

**UNITED STATES – TRANSITIONAL SAFEGUARD
MEASURE ON COMBED COTTON YARN FROM PAKISTAN**

Report of the Panel

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I. INTRODUCTION

1.1 On 3 April 2000, Pakistan requested the DSB to establish a Panel, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 8.10 of the ATC¹, to examine a matter involving the application of the transitional safeguard mechanism of the Agreement on Textiles and Clothing by the United States.

1.2 The DSB established a panel at its meeting on 19 June 2000.² At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the Panel are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Pakistan in document WT/DS192/1, the matter referred to the DSB by Pakistan 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."

1.3 On 30 August 2000, the Panel was constituted as follows:

Chairman: Mr. Wilhelm Meier
Members: Mr. Carlos Antonio da Rocha Paranhos
Mr. Virachai Plasai

1.4 The European Communities and India reserved their third-party rights to participate in the Panel proceedings.

1.5 The Panel met with the parties on 16 and 17 November 2000 and with India on 17 November 2000. (The EU did not participate in this meeting, see paragraph 5.1.) The second substantive meeting with the parties was held on 13 December 2000.

II. FACTUAL ASPECTS

2.1 In late 1998, the United States undertook an investigation to determine whether combed cotton yarn for sale, identified as Category 301,³ was being imported into the territory of the United States in such increased quantities as to cause serious damage or actual threat thereof to the domestic industry producing like and/or directly competitive products.⁴

2.2 On 24 December 1998, the United States requested consultations with Pakistan pursuant to Article 6.7 of the Agreement on Textiles and Clothing (ATC) regarding Category 301 imports of combed cotton yarn from Pakistan⁵. The report on this investigation, entitled "Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale: Category 301, December 1998", was presented to Pakistan as the market statement that must be

¹ Document WT/DS192/1.

² Document WT/DS192/2.

³ Category 301 refers to the specific U.S. textile category for combed cotton yarn and correlates to partial classifications under the Harmonized Tariff Schedule (HTS) of the United States. Categories serve to identify particular textile and clothing products and represents the basis on which the United States administers its textiles program, including safeguard actions under Article 6 of the ATC. The United States has employed the present category system since 1978.

⁴ U.S. First Submission Exhibit 3 (Market Statement) para 1.1.

⁵ 63 Federal Register 72288 (31 December 1998) (US Exhibit 2).

submitted according to Article 6.7 of the ATC in support of the request for consultations on the proposed safeguard action.⁶

2.3 Pursuant to Article 6.7, the United States also communicated this request for consultations, including the relevant factual data, to the Chairman of the Textiles Monitoring Body (TMB).

2.4 Consultations were held between the United States and Pakistan on 10-11 February 1999 which failed to result in a mutual understanding. On 5 March 1999, pursuant to Article 6.10 of the ATC, the United States indicated that it would apply the safeguard, effective 17 March 1999 and notified the TMB of its action.⁷

2.5 The TMB reviewed the matter and heard presentations by the United States and Pakistan on 12-14, 20-22 and 27 April 1999. In its report, the TMB "considered that in view of the serious limitations mentioned above, it was not in a position to assess without doubt whether or not serious damage had been caused to the US' industry producing products like and/or directly competitive with combed cotton yarn by increased imports of combed cotton yarn. Consequently, in the view of the TMB, the United States had not demonstrated successfully that combed cotton yarn was being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products. The TMB, recommended, therefore, that the measure introduced by the United States on imports of combed cotton yarn from Pakistan should be rescinded."⁸

2.6 On 28 May 1999, the TMB received a communication from the United States under Article 8.10 of the ATC informing the TMB that it considered itself unable to conform with this recommendation. At its meeting held on 23-24 June 1999, the TMB examined, in accordance with Article 8:10 of the ATC, the reasons given by the United States for its inability to conform with the recommendation. The TMB concluded that the reasons given in this re-examination did not lead it to change its earlier conclusions and recommendation arrived at during its examination of the measure pursuant to Article 6.10. The TMB recommended, therefore, that the United States reconsider its position and that the measure introduced by the United States on the imports of Category 301 products from Pakistan should be rescinded forthwith.⁹

2.7 On 6 August 1999, the United States informed the TMB that it believed that the US action was justified under the provisions of Article 6 of the ATC and that it would maintain the restraint.¹⁰

2.8 The United States and Pakistan conducted a further round of consultations on 15-16 November 1999, but no mutual understanding was reached.

2.9 The United States extended the restraint for a further year, effective 17 March 2000, pursuant to Article 6:12 of the ATC.¹¹

⁶ The President of the United States has delegated the authority to implement textile and apparel agreements, including the ATC, to the Inter-agency Committee for the Implementation of Textile Agreements (CITA). For purposes of safeguard actions, the Office of Textiles and Apparel (OTEXA), within the U.S. Department of Commerce, conducts the investigation and produces the statement of serious damage or actual threat of serious damage, and CITA reviews the statements and makes the determination of serious damage or actual threat thereof.

⁷ Document G/TMB/18, para. 3 and 64 US Federal Register 12290 (12 March 1999) (US Exhibit 4).

⁸ Document G/TMB/18, para. 32.

⁹ Document G/TMB/19, para. 36.

¹⁰ Document G/TMB/R/57, para. 5 and US communication G/TMB/N/346.

¹¹ 65 Federal Register 14544 (17 March 2000) (US Exhibit 6). The restraint was extended for yet a further year as of 17 March 2001 (66 FR 13307, 5 March 2001).

2.10 Article 8:10 of the ATC provides that if a matter remains unresolved after a further recommendation of the TMB based on that provision, the Members concerned may bring the matter before the Dispute Settlement Body (DSB) and invoke Article XXIII:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (see Section I).

III. CLAIMS BY THE PARTIES

3.1 In the light of the facts and arguments put forward, **Pakistan** requests the Panel:

- to find that the United States failed to demonstrate, before taking its safeguard action on combed cotton yarn from Pakistan on 17 March 1999, that imports of combed cotton yarn caused serious damage and actual threat thereof to its domestic industry producing such yarn and that such damage and threat was attributable to Pakistan because the United States
 - did not examine the state of the entire domestic industry producing combed cotton yarn;
 - based its determination on the state of the domestic industry on unverified, incorrect and incomplete data;
 - based its determination on the causal link between imports and serious damage on changes in economic variables during an eight-month period only;
 - did not conduct a prospective analysis of the effects of imports to determine whether they were causing a threat of serious damage; and
 - attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects;
- to rule, on the basis of the above findings, that the safeguard action imposed by the United States on combed cotton yarn from Pakistan is inconsistent with the United States' obligations under Article 6 of the ATC;
- to rule further that the United States has nullified or impaired benefits accruing to Pakistan under the ATC since, according to Article 3.8 of the DSU, the infringement of an obligation is considered to constitute a *prima facie* case of nullification or impairment;
- to recommend, in accordance with Article 19.1, first sentence, of the DSU, that the DSB request the United States to bring its safeguard action into conformity with its obligations under the ATC; and
- to suggest, in accordance with Article 19.1, second sentence, of the DSU, that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith as has been recommended by the TMB already, in June 1999.

3.2 The **United States** requests the Panel, based on an objective assessment of the facts, to conclude that it acted consistently with the ATC in (i) defining the domestic combed cotton yarn for sale industry, (ii) determining that a sharp and substantial increase in imports of combed cotton yarn

caused both serious damage and actual threat of serious damage to the industry, (iii) attributing the serious damage and actual threat of serious damage to the 283.2 per cent surge of low-priced imports of combed cotton yarn from Pakistan, and (iv) relying on the best available and most up-to-date data.

3.3 For these reasons, the United States submits that its transitional safeguard measure applied to imports from Pakistan of combed cotton yarn satisfies U.S. obligations under the ATC. Pakistan's claims to the contrary are without merit and the Panel should reject them.

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

VI. INTERIM REVIEW⁹³

A. GENERAL

6.1 On 30 March 2001, Pakistan and the United States requested an interim review by the Panel of certain aspects of the interim report issued to the parties on 23 March 2001. Neither party requested an interim review meeting, and thus, as provided for in the Working Procedures of the Panel, both parties were permitted to submit further comments on the other party's interim review requests. Pakistan did not submit any further comments, while the United States submitted further comments on 6 April 2001.

B. COMMENTS OF PAKISTAN

1. Standard of Review

6.2 **Pakistan** made the following comments on the standard of review which the Panel had applied to this case: "Pakistan is ... concerned about the 'justifiability' standard that the Panel applied when examining the question of whether the United States had demonstrated serious damage (see in particular paragraphs 7.116, 7.110 and 7.120. The concept of 'justifiability' is a new concept that can be found neither in the text of the ATC nor in the WTO jurisprudence regarding the standard of review to be applied under Article 11 of the DSU. The Panel does not explain what the treaty basis and scope of this standard are. In the view of Pakistan, the Panel applies this standard in a manner that reduces substantially the value of the disciplines set out in Article 6 of the ATC and the practical relevance of Panel's rulings on industry definition, attribution and actual threat. The effect of the Panel's approach is [to] relieve the United States of the obligation set out in Article 6 to demonstrate serious damage and causality and to shift the burden of meeting this obligation to Pakistan."⁹⁴

6.3 **The Panel** would like to emphasize that in the interim report, footnote 127, "[w]e consider th[e] term ["justifiable"] to be *descriptive of the current jurisprudence*, rather than any addition or deletion thereto" (emphasis added), and accordingly, has moved this statement into the text of paragraph 7.35. In contrast to the argument of Pakistan, we do not consider that this standard would reduce the value of the disciplines set out in Article 6 of the ATC. As we explained in subsection VII.D.3, in particular, paragraph 7.32, this standard is not introduced from without the WTO Agreement, but derived from the text of Article 11 of the DSU. As both the DSU and the ATC are integral parts of the WTO Agreement, the standards set out in the DSU are applicable in interpreting the ATC. In addition, we disagree with the argument that this standard improperly shifts the burden of proof to Pakistan. As we pointed out, in line with the jurisprudence, it is Pakistan rather than the United States that bears the burden of establishing a *prima facie* case that the United States did not demonstrate serious damage and causality.

2. Comments Specific to Claims

(a) General

6.4 **Pakistan** also commented "that some of its legal claims and some of the undisputed facts relevant to its claims were not examined by the Panel in reaching its conclusions on serious damage."

⁹³ Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the following section entitled Interim Review is an integral part of the Findings of this Panel Report.

⁹⁴ Pakistan's comments on the interim report, para. 1.

6.5 **The Panel** is of the view that it has properly examined all the legal and factual claims of Pakistan, as indicated in Section VII (in particular, subsection F) below. Nevertheless, for purposes of further clarification, we will discuss several points in greater depth.

(b) Claim on the reliability of AYSA data:

6.6 **Pakistan** provided the following comments on the Panel's finding regarding its claim concerning the reliability of AYSA data:

- (a) "The Panel reaches its conclusions without discussing the undisputed facts on which Pakistan based its *prima facie* case. Pakistan respectfully requests the Panel to do so in its final report and to indicate how, in its view, the United States had demonstrated that it had verified the data supplied by AYSA.
- (b) The Panel states in paragraph 7.95 that the data AYSA supplied in 1997 'might not have been fully accurate', while they were demonstrated to be false. In fact, in the next paragraph the Panel describes these data as "incorrect". The data should in both paragraphs be described as incorrect.
- (c) In paragraph 7.96, the Panel notes the authorities' positive reaction to the submission of incorrect data by AYSA in 1997. However, the issue in this paragraph is not the good faith of the authorities but the reliability of the AYSA data. It is therefore not clear to Pakistan why the Panel considers the authorities' reaction to the submission of false data by AYSA to be relevant in this context.
- (d) The Panel examines in paragraph 7.95 whether the data provided by AYSA were inherently untrustworthy. It states that the data of interested trade organisations are not *per se* unreliable but that this was a question of verification and judgement. This statement is no doubt correct but does not deal with the facts and arguments submitted by Pakistan. Pakistan had argued that the data of an interested trade association that had previously supplied incorrect data to obtain a safeguard measure were inherently untrustworthy. The Panel therefore does not examine the specific facts on which Pakistan had requested findings.
- (e) Pakistan had demonstrated that the United States had failed to verify the data supplied by AYSA. The Panel, while recognising that the data of interested trade association required verification and judgement, does not examine whether the data had been verified.
- (f) The Panel states in paragraph 7.96 that the United States verified the 1996 and 1997 production data supplied by AYSA by comparing them with official statistics. However, as Pakistan had pointed out, this particular verification was completely irrelevant because the United States based its determination on 1998 production data, which were not verified by comparing them with official statistics This point is not addressed by the Panel."⁹⁵

6.7 Also, with respect to paragraph 7.97, Pakistan commented that "[i]t is not clear from this paragraph under which norm the Panel subsumes which facts and how it distributed the burden of proof."⁹⁶ Furthermore, Pakistan claims that the Panel is not required to prescribe methodologies for information gathering and verification, but should find that the US methods did not yield the required

⁹⁵ See *ibid.*, para. 8. (emphasis in original)

⁹⁶ *Ibid.*, para. 10.

demonstration in this case. Pakistan again argues that the United States failed in its demonstration because "the data supplied by AYSA could be used without verification."⁹⁷

6.8 The **United States** responded to Pakistan's argument concerning the burden of proof by stating that "[a]ccording to well settled principles of WTO jurisprudence,⁹⁸ Pakistan, as the party claiming a breach of the ATC, must assert and prove its claim and put forward evidence and argument sufficient to demonstrate that the transitional safeguard was inconsistent with the ATC".⁹⁹

6.9 The United States also responded to Pakistan's arguments regarding the reliability of AYSA data by stating the United States had demonstrated throughout this proceeding that it had verified the accuracy and reliability of the data in this case. The United States disputed Pakistan's suggestion that it is "undisputed" that the data supplied by AYSA in 1997 were "incorrect", noting that in the process of conducting ongoing verification of data contained in the 1997 market statement on combed cotton ring spun yarn, the United States had "discovered evidence that called the 1997 market statement into question." At no point did the United States conclude that AYSA data were false, incorrect, or inherently untrustworthy. Accordingly, the United States objects to Pakistan's request that the Panel refer to this data as incorrect and requests that the Panel strike reference to "incorrect data" in paragraph 7.96 of the interim report.¹⁰⁰

6.10 First, **the Panel** would like to emphasize that when finding that Pakistan did "not establish" its claim, for example, in paragraph 7.101, it meant that Pakistan had not established a *prima facie* case that the transitional safeguard measure in question is inconsistent with Article 6 of the ATC. This is clear from reading the paragraphs with our finding on the burden of proof, in particular in paragraph 7.23. In this sense, we agree that what Pakistan should do was "the presentation of a *prima facie* case that the United States ... failed to [demonstrate serious damage]."¹⁰¹ We note, however, that exactly because we did not find that Pakistan had presented such a *prima facie* case, we rejected some of Pakistan's claims. In other words, the United States must demonstrate the basis for its safeguard action. The United States presented its 1998 Market Statement for this purpose. Pakistan then has the burden of establishing a *prima facie* case that the United States did not in fact make such a demonstration. The reference to "demonstrated" in Article 6.2 does not refer to a shift of the burden of proof within the context of dispute settlement.

