WORLD TRADE ORGANIZATION

WT/DS24/AB/R
10 February 1997

(97-0454)

Appellate Body

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear

AB-1996-3

Report of the Appellate Body

WORLD TRADE ORGANIZATION

APPELLATE BODY

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear	AB-1996-3
Costa Rica, Appellant	Present:
United States, Appellee	Ehlermann, Presiding Member
	Feliciano, Member
India, Third Participant	Matsushita, Member

I. Introduction: Factual Background and Statement of the Appeal

This is an appeal by Costa Rica from certain issues of law and legal interpretations set out in the Panel Report, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*[1] (the "Panel Report"). That Panel (the "Panel") had been established to consider a complaint by Costa Rica relating to a transitional safeguard measure imposed by the United States on imports of cotton and man-made fibre underwear from Costa Rica under Article 6 of the *Agreement on Textiles and Clothing* ("*ATC*").[2]

The factual background essential to understanding this appeal, may be sketched quickly.

On 27 March 1995, the United States requested consultations with Costa Rica on trade in cotton and man-made underwear under Article 6.7 of the *ATC*. At the same time, the United States provided Costa Rica with a "Statement of Serious Damage", dated March 1995 (the "March Statement"), on the basis of which the United States proposed the introduction of a restraint on imports of underwear from Costa Rica. Notice of the request for consultations, the proposed restraint and the proposed

[1]WT/DS24/R.

[2]Establishment of an Import Limit for Certain Cotton and Man-Made Fibre Textile Products Produced or Manufactured in Costa Rica, 60 Federal Register 32653, 23 June 1995.

restraint level was published in the United States Federal Register on 21 April 1995. The consultations were held but the United States and Costa Rica failed to negotiate a mutually acceptable settlement during these consultations. The United States then invoked Article 6.10 of the *ATC*, and introduced a transitional safeguard measure in respect of cotton and man-made fibre underwear imports from Costa Rica on 23 June 1995. The measure was, by its terms, to be valid for a period of 12 months, effective as of 27 March 1995 (*i.e.*, the date of the request for consultations).

At the same time, the United States referred the matter to the Textiles Monitoring Body (the "TMB"). The TMB found that the United States had failed to demonstrate serious damage to the United States domestic industry. However, the TMB did not reach a consensus on the existence of an actual threat of serious damage. The TMB similarly failed to make any findings on the effective date of application of the United States restraint. Accordingly, the TMB recommended that the United States and Costa Rica hold further consultations with a view to resolving the matter. In the absence of any settlement, the parties reverted to the TMB, which confirmed its earlier findings and considered its review of the matter completed. Although further consultations took place between the United States and Costa Rica in November 1995, no agreement was reached. In December 1995, therefore, Costa Rica invoked the dispute settlement provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*").

A panel was established to examine this matter on 5 March 1996. On 27 March 1996, the United States renewed the transitional safeguard measure for a second period of 12 months. In due time, after the full course of written submissions and hearings and the Interim Review, the Panel rendered its Report.

The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 8 November 1996. It contains the following conclusions:

(i) the United States violated its obligations under Article 6.2 and 6.4 of the *ATC* by imposing a restriction on Costa Rican exports without having demonstrated that serious damage or actual threat thereof was caused by such imports to the United States' domestic industry;[3]

[3]Panel Report, paras. 7.52 and 7.55.

(ii) the United States violated its obligations under Article 6.6(d) of the *ATC* by not granting the more favourable treatment to Costa Rican re-imports contemplated by that sub-paragraph;[4]

(iii) the United States violated its obligations under Article 2.4 of the *ATC* by imposing a restriction in a manner inconsistent with its obligations under Article 6 of the *ATC*;[5] and

(iv) the United States violated its obligations under Article X:2 of the *General Agreement on Tariffs and Trade 1994* (the "*General Agreement*") and Article 6.10 of the *ATC* by setting the start of the restraint period on the date of the request for consultations, rather than the subsequent date of publication of information about the restraint.[6]

