

#### NOTE

1. The Agreement on Textiles and Clothing (ATC) was negotiated in the Uruguay Round of Trade Negotiations. It replaced the Arrangement Regarding International Trade in Textiles (MFA, or Multi-Fibre Arrangement) of 20 December 1973. The ATC provided for all then-existing textile and clothing trade restrictions to be notified and eliminated over a period of 10 years from the date of entry into force of the WTO Agreement.
2. The ATC also provided that the ATC itself would be terminated at the beginning of the 12<sup>th</sup> year of the WTO, together with all of the remaining restrictions within its scope. As this termination duly took place on 1 January 2005, the ATC is no longer in effect.
3. Annexed is the Chapter from the *WTO Analytical Index, 3<sup>rd</sup> edition* (2012) providing information on the Agreement on Textiles and Clothing.

Agreement on Textiles and Clothing

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**II. GENERAL**

4. The Agreement on Textiles and Clothing (ATC) was negotiated in the Uruguay Round of Trade Negotiations. It replaced the Arrangement Regarding International Trade in Textiles (MFA, or Multi-Fibre Arrangement) of 20 December 1973. The ATC provided for all then-existing textile and clothing trade restrictions to be notified and eliminated over a period of 10 years from the date of entry into force of the WTO Agreement. The ATC also provided that the ATC itself would be terminated at the beginning of the 12<sup>th</sup> year of the WTO, together with all of the remaining restrictions within its scope. As this termination duly took place on 1 January 2005, the ATC is no longer in effect.

5. For additional information on practice under the ATC during the 1995-2005 period, see earlier editions of the *WTO Analytical Index*.

**III. PREAMBLE**

A. TEXT OF THE PREAMBLE

*Members,*

*Recalling* that Ministers agreed at Punta del Este that "negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade";

*Recalling* also that in the April 1989 Decision of the Trade Negotiations Committee it was agreed that the process of integration should commence following the conclusion of the Uruguay Round of Multilateral Trade Negotiations and should be progressive in character;

*Recalling* further that it was agreed that special treatment should be accorded to the least-developed country Members;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

*No jurisprudence or decision of a competent WTO body.*

**IV. ARTICLE 1**

A. TEXT OF ARTICLE 1

*Article 1*

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

2. Members agree to use the provisions of paragraph 18 of Article 2 and paragraph 6(b) of Article 6 in such a way as to permit meaningful increases in access possibilities for small suppliers and the development of commercially significant trading opportunities for new entrants in the field of textiles and clothing trade.<sup>1</sup>

*(footnote original)* <sup>1</sup> To the extent possible, exports from a least-developed country Member may also benefit from this provision.

3. Members shall have due regard to the situation of those Members which have not accepted the Protocols extending the Arrangement Regarding International Trade in Textiles (referred to in this Agreement as the "MFA") since 1986 and, to the extent possible, shall afford them special treatment in applying the provisions of this Agreement.

4. Members agree that the particular interests of the cotton-producing exporting Members should, in consultation with them, be reflected in the implementation of the provisions of this Agreement.

5. In order to facilitate the integration of the textiles and clothing sector into GATT 1994, Members should allow for continuous autonomous industrial adjustment and increased competition in their markets.

6. Unless otherwise provided in this Agreement, its provisions shall not affect the rights and obligations of Members under the provisions of the WTO Agreement and the Multilateral Trade Agreements.

7. The textile and clothing products to which this Agreement applies are set out in the Annex.<sup>1</sup>

## B. INTERPRETATION AND APPLICATION OF ARTICLE 1

### 1. General: Purpose and interpretation of the ATC

6. The Panel in *US – Underwear* examined whether a transitional safeguard measure imposed by the United States was consistent with Article 6. In so doing, the Panel referred to Article 1 in explaining the overall purpose of the ATC:

"[T]he overall purpose of the ATC is to integrate the textiles and clothing sector into GATT 1994. Article 1 of the ATC makes this point clear. To this effect, the ATC requires notification of all existing quantitative restrictions (Article 2 of the ATC) and provides that they will have to be terminated by the year 2004 (Article 9 of the ATC)."<sup>2</sup>

7. In *Turkey – Textiles*, the Panel noted (in relation to the notification requirement of Article 2.1) that "since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly".<sup>3</sup>

## V. ARTICLE 2

### A. TEXT OF ARTICLE 2

#### *Article 2*

<sup>1</sup> With respect to the Annex, see Section XIII. (The list of textile and clothing products is omitted).

<sup>2</sup> Panel Report, *US – Underwear*, para. 7.19.

<sup>3</sup> Panel Report, *Turkey – Textiles*, para. 9.69.

1. All quantitative restrictions within bilateral agreements maintained under Article 4 or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement shall, within 60 days following such entry into force, be notified in detail, including the restraint levels, growth rates and flexibility provisions, by the Members maintaining such restrictions to the Textiles Monitoring Body provided for in Article 8 (referred to in this Agreement as the "TMB"). Members agree that as of the date of entry into force of the WTO Agreement, all such restrictions maintained between GATT 1947 contracting parties, and in place on the day before such entry into force, shall be governed by the provisions of this Agreement.

2. The TMB shall circulate these notifications to all Members for their information. It is open to any Member to bring to the attention of the TMB, within 60 days of the circulation of the notifications, any observations it deems appropriate with regard to such notifications. Such observations shall be circulated to the other Members for their information. The TMB may make recommendations, as appropriate, to the Members concerned.

3. When the 12-month period of restrictions to be notified under paragraph 1 does not coincide with the 12-month period immediately preceding the date of entry into force of the WTO Agreement, the Members concerned should mutually agree on arrangements to bring the period of restrictions into line with the agreement year<sup>2</sup>, and to establish notional base levels of such restrictions in order to implement the provisions of this Article. Concerned Members agree to enter into consultations promptly upon request with a view to reaching such mutual agreement. Any such arrangements shall take into account, *inter alia*, seasonal patterns of shipments in recent years. The results of these consultations shall be notified to the TMB, which shall make such recommendations as it deems appropriate to the Members concerned.

*(footnote original)* <sup>2</sup> The "agreement year" is defined to mean a 12-month period beginning from the date of entry into force of the WTO Agreement and at the subsequent 12-month intervals.

4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.<sup>3</sup> Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith.

*(footnote original)* <sup>3</sup> The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.

5. Any unilateral measure taken under Article 3 of the MFA prior to the date of entry into force of the WTO Agreement may remain in effect for the duration specified therein, but not exceeding 12 months, if it has been reviewed by the Textiles Surveillance Body (referred to in this Agreement as the "TSB") established under the MFA. Should the TSB not have had the opportunity to review any such unilateral measure, it shall be reviewed by the TMB in accordance with the rules and procedures governing Article 3 measures under the MFA. Any measure applied under an MFA Article 4 agreement prior to the date of entry into force of the WTO Agreement that is the subject of a dispute which the TSB has not had the opportunity to review shall also be reviewed by the TMB in accordance with the MFA rules and procedures applicable for such a review.

6. On the date of entry into force of the WTO Agreement, each Member shall integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports of the products in the Annex, in terms of HS lines or categories. The products to be integrated shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing.<sup>4</sup>

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<sup>4</sup> With respect to Article 2.6, in Marrakesh, the Ministerial Conference took the following Decision on Notification of First Integration under Article 2.6 of the *ATC*:

*"Ministers agree* that the participants maintaining restrictions falling under paragraph 1 of Article 2 of the Agreement on Textiles and Clothing shall notify full details of the actions to be taken pursuant to paragraph 6 of Article 2 of that Agreement to the GATT Secretariat not later than 1 October 1994. The

7. Full details of the actions to be taken pursuant to paragraph 6 shall be notified by the Members concerned according to the following:

- (a) Members maintaining restrictions falling under paragraph 1 undertake, notwithstanding the date of entry into force of the WTO Agreement, to notify such details to the GATT Secretariat not later than the date determined by the Ministerial Decision of 15 April 1994. The GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the TMB, when established, for the purposes of paragraph 21;
- (b) Members which have, pursuant to paragraph 1 of Article 6, retained the right to use the provisions of Article 6, shall notify such details to the TMB not later than 60 days following the date of entry into force of the WTO Agreement, or, in the case of those Members covered by paragraph 3 of Article 1, not later than at the end of the 12th month that the WTO Agreement is in effect. The TMB shall circulate these notifications to the other Members for information and review them as provided in paragraph 21.

8. The remaining products, i.e. the products not integrated into GATT 1994 under paragraph 6, shall be integrated, in terms of HS lines or categories, in three stages, as follows:

- (a) on the first day of the 37th month that the WTO Agreement is in effect, products which accounted for not less than 17 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;
- (b) on the first day of the 85th month that the WTO Agreement is in effect, products which accounted for not less than 18 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;
- (c) on the first day of the 121st month that the WTO Agreement is in effect, the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this Agreement having been eliminated.

9. Members which have notified, pursuant to paragraph 1 of Article 6, their intention not to retain the right to use the provisions of Article 6 shall, for the purposes of this Agreement, be deemed to have integrated their textiles and clothing products into GATT 1994. Such Members shall, therefore, be exempted from complying with the provisions of paragraphs 6 to 8 and 11.

10. Nothing in this Agreement shall prevent a Member which has submitted an integration programme pursuant to paragraph 6 or 8 from integrating products into GATT 1994 earlier than provided for in such a programme. However, any such integration of products shall take effect at the beginning of an agreement year, and details shall be notified to the TMB at least three months prior thereto for circulation to all Members.

11. The respective programmes of integration, in pursuance of paragraph 8, shall be notified in detail to the TMB at least 12 months before their coming into effect, and circulated by the TMB to all Members.

12. The base levels of the restrictions on the remaining products, mentioned in paragraph 8, shall be the restraint levels referred to in paragraph 1.

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GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the Textiles Monitoring Body, when established, for the purposes of paragraph 21 of Article 2 of the Agreement on Textiles and Clothing."

13. During Stage 1 of this Agreement (from the date of entry into force of the WTO Agreement to the 36th month that it is in effect, inclusive) the level of each restriction under MFA bilateral agreements in force for the 12-month period prior to the date of entry into force of the WTO Agreement shall be increased annually by not less than the growth rate established for the respective restrictions, increased by 16 per cent.

14. Except where the Council for Trade in Goods or the Dispute Settlement Body decides otherwise under paragraph 12 of Article 8, the level of each remaining restriction shall be increased annually during subsequent stages of this Agreement by not less than the following:

- (a) for Stage 2 (from the 37th to the 84th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 1, increased by 25 per cent;
- (b) for Stage 3 (from the 85th to the 120th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 2, increased by 27 per cent.

15. Nothing in this Agreement shall prevent a Member from eliminating any restriction maintained pursuant to this Article, effective at the beginning of any agreement year during the transition period, provided the exporting Member concerned and the TMB are notified at least three months prior to the elimination coming into effect. The period for prior notification may be shortened to 30 days with the agreement of the restrained Member. The TMB shall circulate such notifications to all Members. In considering the elimination of restrictions as envisaged in this paragraph, the Members concerned shall take into account the treatment of similar exports from other Members.

16. Flexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this Article, shall be the same as those provided for in MFA bilateral agreements for the 12-month period prior to the entry into force of the WTO Agreement. No quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward.

17. Administrative arrangements, as deemed necessary in relation to the implementation of any provision of this Article, shall be a matter for agreement between the Members concerned. Any such arrangements shall be notified to the TMB.

18. As regards those Members whose exports are subject to restrictions on the day before the entry into force of the WTO Agreement and whose restrictions represent 1.2 per cent or less of the total volume of the restrictions applied by an importing Member as of 31 December 1991 and notified under this Article, meaningful improvement in access for their exports shall be provided, at the entry into force of the WTO Agreement and for the duration of this Agreement, through advancement by one stage of the growth rates set out in paragraphs 13 and 14, or through at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions. Such improvements shall be notified to the TMB.

19. In any case, during the duration of this Agreement, in which a safeguard measure is initiated by a Member under Article XIX of GATT 1994 in respect of a particular product during a period of one year immediately following the integration of that product into GATT 1994 in accordance with the provisions of this Article, the provisions of Article XIX, as interpreted by the Agreement on Safeguards, will apply, save as set out in paragraph 20.

20. Where such a measure is applied using non-tariff means, the importing Member concerned shall apply the measure in a manner as set forth in paragraph 2(d) of Article XIII of GATT 1994 at the request of any exporting Member whose exports of such products were subject to restrictions under this Agreement at any time in the one-year period immediately prior to the initiation of the safeguard measure. The exporting Member concerned shall administer such a measure. The applicable level shall not reduce the relevant exports below the level of a recent representative period, which shall normally be the average of exports from the Member concerned in the last three representative years

for which statistics are available. Furthermore, when the safeguard measure is applied for more than one year, the applicable level shall be progressively liberalized at regular intervals during the period of application. In such cases the exporting Member concerned shall not exercise the right of suspending substantially equivalent concessions or other obligations under paragraph 3(a) of Article XIX of GATT 1994.

21. The TMB shall keep under review the implementation of this Article. It shall, at the request of any Member, review any particular matter with reference to the implementation of the provisions of this Article. It shall make appropriate recommendations or findings within 30 days to the Member or Members concerned, after inviting the participation of such Members.

## B. INTERPRETATION AND APPLICATION OF ARTICLE 2

### 1. General

8. Article 2 provided for (1) notification of all restrictions imposed under the MFA as of the day before the date of entry into force of the WTO Agreement; (2) a ban on introduction or maintenance of restrictions except as provided by Article 2(4); (3) elimination of all the notified restrictions, in four stages, supervised by the TMB; and (4) provisions regarding application of Article XIX of the GATT 1994 to products covered by the ATC, during the duration of the ATC.

9. ATC Articles 2 and 3 both required notifications thereunder to be submitted within 60 days following the date of entry into force of the WTO Agreement. Most such notifications were received in the 60 days following 1 January 1995. However, where the terms of an accession protocol provide that "those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by [the acceding Member] as if it had accepted that Agreement on the date of its entry into force", the 60-day window started on the date of accession. Accordingly, notifications under Article 2 and 3 were also received by and in respect of newly acceded Members, until termination of the ATC on 1 January 2005.

10. At its meeting in December 1999, the TMB addressed the concern expressed by a number of Members that the United States had introduced a new restraint measure on exports of certain products from Turkey. The measure had been published under the United States domestic procedures, but not notified to the TMB, since, according to the United States and Turkey, it "was taken pursuant to a provision of the ATC which does not require notification to the TMB".<sup>5</sup> The TMB "examine[d] briefly all the provisions of the ATC with a view to identifying under which provision such a measure could have been agreed without requiring its notification to the TMB", stating as follows:

"[R]estrictions maintained under Article 2 had to be notified, in detail, within 60 days following the entry into force of the WTO Agreement. A measure that had not been notified at all, obviously could not fall under the provisions of Article 2. . . . no provision under Article 2 provides the possibility of introducing new restrictions. The TMB noted, therefore, that the particular measure subject to its examination could not have been taken pursuant to Article 2."<sup>6</sup>

### 2. Article 2.1

11. In *Turkey – Textiles*, the Panel found that Article 2.1 established a mandatory requirement to notify all MFA restrictions within a 60-day time window after entry into force of the WTO Agreement. The Panel noted that all Members that could notify such MFA-derived restrictions had done so, and no others could be notified later:

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<sup>5</sup> G/TMB/R/60, para. 29.