6.11 In this connection, we note that Pakistan claimed that the "question before the Panel was whether the United States had demonstrated serious damage",¹⁰² rather than "whether Pakistan had established that the data supplied by AYSA are inherently untrustworthy."¹⁰³ In support of this proposition, Pakistan referred to the language of Article 6.2 of the ATC, which provides that "[s]afeguard action may be taken under this Article when ... it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage ... to the domestic industry...".¹⁰⁴ In accordance with the WTO jurisprudence on the burden of proof, we examined whether Pakistan established that the United States had not demonstrated serious damage, as stated above. We do not accept Pakistan's request that "the Panel ... indicate how, in its view, the United States had demonstrated that it had verified the data supplied by AYSA",¹⁰⁵ because this request would mean to shift the burden of proof to the United States, the respondent, in contrast to the

⁹⁷ *Ibid.*, first bullet.

⁹⁸ The United States referred to Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997, pp. 16, 19-20.

⁹⁹ US comments on Pakistan's comments on the interim report, para. 1.

¹⁰⁰ *See ibid.*, paras. 2-3.

¹⁰¹ *See* Pakistan's comments on the interim report, para. 5.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, para. 10, first bullet.

¹⁰⁴ *Ibid.*, para. 4.

¹⁰⁵ *Ibid.*, para. 8, first bullet.

WTO jurisprudence on this issue. Rather, as noted in Section VII.D.2 below, in examining the consistency of a transitional safeguard measure with Article 6 of the ATC, the Appellate Body stated that "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."¹⁰⁶ In this line, we considered that Pakistan, the complainant, bears the burden of proof for establishing a *prima facie* case that the subject transitional safeguard measure is inconsistent with Article 6, and subsequently, found that Pakistan did not discharge this responsibility for its claim on serious damage.

6.12 Second, Pakistan requested that "[t]he data [supplied by AYSA in 1997] should in both paragraphs 7.95 and 7.96 be described as incorrect",¹⁰⁷ as in paragraph 7.96, "the Panel describes these data as 'incorrect'",¹⁰⁸ but we do not accept this request. To the contrary, we did not find the data "incorrect". The evidence before us only shows that the US investigation authority decided not to rely on the data supplied by AYSA in the 1997 proceedings,¹⁰⁹ because it "discovered evidence that called the 1997 statement into question."¹¹⁰ We accordingly deleted the term "incorrect" in the second sentence of paragraph 7.96.

6.13 Third, we would like to point out that, as opposed to Pakistan's comments, the Panel actually examined "the specific facts on which Pakistan had requested findings"¹¹¹, as shown in paragraphs 7.95-7.97 below. There, we concluded that Pakistan did not establish that the data supplied by AYSA in the proceedings for the transitional safeguard measure in question were "inherently untrustworthy", taking into consideration the fact that the data supplied by the AYSA in the 1997 proceedings were called into question, and the other fact that the AYSA is a trade association consisting of domestic producers which are requesting trade remedies.¹¹²

6.14 Also, we noted that "the United States pointed out that it verified the production data for 1996 and 1997 supplied by AYSA for the transitional safeguard measure at issue by comparing them with the official statistics ...".¹¹³ Further, we point out the following statement of the United States: "In addition to relying on official statistics for verification purposes, the United States engaged in direct discussions with individual firms to verify AYSA data",¹¹⁴ for example, regarding profit and investment, and "the number of mills that exited the combed cotton yarn for sale industry, and the number of jobs lost."¹¹⁵ In this connection, Pakistan stated that the verification of the production data for 1996 and 1997 is irrelevant because the United States based its determination on 1998 production data.¹¹⁶ We acknowledge that the United States did not specifically state that it verified the 1998 production data. Nevertheless, we must note that the United States verified a large part of data submitted by AYSA, including 1998 data on profit and investment. In our view, the question is the reliability of the overall data. It is unrealistic to require that every single element of data be verified. Furthermore, this is not required by the treaty language. We however would like to emphasize that we do not mean that the national investigation authority has an unfettered discretion in fact-finding, since this Panel has a mandate under the DSU to make "an objective assessment of the facts of the case".

¹⁰⁶ Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, p. 17. (emphasis in original)

¹⁰⁷ Pakistan's comments on the interim report, para. 8, second bullet.

¹⁰⁸ *Ibid.*

¹⁰⁹ See paragraph 7.87.

¹¹⁰ US First Submission, para. 158.

¹¹¹ See Pakistan's comments on the interim report, para. 8, fourth bullet.

¹¹² See paragraph 7.95.

¹¹³ Paragraph 7.96.

¹¹⁴ US Answers to Panel's Questions, 22 December 2000, para. 11. See also 1998 Market Statement, US Ex. 3, Section II.

¹¹⁵ *Ibid.*, para. 14.

¹¹⁶ See Pakistan's comments on the interim report, para. 8, fifth bullet.

6.15 Also, it appears that Pakistan's argument incorrectly implies that there is only one method of "verification" and that is matching with official statistics. There is no basis for this implication, for if it were so, questionnaires (either written or verbal) would be irrelevant and investigations would be required to be on the basis of periods for official statistics and only after a time-lag to take account of official statistics.¹¹⁷

6.16 Furthermore, in our view, Pakistan's comments in numerous places, in effect, add a new substantive element to Article 6, namely, "verification". Pakistan asked the Panel to explain how the United States "demonstrated that it had verified the data".¹¹⁸ That is not what the treaty requires. The United States, in its investigation, must demonstrate that there was serious damage caused by increasing imports. The United States is not required to demonstrate that it verified the data. Adequate verification procedures may be part of supporting the demonstration, but they are not themselves what must be demonstrated. There are no treaty standards for verification. Indeed, the word does not appear in the ATC. Moreover, the Panel inquired of the United States how it verified the data underlying the determination. The United States explained its methodology. In light of all the explanations and facts before us, we concluded that, on balance, it was not established that the United States had failed to demonstrate the elements required by Article 6.2.

6.17 Fourth, we disagree with Pakistan's argument that the fact that the aforesaid decision of the US authority in the 1997 proceedings is irrelevant to the issue of the reliability of the data supplied by AYSA in the 1998 proceedings.¹¹⁹ In our view, this fact suggests, as indicated in paragraph 7.96 below, that in the proceedings for the transitional safeguard measure at issue as well, the US authority tried to make an objective fact-finding, and, thus, did not unquestioningly rely on the data supplied by AYSA. In addition, as referred to in the preceding paragraph, the United States pointed out that the US authority had made verification; Pakistan provided no major factual argument to counter the US statement. We would like to emphasize that the question before us is not whether the data supplied by AYSA is inherently untrustworthy, but whether the US fact-finding is justifiable, *i.e.* has been "demonstrated" as that term is interpreted in light of the relevant jurisprudence.

6.18 With respect to Pakistan's comments on paragraph 7.97, we must first state that we find Pakistan's premise incorrect. The AYSA data were not used without verification. Pakistan has argued previously that the United States must demonstrate that it verified the AYSA data, that the US treatment of the earlier AYSA data was irrelevant, that Pakistan had demonstrated that the United States failed to verify the AYSA data, and that the 1998 production data used by the United States were not verified by comparing them with official statistics. In fact, the United States verified the data. Pakistan's mere assertion here to the contrary is insufficient to establish otherwise. As discussed above, the US obligation was to demonstrate serious damage and causation, not to demonstrate verification. We have examined all of the facts before us, including the US treatment of the 1998 AYSA data in light of its previous submissions, including the steps taken for verification by the United States, and Pakistan's arguments made in its submissions and restated here. The norm which we use is that Pakistan, in light of *all* the facts before us, did not establish a *prima facie* case that the United States did not demonstrate serious damage and causation thereof. We further note that Pakistan by its claim that verification must be done by comparison with official statistics is indeed asking the Panel to prescribe methodologies. We decline to do so and for the reasons stated in the Findings (inclusive of this Interim Review Section) find that Pakistan did not establish that the

¹¹⁷ In addition, we note that we examined Pakistan's challenge against the US fact-finding based upon a discrepancy with the 1998 official statistics, and found that "this discrepancy is not sufficient for us to conclude that the factual situation was not 'demonstrated' within the meaning of Article 6.2." See paragraph 7.98 below.

¹¹⁸ Pakistan's comments on the interim report, para. 8, first bullet.

¹¹⁹ See Pakistan's comments on the interim report, para. 8, third bullet.

methodologies actually used by the United States did not demonstrate serious damage and causality thereof.¹²⁰

3. Treatment of Establishments Retooled to Produce Other Products

6.19 **Pakistan** also commented that "[t]he Panel ... does not examine Pakistan's claims that the United States failed to examine whether:

- (a) the retooling entailed damage,
- (b) the retooling was autonomous or forced upon the industry by imports, and
- (c) the damage was serious."¹²¹

6.20 The **United States** responded to Pakistan's claim that the US verification "did not reveal the truth regarding the state and activities of the plants reported to be closed,"¹²² and directed the Panel's attention to its submissions.

6.21 **The Panel** would like to emphasize that it stated that "the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry".¹²³ In our view, it is not decisive in this case whether "one plant had not closed at all during the investigation period"; rather, it is more important whether the plant "changed its products to those which are neither like nor directly competitive products". It is not disputed that the establishment at issue was producing carded cotton yarn rather than combed cotton yarn at the time of the US determination. Pakistan has not argued that carded cotton yarn is a like or directly competitive product with combed cotton yarn, which is the subject product in this case.¹²⁴ Therefore, we must suppose otherwise (*i.e.* that carded cotton yarn is neither a like product nor a directly competitive product) in evaluating Pakistan's claim, because Pakistan bears the burden of establishing a *prima facie* case. Thus, it might run counter to the common usage and meaning of the terms "close" and "closure" when the US authority found that the three plants "closed" during the investigation period. However, this was not the language used by the Panel, we merely stated that the establishment ceased producing combed cotton yarn and has not been producing any "like and/or directly competitive products".

6.22 With respect to Pakistan's point (b), this of course is a question of causation rather than damage. We examined the evidence of how the United States linked the fact of these establishments ceasing to produce combed cotton yarn to the increased imports. In our view, the United States adequately showed this as part of its overall demonstration of causation. We also listened carefully to Pakistan's arguments that this element of the US investigation was not supportable. On balance, we found that Pakistan did not establish a *prima facie* case that the United States had not demonstrated causation, including this element of the US investigation. We further note that Pakistan, here as elsewhere, has merely restated what it argued in its main submissions and claims that the Panel did not listen. We did listen; we simply did not agree.

6.23 With respect to Pakistan's point (c), we think it is misplaced. The question is not whether the establishments' exit from the industry constituted serious damage. We have re-examined the 1998 Market Statement and cannot find where the United States so claimed. Rather, the exit of these

¹²⁰ We recall that the Findings in regard to this issue must be read, *mutatis mutandis*, with our finding that the United States did not properly identify the domestic industry. See paragraph 7.93.

¹²¹ See Pakistan's comments on the interim report, para. 12. (emphasis in original)

¹²² See US comments on Pakistan's comments on the interim report, para. 4.

¹²³ Paragraph 7.105.

¹²⁴ See also footnote 237 below.

establishments was one element of a broader demonstration of serious damage. We found the evidence to be an appropriate element of such demonstration.

4. Investigation Period, Including Period for Determining Serious Damage and Causation

6.24 **Pakistan** provided the following comments on the Panel's finding on its claim concerning the investigation period:

- (a) The Panel bases its conclusions in part on factual assertions of the United States that Pakistan has demonstrated to be incorrect, in particular assertions as to the "closure of plant" and "job losses" (see paragraph 7.118(a) and (b) of the report).
- (b) The legal claim submitted by Pakistan was not that the United States' choice of the investigation period, as such, was inconsistent with the ATC. The Panel therefore makes a ruling on an issue that Pakistan did not raise in this form.
- (c) Pakistan claimed that the United States had not conducted the trend analysis required by the terms of Article 6 of the ATC nor otherwise demonstrated a causal link. The interim report however does not address the questions of whether:
 - (i) Article 6.2 requires a trend analysis,
 - (ii) such an analysis has been conducted by the United States, and
 - (iii) an eight-month period lends itself to such an analysis.
- (d) More generally, the interim report does not indicate how the Panel objectively assessed whether the United States has met its obligation under Article 6.2 to demonstrate in its Market Statement that the rise in imports and change in economic variables were not merely coincidental but causally linked.
- (e) By stating that Pakistan has not established that the United States failed to demonstrate "serious damage" to the domestic industry, the Panel appears to impose on Pakistan a burden of proof that clearly falls on the United States: It is the United States that must according to Article 6.2 of the ATC demonstrate that there was a causal link. Nowhere in the interim report is there any indication on which basis the Panel concluded that the United States had met this requirement.
- (f) The Panel applies the standard of "justifiability", which has no treaty basis.
- (g) Panel refers to the "changes in all relevant economic variables between 1996 and 1997" as one of the bases of its conclusions even though these changes did not point to any serious damage. Pakistan recalls that the changes during that period were minimal and provided a chart to that effect.¹²⁵

6.25 The **United States** responded to Pakistan's argument concerning the burden of proof, stating that "[a]ccording to well settled principles of WTO jurisprudence,¹²⁶ Pakistan, as the party claiming a breach of the ATC, must assert and prove its claim and put forward evidence and argument sufficient to demonstrate that the transitional safeguard was inconsistent with the ATC".¹²⁷

¹²⁵ Pakistan's comments on the interim report, para. 19.

¹²⁶ The United States referred to Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997, pp. 16, 19-20.

¹²⁷ US comments on Pakistan's comments on the interim report, para. 1.

6.26 The United States also claimed that it "established, based on clear evidence, that the surge of low-priced imports on the domestic industry unmistakably caused serious damage and actual threat thereof."¹²⁸ The United States further argued that it "demonstrated that other possible factors – such as changes in consumer preference and technological changes – were not responsible for such serious damage and actual threat thereof."¹²⁹

6.27 First, **the Panel** notes that subsection 3 above addressed Pakistan's claim (a) above.

6.28 Second, with respect to Pakistan's claim (b), we would like to point out that we expressly noted the parties' agreement that "Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports."¹³⁰ This statement is quite clear that the panel looked at two distinct points: (1) the period of investigation; and (2) the period for determining whether there is serious damage or causation thereof. We included the first point because much of the language in Pakistan's submissions referred to the period of investigation. However, the focus of our discussion and findings was on the second issue as is made quite clear in paragraphs 7.115-7.117. Thus, we cannot accept this argument by Pakistan.