The Panel recommended that the Dispute Settlement Body request the United States to bring the measure challenged by Costa Rica into compliance with the United States' obligations under the *ATC*. The Panel stated that such compliance can best be achieved, and further nullification and impairment of benefits accruing to Costa Rica under the *ATC* best avoided, by "prompt removal of the measure inconsistent with the obligations of the United States". The Panel further suggested that the United States bring the measure challenged by Costa Rica into compliance with United States' obligations under the *ATC* by "immediately withdrawing the restriction imposed by the measure".[7]

On 11 November 1996, Costa Rica notified the Dispute Settlement Body[8] of the WTO of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *DSU*. On the same day, Costa Rica filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[9] Costa Rica filed its appellant's submission on 21 November

[4]Panel Report, para. 7.59.

[5]Panel Report, para. 7.71.

[6]Panel Report, para. 7.69.

[7]Panel Report, para. 8.3.

[8]WT/DS/24/5.

[9]WT/AB/WP/1, 15 February 1996.

1996.[10] On 6 December 1996, the United States filed an appellee's submission.[11] That same day, India submitted a third participant's submission.[12] No other submissions by either the United States or Costa Rica, whether *qua* appellant or *qua* appellee, were made. The complete record of the Panel proceedings was duly transmitted to the Appellate Body.[13]

The oral hearing contemplated by Rule 27 of the *Working Procedures* was held on 16 December 1996. At the hearing, oral arguments were made respectively by the participants and the third participant. Questions were put to them by the Division. All of these questions were answered orally. The participants and third participant did not take advantage of an invitation by the Division to submit post-hearing memoranda. On 18 December 1996, the United States submitted a written clarification and amplification of its oral response to one of the Division's questions. The next day, Costa Rica responded in writing to the United States' clarification.

II. The Basic Contentions of the Participants and the Third Participant

1. The Claims of Error by Appellant Costa Rica

Costa Rica appeals only from the Panel's conclusions relating to the permissible effective date of application of the United States' transitional safeguard measure.

It is claimed by Costa Rica that the Panel erred in finding that the United States' restraint measure could have legal effect between the date of publication of the notice of consultations (between the United States and several countries, including Costa Rica) in the Federal Register (i.e., 21 April 1995) and the date of the application of that measure (i.e. 23 June 1995). The restriction was "introduced" on 23 June 1995 for a period of 12 months starting on 27 March 1995, i.e., starting on the day the United States requested the several Members concerned for consultations under Article 6.7 of the *ATC*. Invoking Article 2.4 of the *ATC*, Costa Rica argues that new restrictions may be imposed in the textiles sector only under either (i) the *ATC* or (ii) the "relevant" provisions of the *General Agreement*. More specifically, a transitional safeguard measure may be imposed only if it meets the requirements of (i) Articles XI[14] and XIII of the *General Agreement*, or of (ii) Article 6 of the *ATC*. Since, Costa Rica

[10]Pursuant to Rule 21(1) of the *Working Procedures*.

[11]Pursuant to Rule 23(3) of the *Working Procedures*.

[12]Pursuant to Rule 24 of the *Working Procedures*.

[13]Pursuant to Rule 25 of the *Working Procedures*.

[14]Costa Rica, however, did not submit any arguments in respect of Article XI, *General Agreement.*

argues, Article XIII:3(b) of the *General Agreement* generally prohibits the backdating of import quotas, a backdated transitional safeguard measure restricting imports would be permissible only if it is expressly authorized by Article 6 of the *ATC*, and this, Article 6 does not. Costa Rica accordingly concludes that such a safeguard measure cannot impose a backdated quota.