<sup>6</sup> G/TMB/R/60, para. 30.

"The lists of restrictions notified pursuant to Article 2.1 set the starting point for the treatment of the restraints carried over from the former MFA regime. Four WTO Members notified the TMB pursuant to Article 2.1 of the ATC: Canada, the European Communities, Norway and the United States. We consider that the notification requirement of 60 days referred to in Article 2.1 of the ATC is mandatory both for formal and substantive reasons. The wording of Article 2.1 is unequivocal with the use of the term "shall". Moreover, since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly.<sup>7</sup> Stemming from this provision, only the four Members above had the right to and did notify measures which allowed them to maintain MFA-derived quantitative restrictions for a maximum period of 10 years during which import quotas must increase annually until the products they cover are integrated into GATT. In the absence of an exception under the ATC or a justification under GATT, no new quantitative restrictions introduced by a Member can benefit from the exceptions provided for in Article 2.1 of the ATC after this 60 day period."<sup>8</sup>

### 3. Article 2.4

#### (a) Jurisprudence

12. In *Turkey – Textiles*, the Panel held that any increase of an existing restriction was a 'new measure' and hence a violation of Article 2.4:

"The prohibition on 'new restrictions' must be interpreted taking into account the preceding sentence: 'The restrictions notified under paragraph 1 shall be deemed to constitute the *totality of such restrictions* applied by the respective Members on the day before the entry into force of the WTO Agreement'. The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a 'new restriction', would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a 'new' restriction."<sup>9</sup>

#### (b) TMB statements

13. In its report of the meeting in December 1999, when examining a new restriction introduced by the United States on Turkey's exports of certain textile products, as part of a broader understanding reached between the two Members, the TMB stated:<sup>10</sup>

"In concluding its examination of the measure mutually agreed between Turkey and the United States, the TMB recalled that Article 2.4 of the ATC states that "[n]o new

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<sup>7</sup> (footnote original) See for instance in Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R, ("*Indonesia – Autos*") (Not appealed), para. 14.92, where the period allowed for notification to the TRIMS Committee under Article 5 of the TRIMS Agreement, in order for a Member to benefit from the transition provisions of the TRIMS Agreement, was considered mandatory.

<sup>8</sup> Panel Report, *Turkey – Textiles*, para. 9.69.

<sup>9</sup> Panel Report, *Textiles – Turkey*, para. 9.71.

<sup>10</sup> G/TMB/R/60, para. 33.

restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions". After having considered the new measure against the different provisions of the ATC on the basis of the information available to it [...], the TMB concluded that the measure agreed upon by Turkey and the United States, affecting imports by the United States of category 352/652 products, had not been demonstrated to be in conformity with the provisions of the ATC."<sup>11</sup>

#### 4. Article 2.17

14. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, which provided for, *inter alia*, the introduction of a new restraint (on United States imports from Pakistan on products falling under US categories 666-S and 666-P), the TMB noted that the restrictions in question "had not been notified pursuant to Article 2.1 and, therefore, did not fall under the scope of the provisions of Article 2" and that "there appeared to be no justification to apply new quantitative restrictions under Article 2.17."<sup>12</sup>

## VI. ARTICLE 3

### A. TEXT OF ARTICLE 3

#### *Article 3*

1. Within 60 days following the date of entry into force of the WTO Agreement, Members maintaining restrictions<sup>4</sup> on textile and clothing products (other than restrictions maintained under the MFA and covered by the provisions of Article 2), whether consistent with GATT 1994 or not, shall (a) notify them in detail to the TMB, or (b) provide to the TMB notifications with respect to them which have been submitted to any other WTO body. The notifications should, wherever applicable, provide information with respect to any GATT 1994 justification for the restrictions, including GATT 1994 provisions on which they are based.

(footnote original) <sup>4</sup> Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.

2. Members maintaining restrictions falling under paragraph 1, except those justified under a GATT 1994 provision, shall either:

- (a) bring them into conformity with GATT 1994 within one year following the entry into force of the WTO Agreement, and notify this action to the TMB for its information; or
- (b) phase them out progressively according to a programme to be presented to the TMB by the Member maintaining the restrictions not later than six months after the date of entry into force of the WTO Agreement. This programme shall provide for all restrictions to be phased out within a period not exceeding the duration of this Agreement. The TMB may make recommendations to the Member concerned with respect to such a programme.

3. During the duration of this Agreement, Members shall provide to the TMB, for its information, notifications submitted to any other WTO bodies with respect to any new restrictions or changes in existing restrictions on textile and clothing products, taken under any GATT 1994 provision, within 60 days of their coming into effect.

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<sup>11</sup> G/TMB/R/60, para. 33.

<sup>12</sup> G/TMB/R/45, paras. 27-28.

4. It shall be open to any Member to make reverse notifications to the TMB, for its information, in regard to the GATT 1994 justification, or in regard to any restrictions that may not have been notified under the provisions of this Article. Actions with respect to such notifications may be pursued by any Member under relevant GATT 1994 provisions or procedures in the appropriate WTO body.

5. The TMB shall circulate the notifications made pursuant to this Article to all Members for their information.

## B. INTERPRETATION AND APPLICATION OF ARTICLE 3

### 1. General

15. With respect to the measure concerning the United States and Turkey, the TMB confirmed that all restrictive measures that touch upon the subject matter of the ATC, even if adopted on a non-ATC basis, had to be notified to the TMB:

"Article 3.3 does not exclude the possibility, *inter alia*, of introducing new restrictions on textile and clothing products. However, it contains not only the requirement of 'double' notification (i.e. to the appropriate WTO body and also to the TMB, for its information), but also limits the possibility of applying, *inter alia*, new restrictions to those cases where the measures were taken under any GATT 1994 provision."<sup>13</sup>

### 2. Article 3.1

#### (a) "restrictions"

16. At its meeting in November 2002, while reviewing an Article 3.1 notification by China following its accession to the WTO,<sup>14</sup> the TMB considered, *inter alia*, whether Article 3 also applied to export restrictions. The TMB noted:

"[A]rticle 3.1 uses the word 'restrictions' without any additional qualifications and that the footnote to this provision related to the same term states the following: 'Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.'<sup>15</sup> The language of Article 3 does not limit the application of this provision to any specific type of restriction. The export quotas maintained by China affecting silk yarn and woven fabrics of silk are, undoubtedly, unilateral quantitative restrictions, corresponding to the definition provided in the footnote referred to above. Therefore, also in view of the lack of any further precision in the respective provision of the ATC, export restrictions are not *a priori* excluded from the scope of application of Article 3. This conclusion is also in line with past practice in the TMB, whereby the notification under Article 3 of certain measures affecting exports of some textile products was not questioned.<sup>16</sup>

The TMB noted, furthermore, that the additional notification by China referred to 'restrictions on certain textile products which fall under the coverage of ATC and are subject to Article 3 of [that] Agreement'. This reference presumably indicated that, in the view of China, the measures in question should be considered under the

<sup>13</sup> G/TMB/R/60, para. 30.

<sup>14</sup> G/TMB/N/426 and Add.1.

<sup>15</sup> (*footnote original*) See footnote 4 of the ATC.

<sup>16</sup> (*footnote original*) Japan notified the application of an export approval system affecting certain products with certain specified destinations (United States, European Communities). For details see G/TMB/N/82 and G/TMB/N/175.

applicable provisions of the ATC. It was observed that the notification of these export restrictions under Articles 3.1 and 3.2(b) did not appear to be in contradiction with the relevant portion of the Report of the Working Party on the Accession of China.<sup>17</sup><sup>18</sup>

## VII. ARTICLE 4

### A. TEXT OF ARTICLE 4

#### *Article 4*

1. Restrictions referred to in Article 2, and those applied under Article 6, shall be administered by the exporting Members. Importing Members shall not be obliged to accept shipments in excess of the restrictions notified under Article 2, or of restrictions applied pursuant to Article 6.

2. Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products, including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between the Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.

3. If a product which constitutes only part of a restriction is notified for integration pursuant to the provisions of Article 2, Members agree that any change in the level of that restriction shall not upset the balance of rights and obligations between the Members concerned under this Agreement.

4. When changes mentioned in paragraphs 2 and 3 are necessary, however, Members agree that the Member initiating such changes shall inform and, wherever possible, initiate consultations with the affected Member or Members prior to the implementation of such changes, with a view to reaching a mutually acceptable solution regarding appropriate and equitable adjustment. Members further agree that where consultation prior to implementation is not feasible, the Member initiating such changes will, at the request of the affected Member, consult, within 60 days if possible, with the Members concerned with a view to reaching a mutually satisfactory solution regarding appropriate and equitable adjustments. If a mutually satisfactory solution is not reached, any Member involved may refer the matter to the TMB for recommendations as provided in Article 8. Should the TSB not have had the opportunity to review a dispute concerning such changes introduced prior to the entry into force of the WTO Agreement, it shall be reviewed by the TMB in accordance with the rules and procedures of the MFA applicable for such a review.

### B. INTERPRETATION AND APPLICATION OF ARTICLE 4

17. In the context of examining the measure introduced by the United States on exports of certain products from Turkey, the TMB held that the provisions of Article 4 have to be read in conjunction with the other provisions of the Agreement:

"[A]rticle 4.1 deals with the administration of 'restrictions referred to in Article 2, and those applied under Article 6'. Article 4.2 states that 'Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.' Article 4.4 provides, *inter alia*, the possibility to reach

<sup>17</sup> (*footnote original*) See WT/ACC/CHN/49, paragraph 165.

<sup>18</sup> G/TMB/R/93, paras. 19-20.

a 'mutually acceptable solution regarding appropriate and equitable adjustment' between Members when necessary changes, in the sense of Article 4.2, are introduced in the implementation or administration of existing restrictions. The TMB noted that, according to Article 4.4, such mutually acceptable solutions did not have to be notified to the TMB. The TMB recalled its findings that the new restriction could not have been agreed pursuant to the provisions of Articles 2 and 6. It was also observed that Article 4.4 does not provide explicit guidance regarding the scope of the adjustment that can be agreed between the Members concerned in the framework of the mutually acceptable solution. A reading according to which the introduction of a new restriction, in the sense of Article 2.4, can be agreed upon pursuant to Article 4.4 as an adjustment to balance possible improvements in the implementation or administration of restrictions maintained pursuant to Article 2 was, however, in the view of the TMB not consistent with the intention of the drafters of the ATC, since Article 4 relates to the implementation or administration of the restrictions referred to in Article 2, or applied under Article 6. Also, the construction of Article 4 and its language seem to suggest that when changes, in the sense of Article 4.2 are introduced, the appropriate and equitable adjustment referred to in Article 4.4 can only involve and affect the restrictions that have already been in place and notified pursuant to Article 2 or Article 6."<sup>19</sup>

## VIII. ARTICLE 5

### A. TEXT OF ARTICLE 5

#### *Article 5*

1. Members agree that circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents, frustrates the implementation of this Agreement to integrate the textiles and clothing sector into GATT 1994. Accordingly, Members should establish the necessary legal provisions and/or administrative procedures to address and take action against such circumvention. Members further agree that, consistent with their domestic laws and procedures, they will cooperate fully to address problems arising from circumvention.

2. Should any Member believe that this Agreement is being circumvented by transshipment, re-routing, false declaration concerning country or place of origin, or falsification of official documents, and that no, or inadequate, measures are being applied to address and/or to take action against such circumvention, that Member should consult with the Member or Members concerned with a view to seeking a mutually satisfactory solution. Such consultations should be held promptly, and within 30 days when possible. If a mutually satisfactory solution is not reached, the matter may be referred by any Member involved to the TMB for recommendations.

3. Members agree to take necessary action, consistent with their domestic laws and procedures, to prevent, to investigate and, where appropriate, to take legal and/or administrative action against circumvention practices within their territory. Members agree to cooperate fully, consistent with their domestic laws and procedures, in instances of circumvention or alleged circumvention of this Agreement, to establish the relevant facts in the places of import, export and, where applicable, transshipment. It is agreed that such cooperation, consistent with domestic laws and procedures, will include: investigation of circumvention practices which increase restrained exports to the Member maintaining such restraints; exchange of documents, correspondence, reports and other relevant information to the extent available; and facilitation of plant visits and contacts, upon request and on a case-by-case basis. Members should endeavour to clarify the circumstances of any such instances of circumvention or alleged circumvention, including the respective roles of the exporters or importers involved.

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<sup>19</sup> G/TMB/R/60, para. 31.

4. Where, as a result of investigation, there is sufficient evidence that circumvention has occurred (e.g. where evidence is available concerning the country or place of true origin, and the circumstances of such circumvention), Members agree that appropriate action, to the extent necessary to address the problem, should be taken. Such action may include the denial of entry of goods or, where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin. Also, where there is evidence of the involvement of the territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members. Any such actions, together with their timing and scope, may be taken after consultations held with a view to arriving at a mutually satisfactory solution between the concerned Members and shall be notified to the TMB with full justification. The Members concerned may agree on other remedies in consultation. Any such agreement shall also be notified to the TMB, and the TMB may make such recommendations to the Members concerned as it deems appropriate. If a mutually satisfactory solution is not reached, any Member concerned may refer the matter to the TMB for prompt review and recommendations.

5. Members note that some cases of circumvention may involve shipments transiting through countries or places with no changes or alterations made to the goods contained in such shipments in the places of transit. They note that it may not be generally practicable for such places of transit to exercise control over such shipments.

6. Members agree that false declaration concerning fibre content, quantities, description or classification of merchandise also frustrates the objective of this Agreement. Where there is evidence that any such false declaration has been made for purposes of circumvention, Members agree that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Should any Member believe that this Agreement is being circumvented by such false declaration and that no, or inadequate, administrative measures are being applied to address and/or to take action against such circumvention, that Member should consult promptly with the Member involved with a view to seeking a mutually satisfactory solution. If such a solution is not reached, the matter may be referred by any Member involved to the TMB for recommendations. This provision is not intended to prevent Members from making technical adjustments when inadvertent errors in declarations have been made.

