconsistent with Article 2 of the ATC and that the US

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<sup>28</sup>We note that, for instance, Article 6.2 of the ATC refers to the expression “serious damage, or actual threat thereof” with a comma, as well as to the expression “serious damage or actual threat thereof” without a comma. We decide to use the expression “serious damage or actual threat thereof” without seeking to be dispositive of the issue raised by India and further discussed hereinafter in paragraphs 7.31 and 7.53.

determination for a safeguard action was inconsistent with the provisions of Article 6 of the ATC. Second, we consider the question of what the importing Member must demonstrate at the time of its determination. Concerning the substantive obligations under Article 6 of the ATC, it is clear from the wording of Article 6.2 and 6.3 of the ATC that, in its determination of the need for the proposed restraint, the United States had the obligation to demonstrate that it had complied with the relevant conditions of application of Article 6.2 and 6.3 of the ATC.

## 2. Standard of Review

7.13 India argued that the task of this Panel, established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is to determine whether the United States had observed the requirements of Article 6 in good faith, not whether it had acted reasonably. India referred the Panel to the Transformers<sup>29</sup> and Canadian Corn<sup>30</sup> cases, an anti-dumping case and a countervailing duty case, respectively, where, according to India, the panels reviewed the importing countries' actions and imposed on them the duty to establish all facts on which they had based their actions. In response, the United States argued that the task of the Panel is to consider whether the US authorities could reasonably and in good faith have determined that serious damage or actual threat thereof existed, not whether serious damage or actual threat thereof existed, as such. The United States referred the Panel to the Fur Felt Hat Working Party report<sup>31</sup> which, according to the United States, provides authoritative guidance from GATT 1947 practice and procedures concerning the standard of review to be applied in the present case. In the Fur Felt Hat case, the Working Party concluded that, in reviewing a US safeguard measure applied against Czechoslovak imports pursuant to Article XIX of GATT 1947, the United States "were entitled to the benefit of reasonable doubt" and the Working Party rejected the Czechoslovak claim.

7.14 In response to India's arguments, the United States argued that the standard of review used in anti-dumping and countervailing duty cases as well as the relevant provision contained in the Agreement on Implementation of Article VI of GATT 1994 (Article 17.6) were not applicable to the present dispute. India rejected the relevance of the Fur Felt Hat case which set out criteria for the review of safeguard measures under Article XIX of GATT 1947, since the mechanism under Article XIX was legally different from that under Article 6 of the ATC where, for instance, there was no compensation provided to the exporting Member.

7.15 We do not consider that the reports cited by the parties are relevant to the present dispute. First, we note that the Appellate Body has made clear in the Japan Taxes report that past GATT panel reports do not constitute binding "subsequent practice" referred to in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention). The Appellate Body also concluded that "... adopted panel reports in themselves [do not] constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947' for the purpose of paragraph 1(b)(iv) of the language of Annex 1A incorporating the

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<sup>29</sup>Panel Report on "New Zealand - Imports of Electrical Transformers from Finland", adopted on 18 July 1985, BISD 32S/55.

<sup>30</sup>Panel Report on "Canada - Countervailing Duties on Imports of Grain Corn", adopted on 26 March 1992, BISD 39S/411.

<sup>31</sup>Working Party Report on "The Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT" GATT Document CP/106, adopted on 22 October 1951, (C.P.6/SR.19), version published by the Secretariat in November 1951, preface by Mr. E. Wyndham-White.

GATT 1994 into the WTO Agreement”<sup>32</sup>. We are, therefore, not bound by past GATT reports, although we may follow their reasoning to the extent relevant. Secondly, the reports cited by the parties were adopted many years ago (more than 40 in one case) and they interpreted different agreements in different contexts. Thirdly, the ATC has instituted a new regime for textile products and the DSU has instituted new rules for panels.

7.16 We note that the ATC does not establish a standard of review for panels.<sup>33</sup> However, although the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU which describes the parameters of the function of panels, is relevant here:

“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.” (emphasis added)

7.17 Pursuant to Article 11 of the DSU, we must determine what is “the matter before [the Panel]”. This Panel was established pursuant to Article 8.10 of the ATC and Article 6 of the DSU. Article 8.10 of the ATC provides that a Member may bring an unresolved matter before the DSB:

“ ... Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding.” (emphasis added)

The “unresolved matter” would appear to be the contested right of the importing Member to apply the proposed restraint, as provided for in Article 6.10 of the ATC:

“If, however, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of this Article, within 30 days following the 60-day period for consultations, and at the same time refer the matter to the TMB. ...”. (emphasis added)

The only restraint discussed under Article 6 of the ATC is the proposed restraint by the importing Member. Therefore, pursuant to Article 11 of the DSU, the function of this Panel, established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is limited to making an objective assessment of the facts surrounding the application of the specific restraint by the United States (and contested by India) and of the conformity of such restraint with the relevant WTO agreements.