(a) *Concerning Article XIII of the General Agreement*

Costa Rica contends that Article XIII:3(b) of the *General Agreement* sets out a general prohibition against the retroactive application of import quotas and allows backdating of such quotas only in the circumstances expressly provided for, i.e., in respect of goods *en route* to the importing country at the time public notice of the restraint is given. To Costa Rica, the reasoning of the panel in the 1989 *Chilean Apples* case[15] applies as well in the present case, because there, as here, the import quota became effective before the publication of the restraint. Article XIII:3(b) requires "public notice of the total quantity --- of the product or products which will be permitted to be imported during a specific future period". It is urged by Costa Rica that the notice published in the Federal Register on 21 April 1995 does not satisfy the requirements of Article XIII:3(b), since the publication of a contingent notice, which provides merely for the possibility of a restraint rather than the actual establishment or adoption of a safeguard measure, fails to bring about the legal certainty and predictability sought by Article XIII:3(b). The Panel erred, Costa Rica concludes, in finding in effect that the United States' backdated restraint substantially complies with the requisites of Article XIII:3(b).

(b) *Concerning Article X of the General Agreement*

It is further in effect claimed by Costa Rica that even the limited backdating of the United States' restraint measure approved as permissible by the Panel, i.e,. to 21 April 1995 (the date when the request for consultations was published in the Federal Register) rather than to 27 March 1995, (the date when consultations were in fact requested and initiated), cannot be justified by Article X of the *General Agreement*. In Costa Rica's view, any backdating that could result from application of Article X would be precluded by the "conflict clause" of the *General Interpretative Note to Annex IA* of the *Marrakesh*

[15] *European Economic Community - Restrictions on Imports of Dessert Apples*: *Complaint by Chile*, BISD 36S/93, adopted 22 June 1989, p. 132. See also *European Economic Community - Restrictions on Imports of Apples*: *Complaint by the United States*, BISD 36S/135, adopted 22 June 1989, p. 166.

Agreement Establishing the World Trade Organization (the "*WTO Agreement*"):[16] the provisions of Article 6 of the *ATC* which do not provide for backdating must prevail over Article X of the General Agreement. A procedural argument is also made by Costa Rica in noting that the parties to the present dispute had not raised the application of Article X before the Panel. Costa Rica thus concludes that the Panel had erred in applying Article X of the General Agreement.

(c) *Concerning Article 6 of the ATC*

Costa Rica states that Article 6 of the *ATC* is "silent" on the question of backdated transitional safeguard measures, and that certain considerations concerning Article 6 prevent an interpretation of the provisions thereof which would permit any backdating. To permit, Costa Rica argues firstly, WTO Members to impose restraints within the 30-day post-consultation "window" which become effective at some point outside (whether before or after) that 30-day period, could lead to circumvention of an important requirement or objective of Article 6.10 of the *ATC*: that an importing country must take a definitive or final decision during the 30-day period on whether or not to impose a proposed restraint at all.

Next, Costa Rica underscores the absence in Article 6.10 of the *ATC* of a clause equivalent to that found in Article 3:5(i) of the *Arrangement Regarding International Trade in Textiles* which became effective on 1 January 1974 and which is widely known as the *Multifibre Arrangement* (the "*MFA*"). Article 3:5(i) of the *MFA* expressly permitted the importing country imposing a restraint measure to backdate the effectivity of such measure "beginning on the day when the request [for consultations] was received by the participating exporting country or countries", where no agreement is reached after a period of 60 days from receipt of the request for consultations. It is urged by Costa Rica that the absence of equivalent wording in Article 6.10 of the *ATC* was deliberate and should not be remedied by the expansive interpretation of Article 6.10 adopted by the Panel. Along the same vein, Costa Rica notes the absence in Article 6.10 of the *ATC* of wording similar or comparable to the provisions expressly allowing retroactive application of provisional restraint measures under Article 10 of the *Agreement on Implementation of Article VI of the GATT 1994* (the "*Anti-Dumping Agreement*") and under Article 20 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM*

[16]The text of the *General interpretative note for Annex 1A* reads:

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

Agreement"). According to Costa Rica, had the drafters of the *ATC* wanted to provide for retroactive safeguard restraints, they would have done so expressly.

