

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

*Report of the Panel*

The report of the Panel on United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 6 January 1997 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and that there shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

## **I INTRODUCTION**

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

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

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

### Terms of Reference

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

### Composition

Chairman: Mr. Jacques Bourgeois

Panelists: Mr. Robert Arnott  
Mr. Wilhelm Meier

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

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

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## **II CHRONOLOGY OF EVENTS**

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

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

2.1 Since the inception of the MFA in 1974, exports of textile and clothing products from India to the United States had been regulated by bilateral textile agreements under Article 4 of the MFA. The last bilateral textile agreement between India and the United States expired on 31 December 1994 and, effective from 1 January 1995, trade in textiles and clothing between the two Members has been governed by the ATC.

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

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

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

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

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

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

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

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

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

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

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

2.9 With respect to category 440, the TMB found:

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

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

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

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

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

"The TMB reviewed the matter referred to it by India under Article 8.10 in its letter dated 16 October 1995. The TMB heard the presentation made by India and considered the elements put forward. The Body could not make any recommendation in addition to the conclusions it had reached at its meeting on 12-15 September 1995 (G/TMB/R/3, paragraph 26). The TMB therefore considered its review of the matter completed". (G/TMB/R/6)

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

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

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

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

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## **III CLAIMS OF THE PARTIES**

### **The Request of India**

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

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

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

- (i) According to the ATC, notably Article 6, the onus of demonstrating serious damage or its actual threat was on the United States, as the importing Member. It had to choose at the beginning of the process whether it would claim the existence of "serious damage" or "actual threat". These were not interchangeable because the data requirement would vary with the chosen situation. It would not be valid to transfer a transitional safeguard to a situation of actual threat when the claim of serious damage had failed to gain acceptance.

- (ii) There was no provision in the ATC under which the United States, as the importing Member, could have imposed a restraint with retrospective effect.

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

3.3 The United States requested the Panel to find that:

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

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

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

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

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

## VI INTERIM REVIEW

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

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

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

6.4 Concerning the comments made by the United States regarding the US government’s lack of reliable export data, we reiterate that we do not interpret the ATC so as to impose on WTO Members any method of collecting data but that it is up to each concerned Member to collect the relevant data from relevant sources, possibly including the private sector.

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

6.6 Concerning India’s argument that Article 11 of the DSU entitles India to a finding on each of the issues it raised, we disagree and refer to the consistent GATT panel practice of judicial economy. India is entitled to have the dispute over the contested “measure” resolved by the Panel, and if we judge that

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

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

the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute.

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

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

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

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

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## **VII FINDINGS**

### **A. Introduction**

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

"if no solution is agreed upon in consultations with the Government of India ... , the Committee for the Implementation of Textiles Agreements may later establish a limit for the entry and withdrawal from warehouse for consumption of wool textile products in Category 440 ... and exported during the twelve month period April 18, 1995 through April 17, 1996, at a level of not less than 76,698 dozen ... "

7.2 The parties held bilateral consultations in Geneva on 19 April 1995, and in Washington D.C. on 14-16 June 1995. The consultations did not result in a mutually agreed solution and on 14 July 1995, the United States implemented a restraint on imports of woven wool shirts and blouses (category 440) from India, with the restraint being effective as of 18 April 1995 for one year. At the same time, the United

States referred the matter to the TMB in accordance with Article 6.10 of the ATC. The US restraint was later extended through 17 April 1997.

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

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

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

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

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

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

7.8 The United States claims that it did comply with the requirements of Article 6 of the ATC in that

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

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

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

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

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

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

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

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

7.12 The parties seem to have addressed two different aspects of what one might call the "burden of proof" issue. We believe that a distinction should be made. First, we consider the question of which party bears the burden of proof before the Panel. Since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put forward factual and legal arguments in order to establish that the US restriction was inconsistent with Article 2 of the ATC and that the US determination for a safeguard action was inconsistent with the provisions of Article 6 of the ATC. Second, we consider the question of what the importing Member must demonstrate at the time of its determination. Concerning the substantive obligations under Article 6 of the ATC, it is clear from the wording of Article 6.2 and 6.3 of the ATC that, in its determination of the need for the proposed restraint, the United States had the obligation to demonstrate that it had complied with the relevant conditions of application of Article 6.2 and 6.3 of the ATC.