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<sup>32</sup>Report on “Japan - Taxes on Alcoholic Beverages”; Appellate Body Report adopted on 29 October 1996, at page 14 (WT/DS8/AB/R, WT/10/AB/R, WT/DS11/AB/R).

<sup>33</sup>We note that both parties agreed that the provision on standard of review for anti-dumping cases was not applicable to the present case.

### 3. The Role of the TMB Process Versus the Role of the Dispute Settlement Mechanism of the DSU

7.18 In this context, we think it is useful to draw an important distinction between the role of panels under the DSU and the role of the TMB under the ATC as regards safeguard actions. We note that the preamble of the ATC refers to the process of progressive integration of textiles and clothing products into GATT 1994 disciplines over a period of ten years. The role of the TMB, in light of the object and purpose of the ATC, may be understood better if the application of the ATC is described as providing two tracks: a TMB track and a DSU track.

7.19 The wording of the ATC and the DSU confirms that the role and function of DSU panels differ substantially from that of the TMB. For instance, the TMB is not limited to any specific terms of reference as DSU panels are (Article 7 of the DSU). The function of the TMB is to supervise the implementation of the ATC generally and to examine measures taken, agreements reached and any other matters referred to it. The nature of these broad functions confirms the special and multifaceted role of the TMB. This is also reflected in the TMB's rules of procedure, its decision-making rule and its composition. The TMB members are appointed by WTO Members designated by the Council for Trade in Goods but discharge their function on an *ad personam* basis. Pursuant to a General Council Decision, the TMB's membership is composed of constituencies, in most cases of several Members, where most members also appoint alternates. Furthermore, a TMB member appointed by a WTO Member involved in a dispute before the TMB, participates in the TMB's deliberations, although such TMB member cannot block a consensus (Article 8.2 of the ATC). On the contrary, panelists under the DSU are not selected on the basis of constituencies and the citizens of any party to a dispute under the DSU cannot participate as panelists, absent agreement of the parties (Article 8.3 of the DSU). In addition, a panelist may issue a dissenting opinion under the DSU, while the TMB can only act by consensus. Moreover, Article 8.3 of the ATC is clear as to the wide investigative authority of the TMB:

“3. The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them. It may also rely on notifications to and reports from other WTO bodies and from such other sources as it may deem appropriate.” (emphasis added)

We note also that, according to Article 8.10 of the ATC, when the TMB process has been completed, a Member which remains unsatisfied with the TMB recommendations can request the establishment of a panel without having to request consultations under Article 4 of the DSU. This is to say that the TMB process can replace the consultation phase in the dispute settlement process under the DSU and is distinct from the formal adjudication process by panels<sup>34</sup>.

7.20 Therefore when differences arise, the ATC requires parties first to seek consultations with a view to reaching a mutually satisfactory solution to the problem, within the specific parameters or

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<sup>34</sup>Article 8.10 of the ATC: “If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding.”

considerations set out in the relevant provision(s) of the ATC. If a mutually satisfactory solution is not reached in the consultations, the matter may be or shall be, depending on the applicable provision, referred to the TMB for review and recommendations. In the case of recourse to Article 6 of the ATC, the object of the consultations is to see whether there is a mutual understanding that the situation calls for restraint on the exports of the particular product or not. If there is such a mutual understanding, details of the agreed restraint measure shall be communicated to the TMB which has to determine whether the agreement is justified in accordance with the provisions of Article 6 of the ATC. If there is no agreement between the parties concerned and the safeguard action is taken, the matter also has to be referred to the TMB. According to Article 6.10 of the ATC, in order to conduct such an examination, “... the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7 [of Article 6], as well as any other relevant information provided by the Members concerned”. During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we understand, may relate to subsequent events. Moreover, the TMB may hear witnesses on these facts and perform a genuine fact finding and evidence-building exercise on the continuing situation of the parties concerned with the safeguard action, in order to settle the dispute. TMB members deliberate on the basis of all the information presented to decide whether the safeguard action taken by the importing Member is justified and whether serious damage or actual threat thereof to the domestic industry of the importing Member and causation exist.