Costa Rica also rejects the Panel's statements concerning the possibility of speculative trade being caused by the request of the importing country for consultations required in Article 6.7 of the *ATC*. Since no evidence had been presented to the Panel on the matter, appellant Costa Rica denies that the Panel made a factual finding establishing the general prevalence of speculative trade. While acknowledging that a speculative "flood of imports" could arise in unusual and critical circumstances, appellant denies that such speculative trade could or had arisen in the present case and contends that, in any event, the appropriate remedy for such speculation is to be found in Article 6.11 of the *ATC*, not in Article 6.10.

Finally, Costa Rica contends, the "highly exceptional nature" of an Article 6 transitional safeguard mechanism should be taken into account in interpreting that Article of the *ATC*. No other WTO provision allows the imposition of "selective" (i.e. discriminatory, country-specific), Member-by-Member, restrictive measures against fair trade upon the ground that such trade is causing or threatens to cause serious damage to the importing Member's domestic industry. Accordingly, Costa Rica notes, Article 6.1 of the *ATC* directs that a transitional safeguard should be applied "as sparingly as possible". In the appellant's view, the Panel had failed to consider the exceptional nature of the *ATC* transitional safeguard mechanism.

2. The Arguments of Appellee United States

The Appellee contends that the Panel correctly found that the United States would have acted consistently with Article 6.10 of the *ATC* in applying a transitional safeguard measure against Costa Rican underwear on 21 April 1995, the date of publication in the Federal Register of the request for consultations. A basic contention of the United States is that no provisions of the *ATC* or of the *General Agreement* prohibits the setting as the "initial date" of a transitional safeguard measure (i.e. the date from which imports may be "counted" against the quota imposed), of the date of the public notice announcing the request for consultations. The second principal argument of the Appellee is that the Panel correctly distinguished *Chilean Apples* by stressing that the 21 April 1995 notice was published before the measure was imposed on 23 June 1995.

(a) *Concerning Article 6.10 of the ATC*

The United States claims that the text of Article 6.10 of the *ATC* is "silent" on the initial date of a transitional safeguard measure and that, accordingly, the ordinary meaning of Article 6.10 does not prevent a Member from setting the date of the public notice announcing the request for consultations as the "initial date" of a safeguard measure. In its view, the term "apply" contained in Article 6.10 refers to the date on which goods counted under the restraint may be "embargoed", and does not bear upon the "initial date" of the restraint.

The United States argues that, in the absence of guidance from the language of Article 6.10 of the *ATC*, the Panel had appropriate recourse to the provisions of Articles X:2 of the *General Agreement*. That recourse is sustained by the principle of effectiveness in treaty interpretation, in view of the "important factual finding" of the Panel that "there would be a flood of imports" after publication of the request for consultations if a transitional safeguard measure could become effective only as of its date of application. In the view of the Appellee, the Panel's interpretation renders Article 6.10 of the *ATC* an "'effective' component of the transitional safeguard mechanism of Article 6 of the *ATC*", in line with the requirement of Article 6.1 that transitional safeguard measures should be applied "consistently --- with the effective implementation of the integration process" under the *ATC*. The United States further suggests that Article 6.11 of the *ATC* pointed to by Costa Rica is an "extraordinary remedy" not intended to address the "flood of imports" that typically follows publication of the request for consultations. To the United States, the Appellant's effort to dispute the "factual finding" of the Panel falls outside the proper scope of this appeal, in view of the provisions of Article 17.6 of the *DSU*.

Clearly regarding them as part of the context of Article 6.10, the United States refers to Articles 6.2, 6.3 and 6.4 of the *ATC* the requisites of which must be complied with by an importing country making the determination of serious damage on the basis of which consultations with particular exporting countries are requested under Article 6.7. The United States contends that, considering the "rigorous analysis" to which such a determination is subjected, for purposes of WTO dispute settlement, that determination is "in the nature of a final determination". Therefore, the United States submits, it is "appropriate" for a Member making such a "final determination" to be able to count imports as within a restraint from the date of public announcement of that determination of serious damage.