6.29 Third, with respect to Pakistan's claims (c) and (d), we note that our finding on Pakistan's claim concerning the investigation period was in accordance with the following findings of the Appellate Body on *Argentina – Footwear*, under the Safeguards Agreement, to which Pakistan referred in support of its argument:

"We also agree with the Panel that, in an analysis of causation, 'it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.'¹³¹ (emphasis added) Furthermore, with respect to a 'coincidence' between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should 'normally' occur if causation is present.¹³² The Panel qualified this statement, however, in the following sentence:

'While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.'^{133, 134}

6.30 Following this statement, the Appellate Body explicitly rejected the appeal of Argentina that the panel erroneously "required that an upward trend in imports must *coincide* with a *downward* trend in the injury factors", stating "Argentina mischaracterized the Panel's interpretation and reasoning."¹³⁵

6.31 Keeping in mind the finding of the Appellate Body as quoted in paragraphs 6.29 and 6.30 above, we consider that the analysis of the relationship between the movement in imports and the movements in injury factors would be "central" to a causation analysis, but not required under

¹²⁸ *Ibid.*, para. 5.

¹²⁹ *Ibid.*

¹³⁰ Paragraph 7.116.

¹³¹ (footnote in original) *Ibid.*

¹³² (footnote in original) Panel Report., para. 8.238.

¹³³ (footnote in original) *Ibid.*

¹³⁴ Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, para. 144. (emphasis in original)

¹³⁵ *Ibid.* paras. 143 and 145. (emphasis in original)

Article 6 of the ATC. Pakistan demands a ruling on whether a "trend analysis" is required. Such a term is not contained in Article 6. Therefore, literally speaking, the answer is "no". We have used the test contained in Article 6.2 utilizing the guidance of the Appellate Body cited above. In this line, as indicated in subsection VII.G of the interim report, we evaluated the US analysis contained in the 1998 Market Statement, and consequently, concluded that the US fact-finding on serious damage and causation is justifiable, in light of its factual basis, including the changes in economic variables of the US domestic industry and those in imports from Pakistan and all other sources during the investigation period – from January 1996 to August 1998, for the purpose of injury and causation determination. In the interim report, in support of our conclusion, we put an emphasis on the (negative) direction and magnitude of changes in economic variables of the US domestic industry, and the surge in imports from Pakistan between January-August 1997 and January-August 1998. Thus, we consider that Pakistan's comment (c) has been already addressed in the interim report, but for clarification, we have made changes to subsection VII.G below. We believe that such changes naturally respond to Pakistan's comments (d) and (g) above. In regard to (g), we would specifically point out that we of course took into consideration "changes in all relevant economic variables between 1996 and 1997", to which Pakistan again called our attention, but we must examine the case from a broader perspective. Thus, taking into consideration *not only* these changes *but also* the negative changes in economic variables of the US domestic industry, and increase in imports between January-August 1997 to January-August 1998, we concluded that the US fact-finding is justifiable.

6.32 Fourth, we believe that Pakistan's comments (e) and (f) above have already been addressed in paragraphs 6.10-6.11 above and subsection 1, respectively.

6.33 Lastly, Pakistan requested that we revise the heading of subsection VII.G.¹³⁶ We considered this request and have revised the heading as follows: "Investigation Period, including Period for Determining Serious Damage and Causation", in response to Pakistan's request.

5. Attribution

6.34 **Pakistan** requested that the Panel not mention "Mexico" in paragraph 8.1(b) because "the Panel's ruling effectively does not concern only Mexico".¹³⁷

6.35 "The **United States** objects to this suggestion. Pakistan's arguments regarding attribution focused entirely on imports from Mexico, not other unrestrained sources. The Panel's findings and conclusions are consistent with these arguments. Accordingly, Pakistan's suggested change could broaden the findings of the Panel beyond the facts of this case."¹³⁸

6.36 **The Panel** notes that in its first submission, Pakistan claimed that the United States "attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and *Mexico* and their respective effects",¹³⁹ and did not refer to any other exporting Members. Furthermore, the conclusion is already generalized by the parenthetical in paragraph 8.1(b). Thus, we do not accept the request of Pakistan.

¹³⁶ See Pakistan's comments on the interim report, para. 20. On this point, the United States commented that "[w]hile the United States understands the basis for the suggestion, a more appropriate change to address the concern is to move the text under the title above 7.114 to Section IV.D, not have two sections of the report with the same heading." US comments on Pakistan's comments on the interim report, para. 6, first tirt.

¹³⁷ *Ibid.*, para. 22.

¹³⁸ US comments on Pakistan's comments on the interim report, para. 6, second tirt. (footnote omitted)

¹³⁹ Pakistan First Submission, p. 43. (emphasis added)

6. Other Drafting Suggestions

6.37 Pakistan made a drafting suggestion regarding paragraph 7.84,¹⁴⁰ which we decline to accept. Also, Pakistan suggested moving footnote 220 into the text.¹⁴¹ We agree with this suggestion.

C. COMMENTS OF THE UNITED STATES

1. General

6.38 The Panel accepted some of the US comments, and revised Section VII below, specifically, paragraphs 7.45, 7.83, 7.96, and 7.118 and footnote 132. The following is our response to the other comments.

2. Issue of Descriptive Part

6.39 The United States made numerous comments concerning the Descriptive Part of the Panel Report. The primary comment was that the Descriptive Part was unbalanced in that it addressed several portions of Pakistan's arguments in full because the executive summaries provided by Pakistan were not available or were inadequate, while the US arguments were presented only in the summary form drawn from the more complete US executive summaries. The United States therefore proposed that this Panel adopt the practice of other panels and attach the full submissions to the Report. Should the Panel not agree with this suggestion, then the United States offered extensive additions to the existing Descriptive Part.

6.40 We cannot agree with the suggestion that we attach all the submissions to the Report for the reasons discussed in the Findings. We will not elaborate further here. As we say in the Findings, we commend the parties for doing a good job overall on the executive summaries. This is a new process with which parties to disputes as well as panels and the Secretariat will need to gain experience. In this case, we have used the summaries as the basis for the Descriptive Part of the Report, but we have also made adjustments where we thought them necessary.

6.41 We disagree with the overall complaint of the United States that there is an imbalance in the Descriptive Part in favour of Pakistan. While we are reluctant to refer to mere word or paragraph counts, we do note that there are 123 paragraphs of the Descriptive Part discussing the US arguments and 92 discussing Pakistan's arguments. More importantly, we are of the view that substantively the Descriptive Part accurately reflects the arguments of the parties. We continue to disagree with the US argument that it has been prejudiced in any way. As we note in the Findings, the Panel's deliberations Findings and Conclusions were based on its assessment of the **full** submissions and oral arguments of the parties, not on the executive summaries.

6.42 The United States has noted that Pakistan's first executive summary was merely the introduction to their submission. This is true and that executive summary was only six pages long. But the separately submitted executive summary of the United States for its first submission was only eight pages. We used both as the bases for that portion of the Descriptive Part and made some additions where necessary.

6.43 The United States also notes that Pakistan did not submit any summary for its first set of answers to panel questions, while the United States did. According to the United States this led to another imbalance because the Panel used the full Pakistan answers while relying on the US summaries. The United States raised this complaint during the proceedings. At that time, we declined the US request that we require Pakistan to submit an executive summary of its answers. We

¹⁴⁰ See Pakistan's comments on the interim report, para. 21.

¹⁴¹ See *ibid.*, para. 23.

noted that during the first substantive meeting of the Panel with the parties, the Chairman provided guidance to the parties to the effect that they were encouraged to provide summaries if their answers were longer than 20 pages in total. It is the case that Pakistan's answers were somewhat longer than that, but taking into account that they were not much longer and that Pakistan restated the questions each time thereby adding length to their document, Pakistan was not required to make a summary of those answers.

6.44 Deciding how to deal with answers to panel questions is indeed difficult. They are not easily summarized because, unlike the primary and rebuttal submissions, they generally are not woven into a single coherent whole. They tend to be a series of responses to distinct inquiries that may or may not be susceptible to summarization. This is an issue that has caused us some difficulties in writing the Descriptive Part and that panels in future disputes may need to address. In the present dispute, in response to the US request, we have included much fuller accounts of the answers to questions of both parties.

6.45 In its comments on the Interim Report, the United States provided a further explanation of the concerns expressed in its Descriptive Part comments. In light of this most recent explanation by the United States, we have made a large number of changes to this section of the Report. Thus, given the extensive nature of the amendments we will not attempt to identify specific paragraphs of this section of the interim report which have been changed.

3. Standard of Review

6.46 The United States requested the deletion or revision of footnotes 126 and 130 which point out that the ATC does not ensure that exporting Members may participate in the national investigation procedures for transitional safeguard measures, for example, because the United States provided this opportunity to Pakistan in this case. We accepted this point, and revised those footnotes accordingly.

4. Definition of Domestic Industry

6.47 The **United States** requested that the second sentence of paragraph 7.38 be replaced with the following language:

"Vertically integrated fabric manufacturers spin combed cotton yarn not for sale in the open market but for their internal consumption in the subsequent production of a fabric, apparel, or home furnishing. Consequently, the combed cotton yarn manufactured by these firms is not directly competitive with combed cotton yarn imported from Pakistan."¹⁴²

6.48 **The Panel** accepted this request except for the use of the term "spin". We would like to point out that the United States used the term "manufacture[]" in the relevant paragraph in its First Submission.¹⁴³

6.49 The **United States** argued that its position on the interpretation of the term "like and/or directly competitive products" is consistent throughout this procedure,¹⁴⁴ and accordingly requested a revision of the Panel's finding that "the United States took a different position in its rebuttal submission."

¹⁴² US comments on the interim report, p. 6.

¹⁴³ US First Submission, para. 49.

¹⁴⁴ See US comments on the interim report, pp. 7 and 8.

6.50 **The Panel** points out that the US Answers to the Panel's first set of questions indicates as follows: "Therefore, the ordinary meaning of the phrase 'like and/or directly competitive' permits a Member, in analyzing a domestic industry, to choose from three potential definitions of domestic industry. First, the industry producing *like* products. Second, *like and directly competitive* products. Third, the industry producing *directly competitive* products that are not *like*."¹⁴⁵ On its face, it is difficult to definitively conclude that the first category means "products which are like but not directly competitive", which is one of the three categories that the United States clearly presented in its first submission, but we accepted the US request.

6.51 The **United States** requested the deletion of footnote 176 in the interim report, because "[t]he factual record provides no basis to infer that vertically integrated fabric producers were interested in selling or made offers to sell."¹⁴⁶

6.52 **The Panel** does not accept this request. In that footnote, we do not suggest that "vertically integrated fabric producers were *interested* in selling or made offers to sell." (emphasis added) Instead, we were looking for evidence that there had been an inquiry as to whether there were or were not such offers. It is in the offers where competition occurs. Shipments only serve as an indirect indication of competition. Thus, in our view, in order to determine whether combed cotton yarn produced by those manufacturers is "directly competitive" with combed cotton yarn sold in the market, it may be more important whether and how often combed cotton yarn produced for the internal consumption was *offered* for sale in the market, and combed cotton yarn sold in the market was sought by vertically integrated fabric manufacturers as alternatives for combed cotton yarn they produce for their internal use. It is the very lack of evidence of an investigation of offers for sale, and therefore competition, which we noted.

6.53 The **United States** also requested the deletion of footnote 180 in the interim report (footnote 246 in the final report), because it "did not suggest that the concept of *de minimis* sales was treaty based."¹⁴⁷

6.54 **The Panel** disagrees. We have never indicated that the United States made the aforesaid suggestion. Our point is that the United States argued that vertically integrated fabric manufacturers sell or purchase combed cotton yarn in the open market but only in a *de minimis* amount, and thus, combed cotton yarn produced by them for their internal consumption is not "directly competitive" with combed cotton yarn imported from Pakistan.¹⁴⁸ It is obvious that in this context, the term "*de minimis*" was used not only as a description of the fact, but also as a threshold for determining whether certain domestic products are "directly competitive" with subject imports. We find nothing in Article 6 that includes the concept of "*de minimis*" in determining the scope of "directly competitive products".

5. Attribution

6.55 The **United States** contested the summary of its argument contained in paragraph 7.122 regarding the issue of attribution. Among other things, the United States is claiming that it "did not argue that the requirements of Article 6.4 'could be satisfied by a simple comparison of Pakistan to a grouping of all other exporters.'"¹⁴⁹ Also, the United States contested the Panel's summary, stating that "the United States did not argue that a measure may be applied to 'any, but not all, Members that are the cause of serious damage'."¹⁵⁰

¹⁴⁵ US Answers to Panel's Questions, 28 November 2000, para. 70.

¹⁴⁶ See US comments on the interim report, pp. 7-8.

¹⁴⁷ See *ibid.*, p. 8.

¹⁴⁸ E.g. US First Submission, para. 69.

¹⁴⁹ US comments on the interim report, p. 11.

¹⁵⁰ *Ibid.*, p. 12.

6.56 The **Panel** disagrees with these arguments. First, indeed, the United States pointed out that Article 6.4 of the ATC enumerates a number of factors that should be considered, and provides that "none of these factors – including volume – is dispositive," as the United States argued.¹⁵¹ However, the central question we are confronted with under Article 6.4 is whether or not that Article requires the analysis of impacts of imports from Mexico (and possibly other suppliers) individually. In its Oral Statement at the first substantive meeting with the Parties, the United States made the following statement:

"[T]he ATC specifically authorizes Member-by-Member safeguard action based on a sharp and substantial increase in imports from that Member and *an analysis of imports from all other sources generally* as well as market share and price."¹⁵²

Also, in its First Submission, the United States stated that it had "compared this surge in imports from Pakistan *to imports from other sources*, market share and price." The United States then went on in separate sub-paragraphs to examine: "Imports from Pakistan versus all imports"; "Market share of Pakistan versus market share of all imports", and "Price from Pakistan versus price from other sources".¹⁵³ Also, the United States stated in its Rebuttal Submission that "the ATC does not impose on an importing Member such a source-specific analysis."¹⁵⁴

6.57 Second, we note that the United States stated that "Article 6.4 of the ATC gives an importing Member the discretion to take a transitional safeguard measure against an exporting Member to whom serious damage is attributable, but simultaneously not to take such measure against another exporting Member whose exports are contributing to the same serious damage."¹⁵⁵ We do not find any error in our summary of the US argument that "a safeguard measure may be applied to any, but not all, Member or Members that are a cause of the serious damage."¹⁵⁶ On the other hand, we accept the other comments of the United States on paragraph 7.122, and have revised it accordingly.

6.58 The **United States** contested the finding of the Panel on Pakistan's claim concerning the US attribution analysis, repeating its argument that the US investigation authority assessed data regarding Mexico in conducting its attribution analysis.¹⁵⁷

6.59 In the view of **the Panel**, the evidence before it reveals that the US investigating authority did not assess the impact of imports from Mexico *individually*, in contrast to the US argument. In this regard, we added explanation to subsection VII.H below. The only mention of Mexico is in one chart that has a line item of "FTA's" that includes Mexico.