7.21 The second track is the DSU. If, after recourse to Articles 6.10 and 8.10 of the ATC, the exporting Member is not satisfied with the recommendation of the TMB, such exporting Member can challenge the safeguard action and bring it to the formal dispute settlement process under the DSU. 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 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.

#### **D. Review of the US Determination**

##### **1. Article 6 of the ATC**

7.22 Before reviewing the US Market Statement, we must determine what are the conditions for application of a safeguard action pursuant to Article 6 of the ATC. In the Gasoline<sup>35</sup> and Japan Taxes<sup>36</sup> cases, the Appellate Body stressed that pursuant to Article 3.2 of the DSU, interpretation and clarification of the WTO Agreement needed to be achieved by reference to the fundamental rule of treaty interpretation set out in Article 31 of the Vienna Convention. Article 31 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”. We

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<sup>35</sup>Report on “United States - Standards for Reformulated and Conventional Gasoline”; Panel Report circulated on 29 January 1996 (WT/DS2/R), Appellate Body report circulated on 20 May 1996 (WT/DS2/AB/R); both reports were adopted by the DSB on 6 June 1996.

<sup>36</sup>Report on “Japan - Taxes on Alcoholic Beverages”; Panel Report circulated on 11 July 1996 (WT/DS8/R, WT/10/R, WT/DS11/R), Appellate Body Report circulated on 4 October 1996 (WT/DS8/AB/R, WT/10/AB/R, WT/DS11/AB/R); both reports were adopted by the DSB on 29 October 1996.

must, therefore, when called upon to interpret and apply the provisions of the WTO Agreement, including those of the ATC, endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur<sup>37</sup>.

7.23 Article 6.2 and 6.3 of the ATC provides as follows:

“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.” (emphasis added)

“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.” (emphasis added)

7.24 The wording of Article 6.2 of the ATC confirms two propositions. First, WTO Members have a right to take safeguard actions; second, the decision to impose a safeguard action must be based on a demonstration by the importing Member, before the safeguard action is taken, that the increased quantities of imports are causing serious damage or actual threat thereof.

7.25 In our view, the wording of Article 6.2 and 6.3 of the ATC makes it clear that all relevant economic factors, namely, all those factors listed in Article 6.3 of the ATC, had to be addressed by CITA, whether subsequently discarded or not, with an appropriate explanation. The wording of paragraph 3, which reads

“... 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.”, (emphasis added)

implies two requirements. First, the relevant economic variables must be examined. Second, output, productivity, utilization of capacity, etc. ... are relevant economic variables. The wording of Article 6.3 of the ATC “... the Member shall examine the effects ... on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, etc. ...” makes clear

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<sup>37</sup>See the Appellate Body Report on “Japan - Taxes on Alcoholic Beverages”, op.cit., on page 12: “The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. In footnote 19, at page 12, the Appellate Body cited *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)* (1950), *I.C.J. Reports*, p. 4 at 8, in which the International Court of Justice stated: “The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur”. The Appellate Body also stated, in footnote 20, that “... the treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation” and cited further references.

that each of the listed factors is not only relevant but must be examined. Effectively, the listed economic variables are examples of relevant economic variables, they are presumed to be “relevant economic variables” and must be examined by the importing country in its determination.

7.26 The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide -- in its assessment of whether or not serious damage or actual threat thereof has been caused to the domestic industry -- that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC.<sup>38</sup>

7.27 The last part of Article 6.3 of the ATC, which states that “none of which, either alone or combined with other factors, can necessarily give decisive guidance”, confirms that some consideration and a relevant and adequate explanation have to be provided of how the facts as a whole support the conclusion that the determination is consistent with the requirements of the ATC.

7.28 Article 6.2 of the ATC requires that serious damage or actual threat thereof to the domestic industry must not have been caused by such other factors as technological changes or changes in consumer preferences. The explicit reference to specific factors imposes an additional requirement on the importing Member to address the question of whether the serious damage or actual threat thereof was not caused by such other factors as technological changes or changes in consumer preference.