## B. INTERPRETATION AND APPLICATION OF ARTICLE 5

### 1. General

18. In the context of examining a US restraint on exports of certain products from Turkey, referred to in paragraphs 9 and 12 above, the TMB stated that "any action taken pursuant to Article 5.4 has to be notified to the TMB. In case of evidence that the ATC is being circumvented by false declaration concerning fibre content, quantities, description or classification of merchandise, Article 5.6 allows the Members concerned to consult with a view to seeking a mutually satisfactory solution and the same Article does not require the notification of such mutually agreed solutions to the TMB."<sup>20</sup>

### 2. Article 5.4

(a) "appropriate action, to the extent necessary to address the problem"

19. In reviewing a number of administrative arrangements agreed between the United States and several other Members under which triple charges could be imposed on quotas to counter circumventions, the TMB "noted, *inter alia*, that paragraph 4 of Article 5 of the ATC seemed to provide some flexibility in terms of remedies or agreed actions that could be foreseen in cases when circumvention has occurred. It observed, however, that Article 5 contained no mention of the

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<sup>20</sup> G/TMB/R/60, para. 30.

possibility for the importing Member to impose triple charges on quotas, as a deterrent to circumvention."<sup>21</sup>

(b) "Members concerned may agree on other remedies in consultation"

20. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, referenced in paragraph 14 above, which provided, *inter alia*, for the introduction of a new restraint, the TMB "observed that, apart from the third sentence of Article 5.4, the introduction of a new restriction, even if mutually agreed between the Members concerned, was not mentioned in Article 5.4 as an 'appropriate action, to the extent necessary to address the problem' when circumvention as defined in Article 5.1 had occurred. Furthermore, the TMB understood that the introduction of restrictions, set out in the third sentence of Article 5.4, related only to the true country or place of origin in case there had been evidence of its involvement in the transshipment. This provision, therefore, could not *per se* allow the introduction of new restrictions on imports from Pakistan in the particular case when circumvention had occurred."<sup>22</sup>

21. While examining the measure referred to in paragraph 20 above, the TMB noted with respect to the fifth sentence of Article 5.4 that "the Agreement did not specify what, in the context of this paragraph, could or could not constitute the 'other remedies' ". It also held that Article 5.4 was sufficiently clear that an objective interpretation of 'other remedies' could not be asserted as to grant Members the right to adopt new quantitative restrictions:

"It could be argued that the 'other remedies' referred to in Article 5.4 did not include the permission to introduce new quantitative restrictions, since Article 5.4 in itself as well as the broader context as determined by the ATC provided sufficient guidance. . . . The second sentence . . . seemed to imply that the action taken should affect the product that was subject to circumvention. Since only the exports of products that had already been subject to restrictions could be circumvented, the remedy for such circumvention could not affect products other than those with respect to which circumvention had been claimed. . . . the two Members could have agreed on adjustments of charges to the restraint level established for the [products already subject to restriction] or on 'other remedies' affecting the same products, but not on 'other remedies' affecting other products."<sup>23</sup>

22. With respect to the treatment of the measure at issue under Article 2.17, see the excerpts from the reports of the TMB referenced in paragraph 14 above. Also, with respect to the same issue under Article 5.6, see the excerpt from the report of the TMB referenced in paragraph 23 below.

### 3. Article 5.6

23. Concerning the same agreement, the TMB held that "it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6".<sup>24</sup>

## IX. ARTICLE 6

### A. TEXT OF ARTICLE 6

#### *Article 6*

<sup>21</sup> G/TMB/R/31, paras. 20-21.

<sup>22</sup> G/TMB/R/45, paras. 33-34.

<sup>23</sup> G/TMB/R/45, paras. 36-37.

<sup>24</sup> G/TMB/R/45, paras. 47-48.

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

2. Safeguard action may be taken under this Article when, on the basis of a determination by a Member<sup>5</sup>, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference.

*(footnote original)* <sup>5</sup> A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious damage or actual threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious damage, or actual threat thereof, shall be based on the conditions existing in that member State and the measure shall be limited to that member State.

3. In making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance.

4. Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent<sup>6</sup>, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement.

*(footnote original)* <sup>6</sup> Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising, for example, from the existence of production capacity in the exporting Members.

5. The period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard action shall not exceed 90 days from the date of initial notification as set forth in paragraph 7.

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

(a) least-developed country Members shall be accorded treatment significantly more favourable than that provided to the other groups of Members referred to in this paragraph, preferably in all its elements but, at least, on overall terms;

(b) Members whose total volume of textile and clothing exports is small in comparison with the total volume of exports of other Members and who account for only a small percentage of total imports of that product into the importing Member shall be accorded

differential and more favourable treatment in the fixing of the economic terms provided in paragraphs 8, 13 and 14. For those suppliers, due account will be taken, pursuant to paragraphs 2 and 3 of Article 1, of the future possibilities for the development of their trade and the need to allow commercial quantities of imports from them;

(c) with respect to wool products from wool-producing developing country Members whose economy and textiles and clothing trade are dependent on the wool sector, whose total textile and clothing exports consist almost exclusively of wool products, and whose volume of textiles and clothing trade is comparatively small in the markets of the importing Members, special consideration shall be given to the export needs of such Members when considering quota levels, growth rates and flexibility;

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

7. The Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action. The request for consultations shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors, referred to in paragraph 3, on which the Member invoking the action has based its determination of the existence of serious damage or actual threat thereof; and (b) the factors, referred to in paragraph 4, on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned. In respect of requests made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8. The Member invoking the action shall also indicate the specific level at which imports of the product in question from the Member or Members concerned are proposed to be restrained; such level shall not be lower than the level referred to in paragraph 8. The Member seeking consultations shall, at the same time, 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 Chairman shall inform the members of the TMB of the request for consultations, indicating the requesting Member, the product in question and the Member having received the request. The Member or Members concerned shall respond to this request promptly and the consultations shall be held without delay and normally be completed within 60 days of the date on which the request was received.

8. If, in the consultations, there is mutual understanding that the situation calls for restraint on the exports of the particular product from the Member or Members concerned, the level of such restraint shall be fixed at a level not lower than the actual level of exports or imports from the Member concerned during the 12-month period terminating two months preceding the month in which the request for consultation was made.

9. Details of the agreed restraint measure shall be communicated to the TMB within 60 days from the date of conclusion of the agreement. The TMB shall determine whether the agreement is justified in accordance with the provisions of this Article. In order to make its determination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned. The TMB may make such recommendations as it deems appropriate to the Members concerned.

10. 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. It shall be open to either Member to refer the matter to the TMB before the expiry of the period of 60 days. In either case, the TMB shall promptly conduct an examination of the matter, including the determination of serious damage, or actual threat thereof, and its causes, and make appropriate recommendations to the Members concerned

within 30 days. In order to conduct such examination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned.

11. In highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair, action under paragraph 10 may be taken provisionally on the condition that the request for consultations and notification to the TMB shall be effected within no more than five working days after taking the action. In the case that consultations do not produce agreement, the TMB shall be notified at the conclusion of consultations, but in any case no later than 60 days from the date of the implementation of the action. The TMB shall promptly conduct an examination of the matter, and make appropriate recommendations to the Members concerned within 30 days. In the case that consultations do produce agreement, Members shall notify the TMB upon conclusion but, in any case, no later than 90 days from the date of the implementation of the action. The TMB may make such recommendations as it deems appropriate to the Members concerned.

12. A Member may maintain measures invoked pursuant to the provisions of this Article: (a) for up to three years without extension, or (b) until the product is integrated into GATT 1994, whichever comes first.

13. Should the restraint measure remain in force for a period exceeding one year, the level for subsequent years shall be the level specified for the first year increased by a growth rate of not less than 6 per cent per annum, unless otherwise justified to the TMB. The restraint level for the product concerned may be exceeded in either year of any two subsequent years by carry forward and/or carryover of 10 per cent of which carry forward shall not represent more than 5 per cent. No quantitative limits shall be placed on the combined use of carryover, carry forward and the provision of paragraph 14.

14. When more than one product from another Member is placed under restraint under this Article by a Member, the level of restraint agreed, pursuant to the provisions of this Article, for each of these products may be exceeded by 7 per cent, provided that the total exports subject to restraint do not exceed the total of the levels for all products so restrained under this Article, on the basis of agreed common units. Where the periods of application of restraints of these products do not coincide with each other, this provision shall be applied to any overlapping period on a *pro rata* basis.

15. If a safeguard action is applied under this Article to a product for which a restraint was previously in place under the MFA during the 12-month period prior to the entry into force of the WTO Agreement, or pursuant to the provisions of Article 2 or 6, the level of the new restraint shall be the level provided for in paragraph 8 unless the new restraint comes into force within one year of:

- (a) the date of notification referred to in paragraph 15 of Article 2 for the elimination of the previous restraint; or
- (b) the date of removal of the previous restraint put in place pursuant to the provisions of this Article or of the MFA

in which case the level shall not be less than the higher of (i) the level of restraint for the last 12-month period during which the product was under restraint, or (ii) the level of restraint provided for in paragraph 8.

16. When a Member which is not maintaining a restraint under Article 2 decides to apply a restraint pursuant to the provisions of this Article, it shall establish appropriate arrangements which: (a) take full account of such factors as established tariff classification and quantitative units based on normal commercial practices in export and import transactions, both as regards fibre composition and in terms of competing for the same segment of its domestic market, and (b) avoid over-categorization. The request for consultations referred to in paragraphs 7 or 11 shall include full information on such arrangements.

## B. INTERPRETATION AND APPLICATION OF ARTICLE 6

## 1. General

## (a) Elements of Article 6

24. In *US – Cotton Yarn*, the Appellate Body held that in applying Article 6:

"[W]e have to distinguish three different, but interrelated, elements under Article 6: first, *causation* of serious damage or actual threat thereof by increased imports<sup>25</sup>; second, *attribution* of that serious damage to the Member(s) the imports from whom contributed to that damage; and third, *application* of transitional safeguard measures to such Member(s)."<sup>26 27</sup>

## (b) Notification as an element of a valid safeguard measure

25. In examining a new restriction imposed by the United States on Turkey's exports of certain textile products as part of a broader bilateral agreement, the TMB held that failure to notify demonstrated that this restraint had not been taken under Article 6:

"Article 6 specifically provides in its paragraph 1 the possibility of introducing 'transitional safeguard' which, as stipulated in other provisions of the same Article, takes the form of restraint measures. However, the restraint measure or measures taken under this Article have to be notified to the TMB, whether agreed or applied unilaterally, as clearly set out in Articles 6.9, 6.10 and 6.11, so as to enable the TMB to examine the measure(s) in question, as required by the provisions of Article 6. Therefore, the measure agreed between Turkey and the United States could not have been taken under Article 6 since that Article requires notification and since both Members had stated to the TMB that the measure had been taken 'pursuant to a provision of the ATC which does not require notification to the TMB'.<sup>28</sup>

## (c) Scope and basis of review

## (i) Jurisprudence

26. In *US – Underwear*, the United States provided the Panel with a market statement by the United States authorities of 23 March 1995 (the "March Statement"), which was the basis for the transitional safeguard measure at issue, and another statement provided during TMB review proceedings (the "July Statement"). The Panel limited its review to an examination of the March Statement, noting as follows:

"We believe that statements subsequent to the March Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof in the present case. A restriction may be imposed, in a manner consistent with Article

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<sup>25</sup> (footnote original) The element of *causation* of serious damage is referred to in paragraph 2 of Article 6 of the *ATC*. The second sentence of paragraph 2 provides that serious damage "must demonstrably be caused by such increased quantities in total imports of that product" and not by "*other factors*" such as technological changes or changes in consumer preferences.

<sup>26</sup> (footnote original) The element of *application* of transitional safeguard measures to exporting Member(s) is dealt with in the first and the last sentences of paragraph 4 of Article 6 of the *ATC*. It is also dealt with in various places in paragraphs 6 through 16 of that Article. The first sentence of Article 6.4 provides that transitional safeguard measures "shall be applied on a Member-by-Member basis".

<sup>27</sup> Appellate Body Report, *US – Cotton Yarn*, para. 109.

<sup>28</sup> G/TMB/R/60, para. 30.

6 of the ATC, when based on a determination made in accordance with the procedure embodied in Article 6.2 and 6.4 of the ATC. This is precisely the role that the March Statement is called upon to play. Consequently, to review the alleged inconsistency of the US action with the ATC, we must focus our legal analysis on the March Statement as the relevant legal basis for the safeguard action taken by the United States."<sup>29</sup>

27. While it declined to consider the July Statement, the Panel held that it could "legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement":

"The March Statement included under the heading 'Market Situation' one sub-heading entitled 'Serious Damage to the Domestic Industry' (sub-heading A), which contained general information about the effect of underwear imports in Category 352/652, and a second sub-heading 'Industry Statements' (sub-heading B), which summarized statements to the US authorities by individual US companies. To some extent, there was an overlap between the information contained under the two sub-headings. The same categories of information were equally discussed in a statement submitted to the TMB by the United States in July 1995 (the 'July Statement'). While we have concluded that the July Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof, we feel that we can legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement. Consequently, we will use the July Statement for this limited purpose only. By doing so, we do not share the concerns expressed by the United States that such use of the July Statement would impair proceedings in the TMB in the future. We consider that a reluctance to submit updated information would normally adversely affect Members concerned. The interest to cooperate as required by Articles 6.7 and 6.9 of the ATC would prevail."<sup>30</sup>

28. In *US – Cotton Yarn*, the US determination under Article 6.2 had been based on contemporaneous industry data regarding the market situation; in the Panel proceeding, Pakistan presented later official data concerning the same facts, in order to demonstrate that the industry data were flawed. The Panel considered those data. On appeal, the Appellate Body found that this action exceeded the Panel's mandate under Article 11 of the DSU::

"[A] *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the ATC has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*. A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. If a panel were to examine such evidence, the panel would, in effect, be conducting a *de novo* review and . . . making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgment for that of the Member. . . .

Moreover, if a Member that has exercised due diligence in complying with its obligations of investigation, evaluation and explanation, were held responsible before a panel for what it *could not have known* at the time it made its determination, this would undermine the right afforded to importing Members under Article 6 to take

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<sup>29</sup> Panel Report, *US – Underwear*, para. 7.26.

<sup>30</sup> Panel Report, *US – Underwear*, para. 7.29.

transitional safeguard action when the determination demonstrates the fulfilment of the specific conditions provided for in this Article."<sup>31</sup>

29. In the same context, the Panel in *US – Underwear* held with respect to offers made in the course of bilateral negotiation between the parties:

"In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information."<sup>32</sup>

(ii) *TMB statements*

30. At its meeting in November 1998, in examining a safeguard measure introduced by Colombia against imports of certain products from Korea and Thailand, the TMB observed:

"[T]he TMB was of the view that its review of the measures introduced by Colombia had to be based essentially on the information made available by Colombia in accordance with Article 6.7 at the time the request for consultations had been made."<sup>33</sup>

(d) *Burden of proof*

31. In *US – Wool Shirts and Blouses*, on the issue of the burden of proof regarding whether a certain transitional safeguard measure complied with the requirements in Article 6, the Appellate Body held that it was for India to demonstrate that the United States measure had been imposed in violation of Article 6. In so doing, the Appellate Body also indirectly reversed a statement by the Panel in *US – Underwear*, which had held that the burden of proof under Article 6 fell upon the Member imposing the safeguard measure. In *US – Wool Shirts and Blouses*, the Appellate Body found that Article 6 embodied "a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period":

"We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption.

...

The transitional safeguard mechanism provided in Article 6 of the ATC is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the ATC. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument

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<sup>31</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 78-79.

<sup>32</sup> Panel Report, *US – Underwear*, para. 7.27.