Upon the other hand, the Appellee dismisses Appellant's suggestion that the *Anti-Dumping Agreement* and the *SCM Agreement* form part of the context of Article 6.10 of the *ATC*, upon the ground that those two Agreements are different from the *ATC*. The Appellee also rejects the inference which

the Appellant would draw from the absence in Article 6.10 of the *ATC* of language equivalent to the express permission for backdating a restraint measure under Article 3.5(i) of the *MFA*. The United States states that there was no debate on this point during the negotiations of the *ATC*.

(b) *Concerning Article XIII:3(b) of the General Agreement*

The United States, turning to Costa Rica's arguments relating to Article XIII:3(b), supports the Panel's decision to distinguish *Chilean Apples*[17] on its facts. It also traverses Costa Rica's claim that Article XIII:3(b) was infringed because the United States gave public notice merely of the initiation of a procedure which could possibly lead to the imposition of a restraint measure, rather than of the imposition of the restraint measure itself. The principal contention of the Appellee here is that the wording of Article XIII:3(b) recognizes the possibility that the quota announced in the original public notice may change, and does not prohibit notice of future quotas that may be subject to a contingency, such as the contingency that consultations may not be successful and the proposed restraint may in fact be adopted.

3. The Arguments of the Third Participant India

The Third Participant endorses all of the arguments submitted by Costa Rica, providing additional statements on a number of particular points. For example, India argues that a plain reading of Article 6.10 of the *ATC* precludes the imposition of transitional safeguard measures either before or after the 30-day post-consultation period. According to India, the absence of a provision permitting retroactive transitional safeguard measures, of the sort envisaged by Article 3:5(i) of the *MFA*, is deliberate. In addition, the argument is submitted that Article XIII of the *General Agreement* and Article 6.10 of the *ATC* should be interpreted consistently with each other, such that Members should not be allowed to announce the possibility of trade action *ex ante* and actually apply any resultant measure *ex post*. The Third Participant also recalls the right of WTO Members to apply provisional safeguard measures under Article 6.11 of the *ATC*, noting that the United States chose not to invoke that provision in the present case. Finally, India emphasizes the exceptional nature of the *ATC* transitional safeguard mechanism recognized in Article 6.1 of the *ATC* itself, noting that Article 6 of the *ATC* allows Members to impose quantitative restrictions in a manner inconsistent with Article XI of the *General Agreement* and on a selective, "Member-by-Member" basis.

[17] *Supra*, footnote 15.

III. The Issues Raised in this Appeal

We must note at the outset the narrowness of the present appeal. Costa Rica appeals from only one finding of the Panel: the finding allowing the backdating of the transitional safeguard measure here involved to the date of publication in the Federal Register of the request for consultations with, *inter alia*, Costa Rica. At the same time, Costa Rica questions certain legal interpretations adopted by the Panel in the course of reaching that finding.

The United States has not appealed from any of the findings of the Panel, either by filing an Appellant's submission under Rule 23(1) of the *Working Procedures* or by bringing a separate appeal under Rule 23(4) of the same *Procedures*. In its submissions, written and oral, as Appellee, the United States endorses the Panel's finding from which Costa Rica appeals, as well as the legal interpretations adopted by the Panel in the process of making that finding. Thus, Costa Rica is the only Appellant in AB-1996-3.

On the basis of the written submissions and oral statements made by the participants and the third participant, this appeal may be said to raise the following issues:

1. Whether or not backdating of the effectivity of a transitional safeguard measure is permitted by Article 6.10 of the *ATC*;

2. Whether or not Article XIII:3(b), *General Agreement*, is applicable to a transitional safeguard measure taken under Article 6, *ATC*; and

3. Whether or not Article X:2, *General Agreement*, is applicable to a transitional safeguard measure taken under Article 6, *ATC*.

IV. The Issue of Backdating the Effectivity of a Transitional Safeguard Measure taken under Article 6.10 of the *ATC*

The *Agreement on Textiles and Clothing*, one of the Multilateral Trade Agreements in Annex 1A of the *WTO Agreement*, sets out provisions to be applied by WTO Members during a 10-year transition period leading to the integration of the textiles and clothing sector into the regime of the *General Agreement*. The Members have recognized that, during this transition period, it may become necessary "to apply a specific transitional safeguard mechanism" to textile and clothing products not yet integrated

into the *General Agreement*. A transitional safeguard mechanism is in essence a measure establishing, for a certain period of time, a quantitative restraint on the importation of specified categories of goods from an identified Member or Members. Many legal and operating aspects of this mechanism are defined and regulated in varying degrees of detail by Article 6 of the *ATC*.