7.29 We will now proceed to the review of the US Market Statement in respect of which India claims that the US determination is not consistent with the provisions of Article 6 of the ATC.

## **2. India’s Claim Regarding the Substantive Requirements of Article 6 of the ATC**

7.30 India claims that the ATC requires a demonstration that the increase in imports is causing serious damage or actual threat thereof and that, in the present case, the actual data and the method of collecting and analysing the data on the state of industry were so seriously flawed that they could not possibly form the basis of a demonstration on the state of industry. India also claims that the United States failed and, in fact, did not even attempt, to demonstrate any causal link between rising imports and declining production. The United States argued that the ATC does not prescribe any specific methodology for collecting data and that the demonstration by CITA was reasonable both with respect to causation and serious damage or actual threat thereof.

7.31 India also requests a supplementary finding by the Panel that:

“According to the ATC, notably Article 6, the onus of demonstrating serious damage or its actual threat is on the United States, as the importing country. It has to choose at the beginning of the process whether it will claim the existence of "serious damage" or "actual threat". These are not interchangeable because the data requirement would vary with the chosen situation. It would not be valid to transfer a transitional safeguard to a situation of actual threat when the claim of serious damage has failed to gain acceptance.”

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<sup>38</sup>There may be cases where a lack of information on one or more factors would not preclude a finding of serious damage or actual threat thereof.



We are of the view that this claim would normally be considered as a preliminary issue which could have a bearing on our analysis of this section of the panel report. However, in view of our conclusion on the US determination, we address this claim of India in paragraph 7.53.

7.32 We will proceed in the following way: we will first make general comments on the US Market Statement. Then, we will comment on some of the factors mentioned by the United States in the Market Statement; we will also deal with the fact that certain factors were not addressed by CITA. Subsequently, we will address the issue of causation. Thereafter, we will make an overall assessment of the US determination, taking into account the specific requirements mentioned in Article 6.2 and 6.3 of the ATC.

7.33 We commence with two general remarks. First, the US Market Statement, which according to the United States constitutes the totality of the information used by CITA in making its determination, defines specially the product category on which the safeguard action was to be applied: woven wool shirts and blouses, category 440. However, much of the data are not related to that “particular industry” or to that specific segment of production, as required by Article 6.3 of the ATC. The following Section, entitled “Industry Profile”, states that the entire woven shirt and blouse sector includes approximately 748 establishments. In a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States informed the Panel that the specific woven wool shirt and blouse industry was composed of some 15 firms and that the production of two of these firms represented at least 60 percent of the total domestic production of that industry. Nonetheless, in its discussion of serious damage to the US industry, in Section III:A of its Market Statement, the United States provided employment, man-hour and wage information for the woven shirt and blouse industry but not for the woven wool shirt and blouse industry. Similarly, all of the information in Section III:B of the Market Statement was based on statements provided by firms making woven shirts and blouses generally. While it was asserted that “[i]n general, this information applies” to the woven wool shirt and blouse industry, it is not clear to what extent the references to “several”, “some”, “most”, etc. companies in the woven shirt and blouse industry would apply to the woven wool shirt and blouse industry which represents such a small portion of the larger industry. These vague industry statements could have been made more precise since the United States did so a few months after, as evidenced in a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case. For instance, it should have been possible to provide information on sales and profits for 1994 or 1993. Second, in its Market Statement, the United States did not make any reference to several factors listed in Article 6.3 of the ATC. The United States did not mention anything about the factor of “productivity” or “inventories” or “exports”, all of which could have had some bearing on the overall determination by the United States.

7.34 We now turn to an examination of the specific elements of the US Market Statement. The Market Statement contains six headings under Section III:A “Serious Damage to the Domestic Industry”: (1) US Production, (2) Market Share Loss, (3) Import Penetration, (4) Employment, (5) Man-Hours, (6) Total Annual Wages. Then, there are also six headings under Section III:B, “Industry Statements”: (1) Employment, (2) Sales, (3) Profits, (4) Investment, (5) Capacity and (6) Prices. We note in this regard that of the eleven economic variables mentioned in Article 6.3 of the ATC no information or comment is provided in respect of productivity, inventories and exports.

7.35 “A. *Serious Damage to the Domestic Industry*”

“1. *US Production*”

*“US production of woven wool shirts and blouses, Category 440, declined during the first nine months of 1994, falling to 61, 000 dozen, 8 percent below the 66, 000 dozen produced during January-September 1993. (Table II)”*

Although the accuracy of the US production statistics was questioned by India in general, India did not raise any specific questions about these statistics.