<sup>33</sup> G/TMB/R/49, para. 25. The TMB repeated this statement on several occasions (G/TMB/R/51, para. 32; G/TMB/R/81, paras. 15, 17; G/TMB/R/83, para. 26).

sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States 'violated the provisions of Articles 2 and 6 of the *ATC*.'" <sup>34</sup>

(e) Specificity of data

32. At its meeting in March 1997, in examining a transitional safeguard measure taken by Brazil, with respect to the desired nature of information underpinning such measures, the TMB stated:

"[I]n case of recourse to Article 6, it was important to provide as much factual information and data as possible that was specific to the product category itself, as product-specific information and data should have a major impact on the overall assessment whether serious damage or actual threat thereof could be demonstrated." <sup>35</sup>

33. On the same issue as referenced in paragraph 32 above, the TMB continued:

"[T]he Body agreed with Hong Kong's main contention according to which a determination of serious damage could not be made almost entirely by reference to, and therefore by inferences drawn from, data relating to much broader industries in respect of which damage is claimed." <sup>36</sup>

## 2. Article 6.2

(a) General

34. In *US – Cotton Yarn*, the Appellate Body explained that Article 6.2 provided for three analytical steps which preceded the attribution exercise demanded by Article 6.4:

"Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, '[s]erious damage ... must demonstrably be caused by such increased quantities in *total* imports of that product and not by ... other factors'. (emphasis added)" <sup>37</sup>

(b) "a particular product is being imported"

35. At its fourth meeting in July 1998, in examining a transitional safeguard measure introduced by Colombia on imports of certain products from Brazil and India, the TMB held that the causal link in the phrase "is being imported [...] in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry" "seemed to indicate that the serious damage had to occur in a

<sup>34</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 13, 16 and 17.

<sup>35</sup> G/TMB/R/26, para. 25.

<sup>36</sup> G/TMB/R/26, para. 28.

<sup>37</sup> Appellate Body Report, *US – Cotton Yarn*, para. 112.

period close to the time at which the request for consultation was made. It followed that the information provided to demonstrate the serious damage had to be recent."<sup>38</sup>

(c) "in such increased quantities"

36. At its meeting in January 2000, the TMB considered a safeguard measure imposed by Argentina on certain imports from Brazil. The TMB pointed to the decline in imports and held that "the conditions defined in Article 6.2 did not allow for the application of transitional safeguard measures in cases where imports were declining, even though their share in the apparent market were increasing."<sup>39</sup>

37. At its meeting in September 2001, the TMB examined a safeguard measure imposed by Poland on imports of certain textile products from Romania. The TMB, observing the trend of imports over a five-year period, held that the reference period should be seen in its proper context, taking into account the continuous and significant decrease of imports of the relevant product in the years prior to the reference period:

"In analysing the above information, the TMB noted that there had been an increase in the volume of total imports in the year 2000, the reference period, compared to the previous year. It could not be ignored, however, that the volume of imports continuously decreased in 1998 and 1999, and that the level achieved in 2000 still remained well below the volume of total imports in 1996 and 1997, respectively. In this light, the trends indicated, at most, a recovery of total imports, but did not appear to substantiate the claim of a significant increase compared to the performance achieved in previous years. As to the argument of Poland that the decrease experienced in 1998 and 1999 was only in absolute terms, but not relative to consumption, the TMB observed that the ATC does not incorporate the concept of increased quantities of imports relative to other factors.

In light of the trends described above, the TMB was of the view that the 10.5 per cent increase in total imports reported for the reference period should be assessed in its proper context. Noting the argument by Romania that it had serious doubts as to whether an increase of total imports of this magnitude could constitute a sufficient demonstration in the meaning of Article 6.2, which requires the demonstration that 'a particular product is being imported into its territory **in such increased quantities** as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products (emphasis added)', the TMB also expressed its doubts that the alleged serious damage could be caused by the 10.5 per cent increase in total imports during the reference period. These doubts notwithstanding, the TMB decided to review the state of the Polish domestic industry and to revert to this aspect of the case, if necessary, at a subsequent stage of its examination."<sup>40</sup>

(d) "serious damage, or actual threat thereof"

(i) *Concepts of "serious damage, or actual threat thereof"*

38. In *US – Underwear*, the Panel noted that, contrary to the determination of "serious damage", a determination of an "actual threat thereof" required the competent authorities to carry out a prospective analysis in order that they can objectively conclude that unless action is taken, damage will surely occur in the near future:

<sup>38</sup> G/TMB/R/46, para. 13.

<sup>39</sup> G/TMB/R/60, para. 13.

<sup>40</sup> G/TMB/R/81, para. 21-22.

"Article 6.2 and 6.4 of the ATC make reference to 'serious damage, or actual threat thereof'. The word 'thereof', in our view, clearly refers to 'serious damage'. The word 'or' distinguishes between 'serious damage' and 'actual threat thereof'. In our view, 'serious damage' refers to a situation that has already occurred, whereas 'actual threat of serious damage' refers to a situation existing at present which might lead to serious damage in the future. Consequently, in our view, a finding on 'serious damage' requires the party that takes action to demonstrate that damage has already occurred, whereas a finding on 'actual threat of serious damage' requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future.<sup>41</sup> The March Statement contains no elements of such a prospective analysis. In our view, even if the mention of 'actual threat' in the Diplomatic Note accompanying the March Statement were to be considered, the fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual threat of serious damage."<sup>42</sup>

39. In *US – Cotton Yarn*, the Panel quoted the above-mentioned paragraph in *US – Underwear* as support for its finding that when there were domestic findings of both current serious damage and actual threat of serious damage, the finding of actual threat was redundant unless it were supported by an independent prospective analysis. The Panel held:

"In our view, the US finding on actual threat of serious damage contained in the 1998 Market Statement is essentially a finding that the existing 'serious damage' to the domestic industry would continue if imports were to continue as before. It would seem a reasonable inference to assume that if the trend in imports were to continue, the trend in domestic sales would continue, and consequently, the existing 'serious damage' would continue. Under the terms of Article 6.4, there seems to be no basis for demanding any further 'prospective analysis' than taking into consideration the prospect that the price-undercutting of imports from Pakistan would likely continue, in contrast to Pakistan's argument.

However, this US finding of 'actual threat of serious damage' in the 1998 Market Statement is totally dependent on the finding of serious damage. It is based on a finding that there is current serious damage and extrapolates to a conclusion that there is an actual threat of the serious damage continuing. This means that it does not serve as an independent (or alternative) determination of actual threat of serious damage. It is a redundant exercise and that means that if there is a fatal flaw in the serious damage determination, the actual threat determination necessarily falls, too. If the United States were to make an independent finding of actual threat of serious damage, further analysis would need to be done to substantiate the finding. In other words, a prospective analysis is required if an independent finding of actual threat is to be made rather than a redundant and dependant one as was effectively made by the United States in the 1998 Market Statement."<sup>43</sup>

(ii) *Indicators of serious damage: changes in firm output*

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<sup>41</sup> (footnote original) See GATT Panel Reports on *United States – Measures Affecting Imports of Softwood Lumber from Canada*, BISD 40S/358, paras. 402, 408; *New Zealand – Imports of Electrical Transformers from Finland*, para. 4.8; and *Korea – Antidumping Duties on Imports of Polyacetal Resins from the United States*, paras. 253, 272, 278.

<sup>42</sup> Panel Report, *US – Underwear*, para. 7.55.

<sup>43</sup> Panel Report, *US – Cotton Yarn*, paras. 7.138-7.139.

40. In *US – Cotton Yarn*, Pakistan had argued that the United States should not have treated as indicators of damage to its domestic industry the fact that establishments producing combed cotton yarn had been retooled to produce carded cotton yarn or any other products. The Panel, in a statement not addressed by the Appellate Body, considered that this issue related to the interpretation of "damage" under Article 6.2 and concluded "the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry":

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

In this connection, we recall that Pakistan argued that 'if a plant produces carded instead of combed yarn, thrives in its new capacity and retains its workforce, the increase in imports obviously did not cause *grave injury that impaired its value or usefulness*.' However, we disagree with this argument. Assume that, in reaction to import surge, domestic producers of certain textile products merged into companies in another industry; and the establishments of the acquired producers, after retooling to produce totally different products, achieved the same level of production, sales, profit, employment, etc. In this situation, indeed, the 'value' of the retooled establishments may not have been impaired in some overall sense, but it would be obviously unreasonable that no transitional safeguard measure would be permitted since the 'domestic industry' producing the textile products was driven out by the import surge. In our view, the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry."<sup>44</sup>

(iii) *Choice of investigation period*

Length of the investigation period

41. In *US – Cotton Yarn*, Pakistan had argued that the eight-month investigation period chosen by the United States authorities for determining serious damage and causation was not long enough. The Panel "deem[ed] it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC".<sup>45</sup> The Panel further considered that the question of whether an eight-month period was sufficiently long for finding serious damage and causation should be done on a "case-by-case determination"<sup>46</sup> and that whether or not the chosen period is justifiably long would depend on, at least partly, the extent of the damage suffered by a subject domestic industry during that period. Thus, the Panel deemed it "inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC".<sup>47</sup>

<sup>44</sup> Panel Report, *US – Cotton Yarn*, para. 7.104.

<sup>45</sup> Panel Report, *US – Cotton Yarn*, para. 7.115.

<sup>46</sup> Panel Report, *US – Cotton Yarn*, para. 7.120.

<sup>47</sup> Panel Report, *US – Cotton Yarn*, paras. 7.113-7.115.

Most recent period

42. At its meeting in October 1999, the TMB examined transitional safeguard measures by Argentina on imports from Brazil. With respect to the choice of the investigation period, the TMB stated that:

"[I]n examining and assessing the determination of serious damage, or actual threat thereof, caused to the domestic industry producing like and/or directly competitive products by increased quantities of imports, decisive guidance had to be provided by the developments which had occurred in the most recent period, while data related to the longer time-period provided supplementary information that could support the justification of the determination made. The evidence that developments in the most recent period should have a decisive role in such a determination was, in the view of the TMB, supported by the time-frame referred to in Articles 6.7 and 6.8, by the requirements defined in Article 6.2 that in a determination it has to be demonstrated that a particular product 'is being imported' in increased quantities, and by the period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard as stated in Article 6.5. [...] a determination of serious damage, in the sense of Article 6, could not be based on developments that had affected the domestic industry years before the actual determination was being made."<sup>48</sup>

(e) "the domestic industry producing like and/or directly competitive products"

(i) *Product-oriented definition of domestic industry*

43. In *US – Cotton Yarn*, which concerned a safeguard measure of the United States on imports of cotton yarn from Pakistan (see paragraph 53 below), the Panel found that the United States violated Article 6.2 by excluding from the scope of the "domestic industry" the vertically integrated fabric producers that produced yarn for their own internal use. The Appellate Body upheld the Panel's finding<sup>49</sup>, *inter alia* because the definition of domestic industry is "product-oriented and not producer-oriented, and [...] the definition must be based on the products<sup>50</sup> produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive".<sup>51</sup>

(ii) *"producing"*

44. In *US – Cotton Yarn*, the Appellate Body interpreted the term "producing" in Article 6.2:

"[T]he term 'producing' in Article 6.2 means producing for commercial purposes and [...]it cannot be interpreted, in itself, to be limited to or qualified as producing for sale on the merchant or any other segment of the market. The definition of the domestic industry, in terms of Article 6.2, is determined by what the industry *produces*, that is, like and/or directly competitive products. In our view, the term

<sup>48</sup> G/TMB/R/58, para. 14.

<sup>49</sup> Panel Report, *US – Cotton Yarn*, paras. 7.90 and 8.1(a). Appellate Body Report, *US – Cotton Yarn*, para. 105.

<sup>50</sup> (*footnote original*) In *United States – Lamb Safeguard*, we also found that the *product* defines the scope of the definition of the domestic industry under the *Agreement on Safeguards*. In that case, the "like" product at issue was lamb *meat*. (Appellate Body Report, ... paras. 84, 86-88 and 95)

<sup>51</sup> Appellate Body Report, *US – Cotton Yarn*, para. 86.

"producing", in itself, cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with its product."<sup>52</sup>

(iii) "directly competitive products"

"Directly competitive" in the context of Article III:2 of the GATT 1994

45. In *US – Cotton Yarn*, the United States had claimed that its exclusion of yarn produced by vertically integrated fabric producers from the "domestic industry" was justified because they were not producing a directly competitive product.<sup>53</sup> The Appellate Body started its analysis by setting it into the context of its earlier interpretations of "directly competitive" products in the context of the Interpretative Note *Ad* Article III:2 of the GATT 1994. The Appellate Body summed up the key points regarding "directly competitive" as:

(a) The word '*competitive*' means 'characterised by competition'. The context of the competitive relationship is necessarily the marketplace, since that is the forum where consumers choose different products that offer alternative ways of satisfying a particular need or taste. As competition in the marketplace is a dynamic and evolving process, the competitive relationship between products is not to be analyzed exclusively by current consumer preferences<sup>54</sup>; the competitive relationship extends as well to potential competition.<sup>55</sup>

(b) According to the ordinary meaning of the term 'directly competitive', products are competitive or substitutable when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste.<sup>56</sup>

(c) In the context of Article III:2, second sentence, the qualifying word 'directly' in the *Ad* Article suggests a degree of proximity in the competitive relationship between the domestic and imported products. The word 'directly' does not, however, prevent a consideration of both latent and extant demand.<sup>57</sup>

(d) 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'.<sup>58,59</sup>

46. At the same time, the Appellate Body in *US – Cotton Yarn* dismissed the United States' argument that the above elements could not be applied to a definition of "directly competitive products" under Article 6.2 of the *ATC*, because they have been developed to define not only "directly

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<sup>52</sup> Appellate Body Report, *US – Cotton Yarn*, para. 87.

<sup>53</sup> The Appellate Body noted that it did not need to consider the concept of like product in the context of Article 6.2 because both parties agreed that the yarn imported from Pakistan and yarn produced by the producers of the United States, regardless of whether they are vertically integrated fabric producers or independent yarn producers, were like products. Appellate Body Report, *US – Cotton Yarn*, para. 89.

<sup>54</sup> (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 114-115.

<sup>55</sup> (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 115-116.

<sup>56</sup> (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 115.

<sup>57</sup> (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 116.

<sup>58</sup> (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 118.

<sup>59</sup> Appellate Body Report, *US – Cotton Yarn*, para. 91.

competitive" products but also "directly substitutable" products pursuant to Article III:2 of the GATT 1994. In the Appellate Body's view, "the mere absence of the word 'substitutable' in Article 6.2 of the *ATC*" does not "[render] our interpretation of the term 'directly competitive' under Article III:2 of the GATT 1994 irrelevant in terms of its contextual significance for the interpretation of that term under Article 6.2 of the *ATC*." <sup>60</sup>

Direct competitive relationship; potential competitive relationship

47. The Appellate Body in *US – Cotton Yarn* emphasized the importance of direct competition between domestic and imported products, in relation to the requirements of ATC Article 6.2:

"We must bear in mind that Article 6.2 permits a safeguard action to be taken in order to protect a domestic industry from serious damage (or actual threat thereof) caused by a surge in imports, provided the domestic industry is identified as the industry producing 'like and/or directly competitive products' in comparison with the imported product. The criteria of 'like' and 'directly competitive' are characteristics attached to the domestic product in order to ensure that the domestic industry is the appropriate industry in relation to the imported product. The degree of proximity between the imported and domestic products in their competitive relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product." <sup>61</sup>

"According to the ordinary meaning of the term 'competitive', two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. 'Competitive' is a characteristic attached to a product and denotes the *capacity* of a product to compete both in a current or a future situation. The word 'competitive' must be distinguished from the words 'competing' or 'being in actual competition'. It has a wider connotation than 'actually competing' and includes also the notion of a potential to compete. It is not necessary that two products be competing, or that they be in actual competition with each other, in the marketplace at a given moment in order for those products to be regarded as competitive. Indeed, products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions. Thus, a static view is incorrect, for it leads to the same products being regarded as competitive at one moment in time, and not so the next, depending upon whether or not they are in the marketplace." <sup>62</sup>

Like products, directly competitive products, and unlike or dissimilar products

48. The Appellate Body in *US – Cotton Yarn* also noted:

"It is significant that the word 'competitive' is qualified by the word 'directly', which emphasizes the degree of proximity that must obtain in the competitive relationship between the products under comparison. As noted earlier, a safeguard action under the *ATC* is permitted in order to protect the domestic industry against competition from an imported product. To ensure that such protection is reasonable, it is expressly provided that the domestic industry must be producing 'like' and/or 'directly competitive products'. Like products are, necessarily, in the highest degree of

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<sup>60</sup> Appellate Body Report, *US – Cotton Yarn*, para. 94.

