

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

Report of the Panel

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I INTRODUCTION

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

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

Terms of Reference

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

Composition

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

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

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II FACTUAL ASPECTS

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

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

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

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

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

2.5 An article imported under item 9802.00.80 is dutiable under the rate otherwise applicable to the assembled product, but the dutiable value is reduced by deducting the cost or value of the exported fabricated components from the value of the imported assembled product. For instance, the underwear re-imports in the present case are subject to customs duties at the rate applicable to underwear, but their customs value is reduced by deducting the cost or value of the exported garment sections, elastic, zippers, buttons, thread, etc. used in assembling the underwear in Costa Rica. The duty reduction (which is not regulated by the ATC) is a key factor in making the offshore assembly operations in Costa Rica

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

economically viable. The "807" programme is not mandated by tax, social or industrial requirements. However, the underlying intent encompasses a variety of broader social and economic objectives, such as aiding structural adjustment, assisting the economic development of foreign countries, maintaining the competitiveness of US industry, lowering prices for consumers, and reducing the tax burden on US companies.

Guaranteed Access Levels

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

Specific Limits

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

Chronology of Events

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

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

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

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

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

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

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

Review by the TMB

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

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

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

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

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

Further Consultations

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

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

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Action Under the Dispute Settlement Understanding

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

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

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

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

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III FINDINGS REQUESTED

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

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

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

authority to do so; and

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

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

3.3 The United States requested the Panel to find that:

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

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

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

and also to find in its report

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

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

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

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

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

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

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

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Other Issues

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

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

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

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[Parties' arguments in Sections IV and V deleted from this version]

VI INTERIM REVIEW

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

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

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

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

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

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

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

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

6.9 Regarding the Panel's interpretation of Article 6.6(d) of the ATC, the United States argued that finding the United States in violation of this provision based on the requirements under Article 6.8 was

erroneous because the US action was taken based on Article 6.10. The Panel's additional discussion on this point is reflected in paragraph 7.59.

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

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

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

VII FINDINGS

A. CLAIMS OF THE PARTIES

Introduction

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

Main substantive claims

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

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

7.4 There is no disagreement between the parties to the dispute that the restriction applied by the United States is a "transitional safeguard" and that transitional safeguards are to be applied in accordance with Article 6 of the ATC. In this respect, Costa Rica claims that the United States has violated a number of provisions of this Article. In particular, Costa Rica claims that the United States violated its obligations under Article 6 of the ATC by:

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

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

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

B. GENERAL INTERPRETATIVE ISSUES

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

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

Standard of Review

7.7 We note that the two parties to the dispute present diverging views with respect to the standard of review to be applied by the Panel in this case. The United States advocates a standard of review similar to that applied in the "Fur Felt Hat" case¹⁴, in which the neutral members of the Working Party, examining a US escape clause measure in light of the requirements of Article XIX of the General Agreement on Tariffs and Trade (GATT) 1947, afforded to the US authorities considerable discretion by concluding that the United States was not called upon to prove conclusively that the degree of injury caused or threatened in that case should be regarded as serious. Costa Rica argues in favour of a five-step procedure whereby the Panel would certify whether the administrative authority of the importing country, when imposing the restriction had: (i) complied with the ATC's procedural rules; (ii) properly established the facts; (iii) made an objective and impartial evaluation of the facts in the light of the rules of the ATC; (iv) properly exercised its discretion in the interpretation of the rules; and (v) complied with the rules in general, while also having complied with the other four requirements mentioned above.

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

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

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

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

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

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

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

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

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

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

7.13 We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the "March Statement") which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review.¹⁷ 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.¹⁸ We note in this respect, that in response to a question by the Panel, the United States argued that the Panel had to examine whether the domestic authorities *had* based their determination on an examination of factors required by the ATC and whether the basis for the determination was adequately explained. In the US view, such an approach was compatible with the standard of review adopted in the "Fur Felt Hat" case.¹⁹

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

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

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

¹⁹See paragraph 5.45 above.