7.36 “2. *Market Share Loss*”

*“The share of the US woven wool shirt and blouse market held by domestic manufacturers fell from 53 percent in 1993 to 40 percent during the first nine months of 1994. (Table II)”*

India submitted US statistics showing that in 1993 and 1994 most of the production was exported<sup>39</sup>. When requested by the Panel to provide pertinent data, the United States stated that US export data were not reliable because exporters did not have an incentive to report such exports. In its rebuttal submission, the United States estimated that possibly some 10 percent of the US production was being exported but due to the non-reliability of export data, CITA did not provide any export data in its Market Statement.

7.37 The absence of export data means that the US statistics do not provide reliable indications of changes in market share, i.e. share of apparent domestic consumption. The unavailability or questionable accuracy of government-compiled data cannot constitute a valid reason for not making some assessment of the impact of exports. In a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States declared that “The assessment is based on discussion with and information provided by trade associations, labour unions, and direct surveys of individual companies”. The United States should have been able to obtain more accurate data for its Market Statement from these sources or even directly from the fifteen or so producers in this sector.

7.38 “3. *Import Penetration*”

*“The ratio of imports to domestic production increased from 88 percent in 1993 to 151 percent during January-September 1994. (Table II)”*

These data were not challenged by India.

7.39 “4. *Employment*”

*“Employment in the industry producing woven shirts and blouses including shirts and blouses made from wool declined to 31, 929 production workers in 1994, six percent below the 1993 level and a loss of 2, 125 jobs. (Table III)”*

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<sup>39</sup>India stated that in 1993 the US production was 82000 dozen and exports were 85000 dozen and in 1994 production and exports were 76000 dozen and referred to a publication by the US Department of Commerce, US Imports, Production, Markets, Imports Production ratios and Domestic Market Shares for Textile and Apparel Product Categories, various Editions.

This information is not the information required by Article 6.3 of the ATC as it is not specific to the particular industry producing products of category 440, i.e. woven wool shirts and blouses. In a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States was more specific and put forward the number of jobs lost as 15 between 1993 and 1994 (and 12 between June 1994 and June 1995 and nine for the first half of 1995) in the specific sector under examination. The text of the Industry Statement on employment was not related specifically to the particular industry for which the restraint was imposed: “Several companies reported declines in their employment, some of which were specifically attributed to the impact of competitive imported goods ...”.

7.40 **“5. Man-Hours”**

*“The average annual man-hours worked dropped from 62.5 million man-hours in 1993 to 58.9 million man-hours in 1994, a six percent decline. (Table III)”*

As Table III makes clear, these statistics were for the entire woven shirt and blouse industry and no data whatsoever were submitted for the woven wool shirt and blouse industry. In a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States was more specific and stated that there was a drop from 433,000 man-hours in 1992 to 382,000 man-hours in 1994, an 11.8 percent decline in the specific sector under examination.

7.41 **“6. Total Annual Wages”**

*“The total annual production worker wages fell from \$423.1 million in 1993 to \$411.2 million in 1994, a three percent decline. (Table III)”*

These statistics did not relate to the woven wool shirt and blouse industry but covered the entire woven shirt and blouse industry. In a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States was able to submit relevant data for the specific segment of the industry from 1992 to June 1995.

7.42 **“B. Industry Statements”**

Under Section III:B of the Market Statement, the United States provided statements on the industry which, it pointed out, were “based on information supplied by individual US firms domestically producing shirts and blouses ... In general, this information applies to companies producing men’s and women’s woven wool shirts and blouses”.<sup>40</sup> This reference made by the United States that “In general, this information applies to the [relevant industry] ...” does not meet the requirements of Article 6.3 of the ATC that the information must relate to the particular industry object of the safeguard action, i.e. the industry producing woven wool shirts and blouses.

7.43 **“1. Employment”**

*“Several companies reported declines in their employment, some of which were specifically attributed to the impact of competitive imported goods. Some employment declines were in the range of 25-30 percent”*

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<sup>40</sup>We note that for Part A of the Market Statement the information relates often to woven shirts and blouses while for Part B of the Market Statement, the information is provided for the even wider sector of “shirts and blouses”. The United States adds that “In general, this information applies to companies producing men’s and women’s woven wool shirts and blouses”.