<sup>61</sup> Appellate Body Report, *US – Cotton Yarn*, para. 95.

<sup>62</sup> Appellate Body Report, *US – Cotton Yarn*, para. 96.

competitive relationship in the marketplace.<sup>63</sup> In permitting a safeguard action, the first consideration is, therefore, whether the domestic industry is producing a like product as compared with the imported product in question. If this is so, there can be no doubt as to the reasonableness of the safeguard action against the imported product.

When, however, the product produced by the domestic industry is not a 'like product' as compared with the imported product, the question arises how close should be the competitive relationship between the imported product and the 'unlike' domestic product. It is common knowledge that unlike or dissimilar products compete or can compete in the marketplace to varying degrees, ranging from direct or close competition to remote or indirect competition. The more unlike or dissimilar two products are, the more remote or indirect their competitive relationship will be in the marketplace. The term 'competitive' has, therefore, purposely been qualified and limited by the word 'directly' to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike. Under this definition of 'directly', a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product."<sup>64</sup>

#### Captive production

49. In *US – Cotton Yarn*, the United States had excluded from the scope of its definition of domestic industry those vertically integrated United States' fabric manufacturers producing yarn for their own captive consumption. The United States had argued that such yarn was not directly competitive with imported yarn (in spite of being like products) because it was not offered for sale on the market (except when the captive production was "out of balance", and even then only in *de minimis* quantities). The United States also argued that vertically integrated fabric producers were not dependent on the merchant market for meeting any of their requirements of yarn except to a *de minimis* extent. The Appellate Body rejected these arguments as a "static view rendering the competitive relationship between yarn sold on the merchant market and yarn used for internal consumption by vertically integrated producers dependent on what they choose to do at a particular point in time."<sup>65</sup> The Appellate Body concluded that a proper analysis of the competitive relationship between the two products would clearly show that they were "directly competitive" within the meaning of Article 6.2.<sup>66</sup> The Appellate Body also noted that in the *US – Hot-Rolled Steel* case, cited by the United States, "Our observation that captive steel production was 'shielded from direct competition' did not mean that steel produced in the captive market segment is not directly competitive with imported steel destined for the merchant market."<sup>67</sup>

(iv) "and/or"

50. In *US – Cotton Yarn*, the parties disagreed on the interpretation of the connectors "and/or" in Article 6.2. According to Pakistan, a subject domestic industry consisted of producers of: (i) like products; or (ii) directly competitive products; or (iii) both like products and directly competitive products. In contrast, the United States argued that Members are permitted to identify a "domestic

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<sup>63</sup> (footnote original) Appellate Body Report, *Korea – Alcoholic Beverages...*, para. 118; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 473. In these cases, we stated that "like" products are perfectly substitutable and that "directly competitive" products are characterized by a high, but imperfect, degree of substitutability.

<sup>64</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 97-98.

<sup>65</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 99-100.

<sup>66</sup> Appellate Body Report, *US – Cotton Yarn*, para. 101.

<sup>67</sup> Appellate Body Report, *US – Cotton Yarn*, para. 102.

industry" as an industry producing a product that is: (i) like but not directly competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive.<sup>68</sup>

51. The Panel analysed these possibilities and rejected the US argument, on the basis that (i) imports of a textile product cannot damage producers of "like but not directly competitive products" through market competition, and "in this case the need for safeguard action would not arise [and] the case could not be made because causation could not be demonstrated. Thus, the treaty would give a meaningless right." Moreover, (ii) permitting Members to impose transitional safeguard measures for domestic producers of "unlike but directly competitive products" would also be problematic, because "serious damage" would be found based upon these producers' situation, "without taking into consideration the situation of producers of 'like and directly competitive products', which are *core* products competing with subject imports.<sup>69</sup> The Appellate Body exercised judicial economy with respect to this finding.<sup>70</sup>

(v) *TMB statements*

52. At its meeting in November 1998, in examining Colombia's transitional safeguards on imports from Korea and Thailand, the TMB noted that the lack of a definition of "domestic industry" in the *ATC* leaves a level of discretion to Members. Colombia did not need to provide data on 100 per cent of the industry, but Colombia's action counting one company (with only 62 per cent of domestic production), as the entire domestic industry meant that there was important missing information on the rest of the industry, impeding the TMB's work assessing the domestic industry's situation and Colombia's determination.<sup>71</sup> Because this information was missing, the TMB could not determine whether the large domestic producer's difficulties were due to increased imports, or to increased competition between domestic producers.<sup>72</sup>

53. In April 1999, when the TMB examined the US cotton yarn safeguard that was the subject of the *US – Cotton Yarn* dispute, it discussed the US exclusion of captive production discussed above. The TMB noted that in terms of characteristics, all combed cotton yarn was identical; the US had provided information on the industry segment producing such yarn for the merchant market, but not on the segment whose identical yarn was produced for consumption by vertically integrated mills. The TMB "observed that it would ordinarily be up to the Body, on the basis of the detailed information provided pursuant to Article 6.7, to determine whether it was justified to exclude a particular segment of production. Therefore the TMB would have expected to receive, to the extent practicable, sufficient information to allow it to do so."<sup>73</sup> In June 1999, the TMB confirmed that "information reflecting the status of the vertically integrated firms should also have been provided by the United States" and on this basis, "the TMB could have determined" whether or not that segment's exclusion from the "domestic industry" was justified."<sup>74</sup>

(f) Causation

(i) "*demonstrably*"

54. The Panel in *US – Underwear*, referring to Article 6.2, second sentence, emphasized the word "demonstrably" and found that when determining whether imports have caused serious damage to the domestic industry, merely making a mechanical causal link between the increase in imports and the alleged serious damage was not enough:

<sup>68</sup> Panel Report, *US – Cotton Yarn*, para. 7.81.

<sup>69</sup> Panel Report, *US – Cotton Yarn*, paras. 7.87 and 7.89; footnote in original omitted.

<sup>70</sup> Appellate Body Report, *US – Cotton Yarn*, para. 104

<sup>71</sup> G/TMB/R/49, para. 18.

<sup>72</sup> G/TMB/R/51, para. 21.

<sup>73</sup> G/TMB/R/53, paras. 13-14 and 16. Emphases added.

<sup>74</sup> G/TMB/R/55, para. 14.

"Nowhere in the March Statement [on which the United States proposed the subject transitional safeguard measure] could we find a discussion or demonstration of causality as required under this provision, beyond the mere statement that the imports were responsible for the damage. [...] While such trade may certainly cause damage to the domestic industry, the nature of the trade is such that it may benefit the domestic firms that participate in it (see paragraph 7.44). Thus, in a discussion of whether such trade has caused serious damage, it is necessary to look at this trade to determine its effects on the industry. Because of the nature of the trade it is not possible in these circumstances to conclude from the simple fact that there has been a fall in production that there has also been serious damage. The March Statement undertakes no such discussion. Moreover, the March Statement suggests other possible causes of serious damage, such as rising cotton prices (see paragraph 7.44), but does not consider their role as a cause of such damage. Thus, it cannot be said that the March Statement 'demonstrably' shows that serious damage was caused by increased levels of imports. We find, therefore, that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.2 of the ATC by imposing a restriction on imports of Costa Rican underwear without adequately demonstrating that increased imports had caused serious damage."<sup>75</sup>

55. In *US – Wool Shirts and Blouses*, with respect to the term "demonstrably", the Panel found that a Member imposing a textile safeguard measure must demonstrate that the serious damage or actual threat thereof was not due to consumer preferences or technological changes:

"[T]he 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."<sup>76</sup>

(ii) *Lag in investigation period*

56. At its meeting in April 2000, the TMB reviewed transitional safeguard measures by Argentina on textile products from Korea. Korea claimed that since there was a five-month gap between the end of the period investigated and the application of the safeguard measures, Argentina had failed to establish a substantial increase in imports under Article 6.2 and had violated Article 6.7, which stipulates that "the information shall be related, as closely as possible, to ... the reference period set out in paragraph 8" of Article 6. The TMB responded:

"[T]he TMB recognized that the formulation of Article 6.7 (i.e. that the information shall be related as closely as possible to the reference period) permitted certain flexibility in providing information on the different economic variables listed in Article 6.3, depending on the availability of the relevant data and information. However, the safeguard measures in question had been applied by Argentina pursuant to the provisions of Article 6.11, which required the existence of 'highly unusual and critical circumstances, where delay would cause damage which would be difficult to

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<sup>75</sup> Panel Report, *US – Underwear*, para. 7.46.

<sup>76</sup> Panel Report, *US – Wool Shirts and Blouses*, para. 7.50.

repair'. The TMB was of the view that the existence of such circumstances could only be proven if information was provided regarding developments which occurred in the very recent period, i.e. during or very close to the reference period."<sup>77</sup>

### 3. Article 6.3

#### (a) List of conditions in Article 6.3

57. In *US – Underwear*, the Panel held that the criteria in *inter alia* Article 6.3 had to be fulfilled in order for transitional safeguard measures to be consistent with the ATC. Further on in the report, the Panel stated that despite its observation that the United States had failed to analyze all of the listed economic factors of Article 6.3 it could not be concluded that the finding of serious damage was inconsistent with that provision, because "Article 6.3 of the ATC contains an indicative list of economic variables that can be taken into account in order to assess the serious damage or actual threat thereof."<sup>78</sup>

58. In *US – Wool Shirts and Blouses*, months after *US – Underwear*, the Panel followed a different approach:

"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 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."

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.

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

<sup>77</sup> G/TMB/R/64, paras. 23-24.

<sup>78</sup> Panel Report, *US – Underwear*, para. 7.22.

*how the facts as a whole support the conclusion that the determination is consistent with the requirements of the ATC.*"<sup>79</sup>

59. The conclusions of panels and the Appellate Body on the interpretation of a similarly worded provision can be found in Article 4.2(a) of the Chapter on the Agreement on Safeguards; in Article 3.4 of the Chapter on the Anti-Dumping Agreement; and Article 15.4 of the Chapter on the SCM Agreement.

#### 4. Article 6.4

(a) Steps preceding the attribution of serious damage to individual Members

60. In *US – Cotton Yarn*, the Appellate Body explained that before carrying out the attribution exercise demanded by Article 6.4, the three analytical steps set forth in Article 6.2 must be applied:

"Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, "[s]erious damage ... must demonstrably be caused by such increased quantities in *total* imports of that product and not by ... other factors". (emphasis added)"<sup>80</sup>

(b) Attribution requirements

61. In *US – Cotton Yarn*, the Appellate Body noted the prerequisites for a finding under Article 6.4 that attributes serious damage to imports from individual Members.<sup>81</sup> The first requirement is that "the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase".<sup>82</sup> The second requirement is "a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports."<sup>83</sup>

(i) *First requirement: only those Members from whom imports have shown a sharp and substantial increase*

"sharp" and "substantial" increase in imports

62. The Panel in *US – Cotton Yarn* interpreted the terms "sharp" and "substantial". These interpretations were adopted without appeal.<sup>84</sup> The Panel interpreted the "term 'sharp' to refer to the percentage increase and the term 'substantial' to refer to the absolute increase".<sup>85</sup>

Attribution to all Members whose imports cause serious damage or threat thereof

63. In *US – Cotton Yarn*, the Panel had found that the United States had acted inconsistently with Article 6.4 by not examining the effect of imports from Mexico (and possibly other appropriate

<sup>79</sup> Panel Report, *US – Wool Shirts and Blouses*, paras. 7.25-7.27.

<sup>80</sup> Appellate Body Report, *US – Cotton Yarn*, para. 112.

<sup>81</sup> Appellate Body Report, *US – Cotton Yarn*, para. 113.

<sup>82</sup> Appellate Body Report, *US – Cotton Yarn*, para. 114.

<sup>83</sup> Appellate Body Report, *US – Cotton Yarn*, para. 115.

<sup>84</sup> Appellate Body Report, *US – Cotton Yarn*, para. 114.

<sup>85</sup> Panel Report, *US – Cotton Yarn*, para. 7.130.

Members) individually when attributing serious damage to Pakistan.<sup>86</sup> The Panel also ruled that Article 6.4 requires attribution to all Members whose imports cause serious damage or actual threat thereof.<sup>87</sup> The Appellate Body, further to upholding the Panel's first finding regarding US inconsistency with Article 6.4<sup>88</sup>, considered that its findings on that first issue<sup>89</sup> resolved the dispute as defined by Pakistan's claims before the Panel. The Appellate Body therefore declined to rule on the issue of whether Article 6.4 requires attribution to all Members whose imports are causing serious damage or actual threat thereof and indicated that "[i]n these circumstances, the Panel's interpretation on this question is of no legal effect".<sup>90</sup>

(ii) *Second requirement: comparative analysis*

64. In *US – Cotton Yarn*, the Appellate Body referred to the second attribution requirement:

"The second requirement of Article 6.4, second sentence, is a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports.<sup>91</sup> The conduct of the comparative analysis is governed by the latter part of the second sentence of Article 6.4, which requires the analysis to address certain specific factors, namely: (i) the level of imports as compared with imports from other sources; (ii) market share; and (iii) import and domestic prices at a comparable stage of commercial transaction. Article 6.4 further specifies that none of these factors, either alone or combined with other factors, can necessarily give decisive guidance."<sup>92</sup>

Why is a comparative analysis required?

65. In *US – Cotton Yarn*, the Appellate Body faced the question of why a comparative analysis is needed under Article 6.4 as the means to respond to another question, namely how to conduct a comparative analysis since Article 6.4 does not directly address this issue.<sup>93</sup> The Appellate Body concluded that attributing damage actually caused to the domestic industry by imports from a Member to a different Member imports amounted to a "mis-attribution" of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4":

"Article 6.4 provides, in relevant part, that '[t]he Member or Members to whom serious damage ... is attributed, shall be *determined on the basis* of a sharp and

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<sup>86</sup> Panel Report, *US – Cotton Yarn*, para. 8.1(b).

<sup>87</sup> Panel Report, *US – Cotton Yarn*, paras. 7.126-7.127. The Panel had found that "unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, ...[t]he Member imposing a safeguard under the ATC must then do a further attribution analysis and narrow the causation down to only those Members whose exports are causing the serious damage."

<sup>88</sup> The Appellate Body upheld the Panel's finding in para. 8.1(b) of its Report "albeit for reasons partly different from those given by the panel". Appellate Body Report, *US – Cotton Yarn*, para. 126.

<sup>89</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 119 and 125-126.