Burden of Proof

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

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

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

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

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

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

The Interpretation of the ATC

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

Article 31.1 of the VCLT reads:

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

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

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

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

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

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

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

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

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

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

²²See the panel reports on "Canada - Administration of the Foreign Investment Review Act (FIRA)", adopted on 7 February 1984, BISD 30S/140; "United States - Customs User Fee", adopted on 2 February 1988, BISD 35S/245; "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163; "European Economic Community - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93; "Canada - Import Restrictions on Ice Cream and Yogurt", adopted on 5 December 1989, BISD 36S/68; "European Economic Community - Regulation on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132; "United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada", adopted on 11 July 1991, BISD 38S/30; "United States - Definition of Industry Concerning Wine and Grape Products", adopted on 28 April 1992, BISD 39S/436; "United States - Measures Affecting Alcoholic and Malt Beverages", adopted on 19 June 1992, BISD 39S/206.

The Structure of Article 6 of the ATC

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

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

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

"Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent²³, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement."

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

7.24 A determination under Article 6.2 of the ATC is, therefore, a necessary but not sufficient condition to have recourse to bilateral consultations under Article 6.7 of the ATC. Only when serious damage or actual threat thereof has been demonstrated under Article 6.2 and has been attributed to a particular Member or Members under Article 6.4 of the ATC, can recourse to Article 6.7 of the ATC be made in a way consistent with the provisions of the ATC.

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

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

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

The Scope of the Matter

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

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

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

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

Serious Damage

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

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

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

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

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

Overview

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

Output (US Production)

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

7.33 There is, however, a second aspect to Costa Rica's argument. The parties agree that the industry situation within the United States is different between those manufacturers that produce underwear in a totally domestic process and those that utilize the outward processing regime ("807 or 807A trade"). The manufacturers in the latter category are engaged in the cutting process, while assembly of the cut pieces is contracted out to overseas manufacturers and then the finished products are re-imported by the US manufacturers for sale in the US market. It is quite possible that in the case of increased imports damage could occur to manufacturers in the former category, while those in the latter category could see their position improve. The March Statement contains no breakdown of the effect of imports on these two components of the US industry. That such an analysis would have been appropriate is indirectly confirmed by statements of the United States, which recognize that the nature of the effect of 807 or 807A trade on the domestic industry could be significantly different than non 807/807A trade (paragraph

5.158).

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

Market Share (Market Share Loss/Import Penetration)

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

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

Employment

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

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

The same heading in the July Statement reads as follows:

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

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

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

Man-Hours

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

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

The same heading in the July Statement reads as follows:

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

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

Sales

7.39 The March Statement reads as follows:

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

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

Profits

7.40 The March Statement reads as follows:

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

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

Investment

7.41 The March Statement reads as follows:

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

In our view, the information contained in this statement is not sufficiently conclusive. We fail to see, for reasons discussed above (paragraph 7.34), a sufficient causal link between imports and "postponing investment" in the US industry. Moreover, the second sentence of this statement is indefinite ("some companies") and merely speculative ("is being contemplated") and cannot support any definite conclusion on the reasons why investment were slowing down in the United States. Finally, we note the absence of any statistics on, or analysis of, the evolution of investment in the US industry.

Utilization of Capacity

7.42 The March Statement reads as follows:

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

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

Prices

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

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

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

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

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

7.45 In conclusion, in our view, the information submitted in the March Statement under the heading "Market Situation" suffers from two important weaknesses: the information in some cases is inconsistent with other information later submitted by the United States to the TMB and in other cases is inadequate to demonstrate serious damage to the US industry. This latter problem is generally true in respect of the information supplied by specific companies in sub-heading B, where the March Statement typically refers to only one or two companies of indeterminate size or market share out of an industry consisting of 395 establishments. Moreover, while there are general statistics on declines in production and market share, there is no information at all on the general state and performance of the US underwear industry.

For example, the discussion of profits in the industry refers to only one company. In this connection generally, we note that the TMB, in its more fact-intensive review in accordance with Article 8.3 of the ATC, has by consensus concluded in this case that there was absence of serious damage caused to the US industry. The weaknesses in the March Statement that are discussed above raise considerable doubts as to whether serious damage has been demonstrated. However, we refrain from making a finding on this point of law. The factors listed in Article 6.3 of the ATC do not provide sufficient and exclusive guidance in this case. We are, therefore, not in a position to conclude that the United States has failed to demonstrate serious damage or actual threat thereof.

Causality

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

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

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

Attribution of Serious Damage to Costa Rica

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

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

"The sharp and substantial increase of low priced imports from Costa Rica is causing

serious damage to the US domestic industry producing cotton and man-made fibre underwear.