¹⁵¹ *Ibid.*, p. 11, referring to US Rebuttal Submission, paras. 74-75.

¹⁵² Oral Statement of the United States at the First Meeting with the Panel, para. 15. (emphasis added)

¹⁵³ US First Submission, para. 131. (emphasis added)

¹⁵⁴ US Rebuttal Submission, para. 73.

¹⁵⁵ US Answers to Panel's Questions, 28 November 2000.

¹⁵⁶ Paragraph 7.122.

¹⁵⁷ See US comments on the interim report, p. 10, referring to US Rebuttal Submission, para. 78.

VII. FINDINGS¹⁵⁸

A. CLAIMS BY THE PARTIES

7.1 The subject measure is the transitional safeguard (quantitative restriction) imposed by the United States on imports of combed cotton yarn (Category 301¹⁵⁹) from Pakistan as of 17 March 1999,¹⁶⁰ and extended on 17 March 2000 for a further year.¹⁶¹ The United States explained that it had taken this action based on an investigation¹⁶² conducted to determine whether the surge in imports from Pakistan had caused serious damage or actual threat of serious damage to its domestic combed cotton yarn for sale industry.¹⁶³

7.2 **Pakistan** requests the Panel:

- (a) to find that the United States failed to demonstrate, before taking its safeguard action on combed cotton yarn from Pakistan on 17 March 1999, that imports of combed cotton yarn caused serious damage and actual threat thereof to its domestic industry producing such yarn and that such damage and threat was attributable to Pakistan because the United States:
- did not examine the state of the entire domestic industry producing combed cotton yarn;
 - based its determinations on the state of the domestic industry on unverified, incorrect and incomplete data;
 - based its determinations on the causal link between imports and serious damage on changes in economic variables during an eight-month period only;
 - did not conduct a prospective analysis of the effects of imports to determine whether they were causing a threat of serious damage; and
 - attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects;
- (b) to rule, on the basis of the above findings, that the safeguard action imposed by the United States on combed cotton yarn from Pakistan is inconsistent with the United States' obligations under Article 6 of the ATC;

¹⁵⁸ Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the preceding section entitled Interim Review is an integral part of the Findings of this Panel Report.

¹⁵⁹ See US Ex. 1.

¹⁶⁰ Committee for the Implementation of Textile Agreement ("CITA"), Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 5 March 1999, 64 FR 12290. (US Ex. 4)

¹⁶¹ CITA, Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 14 March 2000, 65 FR 14544. (US Ex. 6) Further, the transitional safeguard was extended again for a further year as of 17 March 2001. CITA, Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, 5 March 2001, 66 FR 13307.

¹⁶² Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale Category 301, December 1998 (the "1998 Market Statement") (US Ex. 3).

¹⁶³ US First Submission, para. 1. See CITA, Request for Public Comments on Bilateral Textile Consultations with the Government of Pakistan, 31 December 1998, 63 FR 72288. (US Ex. 2)

- (c) to rule further that the United States has nullified or impaired benefits accruing to Pakistan under the ATC since, according to Article 3.8 of the DSU, the infringement of an obligation is considered to constitute a *prima facie* case of nullification or impairment;
- (d) to recommend, in accordance with Article 19.1, first sentence, of the DSU, that the DSB request the United States to bring its safeguard action into conformity with its obligations under the ATC; and
- (e) to suggest, in accordance with Article 19.1, second sentence, of the DSU, that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith as has been recommended by the TMB already, in June 1999.

7.3 The **United States** requests the Panel, based on an objective assessment of the facts, to conclude that it acted consistently with the ATC in (i) defining the domestic combed cotton yarn for sale industry, (ii) determining that a sharp and substantial increase in imports of combed cotton yarn caused both serious damage and actual threat of serious damage to the industry, (iii) attributing the serious damage and actual threat of serious damage to the 283.2 per cent surge of low-priced imports of combed cotton yarn from Pakistan, and (iv) relying on the best available and most up-to-date data. For these reasons, the United States submits that its transitional safeguard measure applied to imports from Pakistan of combed cotton yarn satisfies US obligations under the ATC. Pakistan's claims to the contrary are without merit and the Panel should reject them.

B. DESCRIPTIVE PART ISSUE

7.4 In its comments on the draft Descriptive Part of the Report, the **United States** has requested that the Panel fundamentally alter its approach to the "Arguments of the Parties" section. Pursuant to paragraph 16 of the Working Procedures of this Panel, the parties were to submit executive summaries of their arguments at each stage of the proceedings. The Panel stated that its intention was to use these summaries as *the basis for* the relevant section of the Report. We have proceeded in this manner by relying on the parties summaries, but making changes as appropriate to more accurately reflect the overall arguments.

7.5 The United States argues that the Descriptive Part is uneven. Among other things, the United States notes that Pakistan did not submit summaries for its answers to questions and used its introduction to its first submission as its summary for that document. The United States complains that, as a result, large portions of the actual submissions by Pakistan were included while only the summaries of US submissions were included. The United States claims that it is prejudiced by the Descriptive Part of the Report.

7.6 The United States then goes on to make several specific arguments concerning flaws it found in the draft Descriptive Part and the Interim Report. Many of these points relate to matters of emphasis that the United States argues were made differently in its full submissions as compared to the executive summaries, or at least that it now appears so in the draft Descriptive Part.

7.7 The **Panel** has reviewed in full the individual points raised by the United States and Pakistan in their comments on the draft Descriptive Part and Interim Report. We have made a number of changes which are reflected in the Final Report. However, in view of the broader issues raised by the United States it is necessary that we address those issues as part of the Findings of the Panel.

7.8 We do not agree with the US argument that the Descriptive Part of the Report results in prejudice to the position of the United States. As the United States was informed when it raised a question earlier in this proceeding, the Panel has reviewed in great detail each and every one of the

substantive submissions of the parties. The Panel has analyzed with great care all of the testimony at the two substantive meetings with the parties. Our Findings and Conclusions are based on those full submissions and testimony. Thus, the United States has in no way been prejudiced; all US arguments were fully considered.

7.9 According to the United States, the preferred alternative to using the executive summaries would be to go along with the "practice of attaching submissions to the report".¹⁶⁴ It is the case that several panels have adopted the approach suggested by the United States; however, most other panels have proceeded otherwise and constructed a more conventional Descriptive Part which summarizes the parties' arguments without resorting to verbatim attachments. Furthermore, even where the attachment method has been used, it has only been with the agreement of the parties and no such agreement was reached here.

7.10 In the present dispute, this Panel at the outset declined to follow the attachment method. Using the attachment method would increase the Descriptive Part of the Report to approximately 400 single-spaced pages from the approximately 70 it now is. We do not consider this to be a viable approach. We are aware that the WTO dispute settlement system is struggling under the burden of massive translation requirements arising from the multi-hundred page Reports that result from the attachment method. Using such a method here would also result in significant delays in issuing the Final Report.¹⁶⁵ We take note of Article 12.2 of the DSU, which provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while *not unduly delaying the panel process*".¹⁶⁶ Furthermore, while our responsibility is to decide the case before us, we also feel constrained not to take steps that would damage the dispute settlement system as a whole.¹⁶⁷

7.11 The only actual alternative to the executive summary approach would have been for the Panel to draft its own concise summary of the parties' arguments. Such a summary would most likely have been a shorter summary than what is presently found in the Descriptive Part. It is unclear how this would answer the US complaint. The purpose of the proposal to use executive summaries was to break the dynamic of the litigation process that has caused Descriptive Parts of Reports to grow to elephantine proportions. In the absence of any direct information as to which party will prevail at the point when they first see the Descriptive Part, parties often responded by requesting that the Descriptive Part be a virtual reproduction of their arguments, presumably in order to prevent any later criticism of their argumentation once the substantive results are known. Under this pressure, panels have often opted for increasing the Descriptive Part by adding more and more of the parties' arguments until they reached the extreme situation where the only acceptable "description" for some parties is actual inclusion of every word written or spoken. This has led to Reports of hundreds of pages for relatively straightforward disputes.

7.12 In our view, the Reports of panels that have attached all submissions and testimony unedited to the Findings result in huge documents that are virtually unreadable. We also note that the United States has informed the Panel at the organizational meeting that it intended to make all its submissions

¹⁶⁴ *Ibid.*

¹⁶⁵ In this regard, we take further note of the extraordinarily short time-period provided in Appendix 3 of the DSU for translation of the Final Report prior to circulation to Members. While we are aware that this time-period is seldom met, we are not inclined to accept a procedure which would virtually disregard the provision.

¹⁶⁶ Emphasis added.

¹⁶⁷ The United States has noted its surprise at the Panel's rejection of the attachment method "in light of the fact that this is the approach contained in an amendment to the DSU sponsored by 13 Members and currently under consideration by the General Council." This Panel obviously would follow the requirements of any treaty language. However, no such language now exists in the DSU and this Panel will offer no comment on, nor presume to prejudge, any negotiations for amendment to the DSU text. We also note that the United States is not among those Members sponsoring the amendment.

public. We are of the view that this is the right way to proceed should the United States be concerned that the full arguments of the parties have not been reflected in the Descriptive Part.¹⁶⁸ For those wishing to read in full detail the US arguments, its submissions are available for analysis. For those wishing to have a thorough overview of the arguments, the Descriptive Part based on the executive summaries is more manageable. We recall that this section of the Report is still over 70 single-spaced pages. This is hardly a cursory treatment of the issues. The purpose of taking the path we chose was precisely to allow the parties to succinctly express their views themselves because they are the best judges of their own arguments. This is a new approach and it will require adaptation along the way. We commend the parties for their efforts and are of the view that, overall, they have done a good job in making their summaries.

7.13 We must also note that the Descriptive Part of the Report cannot be read and evaluated in isolation; it forms a whole with the Findings part and the full weight and importance of certain facts and arguments advanced by the parties emerges fully only in that section, where the panel returns in detail (and repeats again) the facts and arguments from both sides in order fully to evaluate them, discuss them on their merits and finally decide on them. The present Panel Report, read as a whole, demonstrates that the Panel has fulfilled the standard of Article 11 of the DSU (*i.e.* "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").

7.14 In summary, we disagree with the US argument that it has somehow been prejudiced by the Panel's approach in using the executive summaries as the basis for the Descriptive Part. However, we have made a number of changes to the Descriptive Part in response to the comments of both parties, although keeping largely within the parameters we originally set out.

C. RELEVANT PROVISIONS OF THE WTO AGREEMENT

7.15 Articles 6.2 to 6.4 are the major provisions of the ATC which are relevant to our analysis:

"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. (footnote omitted)

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

4. Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or

¹⁶⁸ Pakistan declined the US request that it make its full submissions public and, instead, stated that it would supply non-confidential summaries (which are distinct from the executive summaries which remain confidential). This is the right of Members under the rules of the DSU and we imply no criticism of Pakistan in this regard.

imminent⁶, 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.

(original footnote) ⁶ 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."

D. GENERAL ISSUES OF INTERPRETATION

1. Guidelines for Interpretations of the WTO Agreement

7.16 Before addressing the parties' arguments in detail, the **Panel** believes it necessary and appropriate to clarify the general issues concerning the interpretation of the relevant provisions and their application to the parties' claims.

7.17 First, Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves ... to clarify the existing provisions of those agreements [i.e. the WTO covered agreements] in accordance with customary rules of interpretations of public international law." With respect to the "customary rules of interpretation of public international law", the Appellate Body repeatedly refers to Articles 31 and 32 of the Vienna Convention on the Laws of Treaties (the "Vienna Convention") as interpretative guidelines.¹⁶⁹ Paragraph 1 of Article 31 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." In *US – Shrimps*, the Appellate Body accordingly stated as follows:

"A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive,

¹⁶⁹ For example, in *Japan – Taxes on Alcoholic Beverages*, the Appellate Body stated as follows: "Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the *WTO Agreement* 'in accordance with customary rules of interpretation of public international law'. Following this mandate, in *United States – Standards for Reformulated and Conventional Gasoline*, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation 'has attained the status of a rule of customary or general international law'. There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status." Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, p. 10. (emphasis in original; footnotes omitted). See also, with respect to Article 31, e.g. Appellate Body Reports on *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 17; *India – Protection for Pharmaceutical and Agricultural Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 45-46; *European Communities - Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 84; and *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 42.

or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."¹⁷⁰

7.18 Paragraphs 2 to 4 of Article 31 of the Vienna Convention, to the extent that may be relevant to this case, are cited below:

"2. The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7.19 Further, Article 32 of the Vienna Convention provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

7.20 On this point, in *EC – Computer Equipment*, the Appellate Body noted as follows:

"The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads

¹⁷⁰ Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("US - Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, para. 114. See also Panel Reports on *United States - Sections 301 - 310 of the Trade Act 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.22; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, adopted 22 September 1998, para. 7.18; *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("US - Underwear"), WT/DS24/R, adopted 25 February 1997, para. 7.18; and Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear* ("Argentina – Footwear"), WT/DS121/AB/R, adopted 12 January 2000, para. 91.

to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

'... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'

With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."¹⁷¹

2. Burden of Proof

7.21 With respect to the burden of proof concerning transitional safeguard measures under the ATC, in *US – Shirts and Blouses*, the Appellate Body considered that the burden of proof is incumbent on the complainant, stating as follows:

"... The ATC is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the ATC is an integral part of the transitional arrangement manifested in the ATC and should be interpreted accordingly. As the Appellate Body observed in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* with respect to Article 6.10 of the ATC, we believe Article 6 is 'carefully negotiated language ... which reflects an equally carefully drawn balance of rights and obligations of Members ...'.¹⁷² That balance must be respected.

The transitional safeguard mechanism provided in Article 6 of the ATC is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. ..."¹⁷³

7.22 The Appellate Body and subsequent panels endorsed this principle that a complainant bears the burden of proof.¹⁷⁴ For example, the Appellate Body, in *EC – Hormones*, states as follows:

"... The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*, which the Panel invokes and which embodies a rule applicable in any adversarial proceedings."¹⁷⁵

¹⁷¹ Appellate Body Report on *EC – Computer Equipment*, op. cit., para. 86. (footnote omitted) See also Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., p. 10.

¹⁷² (original footnote) AB-1996-3, adopted 25 February 1997, WT/DS24/AB/R, p. 15.

¹⁷³ Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses* ("*US – Shirt and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, pp. 16-17. (emphasis in original)

¹⁷⁴ E.g. Appellate Body Reports on *EC Measures Concerning Meat and Meat Products* ("*EC - Hormones*"), WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, paras. 98 and 104; and *Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, paras. 141.