In its Report, the Panel formulated the particular issue we are here addressing in the following manner:

> Costa Rica argues that the United States retroactively applied the restriction in violation of Article 6.10 of the ATC. The restriction was introduced on 23 June 1995 for a period of 12 months starting on 27 March 1995, which was the date of the request for consultations under Article 6.7 of the ATC. Although Article 6.10 of the ATC allows the importing country to "apply the restraint, … within 30 days following the 60-day period for consultations", it is silent about the initial date from which the restraint period should be calculated. In contrast, Article 3.5(i) of the Multifibre Arrangement (MFA) stated that the restraint could be instituted "for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries". Thus, the question before the Panel is whether the silence of the ATC in this regard should be interpreted as prohibition of a practice which was explicitly recognized under the MFA, and if so, what should be the appropriate date from which the restraint period is to be calculated under the ATC.[18] (Emphases added)

Apparently taking its assumed premise literally - i.e. that Article 6.10 "is silent about the initial date from which the restraint period should be conducted …" and describing the issue as "a technical question regarding the opening date of a quota period",[19] the Panel went outside the four corners of the *ATC*. Proceeding to the provisions of the *General Agreement*, the Panel then took Article X:2 thereof as its applicable and controlling text. The Panel held that the United States' safeguard restraint measure was "a measure of general application" within the meaning of Article X:2,[20] and concluded;

> … that the prevalent practice under the MFA of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the ATC. However, we note that if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint. In the present case, the United States violated its obligations under Article X:2 of GATT 1994 and consequently under Article 6.10 of

[18]Panel Report, para. 7.62.

[19]*Id.*, para. 7.63.

[20]*Id.*, para. 7.65.

> the ATC by setting the restraint period for 12 months starting on 27 March 1995. However, had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period. The United States argues that it did not "enforce" the restraint until 23 June 1995. We note the US argument. However, in so far as the restraint was applied to exports from Costa Rica which had taken place prior to the publication, it was implemented and therefore enforced within the meaning of Article X:2 of GATT 1994.[21] (Emphases added)

While we agree with the Panel, as pointed out below,[22] that the United States' restraint measure here involved is appropriately regarded as "a measure of general application" for purposes of Article X:2 of the *General Agreement*, we are unable to share and affirm the above conclusion of the Panel.

1. Interpreting Article 6.10 of the *ATC*: Textual and Contextual Considerations and the Principle of Effectiveness

We must focus upon Article 6.10 of the *ATC* which needs to be quoted in full:

> Article 6
>
> x x x
>
> 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.
>
> x x x

[21] *Id.*, para. 7.69.

[22] *Infra*, p. 23.

The first thing which must be noted about Article 6.10 of the *ATC* is that its terms make no express reference to backdating the effectivity of a safeguard restraint measure to some date prior to the promulgation or imposition of such measure. To this extent, we agree with the Panel that Article 6.10 *ATC* is silent on the question of backdating a safeguard restraint measure. We do not, however, believe that Article 6.10 does not substantively address that issue. To the contrary, we believe it does and that the answer to this question is to be found within Article 6.10 itself - its text and context - considered in the light of the objective and purpose of Article 6 and the *ATC*.

Under the express terms of Article 6.10, the importing Member which "propose[s] to take safeguard action" may, "after the expiry of the period of 60 days" from the date of receipt of the request for consultations without agreement having been reached, "apply the restraint (measure)" "within 30 days following the 60-day period for consultations …". As we understand it, "apply" when used as here in respect of a governmental measure - whether a statute or an administrative regulation - means, in ordinary acceptation, putting such measure into operation. To apply a measure is to make it effective with respect to things or events or acts falling within its scope. Put in a slightly different way, a government functionary who evaluates and characterizes things, events or acts in terms of the requirements set out in a restraint measure, is "applying" or "implementing" or "enforcing" that measure.