We refer to our comments made in paragraph 7.39. There is no information specific to the particular industry in the Market Statement.

7.44 “2. *Sales*”

*“Most companies reported sales declines as they lost market share to lower priced imports. Some companies experienced sales declines of 20 percent or more.”* (emphasis added)

No details or factual evidence was submitted. In addition, there is no information specific to the particular industry in the Market Statement. We note that in a later statement which it submitted to this Panel in an annex to its first submission as relevant evidence for this case, the United States said:

*“The two largest US manufacturers of woven wool shirts and blouses, representing over 50% of domestic production, have reported stagnant sales during the last half of 1994 and the first half of 1995.”*

There appears to be a contradiction between the two statements.

7.45 “3. *Profits*”

*“Profit margins have been eroded across the board in the wool shirt industry as raw material cost increased while companies were unable to raise prices because of low-price import competition.”*

This statement is vague and imprecise. It is unclear what “erosion” of profit margin means in concrete terms, as it has not been quantified.

7.46 “4. *Investment*”

*“Investment levels are stagnant across much of the industry.”* (emphasis added)

However, in the chapeau of Section III:A, the United States stated that “... surging imports, ... have resulted in loss of ... investment”. Both statements are vague and imprecise and appear to be inconsistent.

7.47 “5. *Capacity*”

*“Several companies reported a decline in capacity. One company reported ending all outside contracting production (formerly about 25 percent of its manufacturing), representing the equivalent of closing four plants. The company’s own manufacturing plants are now running at only 70 percent of capacity. Furthermore, this company also operates several woolen fabric mills which supply the apparel manufacturing plants, and these apparel manufacturing plants, and these mills are now running at about 65 percent of capacity.”*

It is unclear to what extent these statements are applicable to the specific woven wool shirt and blouse industry. It is said that one company was “running at only 70 percent of capacity”, but no further explanation is given. The question thus arises whether this capacity utilization is lower or greater than the preceding year. The reference to the fabric mills is to a different industry.

7.48 “6. *Prices*”

*“Prices of domestic products, manufactured mainly from US-made fabric, are substantially higher than import competition.”*

Based on Table IV, submitted under Part IV of the Market Statement on “Attribution”, it appears that the world average price was \$187.23, the US average price was \$525-550 and India’s average price was \$133.85. This difference in prices in itself indicates nothing about the state of the particular US industry.

**Causation**

7.49 We note that the United States referred explicitly to the “causation” issue in its industry statement concerning employment, sales and profits. The United States also stated in the chapeau of Section III:A of its Market Statement: “The combination of high imports levels, surging imports, and low priced goods from these countries have resulted in loss of domestic output, market share, investment, employment, man-hours worked, and total annual wages.” However, we note that, as far as the alleged effects of imports are concerned, the United States referred to a series of factors (in Section III A and B of its Market Statement) which do not contain any specific data concerning the industry producing woven wool shirts and blouses alleged to have suffered serious damage or actual threat thereof. Moreover, while the chapeau of Section III:A mentions a loss in investment, paragraph 4 of the Industry Statement section states that investment levels were stagnant. We also note that concerning the loss of profits (Industry Statement), the United States’ allegation concerning un-quantified cost increases weakens the causation analysis because the United States states that factors other than increased imports, such as increases in prices of raw material, were contributing to damaging the wool shirt industry. Concerning the causation referred to in the sub-section on lost sales (Industry Statement), the United States stated that some companies lost sales as they lost market share to lower priced imports; however, without any export data, market shares would not have been adequately determined. The alleged declines in employment (Industry Statement) were said to be specifically attributed to the impact of competitive imported goods, but the declines were not specific to the particular industry of woven wool shirts and blouses. Concerning the alleged decline in the utilization of capacity, the absence of export data affects the information on utilization of capacity, and brings doubts as to whether the reduction of utilization was due to a reduction in exports. In addition to the above specific deficiencies, the United States did not explain how imports may have increased by some 80,000 dozen in the first nine months of 1993, while domestic production decreased by only 5000 dozen.