<sup>90</sup> Appellate Body Report, *US – Cotton Yarn*, para. 128.

<sup>91</sup> (*footnote original*) We note that the panel in *United States – Underwear* stressed that such a comparative analysis of the effects of imports is indispensable in attributing serious damage to a Member. The panel noted that, while there had been a significant increase in imports of underwear from Costa Rica, the position of Costa Rica was not significantly different from that of the other five exporting Members considered in the United States' determination. Nonetheless, the determination failed to undertake a *comparative assessment* of the effects of imports from Costa Rica with those five exporting Members. The panel further reasoned that the United States could not enter into agreements permitting an overall increase of imports of 478 percent over the current import levels from those five Members and, at the same time, claim that an import increase of 22 percent from Costa Rica contributed to serious damage. (Panel Report, *supra*, footnote 29, paras. 7.49 and 7.51) The issue of attribution was not appealed in that case.

<sup>92</sup> Appellate Body Report, *US – Cotton Yarn*, para. 115.

<sup>93</sup> Appellate Body Report, *US – Cotton Yarn*, para. 117.

substantial *increase in imports ... from such a Member or Members*'. (emphasis added) The clear inference from this phrase is that the sharp and substantial increase of imports from *such a Member* determines not only the basis, but also the *scope* of attribution of serious damage to that Member.

In consequence, where imports from more than one Member contribute to serious damage, it is only that *part* of the total damage which is actually caused by imports from such a Member that can be attributed to that Member under Article 6.4, second sentence. Damage that is actually caused to the domestic industry by imports from one Member cannot, in our view, be attributed to a different Member imports from whom were not the cause of that part of the damage. This would amount to a 'mis-attribution' of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4. Therefore, the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member. Contrary to the view of the United States, we believe that Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage."<sup>94</sup>

66. As support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* referred to the rules of general international law on State responsibility and Article 22.4 of the DSU (suspension of concessions):

"Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.<sup>95</sup> In the same vein, we note that Article 22.4 of the DSU<sup>96</sup> stipulates that the suspension of concessions shall be equivalent to the level of nullification or impairment. This provision of the DSU has been interpreted consistently as not justifying punitive damages.<sup>97</sup> These two examples illustrate the consequences of breaches by states of their international obligations, whereas a safeguard action is merely a remedy to

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<sup>94</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 118-119.

<sup>95</sup> (*footnote original*) Article 51 of the International Law Commission's draft articles on Responsibility of States reads:

"Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

(International Law Commission, State Responsibility: Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading, A/CN.4/L.602/Rev.1, 26 July 2001)

<sup>96</sup> (*footnote original*) Article 22.4 of the DSU reads:

"The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."

<sup>97</sup> (*footnote original*) The Arbitrators in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* stated that "there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a punitive nature." (Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999, para. 6.3) See also, Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 20 August 2000, para. 3.55.

WTO-consistent 'fair trade' activity.<sup>98</sup> It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, 'punitive', attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case."<sup>99</sup>

67. Also in support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body pointed out:

"Finally, and most significantly, if the totality of serious damage could be attributed to only one of those Members the imports from whom have contributed to it, there would be no need to undertake a comparative analysis of the effects of imports from that one Member, once the imports from that Member have been found to have increased sharply and substantially; such an interpretation would reduce a whole segment of Article 6.4 to inutility."<sup>100</sup>

#### How to conduct a comparative analysis

68. Further to responding to the question why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* focussed on the question how to conduct a comparative analysis since this is not expressly stated in the wording of Article 6.4, second sentence.<sup>101</sup> In this regard, the Appellate Body considered that such an analysis "is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member." The Appellate Body further concluded that "an assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually":

"We now turn to the question of how to conduct the comparative analysis required by Article 6.4. This analysis is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member. We recall that Article 6.4 enjoins the importing Member to conduct this comparative analysis on a multi-factor basis including "levels of imports", "market share" and "prices", while specifying that none of these factors alone or in combination with other factors can necessarily give decisive guidance. The comparison is to take place between the effects of imports from the Member in question, on the one hand, and those of imports from other sources, on the other. The comparison must thus be based on a variety of factors, each of which has a different significance and weight, and is to be measured on a different scale.

It is of course possible to compare the level of imports of one Member with the level of imports from other sources taken together. Likewise, it is possible to establish the market share of one Member in comparison with all other imports and the output of the domestic industry. However, the full effects of the level of imports from, and the

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<sup>98</sup> (*footnote original*) Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 41, para. 94.

<sup>99</sup> Appellate Body Report, *US – Cotton Yarn*, para. 120.

<sup>100</sup> Appellate Body Report, *US – Cotton Yarn*, para. 121.

<sup>101</sup> Appellate Body Report, *US – Cotton Yarn*, para. 117.

market share of, one Member can only be assessed if this level and this share are compared *individually* with the level of imports from, and the market share of, the other Members from whom imports have also increased sharply and substantially. This conclusion is even more obvious for the comparison of import and domestic prices. The price of imports from one Member can be compared with the average price of imports from other sources and with domestic prices. However, prices of imports from the other Members may vary widely from one another. A fair assessment of the effects of the price of imports from one Member will therefore require a comparison with the price of imports from other Members taken individually. Moreover, these different factors interact in different ways, producing different effects, under different circumstances, not to mention the possible existence of other relevant factors (and their effects) that must be taken into account in the comparison according to the proviso at the end of Article 6.4, second sentence.

An assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually."<sup>102</sup>

69. In *US – Underwear*, the Panel considered on a comparative basis whether the attribution of serious damage in the United States' domestic industry to Costa Rican imports was consistent with the requirements under Article 6.4. In this context the Panel analysed the five bilateral agreements that the United States had concluded with five different exporting States which represented a substantial portion of all United States' imports. In these agreements the United States agreed to ensure unrestricted imports to the United States' territory of more than 170 million "dozen units of a product (an increase of 478 per cent over then current import levels)."<sup>103</sup> The Panel concluded that the attribution of serious damage to Costa Rican imports was inconsistent with the requirements of Article 6.4 as follows:

"In light of (i) the fact that restrictions under Article 6 of the ATC are to be applied only sparingly, (ii) the fact that the United States has the burden of proving that it has complied with the requirements of Article 6 of the ATC, (iii) the deficiencies detailed above in respect of the evidence on the existence of serious damage, which raise serious questions in our view as to whether there was serious damage shown under Article 6.2 at all, (iv) the fact that the United States failed to demonstrate adequately that the cause of serious damage was imports, and (v) the fact that the United States voluntarily agreed to accept import limits from other countries exporting underwear to the United States that permitted increases over their current export levels that were far in excess of Costa Rica's export levels to the United States, we conclude that the United States failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC."<sup>104</sup>

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<sup>102</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 122-124.

<sup>103</sup> Panel Report, *US – Underwear*, para. 7.51.

<sup>104</sup> Panel Report, *US – Underwear*, para. 7.52.

## 5. Article 6.6

### (a) Article 6.6(d)

70. The Panel in *US – Underwear* examined whether the United States, in its application of the transitional safeguard measure at issue, accorded more favourable treatment to re-imports into its territory in accordance with Article 6.6(d). Specifically, the Panel held that the United States could not have complied with Article 6.6(d) merely by offering Costa Rica enhanced access for its textile exports under certain other programmes:

"The 'chapeau' to Article 6.6(d) of the ATC makes it clear that the more favourable treatment must be granted 'in the *application* of the transitional safeguard' (emphasis added). This means, in our view, that Members availing themselves of the Article 6 transitional safeguard are obliged to grant more favourable treatment to re-imports, independently of whether such treatment has been previously rejected by the affected Member during the bilateral consultations or whether other privileges were envisaged to be accorded to such a Member in negotiations based upon the implemented safeguard measure. The term 'more favourable treatment' is not further qualified in the ATC. We, therefore, reject the United States argument (paragraph 5.157) that they had complied with Article 6.6(d) of the ATC by offering Costa Rica enhanced access under GAL programmes during the course of the consultations."<sup>105</sup>

71. In response to the Costa Rican claim for quotas larger than those required under Article 6.8, the Panel in *US – Underwear* rejected the notion that more favourable treatment within the meaning of Article 6.6(d) necessarily implies the availability of larger quotas:

"We agree with Costa Rica that quantitatively more favourable treatment for the full three-year period is one of the options available to Members in order to comply with the requirements of Article 6.6(d) of the ATC. We do not consider it, however, to be the only option. In our view, a Member could, for example, comply with the requirements under Article 6.6(d) of the ATC by imposing a restriction for a period shorter than three years."<sup>106</sup>

## 6. Article 6.7

72. At its meeting in July 1998, the TMB examined a transitional safeguard measure taken by Colombia on imports of denim from Brazil and India. The TMB stated that while Article 6.7 "allowed for some flexibility, in particular in view of the availability of most recent data", this "did not provide for the possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made":

"[T]he TMB addressed the time-lag of about fifteen months that had taken place between the investigation concluded by INCOMEX and the time at which Colombia had requested consultations with, *inter alia*, Brazil and India. The TMB recalled in this respect that, according to Article 6.7, the information referred to in Articles 6.3 and 6.4 shall be related, as closely as possible, to the reference period set out in Article 6.8, i.e. the 12-month period terminating two months preceding the month in which the request for consultation was made [...]. The TMB recognised that this formulation allowed for some flexibility, in particular in view of the availability of most recent data. In the view of the TMB, however, this did not provide for the

<sup>105</sup> Panel Report, *US – Underwear*, para. 7.57.

<sup>106</sup> Panel Report, *US – Underwear*, para. 7.58.

possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made."<sup>107</sup>

73. At its meeting in November 1998, examining a transitional safeguard measure taken by Colombia on imports from Korea and Thailand, the TMB stated as follows:

"The TMB [...] decided to make an examination, on the basis of the information available, of the possible effects of the increased quantities in total imports of plain polyester filaments on the state of the particular industry, as specified in Article 6.3. The TMB noted in this respect that it could not base its assessment on estimates provided by Colombia for the year 1998; and that the monthly averages provided by Colombia could not be considered in most cases as providing reliable indications."<sup>108</sup>

74. At its meeting in January 1999, the TMB provided a clarification on its statement referenced in paragraph 73 above. The TMB agreed that Article 6 did not "lay down a single methodology for the presentation of the information in question". Furthermore, the TMB emphasized that in its statement referenced in paragraph 73 above, it had not made a finding on "how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6", but rather "had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case":

"[T]he TMB agreed with Colombia that Article 6 does not lay down a single methodology for the presentation of the information in question. The TMB had recalled what were the time periods covered by the information presented by Colombia pursuant to Article 6.7. [T]he technical report prepared by INCOMEX contained data regarding the performance of total imports for the 12-month periods June to May of 1995-1996, 1996-1997 and 1997-1998, the reference period referred to in Article 6.8. The data and information incorporated into the report regarding the economic variables set out in Article 6.3 referred to calendar years; for 1998, it incorporated actual data for the period January to May and provided estimates for the full calendar year. In addition, the report provided monthly averages regarding each variable for 1995, 1996, 1997 and January to May 1998' (G/TMB/R/49, paragraph 11). The TMB could not agree with the contention of Colombia that the TMB had omitted to observe that information had been presented in three different forms. The TMB had not qualified whether these forms were mutually supportive, as claimed by Colombia, since the Body had not found that certain such forms were convincing. This had been reflected in the report adopted by the TMB: '[t]he TMB noted [...] that it could not base its assessment on *estimates* provided by Colombia for the year 1998; and that the *monthly averages* provided by Colombia could not be considered in most cases as providing reliable indications.' (G/TMB/R/49, paragraph 21, emphasis added). Therefore, the TMB had added that '[f]or data to be meaningful Colombia would have had *in the present case* to have provided comparisons either on a January/May basis or on a year-ending May basis' (same paragraph, emphasis added). In the view of the TMB, the above excerpts of its report made it clear that (i) the report faithfully reflected the forms of information provided, including the respective time-frames; (ii) the TMB had not provided any interpretation, but had expressed the view that *in the present case* the presentation was such that it did not allow a reliable comparison of the developments or changes in the relevant economic variables referred to in Article 6.3. The reference of the TMB to the January/May comparisons was not an interpretation and was not contrary

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<sup>107</sup> G/TMB/R/46, para. 12.

<sup>108</sup> G/TMB/R/49, para. 21.

to any provision of Article 6, since the Body had not suggested that this information should have been provided *in lieu* of the information submitted, but *in addition* to what had been made available. Without such additional information it was not possible for the TMB to assess whether developments during the first five months of 1998 could be an indication of serious damage caused by imports or whether they constituted a seasonal phenomenon which had characterised the domestic industry in the same period of the preceding years as well. The TMB recognized that Colombia had explained that the product subject to safeguard measures was not subject to seasonal factors. This statement, however, had not been substantiated by the information presented pursuant to Article 6.7.

The TMB reiterated that it had not provided any interpretation regarding how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6. Instead, it had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case."<sup>109</sup>

75. At its meeting in October 1999, concerning the choice of periods for comparison, the TMB held that two data series for overlapping periods were insufficient for the purposes of Article 6.7. In the specific case, there had been an overlap of eight months. The TMB emphasized that "[r]eliable indications cannot be obtained but by comparing data for identical time-periods":

"The TMB recalled that the relevant provisions of the ATC (Article 6.7) required, *inter alia*, that '[i]n respect of requests [for consultations] made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8' of Article 6. In the particular cases referred to the TMB and subject to the present review, this reference period, in accordance with Article 6.8, corresponded to the period May 1998/April 1999, for which category-specific information had been provided by Argentina. It had to be observed, however, that in the factual information given by Argentina developments of this most recent period could not be compared to the state of the domestic industry as reflected in the different variables during a preceding corresponding period, i.e. during May 1997/April 1998, since all other data had been provided on a calendar-year basis. Though Argentina gave indications (expressed in terms of percentages) regarding 'changes over 12 months', these indications could not be considered to provide a reliable basis, as they compared data relating to May 1998/April 1999 to those reported for January/December 1998. Therefore, between the two data series compared there had been an overlap of eight months. Reliable indications cannot be obtained but by comparing data for identical time-periods. Though Argentina had explained that there had not been indications referring to the existence of seasonal factors, the TMB was of the view that the availability of data for the calendar-year 1998 and for the period May 1998/April 1999 could give an indication for comparing trends between January-April 1998 and the same period in 1999, but did not allow for more far-reaching comparisons."<sup>110</sup>

76. At its meeting in November 2001, the TMB examined a notification by Poland which considered itself unable to conform with the recommendation the TMB had made regarding a transitional safeguard measure introduced by Poland on imports of certain products from Romania. The TMB found that "developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member's inability to conform with the TMB's recommendation":

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<sup>109</sup> G/TMB/R/51, paras. 26-27.

<sup>110</sup> G/TMB/R/58, para. 13.