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

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

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

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

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

7.51 Thus, taking into account the US agreements with its other suppliers and the statement by the United States that goods imported under 807A are not regarded as less damaging than non-GAL 807 and other imports (paragraph 5.159), we cannot reconcile the US restriction on imports from Costa Rica with the requirements of attribution under Article 6.4 of the ATC. More specifically, in light of the purpose of Article 6, we find that the United States cannot enter into agreements permitting imports of 170,305,774 dozen units of a product (an increase of 478 per cent over then current import levels) and at the same time claim that imports of 14,423,178 dozen units (an increase of 22 per cent over then current import levels) are contributing to serious damage. In this regard, we recall the TMB's consensus conclusion that the United States had not demonstrated that imports were causing serious damage to the US underwear industry. We find therefore that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.4 of the ATC by imposing a restriction on imports of Costa Rican underwear without making an adequate attribution of serious damage to such imports.²⁴

²⁴We note that by the same reasoning we could have concluded that the United States failed to demonstrate the existence of serious damage in the March Statement as required by Article 6.2 of the ATC. The fact that the US underwear industry was able to accept and withstand such a huge inroad of products from the five other exporting

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

D. ACTUAL THREAT OF SERIOUS DAMAGE

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

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

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

(..continued)

Members suggests that there was no serious damage to the industry in the first place. However, we felt that the inadequacy of the US measure was more acutely represented in the attribution under Article 6.4, which requires a source-specific or Member-by-Member analysis, as opposed to the analysis of total imports under Article 6.2. See also our discussion in paragraph 7.45 above.

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

²⁶We note that the only elements that could be used in a prospective analysis were the following: in sub-heading B ("Industry Statements") under "Employment", the March Statement reads: "A company ... is anticipating two additional closures in 1995 representing total employment of about 400". In the same sub-heading, under "Investment", the March Statement reads: "... additional disinvestment of this nature is being contemplated by underwear manufacturing firms". We note that both elements were used in the March Statement to support a finding on serious damage. Even if, however, these elements were used to support a finding on actual threat, they could hardly constitute adequate evidence of actual threat of serious damage.

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

E. OTHER CLAIMS

Article 6.6(d) of the ATC

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

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

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

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

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

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

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

7.59 However, in our view, under Article 6.10 of the ATC, the level of Costa Rican imports required to be admitted to the United States under an Article 6 of the ATC restraint was 14,423,178 dozen, which

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

Obligation to consult

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

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

Date of Application of the Restriction

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

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

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

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

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

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

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

7.67 In this context, we note that the Panel report on the "Chilean Apples" case stated that "the allocation of back-dated quotas, that is, quotas declared to have been filled at the time of their announcement, did not conform to the requirements of Article XIII:3(b) and Article XIII:3 (c)" of the GATT.²⁸ While we agree with this conclusion, we note that the facts are different in the present case. After having made the request for consultations on 27 March 1995, the United States published the proposed restraint period and the restraint level in the Federal Register on 21 April 1995. The United States therefore did not "back-date" the restraint period in the way which was found to be inconsistent in the report on "Chilean Apples" since here it was made public well before the measure was imposed on 23 June 1995.

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

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

7.69 In light of the foregoing, we conclude that the prevalent practice under the MFA of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the ATC. However, we note that if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint. In the present case, the United States violated its obligations under Article X:2 of GATT 1994 and consequently under Article 6.10 of the ATC by setting the restraint period for 12 months starting on 27 March 1995. However, had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period. The United States argues that it did not "enforce" the restraint until 23 June 1995. We note the US argument. However, in so far as the restraint was applied to exports from Costa Rica which had taken place prior to the publication, it was implemented and therefore enforced within the meaning of Article X:2 of GATT 1994.²⁹

Article 2.4 of the ATC

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

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

Article 8 of the ATC

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

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

"During its review under paragraphs 2 and 3 of Article 6 of the safeguard action taken by the United States against imports of category 352/652 from Costa Rica and Honduras, the TMB found that serious damage, as envisaged in these provisions, had not been demonstrated. The TMB could not, however, reach consensus on the existence of actual threat of serious damage. The TMB recommended that further consultations be held between the United States and the parties concerned, with a view to arriving at a mutual understanding, bearing in mind the above, and with due consideration to the particular features of this case, as well as equity considerations.

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

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

that period."³⁰

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

VIII RECOMMENDATION

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

Article 19.1 of the DSU reads as follows:

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

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

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

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