7.50 Finally, but not the least, the clear wording of Article 6.2 of the ATC “ ... Serious damage or actual threat thereof must demonstrably be caused by ... and not by such other factors as technological changes or changes in consumer preference” imposes on the importing Member at least an explicit obligation to address the question whether serious damage or actual threat thereof to the particular domestic industry was caused by changes in consumer preferences or technological changes. The importing Member remains free to choose the method of assessing whether the state of its particular domestic industry was caused by such other factors as technological changes or changes in consumer preferences, but it must demonstrate that it has addressed the issue. The United States made no mention of this issue in its Market Statement.

**3. Overall Assessment of the US Determination**

7.51 In assessing the US determination in relation to the provisions of Article 6.2 and 6.3 of the ATC, we reach the following conclusion. As discussed in paragraphs 7.25 to 7.28 including footnote 38, Article 6.3 of the ATC lists eleven economic factors which must be “considered” or “examined” by

the importing Member in making its determination, for the particular industry for which the measure is imposed, which in the present case is the woven wool shirts and blouses, category 440. Those factors are: output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment. We find that the United States did not examine eight of these factors, i.e. productivity, utilization of capacity, inventories, exports, wages, employment, profits and investment, in the context of the particular industry, i.e. the woven wool shirt and blouse industry, and the United States gave no explanation for not doing so. For five of these factors (utilization of capacity, wages, employment, profits and investment) some information was provided only for the broader shirt and blouse or woven shirt and blouse sectors without being adequately related to the particular US industry. The absence of any data on exports also vitiates the statements on market shares, sales and utilization of capacity for the purpose of demonstrating serious damage or actual threat thereof as well as causation. In addition, the information provided is often vague and imprecise both in the Section III:A and B. Since the United States did not include any specific information for the particular industry concerned, it, therefore, could not make any convincing analysis as to the causation of serious damage or actual threat thereof to that particular industry of woven wool shirts and blouses. The United States did assert in the chapeau of Section III:A of the Market Statement that imports had resulted in various losses (domestic output, market share, investment, employment, man-hours worked, and total annual wages) for US industry, but the United States failed to tie the effects of imports on those economic variables to the particular industry alleged to have been damaged by such imports. Moreover, the United States did not address the issue of whether the alleged state of the particular industry was caused by technological changes or changes in consumer preferences. Finally, the United States did not include any explanation as to why it was not able to collect specific or more precise information for the particular industry when making its determination, while it was able to develop such data a few months after (as evidenced in a later statement which the United States submitted to this Panel in an annex to its first submission as relevant evidence for this case).

7.52 For all these reasons, and recognizing that the right of importing Members to take safeguard restraints must be exercised within the parameters laid down in Article 6 of the ATC, we reach the conclusion that, on its face, the US determination did not respect the requirements of Article 6 of the ATC. This is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case. The importing Member must, however, comply in its determination with the requirements that (i) at least all economic factors listed in Article 6.3 of the ATC are “considered”, as indicated in paragraphs 7.25 and 7.26 above, and (ii) the importing Member meet the explicit requirement to confirm that the increase in imports is the cause of the serious damage or actual threat thereof to the particular domestic industry and that the state of that industry is not caused by such other factors as technological changes or changes in consumer preferences.

#### **4. Serious Damage or Actual Threat Thereof**

7.53 As discussed in paragraph 7.31, India requested a supplementary finding on the issue of serious damage or actual threat thereof. We note that the Diplomatic Note did refer to serious damage or actual threat thereof, while the US Market Statement and the notification on 23 May 1995 in the Federal Register were limited to an allegation of serious damage. We do not consider, however, that we need to decide whether serious damage or actual threat thereof is a single concept; whether serious damage is a shorthand for the expression “serious damage or actual threat thereof”; whether actual threat of serious damage is but a lower level of serious damage; whether the two expressions refer to different types of market situation in the importing market; or even whether the Diplomatic Note and the Market

Statement together form a single request for consultation with serious damage being used as a shorthand expression for serious damage or actual threat thereof. Whether the United States wanted to demonstrate “serious damage” or, assuming they are distinct standards, “actual threat thereof” or “serious damage or actual threat thereof”, it would have had to demonstrate the effects of imports on the particular domestic industry with reference to at least the eleven factors listed in Article 6.3 of the ATC. Therefore, in view of our conclusions in the previous paragraphs concerning these factors, we consider that the US demonstration, contained in the Market Statement which is the totality of the information used by CITA for its determination, does not support a determination of serious damage or actual threat thereof, as a single or as two separate concepts. Similarly, the deficiencies we found in the analysis of causation in the US Market Statement would apply whether the increased quantities of imports were alleged to have caused serious damage or actual threat thereof as a single or as two separate concepts.