"[T]he TMB recognized that the ATC does not provide specific guidance as to how long the period of investigation (and, consequently, the period covered in the specific and relevant information in the sense of Article 6.7) should be. Therefore, the definition of the length of the period of investigation is very much left to the discretion of the authorities of the Member invoking the provisions of Article 6. While the use of the present tense of the verb in Article 6.2 (i.e. '... a particular product is being imported ...') and the reference to the information 'as up-to-date as possible' in Article 6.7 appear to indicate that the information to be provided should at the minimum, include developments of the recent past, there is no similar guidance regarding what should be the starting-point of the period covered by the factual information. In view of this, the TMB had proceeded to the examination of the matter under Article 6.10 on the basis of the information provided by Poland for the period of 12 months (from 1 January 2000 to 1 January 2001);

It follows from the above that reference to developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member's inability to conform with the TMB's recommendation;"<sup>111</sup>

## 7. Article 6.10

77. In *US – Underwear*, the Appellate Body examined the Panel's finding that a transitional safeguard measure imposed by the United States was inconsistent with Article 6. The Panel had held that the wording of Article 6.10 did not provide any guidance on whether backdating a transitional safeguard measure was permissible. Proceeding to the provisions of the GATT 1994, the Panel then took Article X:2 thereof as its applicable and controlling text.<sup>112</sup> The Appellate Body disagreed with these findings of the Panel. As to whether Article 6 permits the retroactive application of transitional safeguard measures, referring to Article 6.10, the Appellate Body held that there was a "presumption [in the] very text of Article 6.10 that such a measure may be applied only prospectively":

"It is essential to note that, under the express terms of Article 6.10, *ATC*, the restraint measure may be 'applied' only 'after the expiry of the period of 60 days' for consultations, without success, and only within the 'window' of 30 days immediately following the 60-day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, *ATC*, to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively. This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private persons and their acts."<sup>113</sup>

78. Further, the Appellate Body considered that the context of Article 6.10, "includ[ing], of course, the whole of Article 6", supported its finding referenced in paragraph 77 above:

"Article 6.1 directs that transitional safeguard measures be applied 'as sparingly as possible' on the one hand and, on the other, applied 'consistently with the provisions of [Article 6] and the effective implementation of the integration process under [the *ATC*]'. It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint measure will encourage return to the practice of backdating restraint measures which appears to have been

<sup>111</sup> G/TMB/R/83, para. 29.

<sup>112</sup> Panel Report, *US – Underwear*, paras. 7.63-7.64.

<sup>113</sup> Appellate Body Report, *US – Underwear*, p. 14.

widespread under the regime of the *MFA*, a regime which has now ended, as discussed below, with the advent of the *ATC*. Such an introjection would moreover loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later."<sup>114</sup>

79. Finally, the Appellate Body also held that backdating measures imposed pursuant to Article 6.10 would "diminish the utility and significance of prior consultations with the identified exporting Member or Members":

"It further appears to us that to read Article 6.10 as somehow authorizing the backdating, as a matter of course, of the effectivity or operation of a restraint measure, will tend to diminish the utility and significance of prior consultations with the identified exporting Member or Members. Article 6.7 of the *ATC* provides for those consultations in very substantial detail. Thus, Article 6.7 requires that the request for consultations be accompanied by specific, relevant and up-to-date information on the factors which led the importing Member to make a determination of 'serious damage' (listed in Article 6.3) and the factors which led to the unilateral attribution of such damage to an identified exporting Member or Members (referred to in Article 6.4). One clear objective of requiring a 60-day period for consultations is to give such Member or Members a real and fair, not merely *pro forma*, opportunity to rebut or moderate those factors. The requirement of consultations is thus grounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter. It is, again, noteworthy that Article 6.7 refers *repeatedly* to the Member '*proposing* to take safeguard action', or who '*proposes* to invoke the safeguard action' and to the level at which imports of the goods specified 'are *proposed* to be restrained'. The common, day-to-day, implication which arises from this language is clear to us: the restraint is to be applied *in the future, after* the consultations, should these prove fruitless and the proposed measure not withdrawn. The principle of effectiveness in treaty interpretation<sup>115</sup> sustains this implication."<sup>116</sup>

80. In addition to its reasoning referenced in paragraphs 77-79 above, the Appellate Body in *US – Underwear* also addressed "the prior existence and demise, as it were, of the *MFA*" and pointed out that one particular provision of the *MFA* expressly permitted backdating:

"Article 3(5)(i) of the *MFA* expressly permitted backdating of the effectivity of a restraint measure to the date of the importing Member's call for consultations."<sup>117</sup> The

<sup>114</sup> Appellate Body Report, *US – Underwear*, p. 15.

<sup>115</sup> (*footnote original*) See Report of the Appellate Body, "*United States – Standards for Reformulated and Conventional Gasoline*", AB-1996-1, (adopted 20 May 1996) p. 23; and Report of the Appellate Body, "*Japan – Taxes on Alcoholic Beverages*", AB-1996-2 (adopted 1 November 1996), p. 12.

<sup>116</sup> Appellate Body Report, *US – Underwear*, pp. 15-16.

<sup>117</sup> (*footnote original*) Simply as a matter of comparative texts, it may be noted that like Article 6.10 of the *ATC*, Article XIX of the *General Agreement* and the *Agreement on Safeguards* do not contain any language expressly permitting backdating of the effectivity of a safeguard restraint measure taken thereunder with respect to categories of goods already integrated into the *General Agreement*. In contrast, it may also be noted that both Article 10(2) of the *Anti-dumping Agreement* and Article 20(2) of the *SCM Agreement* expressly authorize, under certain conditions, the retroactive levying of anti-dumping and countervailing duties for the period when provisional measures were in force. (*emphasis original*)

above underscored clause of Article 3(5)(i), *MFA*, however, disappeared with the supersession of the *MFA* by the new *ATC*; no comparable clause was carried over into Article 6.10 of the *ATC*. The Panel did not draw any operable inference from the disappearance of the *MFA* clause.<sup>118</sup> Appellant Costa Rica urges that the absence of an equivalent clause in Article 6.10 of the *ATC* means that backdating of a restraint measure may no longer be resorted to under Article 6.10, *ATC*. Appellee United States, in contrast, insists that such backdating is nevertheless available under the regime of the *ATC*.<sup>119</sup>

81. With respect to the fact that a provision of the *MFA* expressly provided for the possibility to backdate preliminary safeguard measures, the Appellate Body held that the disappearance in the *ATC* of this provision "strongly reinforces the presumption that such retroactive application is no longer permissible":

"We believe the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operative effect of a restraint measure, strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from such disappearance. We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption. At the oral hearing, the United States stated that since 1974, for over 20 years, all importing countries had 'counted' imports in the textile area against quotas imposed by restraints from the date of the request for consultations. While that may well have been the practice of many importing countries, it was, of course, the practice *under the MFA*. Two considerations bear upon this matter. Firstly, assuming, *arguendo* only, that the WTO Members had wanted to keep that practice, it is very difficult to understand why the treaty basis for such practice was not maintained but was instead wiped out. Secondly, it has not been suggested that such a widely followed practice has arisen *under Article 6.10 of the ATC* notwithstanding the absence of the *MFA* backdating clause. At any rate, it is much too early for practice to have arisen under the *ATC* regime which commenced only on 1 January 1995."<sup>120</sup>

82. Further, in response to the United States claim that the retroactive application of transitional safeguard measures was needed to deal with flood of imports after an announcement of a request for consultations under the *ATC*, the Appellate Body stated:

"When and to the extent that a speculative 'flood of imports' turns out, in a particular situation, to be a real and serious problem engaging the legitimate interests of the Member proposing a safeguard measure, we consider that recourse may be had to Article 6.11 of the *ATC*. Article 6.11 authorizes the importing Member, 'in highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair', to impose and apply *immediately*, albeit provisionally, the restraint measure authorized under Article 6.10. The request for consultations and the

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<sup>118</sup> (*footnote original*) We have noted in page 12 that the Panel "conclude[d] that *the prevalent practice under the MFA* of setting the initial date of a restraint period as the date of request for consultations *cannot be maintained under the ATC*". Immediately thereafter, however, the Panel held that backdating could be resorted to (in 1995, under the *ATC*) provided that the date of initial effectivity is not earlier than the date of publication of the call for consultations. (Panel Report, para. 7.69) This ruling appears at odds with the Panel's own immediately preceding conclusion. (*emphasis original*)

<sup>119</sup> Appellate Body Report, *US – Underwear*, pp. 16-17.

<sup>120</sup> Appellate Body Report, *US – Underwear*, p. 17.

notification to the Textile Monitoring Board must, however, be issued within five working days after the taking of provisional action. In other words, the requirements of Article 6.10 must nevertheless be observed. Action under Article 6.11 of the *ATC* is not in lieu of, and does not supersede, action taken or begun under Article 6.10, *ATC*. Provisional action under Article 6.11 is folded into action under Article 6.10. Considering that Article 6.11 permits the provisional imposition of a restraint measure even *before* consultations, *a fortiori* it would permit such imposition *after* consultations have in fact begun, so long as the requisites of both Articles 6.10 and 6.11 are met or continue to be met.

...

The conclusion we have arrived at, in respect of the issue of permissibility of backdating, is that the giving of retroactive effect to a safeguard restraint measure is no longer permissible under the regime of Article 6 of the *ATC* and is in fact prohibited under Article 6.10 of that *Agreement*. The presumption of prospective effect only, has not been overturned; it is a proposition not simply presumptively correct but one requiring our assent. We believe, accordingly, and so hold, that the Panel erred in ruling that Article 6.10 of the *ATC* had nothing to say on the issue of backdating and that such backdating to 21 April 1995, the date of publication of the call for consultations, was permissible under Article X:2 of the *General Agreement*. The importing Member is, however, not defenceless against a speculative 'flood of imports' where it is confronted with the circumstances contemplated in Article 6.11. Its appropriate recourse is, in other words, to action under Article 6.11 of the *ATC*, complying in the process with the requirements of Article 6.10 and Article 6.11."<sup>121</sup>

83. In this connection, the Appellate Body held therefore with respect to the finding of the Panel on the permissibility of backdating, referenced in paragraph 77 above, that "[o]ur finding, therefore, that the safeguard restraint measure here involved is properly regarded as 'a measure of general application' under Article X:2 does not conflict with, and does not affect our conclusion under the first issue above that backdating the effectivity of a restraint measure is prohibited by Article 6.10 of the *ATC*."<sup>122</sup>

## 8. Article 6.11

(a) "highly unusual and critical circumstances"

84. The TMB minutes for the meeting of November 1996 include the following agreed statement in connection with transitional safeguard measures taken by Brazil under Article 6.11:

"The TMB was of the view that in cases where the provisions of paragraph 11 of Article 6 were invoked, the expectation was that the elements envisaged in paragraphs 2, 3 and 4 of Article 6 would indicate as unambiguously as possible the highly unusual and critical character of the circumstances. The TMB was also of the view that, unless such circumstances were met, any action taken under Article 6 should be preceded by consultations between the parties."<sup>123</sup>

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<sup>121</sup> Appellate Body Report, *US – Underwear*, pp. 18-19.

<sup>122</sup> Appellate Body Report, *US – Underwear*, p. 21.

<sup>123</sup> G/TMB/R/20, para. 24. The TMB reiterated this view on several occasions. See G/TMB/R/27, para. 37 and G/TMB/R/58, para. 44.

85. At its meeting in January 2000, in examining certain transitional safeguard measures by Argentina on imports of certain products from Pakistan, the TMB summarized the substantive elements of Article 6.11:

"[T]he TMB noted that Article 6.11 involves procedural and substantive elements. ... the substantive elements ... can be summarized as follows:

- it has to be demonstrated that a particular product is being imported into a Member's territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. ... Article 6 defines only one set of criteria for demonstrating serious damage and, therefore, they were the same whether Article 6.10 or 6.11 is invoked;
- in addition, the invoking Member has to provide explanations that would convince the Member affected by the measure, as well as the TMB, regarding the existence of highly unusual and critical circumstances where delay in taking action would cause damage which would be difficult to repair."<sup>124</sup>

86. With respect to the relationship with Article 6.10, see the excerpt from the Appellate Body Report on *US – Underwear*, referenced in paragraph 82 above.

#### **9. Relationship with Article 2.4**

87. In *US – Underwear*, the Panel examined whether certain transitional safeguard measures imposed by the United States on imports from Costa Rica were inconsistent with Article 6. The Panel stated with respect to the relationship between Articles 2.4 and 6 that "one of the central elements of the ATC is the prohibition, in principle, for Members to have recourse to any new restrictions beyond those notified under Article 2.1 of the ATC". Based on this reasoning, the Panel in *US – Underwear* concluded that "Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC".<sup>125</sup> The Appellate Body did not address these findings upon review. However, in its report in *US – Wool Shirts and Blouses*, the Appellate Body held that Article 6 was an integral part of the balance of rights and obligations under the ATC, that Article 6 did not have exceptional character and that the burden of proof in this context fell upon the complaining party. See paragraph 31 above.

88. In *US – Wool Shirts and Blouses*, the Panel examined whether a certain United States transitional safeguard measure was consistent with Article 6. With respect to the relationship between Articles 2.4 and 6, the Panel indicated as follows:

"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."<sup>126</sup>

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<sup>124</sup> G/TMB/R/61, para. 53.

<sup>125</sup> Panel Report, *US – Underwear*, paras. 7.15-7.16.

<sup>126</sup> Panel Report, *US – Wool Shirts and Blouses*, para. 7.59. For same conclusion see Panel Report, *US – Underwear*, paras. 7.70-7.71

**10. Relationship with other WTO Agreements**

(a) Article III.2 of the GATT 1994

89. As regards the relationship between Article 6.2 and Article III.2 and the concept of "directly competitive" products, see paragraph 45 above.

(b) Article X:2 of the GATT 1994

90. In *US – Underwear*, the Appellate Body addressed the Panel's finding on Article X:2 of the GATT 1994 and its applicability to transitional safeguard measures within the meaning of Article 6 of the ATC. The Panel reviewed the measure at issue in the light of Article X:2 of the GATT 1994 because it had found that Article 6.10 of the ATC did not provide guidance on the issue of whether backdating a transitional safeguard measure was permissible; see paragraph 77 above. While the Appellate Body disagreed with the Panel's reading of Article 6.10 of the ATC<sup>127</sup>, it agreed that the safeguard restraint measure was a measure of general application within the meaning of Article X:2:

"The Panel found that the safeguard restraint measure imposed by the United States is 'a measure of general application' within the contemplation of Article X:2. We agree with this finding. While the restraint measure was addressed to particular, i.e. named exporting Members, including Appellant Costa Rica, as contemplated by Article 6.4, ATC, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint."<sup>128</sup>

**X. ARTICLE 7**

A. TEXT OF ARTICLE 7

*Article 7*

1. As part of the integration process and with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round, all Members shall take such actions as may be necessary to abide by GATT 1994 rules and disciplines so as to:

- (a) achieve improved access to markets for textile and clothing products through such measures as tariff reductions and bindings, reduction or elimination of non-tariff barriers, and facilitation of customs, administrative and licensing formalities;
- (b) ensure the application of policies relating to fair and equitable trading conditions as regards textiles and clothing in such areas as dumping and anti-dumping rules and procedures, subsidies and countervailing measures, and protection of intellectual property rights; and
- (c) avoid discrimination against imports in the textiles and clothing sector when taking measures for general trade policy reasons.

Such actions shall be without prejudice to the rights and obligations of Members under GATT 1994.

2. Members shall notify to the TMB the actions referred to in paragraph 1 which have a bearing on the implementation of this Agreement. To the extent that these have been notified to other WTO bodies, a summary, with reference to the original notification, shall be sufficient to fulfil the

<sup>127</sup> Appellate Body Report, *US – Underwear*, p. 14.