¹⁷⁵ Appellate Body Report on *EC – Hormones*, op. cit., para. 98. (emphasis in original; footnote omitted)

7.23 In this line, we consider that Pakistan, the complaining party, bears the burden of proof for establishing a *prima facie* case that the subject transitional safeguard measure is in violation of Article 6.¹⁷⁶

3. Standard of Review

7.24 The parties made extensive arguments concerning the standard of review the Panel should use in this case. They agreed that the Panel should not make a *de novo* review, but they are in disagreement on the scope of review that the Panel should exercise.

7.25 With respect to the US fact-finding, **Pakistan** argued that "[t]he core issue before the Panel is ... whether the Market Statement constitutes a logical proof that the requirements set out in Article 6 were met."¹⁷⁷ Pakistan further argued that the US determination was based upon "unverified, incorrect and incomplete data" in a number of respects,¹⁷⁸ and improper methods of evaluation of facts.¹⁷⁹

7.26 The **United States** argued in support of the correctness and accuracy of its fact-finding contained in the 1998 Market Statement. In addition, the United States contended that Pakistan had attempted to "introduce[] new evidence of Pakistan's import trends *subsequent* to the investigation that is outside the scope of this proceeding."¹⁸⁰ The United States further argued that the Panel is requested to review only whether the US measure was "based on the best available data as contained in the 1998 Market Statement at the time that the United States conducted its determination", citing the panel report on *US – Shirts and Blouses*.¹⁸¹

7.27 In response, **Pakistan** agreed that the Panel cannot examine evidence for the purpose of reinvestigating the market situation, but argued that this does not mean that the Panel cannot examine evidence presented by Pakistan for the purpose of determining whether the market situation was investigated consistently with the requirement of Article 6. According to Article 11 of the DSU and the established WTO jurisprudence endorsed by the Appellate Body, the Panel must make an objective assessment as to whether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determination made. Pakistan is thus entitled to submit facts that were available to the United States at the time of the investigation, but that it failed to consider in the 1998 Market Statement. Pakistan is also entitled to submit facts demonstrating that the data used by the United States were unreliable and incorrect because it would otherwise be prevented from proving that the Market Statement is inconsistent with the requirements of Article 6 of the ATC. In support of its proposition, Pakistan referred to the difference between the ATC and other WTO Agreements; in case of ordinary safeguard measures, countervailing duties or antidumping duties, exporters subject to investigation shall be given an opportunity to present evidence to national investigative authorities, but the ATC does not set forth any such procedural requirement.¹⁸²

7.28 The **Panel** first notes that the ATC does not have any particular provision concerning the standard of review, and thus, Article 11 of the DSU should be used by panels assigned to review measures taken by a Member under the ATC as the basis for their standard of review. Article 11 of

¹⁷⁶ See Appellate Body Report on *US – Shirts and Blouses*, op. cit., pp. 13-14. See also Appellate Body Report on *EC – Hormones*, op. cit., para. 98.

¹⁷⁷ Pakistan First Submission, p. 14. (emphasis in original) (Also paragraphs 4-12-4.13.)

¹⁷⁸ See Pakistan First Submission, pp. 30-36. (Also paragraphs 3.1 and 4.95-4.101.)

¹⁷⁹ See Pakistan First Submission, pp. 36-42. (Also paragraphs 4.110 and 4.112.)

¹⁸⁰ US First Submission, para. 124. (emphasis in original) See also *ibid.* para. 91, 152 and 155-159. (Also paragraphs 4.8, 4.104, 4.124 and 4.202-4.207.)

¹⁸¹ US First Submission, para. 124. (Also paragraph 4.102.)

¹⁸² Pakistan Rebuttal Submission, paras. 8-10. (Also paragraph 4.208.)

the DSU requires panels to "make ... an objective assessment of the facts of the case ...".¹⁸³ We further note that the Appellate Body, in *EC – Hormones*, stated that "[m]any panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review."¹⁸⁴

7.29 On the issue of the standard of review to be applied in cases involving the ATC, the panel on *US – Underwear* rejected both total deference to the findings of national authorities and a *de novo* review. The panel stated as follows:

"...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.

...

... 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. 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.

We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the "March Statement") which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. In our view, an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States."¹⁸⁵

7.30 Further, with respect to the question as to what is included within the scope of the factual examination by panels, in *US – Shirts and Blouses*, the panel stated as follows:

"... 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

¹⁸³ The Appellate Body has stated that Article 11 of the DSU is applicable to all the WTO Agreements except for the Anti-Dumping Agreement. See Appellate Body Reports on *EC – Hormones*, op. cit., paras 114-119; *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, para. 2.67; *Argentina – Footwear*, op. cit., para. 118; and *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, para. 150.

¹⁸⁴ Appellate Body Report on *EC – Hormones*, op. cit., para. 117.

¹⁸⁵ Panel Report on *US – Underwear*, op. cit., paras. 7.10, 12 and 13. (footnote omitted) This approach has been endorsed by the Appellate Body in *EC – Hormones*, op. cit., paras. 115-117.

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."¹⁸⁶

7.31 Moreover, in *US – Underwear*, the panel restricted its review to an examination of the fact-finding of the national authority on which the subject transitional safeguard measure was proposed. In that case, the United States provided the panel with the Statement issued by the US authorities on 23 March 1995 (the "March Statement") on which it proposed the transitional safeguard measure in question, and another Statement it later provided to the complainant in the TMB review proceedings (the "July Statement"). The panel stated as follows:

"... 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."¹⁸⁷

7.32 We agree with the aforesaid finding of the panel on *US – Shirts and Blouses* that panels should not reinvestigate *de novo* the market situation when reviewing decisions made by national investigative authorities. Article 13 of the DSU provides that panels "have the right to seek information and technical advice from any individual or body which it deems appropriate." However, panels are less equipped and might have less expertise in fact-finding than national authorities.¹⁸⁸ In this overall context of the DSU, and in light of the above-quoted jurisprudence, we conclude that "an objective assessment" under Article 11 generally means a more limited factual examination than a *de novo* review.

7.33 We will next consider whether we should examine evidence submitted by Pakistan, which was not examined by, or not available to, the United States at the time of investigation. As the panel on *US – Underwear* indicated, the task of panels is not to determine whether or not to take transitional safeguard measure based upon all facts presented in the panel proceeding in accordance with the national legislation, but to review the consistency of decisions by national authorities with the ATC.¹⁸⁹ Thus, we shall not examine any evidence for the purpose of reinvestigating the market situation, but we should examine any evidence, without regard to whether it was available or considered at the time of investigation, for the purpose of evaluating the thoroughness and sufficiency of the investigation

¹⁸⁶ Panel Report on *US – Shirts and Blouses*, WT/DS33/R, adopted 23 May 1997, para. 7.21.

¹⁸⁷ Panel Report on *US – Underwear*, op. cit., para. 7.26.

¹⁸⁸ See also Appellate Body Report on *EC – Hormones*, op. cit., para. 117, as cited in paragraph 7.28 above.

¹⁸⁹ Panel Report on *US – Underwear*, op. cit., para. 7.12.

underpinning the decision of the US authority.¹⁹⁰ We do not find any provision in the ATC or the DSU that limits the authority of panels to collect factual data in order to review the fact-finding of national authorities in this manner.¹⁹¹

7.34 We further recall that in *Argentina - Footwear*, the Appellate Body concluded that the panel had discharged its duties of making an "objective assessment of facts" in accordance with Article 11 of the DSU, stating as follows:

"... the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. ..."¹⁹²

7.35 Therefore, we will examine whether the US fact-finding is justifiable¹⁹³ in light of all the facts submitted by the parties, including those which were not considered by, or not available to the US authority at the time of investigation. We consider this term "justifiable" to be descriptive of the current jurisprudence, rather than any addition or deletion thereto. Of course, the Appellate Body did not mean that panels should reverse a fact-finding of a national investigation authority if the authority did not consider a marginally relevant fact that was not provided by any party to the authority, or that was not available at the time of investigation. In contrast, it also would not be correct if panels were unable to reverse a fact-finding of a national authority even if the authority overlooked a crucial or

¹⁹⁰ In this connection, we recall that as cited in paragraph 7.30 above, the panel on *US – Shirt and Blouses* stated that panels shall "not consider developments subsequent to the initial determination". Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21. Our conclusion is consistent with this statement; it does not mean to take into consideration any development that occurred to the US domestic industry or subject imports, for example, change in sales volume, after the 1998 Market Statement had been made.

¹⁹¹ We also note that the ATC does not ensure that exporting Members may participate in the national investigation proceedings for transitional safeguard measures, thereby leaving such Members possibly unable to contest the fact-finding of the importing Member at that stage; however, exporting Members have the opportunity to contest the fact-finding of an importing Member prior to the introduction of a transitional safeguard measure, through consultation contemplated by Article 6.7. In addition, we are informed that the United States provided a public notice and accordingly, gave Pakistan and any other interested party an opportunity to comment on its own fact-finding prior to the establishment of the transitional safeguard measure at issue. (See US comments on the interim report, p. 5.)

¹⁹² Appellate Body Report on *Argentina – Footwear*, op. cit., para. 121. See also Appellate Body Report on *US – Wheat Gluten*, op. cit., para. 153. Compare Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21, in which the panel stated that panels shall "limit themselves to the evidence used by the importing Member in making its determination to impose the measure", as cited in paragraph 7.30. We understand that this finding of the panel implies that panels shall examine any evidence not for the purpose of reinvestigating the market situation, but for the purpose of evaluating the thoroughness and sufficiency of the investigation underpinning the decision of the national investigation authority, in light of the finding of the Appellate Body in *Argentina – Footwear*.

¹⁹³ We note that the *New Shorter Oxford English Dictionary* defines the term "justifiable" as: "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible". *New Shorter Oxford English Dictionary* (Clarendon Press 1993), p. 1466. By using the term "justifiable", we do not imply that there is a burden on the respondent to justify itself to a panel, thereby incorrectly shifting the burden of proof. Instead, we refer to the requirement that an investigating authority take into consideration the relevant facts and then adequately explain its reasoning. We have recourse to this term also in order to avoid terms such as "reasonableness" or "wide margin of discretion" which are used in national systems of administrative law and which inevitably carry with them many connotations from these national legal systems.

decisive fact simply because it was not presented to the authority at the time of investigation¹⁹⁴; this would mean that the more poorly the investigation procedures are designed, the more likely a deficient fact-finding of a national authority could withstand the scrutiny of panels.¹⁹⁵ Further, it also could not be correct that panels have to uphold a fact-finding of a national authority when the authority "adequately explained how the facts supported [its] determinations ...", however, excluding a crucial or decisive fact from the explanation. Thus, under Article 6 of the ATC, we deem it necessary and appropriate to review whether a national authority's fact-finding and decision was justified in light of the relevant facts before us.

E. DEFINITION OF DOMESTIC INDUSTRY

1. Identification of Issues

7.36 Article 6.2 of the ATC requires that, in order to take a transitional safeguard measure, a Member must demonstrate that "... a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to *the domestic industry producing like and/or directly competitive products.*" (emphasis added)

7.37 **Pakistan** argued that Article 6.2 provides that the subject "domestic industry" consists of domestic manufacturers that produce: (a) like products; (b) directly competitive products; or (c) like products and directly competitive products, with subject imports. In violation of this provision, in relation to the transitional safeguard measure on imports of combed cotton yarn from Pakistan, the United States excluded from the scope of the domestic industry the vertically integrated manufacturers that produced combed cotton yarn for their own use. Combed cotton yarn produced by domestic producers, whether for sale in the market or for internal use, is a directly competitive product with combed cotton yarn imported from Pakistan. The US position is inconsistent with the practice on the scope of a domestic industry concerning safeguard measures under GATT Article XIX, countervailing duties or antidumping duties.¹⁹⁶

7.38 In rebuttal, the **United States** argued that the text of Article 6 would allow a Member to identify an industry producing a product that is (a) like and directly competitive; or (b) like but not directly competitive; or (c) unlike but directly competitive.¹⁹⁷ According to the United States, vertically integrated fabric producers manufacture combed cotton yarn not for sale in the open market but for their internal consumption in the subsequent production of a fabric, apparel, or home furnishing. Consequently, the combed cotton yarn manufactured by these firms is not a directly competitive product with combed cotton yarn imported from Pakistan.¹⁹⁸ Thus, it is proper to exclude this captive production from the scope of the domestic industry. In support of this proposition, the United States argued that the objective of the ATC is to integrate gradually the textile and clothing sector into the disciplines of the GATT, and thus, the MFA rather than the GATT or any other WTO

¹⁹⁴ In this connection, we note that the Appellate Body, in *US – Wheat Gluten*, stated that "[t]he competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards.*" Appellate Body Report on *US – Wheat Gluten*, op. cit., para. 55.

¹⁹⁵ We note again that the ATC does not ensure that exporting Members may participate in the investigation proceedings for transitional safeguard measures, thereby leaving such Members possibly unable to contest the fact-finding of the importing Member at that stage; however, exporting Members have the opportunity to contest the fact-finding of an importing Member prior to the introduction of a transitional safeguard measure, through consultation contemplated by Article 6.7. See also footnote 191 above.

¹⁹⁶ See Pakistan First Submission, pp. 21-27. (Also paragraphs 4.10-4.11 and 4.18-4.20.)

¹⁹⁷ See US First Submission, para. 49. (Also paragraphs 4.34-4.37.)

¹⁹⁸ See US First Submission, para. 50. (Also paragraphs 4.21-4.25.)

Agreement should serve as the model for the ATC. The United States referred to Annex A to the MFA, which used the term "like and/or directly competitive products".¹⁹⁹

7.39 **Pakistan** asserted that the US position was illogical in that it resulted in a mismatch between imports and domestic products. "If the United States were permitted to define the domestic industry as the manufacturers of combed cotton yarn for sale, it would consequently have been required to impose its restraint only on combed cotton yarn for sale. However, in fact, the restraint applies to all imports of combed cotton yarn whether destined for sale in the merchant market or for consumption by a related fabric producer."²⁰⁰ Pakistan also argued that the US position is inconsistent with GATT/WTO jurisprudence on the definition of the terms "like" and "directly competitive" wherein "like" is a subset of "directly competitive", in that it presupposes that like but not directly competitive products exist.²⁰¹

7.40 The **Panel** understands that the issue before it is whether the text of Article 6.2 permits the US exclusion of production of combed cotton yarn by vertically integrated fabric manufacturers for their internal use from the scope of "the domestic industry".²⁰² The issue consists of the following two interpretative questions regarding Article 6.2²⁰³:

- (a) Does the term "directly competitive products" cover those products which are produced by vertically integrated fabric manufacturers for their internal consumption; is the term limited to products that are *actually competing* with subject imports?²⁰⁴; and
- (b) Should Members examine the "domestic industry" consisting of all manufacturers producing (i) like products, or (ii) directly competitive products, or (iii) both like products and directly competitive products²⁰⁵; or are they permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly

¹⁹⁹ See US First Submission, paras. 37-43, in particular, para. 41. (Also paragraph 4.58.)