## **5. The Obligation to Consult and the Alleged Need for TMB Endorsement**

7.54 India also claims that, on its face, the US measure is inconsistent with the procedural requirements of Article 6 of the ATC. India argued that the procedural requirements of Article 6 of the ATC are the following: a) the Member proposing to take safeguard action shall seek consultations; b) the request shall be accompanied by specific factual information; c) if consultations fail and an action is taken, the TMB shall promptly conduct an examination; d) following that examination, the TMB shall make the appropriate recommendations. For India, the reference to the word “shall” means that all these procedural requirements must be fulfilled for a safeguard action to be consistent with the ATC. India, therefore, claims that the United States could not justify its restraint as a response to an actual threat of serious damage because the US Market Statement dealt only with the existence of serious damage.

7.55 India also claims that the US measure is inconsistent with Article 6 because the mandatory prior consultations were not held on the measure for which the United States obtained TMB “endorsement”. According to India, the US measure was never endorsed by the TMB because the TMB endorsed a measure different from the one which formed the basis of the US decision to impose a safeguard action and different from the one on which India and the United States had consulted. India claims that the TMB endorsed a measure to compensate for an increase of imports which were causing a threat of serious damage, while the United States imposed, and India and the United States consulted on, a safeguard action to compensate for an increase of imports which was causing serious damage to the domestic industry.

7.56 With respect to India’s claim that the United States consulted on, and referred to the TMB, a measure to compensate for serious damage and not a measure to compensate for actual threat of serious damage<sup>41</sup>, we consider that since we have concluded that the US determination did not respect the requirements of Article 6 of the ATC, irrespective of whether serious damage or actual threat thereof is a single or two separate concepts, it is not necessary for us to rule on the issue of whether the consultations were properly held, or on the issue of whether the TMB made a recommendation in respect of the measure on which the United States had consulted with India.

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<sup>41</sup>We recall that the US Diplomatic Note requested consultations in respect of sharp and substantial increase in imports from India of the products in category 440 which were causing “serious damage or actual threat thereof” to the domestic industry, the US Market Statement was entitled “Statement of Serious Damage: Category 440” and the notification on 23 May 1995 in the US Federal Register stated that “the sharp and substantial increase in imports of woven wool shirts and blouses, Category 440, is causing serious damage to the US industry producing woven wool shirts and blouses”.

7.57 Concerning India's claim that the US restraint is invalid because the TMB did not endorse the measure which the United States attempted to justify in the Market Statement and on which consultations were held, we note that under Article 6.10 of the ATC, the United States, should it be entitled to impose a restraint, could do so without TMB authorization, although it would be required to refer the matter to the TMB for appropriate recommendations. Article 8.9 of the ATC confirms that the recommendations of the TMB are not binding:

"The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations." (emphasis added)

We, therefore, reject India's claim that under the ATC a safeguard action can be maintained only if adequately endorsed by the TMB.

**E. Alleged Retroactive Application of the Safeguard**

7.58 India also claims that the decision of the United States to set the period of application of the safeguard action starting from the date of the request for consultations violates the provisions of the ATC, in particular Articles 1.6 and 2, as well as Article XIII of GATT 1994 because the safeguard action should be applied and made effective only after the expiry of the 60-day consultation period. The United States objected to the right of India to invoke a violation of Article XIII of GATT 1994 in support of its claim and urges the rejection of this claim. In view of our conclusion that the US determination did not respect the requirements of Article 6.2 and 6.3 of the ATC and that, therefore, the US measure violated the ATC, we need not consider whether the date of application of that measure was consistent with WTO rules.

**F. India's Claim that Article 2 of the ATC was Violated**

7.59 Since we conclude that the safeguard action taken by the United States violated the provisions of Article 6 of the ATC, it is our view that the United States applied a restraint not authorized under the ATC, which, therefore, constitutes also a violation of Article 2.4 of the ATC.

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**VIII CONCLUSIONS**

8.1 We conclude that the US restraint applied as of 18 April 1995 on imports of woven wool shirts and blouses, category 440, from India and its extensions violated the provisions of Articles 2 and 6 of the ATC. Since Article 3.8 of the DSU 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 India under the WTO Agreement, in particular under the ATC. The Panel recommends that the Dispute Settlement Body make such a ruling.