<sup>128</sup> Appellate Body Report, *US – Underwear*, pp. 21-22.

requirements under this paragraph. It shall be open to any Member to make reverse notifications to the TMB.

3. Where any Member considers that another Member has not taken the actions referred to in paragraph 1, and that the balance of rights and obligations under this Agreement has been upset, that Member may bring the matter before the relevant WTO bodies and inform the TMB. Any subsequent findings or conclusions by the WTO bodies concerned shall form a part of the TMB's comprehensive report.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

*No jurisprudence or decision of a competent WTO body.*

**XI. ARTICLE 8**

A. TEXT OF ARTICLE 8

*Article 8*

1. In order 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, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an *ad personam* basis.

2. The TMB shall develop its own working procedures. It is understood, however, that consensus within the TMB does not require the assent or concurrence of members appointed by Members involved in an unresolved issue under review by 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.

4. Members shall afford to each other adequate opportunity for consultations with respect to any matters affecting the operation of this Agreement.

5. In the absence of any mutually agreed solution in the bilateral consultations provided for in this Agreement, the TMB shall, at the request of either Member, and following a thorough and prompt consideration of the matter, make recommendations to the Members concerned.

6. At the request of any Member, the TMB shall review promptly any particular matter which that Member considers to be detrimental to its interests under this Agreement and where consultations between it and the Member or Members concerned have failed to produce a mutually satisfactory solution. On such matters, the TMB may make such observations as it deems appropriate to the Members concerned and for the purposes of the review provided for in paragraph 11.

7. Before formulating its recommendations or observations, the TMB shall invite participation of such Members as may be directly affected by the matter in question.

8. Whenever the TMB is called upon to make recommendations or findings, it shall do so, preferably within a period of 30 days, unless a different time period is specified in this Agreement. All such recommendations or findings shall be communicated to the Members directly concerned. All

such recommendations or findings shall also be communicated to the Council for Trade in Goods for its information.

9. The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations.

10. 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.

11. In order to oversee the implementation of this Agreement, the Council for Trade in Goods shall conduct a major review before the end of each stage of the integration process. To assist in this review, the TMB shall, at least five months before the end of each stage, transmit to the Council for Trade in Goods a comprehensive report on the implementation of this Agreement during the stage under review, in particular in matters with regard to the integration process, the application of the transitional safeguard mechanism, and relating to the application of GATT 1994 rules and disciplines as defined in Articles 2, 3, 6 and 7 respectively. The TMB's comprehensive report may include any recommendation as deemed appropriate by the TMB to the Council for Trade in Goods.

12. In the light of its review the Council for Trade in Goods shall by consensus take such decisions as it deems appropriate to ensure that the balance of rights and obligations embodied in this Agreement is not being impaired. For the resolution of any disputes that may arise with respect to matters referred to in Article 7, the Dispute Settlement Body may authorize, without prejudice to the final date set out under Article 9, an adjustment to paragraph 14 of Article 2, for the stage subsequent to the review, with respect to any Member found not to be complying with its obligations under this Agreement.

## B. INTERPRETATION AND APPLICATION OF ARTICLE 8

### 1. General

91. The 1996 Singapore Ministerial Declaration included the following statement on the role of the TMB:

"We agree that, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the Agreement. We emphasize the responsibility of the Goods Council in overseeing, in accordance with Article IV:5 of the WTO Agreement and Article 8 of the ATC, the functioning of the ATC, whose implementation is being supervised by the TMB."<sup>129</sup>

92. The TMB held its final meeting on 9 December 2004.<sup>130</sup>

### 2. Role of the TMB

93. The Panel in *US – Wool Shirts and Blouses* described its understanding of the difference between the role and the function of dispute settlement panels on the one hand and the role and function of the TMB on the other. The Panel pointed out, *inter alia*, the lack of specific terms of

<sup>129</sup> The Singapore Ministerial Declaration, para. 15.

<sup>130</sup> G/TMB/R/116.

reference for the TMB and the generally more "multifaceted role" of the TMB, in particular its investigative powers:

"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."

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>131</sup>

94. The Panel also described the relationship between the TMB process and the dispute settlement process under the DSU:

"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>132</sup>.

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<sup>131</sup> Panel Report, *US – Wool Shirts and Blouses*, para. 7.19.

<sup>132</sup> (*footnote original*) 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

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 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.

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."<sup>133</sup>

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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."

<sup>133</sup> Panel Report, *US – Wool Shirts and Blouses*, paras. 7.19-7.21. The Appellate Body characterized the statement that "the TMB is not limited to the initial information submitted" as "purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions" and "not a legal finding." Appellate Body Report, *US - Wool Shirts and Blouses*, p. 17.

### 3. Article 8.1

(a) "The TMB shall consist of a Chairman and 10 members."

95. The composition of the TMB was decided by the General Council on 31 January 1995,<sup>134</sup> 10 December 1997<sup>135</sup> and 20 December 2001.<sup>136</sup>

(b) TMB members "discharge [...] their functions on an *ad personam* basis"

96. The Working Procedures adopted by the TMB state the following:

"In discharging their functions [...], TMB members and alternates undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary."<sup>137</sup>

97. The Council for Trade in Goods adopted a Decision on the Ad Personam Status of TMB Members on 27 January 1997:

"WTO Members which, pursuant to the decision of the General Council of 31 January 1995, appoint TMB members under Article 8.1 of the Agreement on Textiles and Clothing accept that TMB members discharge their function on an *ad personam* basis and not as government representatives. Consequently, they shall not give TMB members instructions, nor seek to influence them, with regard to matters before the TMB. The same applies to alternates."<sup>138</sup>

### 4. Article 8.2

(a) "The TMB shall develop its own working procedures"

98. At its first meeting, in March to July 1995, the TMB adopted its working procedures.<sup>139</sup>

99. At its meeting in December 1996, in relation to working procedures, the TMB took note of the decision of the DSB on 3 December 1996 to adopt rules of conduct for the *DSU*<sup>140</sup>, "in view of the fact that such Rules apply, *inter alia*, to the Chairman of the TMB and other members of the TMB secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the ATC, as well as, to the extent prescribed in the relevant Section of the Rules, to members of the TMB."<sup>141</sup>

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<sup>134</sup> WT/GC/M/1, section 5; text of adopted decision, WT/L/26 and Add.1.

<sup>135</sup> WT/L/253.

<sup>136</sup> WT/L/443.

<sup>137</sup> G/TMB/R/1, para. 1.4 of the Annex.

<sup>138</sup> G/L/141.

<sup>139</sup> G/TMB/R/1, para. 5. The text of the adopted working procedures is found in Annex to G/TMB/R/1.

<sup>140</sup> WT/DSB/RC/1.

<sup>141</sup> G/TMB/R/22, para. 17.

(b) "consensus within the TMB"

100. The 1995 General Council decision on the composition of the TMB provides that "[t]he Textiles Monitoring Body will take all decisions by consensus" and states: "As provided for in Article 8.2 of the Agreement on Textiles and Clothing, in case of an unresolved issue under review by the TMB, it is understood that consensus within the TMB does not require the assent or concurrence of members appointed by members involved in such unresolved issue."<sup>142</sup>

101. The Working Procedures adopted by the TMB stated:

"Consensus within the TMB does not require the assent or concurrence of TMB members appointed by WTO Members involved in an unresolved issue under review by the TMB.<sup>143</sup> However, at least seven TMB members shall be present when deciding on such unresolved issues, except in cases where one or two TMB members have been appointed by WTO Members involved in an unresolved issue, where eight TMB members shall be present. For the purpose of this paragraph the term 'TMB members' covers the respective alternates in case a TMB member is absent."<sup>144</sup>

## 5. Article 8.3

(a) Standard of review

102. The Panel in *US – Underwear* examined the standard of review to be applied in cases involving the Agreement on Textiles and Clothing and noted that Article 11 of the DSU is the relevant provision. The Panel held that "the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States". The Panel went on to state:

"[A] policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU.

...

[T]he Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review.<sup>145</sup> In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. In our view, the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing

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<sup>142</sup> WT/L/26.

<sup>143</sup> (*footnote original*) See paragraph 2, Article 8 of the ATC.

<sup>144</sup> G/TMB/R/1, para. 7.2.

<sup>145</sup> (*footnote original*) See GATT Panel Reports on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, BISD 40S/205; United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway; and United States – Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada, BISD 34S/194.

the international obligations of the United States. Consequently, the ATC constitutes, in our view, the relevant legal framework in this matter.

We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the 'March Statement') which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. In our view, an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States."<sup>146</sup>

103. In *US – Wool Shirts and Blouses*, the Panel examined whether a transitional safeguard measure imposed by the United States was consistent with Article 6 of the Agreement on Textiles and Clothing. India, the complainant, claimed that the Panel should examine whether the United States had acted reasonably, while the United States argued that it should be "entitled to the benefit of reasonable doubt", as it had been so entitled in a certain GATT case. The Panel responded as follows:

"[A]lthough the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU ... is relevant here[.]

...

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. ...

...

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."<sup>147</sup>

104. In *US – Cotton Yarn*, the Appellate Body considered a panel's standard of review under Article 11 in a dispute under the Agreement on Textiles and Clothing. The Appellate Body considered that the Panel had exceeded its mandate under Article 11 of the DSU by considering certain evidence that could not possibly have been examined by the United States when it made the determination. In this regard, the Appellate Body considered:

"Unlike Article 3 of the *Agreement on Safeguards*, which provides explicitly for an investigation by competent authorities of a Member, Article 6 of the *ATC* does not specify either the organ or the procedure through which a Member makes its 'determination'. Nevertheless, the ... principles concerning the standard of review under Article 11 of the DSU with respect to the *Agreement on Safeguards* apply equally, in our view, to a panel's review of a Member's determination under Article 6

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<sup>146</sup> Panel Report, *US – Underwear*, paras. 7.10 and 7.12-7.13.

<sup>147</sup> Panel Report, *US – Wool Shirts and Blouses*, paras. 7.16-7.17.

of the *ATC*. We note that Article 6 does not require the participation of all interested parties in the process leading to the determination. We consider, therefore, that the exercise of due diligence by a Member is all the more important in reaching a determination under Article 6 of the *ATC*.

...

In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the *ATC* has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*.<sup>148</sup> A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. If a panel were to examine such evidence, the panel would, in effect, be conducting a *de novo* review and it would be doing so without having had the benefit of the views of the interested parties. The panel would be assessing the due diligence of a Member in reaching its conclusions and making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgement for that of the Member. In our view, this would be inconsistent with the standard of a panel's review under Article 11 of the DSU."<sup>149</sup>

## 6. Article 8.9

105. The Panel in *US – Wool Shirts and Blouses* addressed the issue of the legal force of the TMB's recommendations and found that the recommendations of the TMB are not binding:

"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."<sup>150</sup>

## 7. Article 8.10

106. Regarding the deadline for making notifications pursuant to Article 8.10, in November 2001, the TMB stated: "... the TMB took the view that the one-month period started on the date when the report containing the TMB's examination, together with the conclusions reached and recommendations adopted, had been officially communicated to the Member concerned. In this particular case, this had been done ...when the TMB's report on the examination of the safeguard

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<sup>148</sup> (*footnote original*) We do not rule upon other forms of evidence, such as an expert opinion submitted to a panel that is based on data which existed when the Member made its determination. (Appellate Body Report, *United States – Lamb Safeguard*, *supra*, [...], paras. 114-116) ...

<sup>149</sup> Appellate Body Report, *US – Cotton Yarn*, paras. 76 and 78.

<sup>150</sup> Panel Report, *US – Wool Shirts and Blouses*, para. 7.57.

measure had been circulated to all WTO Members<sup>151</sup> and the Chairman of the TMB had provided a separate official communication to [the Member taking the safeguard] in this regard."<sup>152</sup>

## 8. Article 8.11

(a) "a major review before the end of each stage of the integration process"

107. The Council for Trade in Goods conducted major reviews of the first stage<sup>153</sup>, second stage<sup>154</sup> and third stage<sup>155</sup> of the integration process. These reviews were based on three comprehensive reports prepared by the TMB on the implementation of the ATC during the three stages of the implementation process.<sup>156</sup> In its third comprehensive report<sup>157</sup>, the TMB observed:

"[I]n the respective official notifications repeated assurances have been recently provided regarding the timely and full implementation of the ATC. The Agreement will be fully implemented as scheduled and provided for in Article 9. Thus the ATC and all restrictions thereunder shall stand terminated on 1 January 2005, on which date the textiles and clothing sector shall be fully integrated into GATT 1994, thereby putting an end to a special and discriminatory regime that has been in application for more than four decades."<sup>158</sup>

## XII. ARTICLE 9

A. TEXT OF ARTICLE 9

### *Article 9*

This Agreement and all restrictions thereunder shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

108. This Agreement was terminated as scheduled on 1 January 2005, together with all the remaining restrictions maintained thereunder.

## XIII. ANNEX

A. TEXT OF ANNEX

### *ANNEX*

#### LIST OF PRODUCTS COVERED BY THIS AGREEMENT

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<sup>151</sup> See G/TMB/25.

<sup>152</sup> G/TMB/R/83, para. 25.

<sup>153</sup> Outcome of review: G/L/224, adopted 16 February 1998. Minutes of discussions: G/C/M/23, G/C/M/26-30.

<sup>154</sup> Outcome of review: G/L/556, adopted on 23 July 2002. Minutes of discussions: G/C/M/51, G/C/M/59-62, G/C/M/64.

<sup>155</sup> Outcome of review: G/L/725, dated 10 December 2004. Minutes of discussions: G/C/M/75/Add.1, G/C/M/76, G/C/M/78 and Add.1

<sup>156</sup> G/L/179 and Corr.1 (31 July and 16 October 1997), G/L/459 (31 July 2001), G/L/683 (30 July 2004) with G/L/692 (20 September 2004).

<sup>157</sup> See G/L/683, paras. 663-666.

<sup>158</sup> G/L/683, para. 664.

1. This Annex lists textile and clothing products defined by Harmonized Commodity Description and Coding System (HS) codes at the six-digit level.
2. Actions under the safeguard provisions in Article 6 will be taken with respect to particular textile and clothing products and not on the basis of the HS lines *per se*.
3. Actions under the safeguard provisions in Article 6 of this Agreement shall not apply to:
  - (a) developing country Members' exports of handloom fabrics of the cottage industry, or hand-made cottage industry products made of such handloom fabrics, or traditional folklore handicraft textile and clothing products, provided that such products are properly certified under arrangements established between the Members concerned;
  - (b) historically traded textile products which were internationally traded in commercially significant quantities prior to 1982, such as bags, sacks, carpetbacking, cordage, luggage, mats, mattings and carpets typically made from fibres such as jute, coir, sisal, abaca, maguey and henequen;
  - (c) products made of pure silk.

For such products, the provisions of Article XIX of GATT 1994, as interpreted by the Agreement on Safeguards, shall be applicable.

[The list of products is omitted here. The items are generally at the six-digit level, with a few particular products listed as sub-positions ("ex-positions").]

B. INTERPRETATION AND APPLICATION OF THE ANNEX

*No jurisprudence or decision of a competent WTO body.*

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