²⁰⁰ Pakistan Rebuttal Submission, para. 36. See also Pakistan First Submission, pp. 21-22. (Also paragraphs 4.18-4.20 and 4.40.)

²⁰¹ See Pakistan Rebuttal Submission, para. 31. (Also paragraphs 4.38-4.41 and 4.43-4.44.)

²⁰² The 1998 Market Statement defined the domestic industry as "domestic establishments (or 'mills') engaged in the production of the subject yarn *for sale* to other firms." US Ex. 3, para. 1.3. (emphasis added) "The USG investigation ... considered only the domestic market combed cotton for sale, chief weight combed cotton spun, as defined by Category 301, and not such yarn produced by vertical integrated firms. The 1998 Market Statement further states that "[v]ertically integrated firms do not sell the yarn they produce in the domestic market, and their production does not compete directly with imports in the U.S. 'yarn for sale' market." *Ibid.* para. 3.1. (footnote omitted)

²⁰³ We note that in addition to those two points, the parties are in disagreement on the interpretation of the term "producing" in Article 6.2; Pakistan argued that the vertically integrated fabric manufacturers "produce" combed cotton yarn while the United States argued that they "produce" not combed cotton yarn, but subsequent products, *e.g.* fabric, apparel or home furnishings for sale, within the context of Article 6.2. See Pakistan Rebuttal Submission, paras. 19-25 and US Oral Statement at the First Substantive Meeting, paras. 9-11. In our view, it is obvious that the term "producing", in light of its ordinary meaning, to mean the production not only final products but also intermediary products which are to be used as input for the production of final products. Also, in the WTO Agreement, the term "production" is distinctly used from the term "sale". See *e.g.* GATT Article III:1, which provides as follows: "The Members recognize that internal taxes ... affecting the internal *sale* ... of products ... should not be applied ... so as to afford protection to domestic *production*." (emphasis added) To the contrary, the US interpretation of the term "producing" would in effect equate "producing" with "selling".

²⁰⁴ With respect to Pakistan's position, see *e.g.* Pakistan Rebuttal Submission, paras. 35-36; with respect to the US position, see *e.g.* US First Submission, paras. 50-51.

²⁰⁵ This is Pakistan's position. See *e.g.* Pakistan First Submission, pp. 22-23. (Also paragraphs 4.38-4.41.)

competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive?²⁰⁶

7.41 In addition, it is necessary to examine the factual question of whether combed cotton yarn produced by vertically integrated fabric producers for their own consumption is a directly competitive product with combed cotton yarn imported from Pakistan; both parties agree that these products are "like products".²⁰⁷

2. Interpretation of "directly competitive products"

(a) Text and context

(i) *Article 6.2 of ATC and the WTO Agreement*

7.42 **Pakistan** argued that "'directly competitive products' are products with common characteristics that give them the potential of satisfying the same need or taste."²⁰⁸ In support of its proposition, Pakistan referred to the Appellate Body's finding in *Korea – Alcoholic Beverages*, which it summarizes as "[i]n examining whether a product is competitive *both latent and extant demand* must therefore be considered."²⁰⁹ Combed cotton yarn produced by vertically integrated fabric manufacturers for their internal consumption share similar technical specifications with imported combed cotton yarn, and as a result, they are "directly competitive" with each other.²¹⁰ "All the WTO agreements, including the ATC, are integral parts of the WTO Agreement, which was negotiated and concluded as a single undertaking. It is, therefore, legitimate and common practice for panels to seek guidance for the interpretation of the terms of a WTO agreement from the rulings on similar terms in other agreements."²¹¹

7.43 The **United States** responded that "combed cotton yarn spun by vertically integrated fabric producers for their own consumption is not intended for release on the marketplace and is not directly competitive with ... imports [of combed cotton yarn]."²¹² The Appellate Body's finding cited by Pakistan concerns the term "directly competitive or substitutable products" in Ad Article III:2 of the GATT, which is different from the term "directly competitive products" in Article 6.2 of the ATC.²¹³ According to the United States, the term "'directly competitive' reflects the actual state of affairs in the market place."²¹⁴ Further, the United States urged "the Panel to remain, as the Appellate Body has discussed, within the 'four corners' of the ATC and interpret Article 6 as it applies to the facts of this case based upon the unique text of Article 6 considered in light of the object and purpose of the ATC."²¹⁵

7.44 **Pakistan** also pointed out that vertically integrated fabric producers purchase combed cotton yarn on the merchant market. Thus, Pakistan argued that combed cotton yarn offered on the merchant

²⁰⁶ This is the US position. *See e.g.* US First Submission, para. 49. (*Also* paragraphs 4.34-4.37.)

²⁰⁷ Pakistan First Submission, p 23, and US Rebuttal Submission, para. 26. (*Also* paragraph 4.43.)

²⁰⁸ Pakistan Rebuttal Submission, para. 33. *See also* Pakistan's Answers to Panel's Questions, 28 November 2000, p. 5. (*Also* paragraphs 4.39 and 4.47-4.50.)

²⁰⁹ Pakistan Rebuttal Submission, para. 32. (*emphasis in original*) (*Also* paragraph 4.39.)

²¹⁰ *See e.g.* Pakistan Rebuttal Submission, para. 33. (*Also* paragraph 4.39.)

²¹¹ Pakistan Rebuttal Submission, para. 13. (*Also* paragraphs 4.10-4.11.)

²¹² US Rebuttal Submission, para. 26. (*Also* paragraphs 4.51 and 4.55.)

²¹³ *See e.g.* US Rebuttal Submission, para. 36. (*Also* paragraphs 4.56-4.57.)

²¹⁴ US Rebuttal Submission, para. 37. (*Also* paragraphs 4.56-4.57.)

²¹⁵ US Answers to Panel's Questions, 28 November 2000, para. 3. (footnote omitted) In support of its argument, the United States referred to Appellate Body Report on *US – Underwear*, WT/DS24/AB/R, adopted 25 February 1997, pp. 12-13.

market is in fact competing with the yarn produced by the vertically integrated fabric producers for their internal use.²¹⁶

7.45 In response, the **United States** indicated that vertically integrated fabric producers purchase roughly two per cent of their combed cotton yarn from the merchant market and sell roughly one per cent. "*De minimis* purchases of combed cotton yarn made by vertically integrated fabric producers are not, as Pakistan suggests, evidence of actual or potential competition. ... The fact that vertically integrated fabric producers may sell roughly one per cent on the market does not mean that the other 99 percent – which never enters the market – is directly competitive with Category 301 imports."²¹⁷

7.46 The **Panel** first notes that the parties are in disagreement on whether the GATT/WTO jurisprudence on any WTO Agreement other than the ATC is relevant to the interpretation of Article 6 of the ATC; Pakistan cited the finding of the Appellate Body on GATT Article III in support of its argument, while the United States urged "the Panel to remain, as the Appellate Body has discussed, within the 'four corners' of the ATC...". As indicated in Article 31(2) of the Vienna Convention, the "context" within the meaning of Article 31(1) comprises "the text" of the *treaty* itself, including its preamble and annexes. The treaty in question here is the WTO Agreement, of which the ATC is an integral part.²¹⁸ Thus, it is the WTO Agreement in its entirety, including GATT Article III, that provides the context of Article 6 of the ATC. As the International Law Commission explained in its commentary to the final set of draft articles on the law of treaties, with regard to Article 31(1) of the Vienna Convention²¹⁹:

"... the ordinary meaning of a term is not to be determined in the abstract but *in the context of the treaty* and in the light of its object and purpose. These principles have repeatedly been affirmed by the [International] Court [of Justice]. ...

...

And the Permanent Court in an early Advisory Opinion stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:

'In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'²²⁰

²¹⁶ See e.g. Pakistan Rebuttal Submission, paras. 34-35. (Also paragraph 4.26.)

²¹⁷ US Rebuttal Submission, para. 40. (Also paragraphs 4.22 and 4.27-4.28.)

²¹⁸ WTO Agreement, Article II:2.

²¹⁹ Article 27(1) of the Final Draft Articles of the International Law Commission.

²²⁰ Report of the Commission to the General Assembly, Part I, Report of the International Law Commission on the work of the second part of its seventeenth session, [1966] 2 Y. B. Int'l L. Comm'n 169, U.N. Doc. A/6309/Rev.1., p. 221, citing *Competence of the ILO to Regulate Agricultural Labour, P.C.I.J.* (1922), Series B, Nos. 2 and 3, p. 23. (emphasis added) Doctrinal writings also indicate that the "context" is the treaty as a whole, not merely a paragraph, an article, a section, or a part of the treaty. See Sinclair, Sir Ian, KCMG, QC, *The Vienna Convention on the Law of Treaties*, Second edition, 1984, p. 127; Jennings, Sir Robert, QC and Watts, Sir Arthur, KCMG QC, *Oppenheim's International Law*, Ninth Edition, 1992, p. 1273; Yasseen, Mustafa Kamil, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités, Recueil des Cours*, Tome 151, 1976 – III, p. 34; Nguyen Quoc Dinh, Daillier, Patrick, et Pellet, Alain, *Droit international public*, quatrième édition, 1992, pp. 252-253. See also Brownlie, Ian, QC, DCL, FBA, *Principles of Public International Law*, Fourth edition, 1990, p. 629.

In this case, the "treaty as a whole" is the WTO Agreement and all its annexes; it is not just the ATC.²²¹ Therefore, we consider that the interpretation on the term "directly competitive or substitutable products" under GATT Article III is relevant in interpreting the term "directly competitive products" under Article 6 of the ATC.

7.47 We note that the United States pointed out that in *US – Underwear*, the Appellate Body rejected certain finding of the panel, indicating that "the Panel went outside the four corners of the ATC."²²² In that case, in examining whether or not the retroactive application of transitional safeguard measures is permissible, the panel stated that "[s]ince the ATC is silent on this question, we will first examine how the matter is treated under the provisions of the GATT 1994 ...", and found that "Article X:2 of GATT 1994 is the relevant provision ...".²²³ The aforesaid statement of the Appellate Body was made to reject this finding of the panel,²²⁴ however, because as opposed to the panel, the Appellate Body did "not ... believe that Article 6.10 [of the ATC] does not substantively address that issue."²²⁵ Contrary to the US argumentation, nothing in the Appellate Body Report on *US – Underwear* prevents us from using any WTO covered agreement other than the ATC as the "context" of Article 6 of the ATC within the meaning of Article 31(1) of the Vienna Convention.

7.48 Second, we recall that panels and the Appellate Body have often consulted dictionaries as a starting point in analyzing the ordinary meaning of terms used in the WTO Agreement in accordance with Article 31(1) of the Vienna Convention.²²⁶ In this case, we note that the term "competitive" is defined as "of, pertaining to, involving, characterized by, or decided by competition."²²⁷

7.49 Our attention is next directed to the most immediate context of the term "competitive" in Article 6.2, *i.e.* the qualifier "directly". In our view, if the term "competitive" were to have only a narrow meaning, for example, *actually competing*, the qualifier "directly" would be rendered meaningless; the function of defining the scope of the term "competitive" has been left to the term "directly".

7.50 Accordingly, we go on to examine the meaning of the term "directly". It is obvious that under Article 6.2, the term "directly" excludes those products which are in remote competition with a subject textile or clothing product, from the scope of a subject domestic industry. In this connection, we note that competition can exist in some sense between any two products. This is particularly

²²¹ Also, the Appellate Body, in *US - Shrimp*, stated that "[t]he preamble of the WTO Agreement ... informs not only the GATT 1994, but also the other covered agreements ...". Appellate Body Report on *US – Shrimp*, op. cit., para. 129.

²²² Appellate Body Report on *US – Underwear*, op. cit., p. 12.

²²³ Panel Report on *US – Underwear*, op. cit., para. 7.64.

²²⁴ Appellate Body Report on *US – Underwear*, op. cit., p. 12.

²²⁵ *Ibid.* p. 14. (emphasis in original)

²²⁶ For a few recent examples, Appellate Body Reports on *US – Wheat Gluten*, op. cit., para. 53; *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and QWT/DS169/AB/R, adopted 10 January 2001, paras. 111 and 120; and *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45.

²²⁷ *New Shorter Oxford English Dictionary*, op. cit., p. 459. Further, the term "competitive" is defined in the *New Shorter Oxford English Dictionary* as: (1a) "The action of competing or contending with others"; (1b) "Striving for custom between rival traders in the same commodity"; (2) "An event in which persons or teams compete; a match; a contest; a trial of ability"; (3) "The person or persons competing with one; the opposition in a contest". *Ibid.* The United States also referred to the definition of "competitive" in the *New Shorter Oxford English Dictionary*. See US Rebuttal Submission, fn. 30 and para. 37. *Webster's New Encyclopedic Dictionary* defines the term "competitive" as "relating to, characterized by, or based on competition," and in turn, "competition" as: (1) "the act or process of competing"; (2) "a contest between rivals ..."; (3) "the effort of two or more persons or firms acting independently to secure business by offering the most favorable terms"; (4) "active demand by two or more organisms or kinds of organisms for some environmental resource in short supply." *Webster's New Encyclopedic Dictionary* (Black Dog & Leventhal Publishing Inc. 1994 ed.), p. 201.

obvious in case of consumer products; for example, a number of consumers would make comparison between cashmere sweaters and silk neckties as a birthday present, and in that sense, they are competing with each other. Keeping in mind the aforesaid relevance of the jurisprudence with respect to GATT Article III, we note that in relation to the interpretation of "directly competitive or substitutable products" under GATT Article III, the panel on *Korea – Alcoholic Beverages* stated as follows:

"At some level all products or services are at least indirectly competitive. Because consumers have limited amounts of disposable income, they may have to arbitrate between various needs such as giving up going on a vacation to buy a car or abstaining from eating in restaurants to buy new shoes or a television set."²²⁸

7.51 The foregoing analysis is suggestive of the role of the term "directly" in qualifying "competitive" under Article 6. Without the qualifier "directly" in Article 6, for example, in order to decide whether a transitional safeguard measure should be imposed on imports of cashmere sweaters, a Member would need to examine the situation of domestic producers of not only cashmere sweaters, but also silk neckties and a wide range of other consumer products. If it were necessary to consider this remote competition under Article 6, the scope of a subject domestic industry would be too broad. Thus, the qualifier "directly" of "competitive" under Article 6 limits the scope of a subject domestic industry by excluding such remote competition.

7.52 The panel on *Korea – Alcoholic Beverages* also found that "an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste."²²⁹ The Appellate Body agreed with this standard, stating that "according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'.²³⁰ Therefore, we consider that this interpretation of "directly competitive or substitutable products" is of relevance in interpreting the term "directly competitive products" under Article 6 of the ATC, because GATT Article III constitutes part of the "context" of Article 6 of the ATC within the meaning of Article 31(1) of the Vienna Convention, as indicated in paragraphs 7.46-7.47 above.