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

## 2. **Standard of Review**

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

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

7.15 We do not consider that the reports cited by the parties are relevant to the present dispute. First, we note that the Appellate Body has made clear in the Japan Taxes report that past GATT panel reports do not constitute binding "subsequent practice" referred to in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention). The Appellate Body also concluded that "... adopted panel reports in themselves [do not] constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947' for the purpose of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement"<sup>32</sup>. We are, therefore, not bound by past GATT reports, although we may follow their reasoning to the extent relevant. Secondly, the reports cited by the parties were adopted many years ago (more than 40 in one case) and they interpreted different agreements in different contexts. Thirdly, the ATC has instituted a new regime for textile products and the DSU has instituted new rules for panels.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

purpose of the ATC, may be understood better if the application of the ATC is described as providing two tracks: a TMB track and a DSU track.

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

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

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

7.20 Therefore when differences arise, the ATC requires parties first to seek consultations with a view to reaching a mutually satisfactory solution to the problem, within the specific parameters or considerations set out in the relevant provision(s) of the ATC. If a mutually satisfactory solution is not reached in the consultations, the matter may be or shall be, depending on the applicable provision, referred to the TMB for review and recommendations. In the case of recourse to Article 6 of the ATC, the object of the consultations is to see whether there is a mutual understanding that the situation calls for restraint on the exports of the particular product or not. If there is such a mutual understanding, details of the agreed restraint measure shall be communicated to the TMB which has to determine whether the agreement is justified in accordance with the provisions of Article 6 of the ATC. If there is no agreement between the parties concerned and the safeguard action is taken, the matter also has to be referred to the

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

TMB. According to Article 6.10 of the ATC, in order to conduct such an examination, “... the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7 [of Article 6], as well as any other relevant information provided by the Members concerned”. During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we understand, may relate to subsequent events. Moreover, the TMB may hear witnesses on these facts and perform a genuine fact finding and evidence-building exercise on the continuing situation of the parties concerned with the safeguard action, in order to settle the dispute. TMB members deliberate on the basis of all the information presented to decide whether the safeguard action taken by the importing Member is justified and whether serious damage or actual threat thereof to the domestic industry of the importing Member and causation exist.

7.21 The second track is the DSU. If, after recourse to Articles 6.10 and 8.10 of the ATC, the exporting Member is not satisfied with the recommendation of the TMB, such exporting Member can challenge the safeguard action and bring it to the formal dispute settlement process under the DSU. Unlike the TMB, a DSU panel is not called upon, under its terms of reference, to reinvestigate the market situation. When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination.

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

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

7.22 Before reviewing the US Market Statement, we must determine what are the conditions for application of a safeguard action pursuant to Article 6 of the ATC. In the Gasoline<sup>35</sup> and Japan Taxes<sup>36</sup> cases, the Appellate Body stressed that pursuant to Article 3.2 of the DSU, interpretation and clarification of the WTO Agreement needed to be achieved by reference to the fundamental rule of treaty interpretation set out in Article 31 of the Vienna Convention. Article 31 of the Vienna Convention provides that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. We must, therefore, when called upon to interpret and apply the provisions of the WTO Agreement, including those of the ATC, endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur<sup>37</sup>.

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

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

<sup>37</sup>See the Appellate Body Report on “Japan - Taxes on Alcoholic Beverages”, op.cit., on page 12: “The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. In footnote 19, at page 12, the Appellate Body cited *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)* (1950), LCJ Reports, p. 4 at 8, in which the International Court of Justice stated: “The

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

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

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

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

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

“... the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment.”, (emphasis added)

implies two requirements. First, the relevant economic variables must be examined. Second, output, productivity, utilization of capacity, etc. ... are relevant economic variables. The wording of Article 6.3 of the ATC “... the Member shall examine the effects ... on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, etc. ...” makes clear that each of the listed factors is not only relevant but must be examined. Effectively, the listed economic variables are examples of relevant economic variables, they are presumed to be “relevant economic variables” and must be examined by the importing country in its determination.

7.26 The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide -- in its assessment of whether or not serious damage or  
(..continued)

Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur”. The Appellate Body also stated, in footnote 20, that “.. the treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation” and cited further references.

actual threat thereof has been caused to the domestic industry -- that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC.<sup>38</sup>

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

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

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

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

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

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

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

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

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

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

the US determination, taking into account the specific requirements mentioned in Article 6.2 and 6.3 of the ATC.

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

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

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

**“1. *US Production*”**

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

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

7.36 **“2. *Market Share Loss*”**

*“The share of the US woven wool shirt and blouse market held by domestic manufacturers fell*

*from 53 percent in 1993 to 40 percent during the first nine months of 1994. (Table II)”*

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

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

7.38 **“3. Import Penetration”**

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

These data were not challenged by India.

7.39 **“4. Employment”**

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

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

7.40 **“5. Man-Hours”**

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

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

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

7.41 **“6. Total Annual Wages”**

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

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

7.42 **“B. Industry Statements”**

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

7.43 **“1. Employment”**

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

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

7.44 **“2. Sales”**

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

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

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

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

There appears to be a contradiction between the two statements.