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.[23] 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.

We turn to the context of Article 6.10 of the *ATC*. That context includes, of course, the whole of Article 6.

[23]Under Article 6.5, *ATC*, the maximum period of validity of a determination of "serious damage or actual threat thereof", for purposes of application of an *ATC*-consistent restraint measure, is 90 days after the date of initial notification of such damage. After the 90-day period, a new determination of "serious damage or actual threat thereof" will have to be made if no restraint measure had been imposed.

Article 6.1, *ATC* offers some reflected light on the question of backdating a restraint. Article 6.1 reads, in pertinent part:

> 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. … 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. (Emphases added)

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 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.

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[24] sustains this implication.

We turn to another element of the context of Article 6.10 of the *ATC*: the prior existence and demise, as it were, of the *MFA*. Article 3(5)(i) of the *MFA* provided as follows:

> If, however, after a period of sixty days from the date on which the request has been received by the participating exporting country or countries, there has been no agreement either on the request for export restraint or on any alternative solution, the requesting participating country may decline to accept imports for retention from the participating country or countries referred to in paragraph 3 above of the textiles and textile products causing market disruption (as defined in Annex A) at a level for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries not less than the level provided for in Annex B. Such level may be adjusted upwards to avoid undue hardship to the commercial participants in the trade involved to the extent possible consistent with the purposes of this Article. At the same time the matter shall be brought for immediate attention to the Textile Surveillance Body. (Emphases added)

It is recognized by Appellant and Appellee and the Third Participant, and the Panel as well, that 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.[25] The 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*.[26] The Panel did not draw any operable inference

---

[24]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.

[25]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.

[26]With the demise of the *MFA*, its place has been taken with respect to WTO Members, firstly, in respect of textile and clothing items not yet integrated into the *General Agreement*, by the *ATC*. Secondly, in respect of items already integrated into the *General Agreement*, the *MFA* safeguard measure is displaced by Article XIX of the *General Agreement* and the *Agreement on Safeguards*.

from the disappearance of the *MFA* clause.[27] 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*.

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 permissable. 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.

2. The Problem of a Speculative "Flood of Imports" upon Notice of a Call for Consultations

The United States claims that the Panel made an "important factual finding" that there would always or "typically" be a "flood of imports" after an announcement of a call for consultations between the importing Member proposing to impose a safeguard restraint measure and the identified exporting Member or Members. It is emphasized that the announcement of a possible restraint measure generates a powerful incentive to maximize exports before the restraint can go into effect. The thrust of the United States' argument is that authority to backdate a restraint measure is essential if the importing Member is effectively to protect itself from such speculative surges of imports. Article 6.10 of the

[27]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.

ATC, in the United States' view, must be considered as impliedly granting such authority if that paragraph is to be an "effective component" of the transitional safeguard mechanism of the *ATC*.

We have been unable to locate such a broad-ranging "factual finding" in the Panel's Report.

At the same time, we must recognize that in the world of international trade and commerce as we know it, a speculative "flood of imports" could in fact materialize, in a particular case, upon public announcement of consultations. We cannot exclude *a priori* the possibility of such a situation arising. Whether or not, in a specific given case, a "flood of imports" would actually follow publication of a call for consultations relating to a proposed restraint measure will, in our view, depend upon any number of variable factors. Such factors would include, for instance, the particular kind of textile or clothing item involved, the "high fashion", high-value or alternatively the fungible, low-value nature of the goods subjected to a quota, the seasonality of demand for such items, the length of production time, the presence or absence of abnormally high inventories of such goods in the exporting country, and so forth. Another kind of factor which may bear upon the possibility of a "flood of imports", is the level of the minimum or floor quota guaranteed to the exporting Member[s] by Articles 6.7 and 6.8, *ATC*, and public awareness of such guaranteed quota level within the importing and exporting countries.