7.53 We will then recall the factual arguments of the parties on the products in question. First, both parties admitted that imported combed cotton yarn and domestically produced combed cotton yarn, whether for sale or internal use, share basically the same technical specifications.²³¹ Second, Pakistan claimed and the United States acknowledged that vertically integrated firms are purchasing combed cotton yarn in the market presumably with the same objective.²³² This indicates that the vertically integrated fabric producers recognize combed cotton yarn offered in the open market and combed cotton yarn they produce for their own consumption "as alternative ways of satisfying a particular need ...". Imported combed cotton yarn is also offered for sale in the market, and thus, should be presumed to be actually competing with combed cotton yarn produced by vertically integrated fabric producers for their internal consumption. In our view, it is obviously unreasonable to exclude captive production from the scope of a domestic industry on the ground that it is not "directly competitive products".

²²⁸ Panel Report on *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R and WT/DS84/R, adopted 17 February 1999, para. 10.40.

²²⁹ *Ibid.*

²³⁰ Appellate Body Report on *Korea – Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R, adopted 17 February 1999, op. cit., para. 115.

²³¹ See US Answers to Panel's Questions, 28 November 2000, para. 91 ("To the best of our knowledge, there are no material differences in the technical specifications of the yarn produced domestically for sale, for internal use and the yarn imported from Pakistan or Mexico."), and Pakistan Rebuttal Submission, para. 33. (Also paragraphs 4.12 and 4.187.)

²³² US Rebuttal Submission, para. 40. (Also paragraphs 4.21-4.23.)

7.54 Here, it is necessary to address further arguments of the United States. The United States argued that the Appellate Body's aforesaid finding in *Korea – Alcoholic Beverages* relies on the term "substitutable", which is missing in Article 6 of the ATC. According to the United States, the absence of this term indicates that the relationship between "like products" and "directly competitive products" under Article 6 of the ATC is different from that between "like products" and "directly competitive or substitutable products" under GATT Article III:2.²³³ Also, the statement of the Appellate Body is based upon the object and purpose of GATT Article III, which is different from that of Article 6 of the ATC.²³⁴

7.55 The Panel notes that, indeed, the finding of the Appellate Body appears to rely on the term "substitutable" as well as "competitive". In *Korea – Alcoholic Beverages*, the Appellate Body also stated as follows:

"The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word 'competitive' which means 'characterized by competition', and from the word 'substitutable' which means 'able to be substituted'. The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another.

Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable²³⁵ or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'.²³⁶ Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand.

The words 'competitive or substitutable' are qualified in the *Ad Article* by the term 'directly'. In the context of Article III:2, second sentence, the word 'directly' suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word 'directly' does not, however, prevent a panel from considering both latent and extant demand."²³⁷

7.56 Also, in *Korea – Alcoholic Beverages*, the Appellate Body relied on the objective of GATT Article III as follows:

"In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable.' The

²³³ US Rebuttal Submission, paras. 30 and 35-37. (Also paragraphs 4.56-4.57.)

²³⁴ US Answers to Panel's Questions, 28 November 2000, para. 8. (Also paragraphs 4.56-4.57.)

²³⁵ (footnote original) Appellate Body Report on *Canada – Measures Concerning Periodicals*, WT/DS31/AB/R.

²³⁶ (footnote original) Panel Report on *Korea – Alcoholic Beverages*, op. cit., para. 10.40.

²³⁷ Appellate Body Report on *Korea – Alcoholic Beverages*, op. cit., paras. 114-116. (emphasis in original)

object and purpose of Article III confirms that the scope of the term 'directly competitive or substitutable' cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit."²³⁸

7.57 However, we note that the case on *Korea – Alcoholic Beverages* dealt with questions of substitutability of *unlike* products while in the case at hand we are dealing with the competitiveness of *like* products, and thus, the situation at hand is even clearer than that in the above-quoted case. In *Korea – Alcoholic Beverages*, the subject products, Korean *soju*, and imported products such as gin and whisky, were different in some respects, while our question is whether the like products (*i.e.* captively produced combed cotton yarn and imported combed cotton yarn) are "directly competitive" with each other. In our view, there is no question that these two like products before us are "directly competitive" even if they are not actually competing with each other for any given sale. The definitions of "like products" and "directly competitive products" may vary depending on the provision,²³⁹ but it is worth noting that under GATT Article III, in *Korea – Alcoholic Beverages*, the Appellate Body stated that "'like' products are a subset of directly competitive or substitutable products...."²⁴⁰ While the precise scope of "directly competitive products" may be different, it is instructive to note the relationship between the terms (*i.e.* one as a subset of another).

7.58 Further, we would like to emphasize again that in the case before us, vertically integrated fabric producers purchase combed cotton yarn and also sell combed cotton yarn they produce, in the market, which includes imported combed cotton yarn, even though their amounts are small. In our view, these facts reveal that combed cotton yarn produced by the integrated producers for their own use is "directly competitive" with imported combed cotton yarn. Manufacturers' decisions as to whether to buy materials in the market or to rely exclusively on internal production, or whether to sell their intermediary products in the market or use them to manufacture downstream products, are an economically driven choice made by individual companies. Such decisions are much more particular in nature than the decision that we have to make as to whether two like products are "directly competitive". Vertically integrated manufacturers make a business decision on these points based primarily on profit maximization. No such decision will be necessary for either the non-integrated purchaser (*i.e.* a fabric producer, which does not have a make/buy decision) or the non-integrated combed cotton yarn producer (which does not have a sell/use decision). Thus, it is arguable that an investigating authority might weigh the evidence differently with regard to the two types of combed cotton yarn producers, but that is a matter of evaluating damage to producers, not whether the products are "directly competitive" with each other.²⁴¹

7.59 In our view, the interpretation to be given of the term "directly competitive" in Article 6 is of a more general and objective nature, without taking account of factors specific to each and every producer or consumer. The focus initially is on the *products*. Thus, the alleged fact that vertically integrated fabric producers do not intend to sell combed cotton yarn in the market would not prevent

²³⁸ Appellate Body Report on *Korea – Alcoholic Beverages*, op. cit., paras. 119-120.

²³⁹ Cf. Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., fn. 44, referring to Panel Report on *Japan – Alcoholic Beverages*, op. cit., para. 6.20.

²⁴⁰ Appellate Body Report on *Korea – Alcoholic Beverages*, op. cit., para. 118.

²⁴¹ In addition, we note that the 1998 Market Statement only reflects statistics on actual completed sales. There is no evidence that *offers for sale* were investigated. This latter point would be necessary to be established even under the US method of defining "directly competitive". It would be reasonable to infer that there must be offers for sale several times as many as actual completed sales, even assuming that vertically integrated fabric manufacturers do not purchase or sell combed cotton yarn in the open market for business. It would be rather unreasonable to consider that they are always able to purchase or sell combed cotton yarn whenever they wish. Taking this into consideration, the US general statement that the vertically integrated manufacturers did not intend to sell their products in the market would appear to be conjecture rather than a fact demonstrated in the 1998 Market Statement.

us from finding that captively produced combed cotton yarn and imported combed cotton yarn are "directly competitive" with each other. In other words, the US interpretation would require an unacceptably novel reading of Article 6 to permit the definition of *products*, in terms of *producers* rather than the reverse, which is the natural reading of the language and that most consistent with GATT/WTO practice.

(ii) *Article 6.2 within the ATC*

7.60 **Pakistan** argued that the US interpretation of "directly competitive products" would run counter to the exceptional nature of the transitional safeguard, and in its support, referred to Article 6.1, which provides that "[t]he transitional safeguard should be applied as sparingly as possible, consistently with ... the effective implementation of the integration process...".²⁴² Also, in a further support of its argument, Pakistan referred to the Appellate Body Report on *US – Underwear*, which used Article 6.1 as a basis for rejection of retroactive application of transitional safeguard measures.²⁴³

7.61 The **United States** responded that "Article 6 exists for the purpose of providing importing Members meaningful recourse to a safeguard mechanism during the transition period in which the textiles and clothing sector is integrated into the GATT. Accordingly, this provision is a fundamental aspect of the carefully negotiated balance struck in the ATC. It is not, as Pakistan claims, a measure 'running counter to the basic purpose of the ATC.' To disregard the ordinary meaning of 'domestic industry producing like and/or directly competitive products' and limit the availability of an Article 6 safeguard only to physically 'like' products would prevent the Panel from giving meaning to words clearly in the text and would amount to rewriting the ATC's carefully negotiated balance of rights and obligations."²⁴⁴

7.62 On this point, **the Panel** agrees that Article 6.1 is part of the immediate context of Article 6.2. The last sentence of Article 6.1 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."

7.63 Indeed, we acknowledge that the last sentence of Article 6.1 could be interpreted as an exhortation that Members exercise restraint in the frequency with which they *apply* transitional safeguard measures, rather than limiting the scope of the interpretation of the language itself. However, it is more natural to read Article 6.1 as encouraging Members to restrict transitional safeguard measures in a more general manner. The Preamble of the ATC notes that "negotiations in the area of textile and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT/WTO on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade". It would be inconsistent with this Preamble if Article 6 were to set forth an overly broad authority of Members to take transitional safeguard measures.

7.64 Moreover, in this connection, we note that the US interpretation of the term "directly competitive" would also permit transitional safeguard measures to be taken to address the following cases:

²⁴² See Pakistan Rebuttal Submission, paras. 38-42, in particular, para. 41. (Also paragraphs 4.2, 4.54 and 4.70.)

²⁴³ Pakistan referred to Appellate Body Report on *US – Underwear*, op. cit., p. 15. (Also paragraph 4.70.)

²⁴⁴ US Rebuttal Submission, para. 23. (footnote omitted) (Also paragraph 4.36.)

- (a) A US manufacturer of combed cotton yarn had been acquired by a vertically integrated fabric producer during the investigation period but continues to produce the same product, but now only for the internal use of the integrated firm. According to the US interpretation, even if the acquired manufacturer had maintained the same number of employees and facilities and the same level of production (or even increased them), it should be deemed to have "exited" the industry merely because of the change in ownership, and, among other things, could be an indicator of "serious damage" to the domestic industry.²⁴⁵
- (b) The integrated fabric producers sell more combed cotton yarn in the market, thereby achieving a market share greater than *de minimis*²⁴⁶ (say, 10%) before the investigation period. Then the integrated firms maintain the same level of production during the investigation period, but switch a significant amount to their own internal use sufficient to drop below the *de minimis* threshold. According to the US interpretation, the integrated firms should be deemed to have "exited" the industry to the extent that they ceased to sell their products in the market in order to use them for their internal consumption, and hence, their resulted loss of shares in the sales market, among other things, could be an indicator of "serious damage" to the domestic industry.²⁴⁷

7.65 It would be manifestly absurd to find serious damage to a domestic industry in these situations, and therefore, to impose a transitional safeguard measure when the domestic production of combed cotton yarn has been maintained at the same level. It is difficult to see how a mere change of ownership or a transitory change in make/buy decisions could support a finding of "serious damage",²⁴⁸ and permit the Member to impose a transitional safeguard measure on imports. In our view, the language encouraging general restraint in Article 6.1, which constitutes part of the context of Article 6.2, supports the interpretation of the term "directly competitive products" as including combed cotton yarn produced by vertically integrated fabric manufacturers for their internal consumption, in order to avoid unjustifiable use of the safeguard mechanism as illustrated by the situations in the preceding paragraph.

(b) Object and purpose of the ATC

7.66 We recall that Article 31(1) 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*." (emphasis added) We will thus examine whether the aforesaid product-based (as opposed to producer-based) interpretation of the term "directly competitive products" is consistent with the object and purpose of the ATC.

²⁴⁵ This is not an extravagant hypothesis. See US First Submission, para. 162, 3rd bullet. (Also paragraphs 4.144-4.148.)

²⁴⁶ We further note that an illustration of the artificiality of the US definition is that the United States has had recourse to the concept of *de minimis* sales which has no basis in the treaty language.

²⁴⁷ In response to the Panel's question as to whether the United States would find "damage" to the domestic industry in these cases, the United States did not provide any clear-cut answer, but did not deny the possibility of finding serious damage based upon the given set of facts. US Answers to Panel's Questions, 28 November 2000, paras. 75-82. (Also paragraphs 4.144-4.148.)

²⁴⁸ Further, it would be improper to adopt any interpretation that would lead to absurd results. See Appellate Body Report on *EC – Computer Equipment*, op. cit., para. 86.

7.67 **Pakistan** argued that the object and purpose of the ATC is to ensure that the textiles and clothing sector will eventually be integrated into the GATT 1994, in response to the Panel's question as to how the object and purpose of the ATC demands Pakistan's interpretation of the scope of a subject domestic industry under Article 6, and excludes the US interpretation. In this line, Pakistan claimed that this leads to Article 1.5, which requests Members to "allow for continuous autonomous industrial adjustment and increased competition in the markets", and further, Article 6.1, which provides that "the transitional safeguard should be applied as sparingly as possible...". Further, the US definition of the subject domestic industry cannot be reconciled with the object and purpose of the ATC, because it allows Members to take transitional safeguard measures to protect domestic producers that are most likely to suffer serious damage from competition with imports. This would greatly facilitate the use of transitional safeguard measures, which would seem contrary to the whole purpose of progressively integrating the textiles and clothing sector into the GATT/WTO.²⁴⁹

7.68 In response to a similar question, the **United States** indicated that "[t]he ATC sets forth a careful balancing of interests between exporting and importing Members to guide the textiles and clothing sector through the delicate ten-year transition from a regime of special quotas to GATT rules."²⁵⁰ Further, it claimed that "[f]or importing Members, a fundamental aspect of this bargain was the ability to address damaging surges in imports of non-integrated products through a special safeguard provision *separate from* Article XIX of GATT 1994 and the *WTO Agreement on Safeguards*"²⁵¹ Also, the United States criticized Pakistan's interpretation in that it "denies the relevance of the marketplace for purposes of transitional safeguard action."²⁵²

7.69 In a further rebuttal, **Pakistan** claimed that the United States attempts to turn an "exception in the ATC into the expression of the basic object and purpose of the ATC."²⁵³

7.70 The **United States** further stated that "[t]he Article 6 transitional safeguard mechanism represents a fundamental part of the ATC's carefully negotiated text; it is *not* ... a measure running counter to the basic purpose of the ATC."²⁵⁴

7.71 In **the Panel's** view, in order to address the issues at hand, it is not necessary to answer the general question of whether or not transitional safeguard measures are *exceptionally* permitted under the ATC. We believe that in the final analysis the parties do not disagree that integration of the trade in textile and clothing into GATT/WTO system is the object and purpose of the ATC as stated in its Preamble. This object and purpose is referred to again in the last sentence of Article 6.1. As indicated above, the interpretation of the term "directly competitive products" in the light of this sentence and also the object and purpose of the ATC would rather favour the traditional product-based interpretation²⁵⁵ as is usual under the GATT/WTO, *inter alia*, in GATT Articles III and

²⁴⁹ See Pakistan Answers to Panel's Questions, 28 November 2000, pp. 8-10, and Pakistan Rebuttal Submission, paras. 44-46. (*Also* paragraphs 4.92 and 4.54.)