7.45 “3. **Profits**”

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

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

7.46 “4. **Investment**”

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

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

7.47 “5. **Capacity**”

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

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

7.48 “6. **Prices**”

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

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

### **Causation**

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

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

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

7.51 In assessing the US determination in relation to the provisions of Article 6.2 and 6.3 of the ATC, we reach the following conclusion. As discussed in paragraphs 7.25 to 7.28 including footnote 38, Article 6.3 of the ATC lists eleven economic factors which must be “considered” or “examined” by the importing Member in making its determination, for the particular industry for which the measure is imposed, which in the present case is the woven wool shirts and blouses, category 440. Those factors are: output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment. We find that the United States did not examine eight of these factors, i.e. productivity, utilization of capacity, inventories, exports, wages, employment, profits and investment, in the context of the particular industry, i.e. the woven wool shirt and blouse industry, and the United States gave no explanation for not doing so. For five of these factors (utilization of capacity, wages, employment, profits and investment) some information was provided only for the broader shirt and blouse or woven shirt and blouse sectors without being adequately related to the particular US industry. The absence of any data on exports also vitiates the statements on market shares, sales and utilization of capacity for the purpose of demonstrating serious damage or actual threat thereof as well as causation. In addition, the information provided is often vague and imprecise both in the Section III:A and B. Since the United States did not include any specific information for the particular industry concerned, it, therefore, could not make any convincing analysis as to the causation of serious damage or actual threat thereof to that particular industry of woven wool shirts and blouses. The United States did assert in the chapeau of Section III:A of the Market Statement that imports had resulted in various losses (domestic output, market share, investment, employment, man-hours worked, and total annual wages) for US industry, but the United States failed to tie the effects of imports on those economic variables to the particular industry alleged to have been damaged by such imports. Moreover, the United States did not address the issue of whether the alleged state of the particular industry was caused by technological changes or changes in consumer preferences. Finally, the United States did not include any explanation as to why it was not able to collect specific or more precise information for the particular industry when making its determination, while it was able to develop such data a few months after (as evidenced in a later statement which the United States submitted to this Panel in an annex to its first submission as relevant evidence for this case).

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

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

7.53 As discussed in paragraph 7.31, India requested a supplementary finding on the issue of serious damage or actual threat thereof. We note that the Diplomatic Note did refer to serious damage or actual

threat thereof, while the US Market Statement and the notification on 23 May 1995 in the Federal Register were limited to an allegation of serious damage. We do not consider, however, that we need to decide whether serious damage or actual threat thereof is a single concept; whether serious damage is a shorthand for the expression “serious damage or actual threat thereof”; whether actual threat of serious damage is but a lower level of serious damage; whether the two expressions refer to different types of market situation in the importing market; or even whether the Diplomatic Note and the Market Statement together form a single request for consultation with serious damage being used as a shorthand expression for serious damage or actual threat thereof. Whether the United States wanted to demonstrate “serious damage” or, assuming they are distinct standards, “actual threat thereof” or “serious damage or actual threat thereof”, it would have had to demonstrate the effects of imports on the particular domestic industry with reference to at least the eleven factors listed in Article 6.3 of the ATC. Therefore, in view of our conclusions in the previous paragraphs concerning these factors, we consider that the US demonstration, contained in the Market Statement which is the totality of the information used by CITA for its determination, does not support a determination of serious damage or actual threat thereof, as a single or as two separate concepts. Similarly, the deficiencies we found in the analysis of causation in the US Market Statement would apply whether the increased quantities of imports were alleged to have caused serious damage or actual threat thereof as a single or as two separate concepts.

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

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

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

7.56 With respect to India’s claim that the United States consulted on, and referred to the TMB, a measure to compensate for serious damage and not a measure to compensate for actual threat of serious damage<sup>41</sup>, we consider that since we have concluded that the US determination did not respect the requirements of Article 6 of the ATC, irrespective of whether serious damage or actual threat thereof is a

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

single or two separate concepts, it is not necessary for us to rule on the issue of whether the consultations were properly held, or on the issue of whether the TMB made a recommendation in respect of the measure on which the United States had consulted with India.

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

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

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

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

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

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

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

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### **VIII CONCLUSIONS**

8.1 We conclude that the US restraint applied as of 18 April 1995 on imports of woven wool shirts and blouses, category 440, from India and its extensions violated the provisions of Articles 2 and 6 of the ATC. Since Article 3.8 of the DSU provides that “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment”, we conclude that the said US measure nullified and impaired the benefits of India under the WTO Agreement, in particular under the ATC. The Panel recommends that the Dispute Settlement Body make such a ruling.