It appears to us that the above is basically all that the Panel sought to convey in its brief statement on the matter:

> Finally, we note the US argument that if the safeguard measure could only be applied starting at some time later than the date of the request for consultations, there would be a flood of imports in anticipation of the eventual restriction, which might defeat the whole purpose of the transitional safeguard measure. We find this argument to be persuasive from a practical point of view. In order to avoid such a consequence, in our view, all that is needed on the part of the importing country is to publish the content of the request for consultations immediately.[28] (Emphases added)

Turning to the legal contention made by the United States concerning the necessity for authority to backdate a restraint measure to prevent or deal with "a flood of imports", that contention may be seen to assume that no other recourse is available to the importing country should speculative "flooding" of imports pose a clear and imminent threat or actually come about in a particular situation.

[28]Panel Report, para. 7.68.

We do not believe it is necessary to make such an assumption.

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 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 standards established in Article 6.11 - "highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair" - are obviously not susceptible of specific quantitative description. The appreciation of when such circumstances may reasonably be regarded as having arisen, can only be done in concrete cases and on a case-to-case basis. Such appreciation would have to take into account that the standards and requisites of Articles 6.10 and 6.11 are to be read together against the background consideration that the *ATC* constitutes a temporary and transitional regime with complete integration of the textile and clothing sector into the *General Agreement* as the final goal.[29]

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

[29]The standard found in Article 6.11, *ATC*, may be compared textually with the counterpart language in Article XIX:2, *General Agreement*, and Article 6 of the *Agreement on Safeguards*: "in critical circumstances, where delay would cause damage which it would be difficult to repair …". This language presently applies to all goods already integrated into the *General Agreement* and will apply, at the end of the transitional period, to goods currently not yet so integrated.

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.

V. The Issue of Applicability of Article XIII:3(b), *General Agreement*, to a Transitional Safeguard Measure taken under Article 6.10, *ATC*

In the written and oral submissions before the Appellate Body, the issue of applicability of Article XIII:3(b) of the *General Agreement* to the restraint measure here at stake, was much discussed by Appellant Costa Rica. The Appellee United States also dealt with this issue, though with less enthusiasm.

Considering the conclusion we have above reached in respect of the first issue, there is no necessity for dealing with this second issue at any length. Had we concluded that under Article 6.10, *ATC*, backdating the effectivity of a restraint measure remained permissible, it would have been necessary to determine whether a different result would be compelled by Article XIII(3)(b) of the *General Agreement* and, in particular, the meaning and applicability of the words "the Contracting Party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period …". In any case, there is nothing in this provision which runs counter to our conclusion that backdating is prohibited under Article 6.10 of the *ATC*.

VI. The Issue of Applicability of Article X:2 of the *General Agreement*, to a Transitional Safeguard Measure taken under Article 6.10, *ATC*

Article X, *General Agreement*, provides in part:

> **Article X**
>
> *Publication and Administration of Trade Regulations*
>
> x x x
>
> 2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more

> burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published. (Emphases added)
>
> x x x

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.

Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected.

At the same time, we are bound to observe that Article X:2 of the *General Agreement*, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just *ATC* safeguard restraint measures sought to be applied retrospectively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the *General Agreement*.

Our 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*.

VII. Findings and Conclusions

For the reasons set out in the preceding sections of this Report, the Appellate Body has reached the following conclusion:

> the Panel erred in law in concluding that under Article 6.10 *ATC* "if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint", and that "had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period".

The foregoing legal conclusion modifies the conclusions of the Panel as set out in paragraph 7.69 of its Report. The Appellate Body's conclusion leaves intact the conclusions of the Panel that were not the subject of appeal.

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measure restricting Costa Rican exports of cotton and man-made fibre underwear, category 352/652, 60 Federal Register 32653, into conformity with its obligations under the *ATC*.

Signed in the original at Geneva this 5th day of February 1997 by:

_____
Claus-Dieter Ehlermann
Presiding Member

_____
Florentino Feliciano
Member

_____
Mitsuo Matsushita
Member