²⁵⁰ US Answers to Panel's Questions, 28 November 2000, para. 16. (*Also* paragraph 4.9.)

²⁵¹ US Answers to Panel's Questions, 28 November 2000, para. 16. (emphasis in original) *See also* US Rebuttal Submission, para. 13. (*Also* paragraph 4.9.)

²⁵² US Answers to Panel's Questions, 28 November 2000, para. 18. (*Also* paragraph 4.51.)

²⁵³ Pakistan Rebuttal Submission, para. 44. (*Also* paragraph 4.54.)

²⁵⁴ US Rebuttal Submission, para. 13. (emphasis in original) (*Also* paragraphs 4.211-4.215.)

²⁵⁵ We recall our discussion in paragraph 7.59 above, where we noted that traditionally the domestic producers are defined in term of directly competitive products rather than defining the products in terms of who produces them.

XIX.²⁵⁶ This is consistent with our finding in paragraph 7.46 above that GATT Article III constitutes part of the context of the term "directly competitive" in Article 6.2 of the ATC.²⁵⁷

(c) Issue of the MFA

7.72 The **United States** argued that the MFA constitutes part of the context of Article 6 of the ATC, with reference to the Appellate Body Report on *US – Underwear*,²⁵⁸ which states that "[w]e turn to another element of the context of Article 6.10 of the ATC: the prior existence and demise ... of the MFA."²⁵⁹

7.73 In contrast, **Pakistan** argued that "[i]n the *Underwear* case the Appellate Body used the MFA *only to confirm* an interpretation it had reached in accordance with Article 31 of the Vienna Convention."²⁶⁰

7.74 **The Panel** first notes that Article 31(2) of the Vienna Convention sets forth as follows:

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrumented related to the treaty."

This clearly indicates that the MFA cannot be part of the "context" of the ATC within the meaning of Article 31(2) of the Vienna Convention. The MFA is not an integral part of the WTO Agreement, and was not made "in connexion with the conclusion of" this treaty. We further note that the Appellate Body Report on *US – Underwear* mentioned as part of the "context" of Article 6.10 of the ATC, not the MFA itself, but "the prior existence and demise ... of the MFA".²⁶¹ They are occurrences rather than "any agreement" or "any instrument". Clearly, in our view, the Appellate Body used the MFA

²⁵⁶ The panel on *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*") recently touched on this issue. In relation to Article 4.1(c) of the Agreement on Safeguards, which defines a "domestic industry" as "the producers as a whole of the like or directly competitive products ... or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products", the panel found that it is inconsistent with this provision to include input producers (growers and feeders of live lamb) in the scope of the domestic industry producing lamb meat. Panel Report on *US – Lamb*, WT/DS177/R and WT/DS178/R, circulated 21 December 2000 and appealed 31 January 2001, section 4(a), in particular, para. 7.118. In support of this finding, the panel referred to GATT Panel Reports on *United States – Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, SCM/71, BISD 39S/436; *New Zealand – Imports of Electrical Transformers from Finland*, adopted 18 July 1985, BISD 32S/55; *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, SCM/85. See Panel Report on *US – Lamb*, op. cit., paras. 7.78-7.109.

²⁵⁷ We note that our interpretation of Article 6 of the ATC is consistent with the object and purpose of the WTO Agreement, as described in its Preamble, as well as the object and purpose of the ATC.

²⁵⁸ US Answers to Panel's Questions, 28 November 2000, paras. 26-28, stating that "[t]he MFA is relevant as providing context for the interpretation of "like and/or directly competitive products" for the purpose of Article 6." (*Also* paragraph 4.62.)

²⁵⁹ Appellate Body Report on *US – Underwear*, op. cit., p. 16.

²⁶⁰ Pakistan Rebuttal Submission, para. 47-51, in particular, para. 50. (emphasis in original) (*Also* paragraph 4.63.)

²⁶¹ Appellate Body Report on *US – Underwear*, op. cit., p. 16.

not as part of the "context" of the ATC within the meaning of Article 31(1) of the Vienna Convention, but as part of the circumstances of the conclusion of the ATC.²⁶²

7.75 In any event, the US position would not be supported by referring to the fact that the same term "like and/or directly competitive products" was used in the MFA. This reference was made to support its proposition that in interpreting the term under Article 6 of the ATC, the Panel should not apply the interpretation of similar terms used elsewhere in the WTO Agreement (*e.g.* "like or directly competitive products" under GATT Article XIX and the Safeguards Agreement). Also, the United States argued that, in light of MFA practices, the term under Article 6 should refer to products which compete in the marketplace.²⁶³

7.76 The United States is correct that the term "and/or" does not appear elsewhere in the WTO Agreement for the purpose of determining the producers of products in question. Nevertheless, this would not necessarily support the US justification for the exclusion of captive production from the scope of "directly competitive products" under the proper interpretation of the language of the ATC as discussed above.

7.77 We further note that the MFA required a finding of "market disruption ... based on the existence of serious damage to domestic producers", as distinct from "serious damage to the domestic industry producing like and/or directly competitive products" under the ATC. Also, under the MFA, "and/or" referred to "technical changes or changes in consumer preference which are instrumental in switches" in production.²⁶⁴ This is different terminology from Article 6.2, which adopts the forms used elsewhere in the WTO (*i.e.* defining an industry based upon products and then assessing the impact of the imports on such an industry), albeit with somewhat different wording. Further, we do not accept the relevance of the MFA pursuant to Article 32 of the Vienna Convention because the interpretation under Article 31 of the Vienna Convention is enough, but even if we had, for the United States, to merely point out that the MFA used the term "and/or" does not help support the US interpretation of the ATC in light of the other more significant distinctions between the treaties' texts.

(d) Practicability

7.78 The **United States** pointed out that it is difficult to examine the factors enumerated in Article 6.3 in respect of vertically integrated producers.²⁶⁵

7.79 **Pakistan**, however, responded that it is possible to do so under the ATC as under the Anti-Dumping Agreement, and that the United States did so under its antidumping law.²⁶⁶

²⁶² See paragraph 7.20 above. In this connection, please also note that in its Rebuttal Submission, the United States did not specifically argue that the MFA constitute part of the "context" of the ATC, as that term is used in the Vienna Convention. See US Rebuttal Submission, para. 31, in particular, fn. 22. The US answer to the Panel's question about the legal relevance of the MFA does not specifically characterize the MFA as such. The US Answers to Panel's Question, dated 22 December 2000, paras. 1-6.

²⁶³ See US Answers to Panel's Questions, 28 November 2000, paras. 26-28. (*Also* paragraph 4.58.)

²⁶⁴ Both parties agreed that Annex A to the MFA, which used the term, clarified that safeguard measures could be invoked to protect domestic producers of certain textile products, *e.g.* cotton fibres, from imports of not identical but directly competitive products, *e.g.* non-cotton vegetable fibres such as ramie. The text of Annex A and the materials the parties cited seem to support their arguments. Pakistan Answers to Panel's Questions, 28 November 2000, p. 14 and US Answers to Panel's Questions, 28 November 2000, para. 25. (*Also* paragraphs 4.59-4.61.)

²⁶⁵ See US First Submission, para. 48 and US Rebuttal Submission, para. 22. (*Also* paragraphs 4.21-4.23 and 4.25.)

²⁶⁶ Pakistan Rebuttal Submission, paras. 22-25. (*Also* paragraph 4.16.)

7.80 **The Panel** notes that under the Anti-Dumping Agreement, the importing Member is required to examine all relevant economic variables of the domestic industry, "including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices ...; actual and potential negative effects [of dumping] on cash flow, inventories, employment, wages, growth, ability to raise capital or investments",²⁶⁷ which cover almost all the economic variables that are required to be examined under Article 6.4 of the ATC. It may be the case that some factors, such as profits, may be difficult to assess for captive producers. However, other factors such as labour, productivity, inventory, wages, capacity utilization, production levels, etc. would be very similar to assess.²⁶⁸ Thus, the examination of the captive producers may be somewhat different and the weighting of such assessment may require further analysis on a case-by-case basis, but that certainly does not mean that it cannot be done.²⁶⁹

3. Interpretation of "and/or"

7.81 The interpretations of the parties are also in a sharp contrast with each other regarding the meaning of "and/or" in Article 6.2. As noted above, according to **Pakistan**, a subject domestic industry consists of producers of (i) like products, or (ii) directly competitive products, or (iii) both like products and directly competitive products.²⁷⁰ In contrast, the **United States** argued that Members are permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive.²⁷¹

7.82 **Pakistan** rebuts the US argument by arguing that the category "like but not directly competitive products" is inconceivable in light of the jurisprudence concerning GATT Article III that like products are a subset of directly competitive products.²⁷²

7.83 The **United States** further responded that the connecting word "and/or" between "like" and "directly competitive products" suggests that the "like products" should not be constructed as a subset of the "directly competitive products". If "like products" is a subset of "directly competitive products" under Article 6 of the ATC, Pakistan's interpretation would contravene the principle of effectiveness in treaty interpretation, because the words "like and/or" would be unnecessary to define a domestic industry under Article 6.2.²⁷³

7.84 In **the Panel's** view, it is difficult to envisage products that are like but not directly competitive and as a factual matter we have found the products in this dispute to be both. However, we cannot ignore the existence of the term "and" in Article 6.2. It may be the unintended result of unfortunate drafting, but the term "and" is there nonetheless. Thus, we shall carry our analysis through on this basis.

²⁶⁷ Antidumping Agreement, Article 3.4.

²⁶⁸ In this connection, we note that the United States did not contest Pakistan's argument that the United States has done this successfully with respect to vertically integrated producers in the antidumping proceedings. See Pakistan Rebuttal Submission, para. 24 and fn. 25.

²⁶⁹ Further, we note that the US interpretation would not remove its alleged difficulties; if vertically integrated fabric manufacturers had sold in the market combed cotton yarn in the amount greater than *de minimis*, the United States presumably would have had to examine these factors only for the production of such combed cotton yarn, as distinct from all the establishment's production.

²⁷⁰ See Pakistan First Submission, pp. 22-23. (Also paragraph 4.39.)

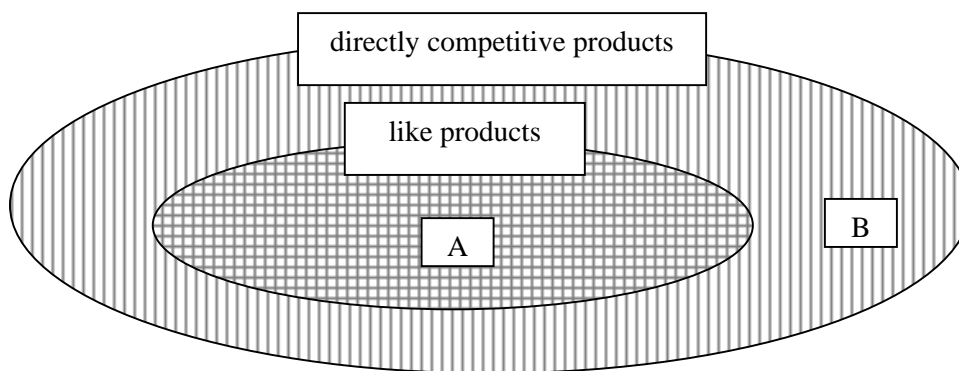
²⁷¹ See US First Submission, para. 49. See also the discussion in paragraphs 7.38-7.40 above. (Also paragraphs 4.34-4.35.)

²⁷² See Pakistan Answers to Panel's Questions, 28 November 2000, p. 4. (Also paragraphs 4.43-4.44.)

²⁷³ See US Rebuttal Submission, paras. 31-34. (Also paragraph 4.45.)

7.85 The following diagram might help illustrate the position of Pakistan.²⁷⁴ In the view of Pakistan, the category of "like products" (A) is always a subset of "directly competitive products" (B); therefore, "like products" plus "directly competitive products" = "directly competitive products" ($A \cup B = B$). Consequently, the choice is, in effect, limited to two possibilities: "like" or "directly competitive".

Diagram 1



7.86 Also, the following diagrams help illustrate our understanding of the US position. The category of "like but not directly competitive products" is A; the category of "unlike but directly competitive products" is B; therefore, products that are both "like and directly competitive" is C. As mentioned in paragraph 7.83 above, the United States contended that the category of "like products" is not a subset of "directly competitive products", and hence, it must presuppose that illustration in Diagram 3.

Diagram 2

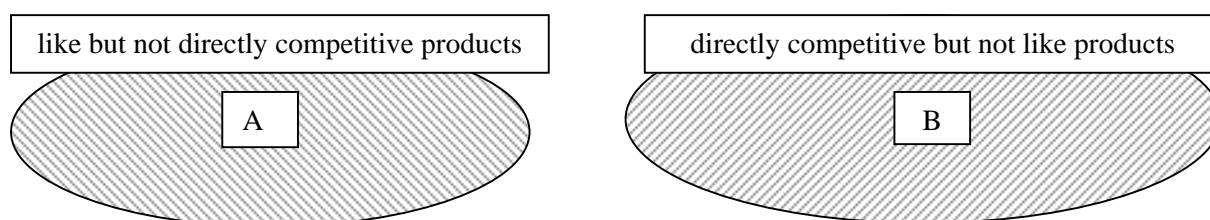
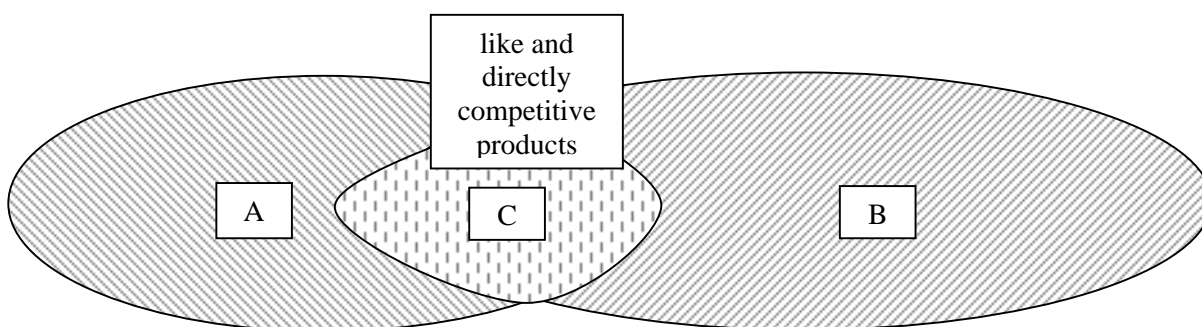


Diagram 3

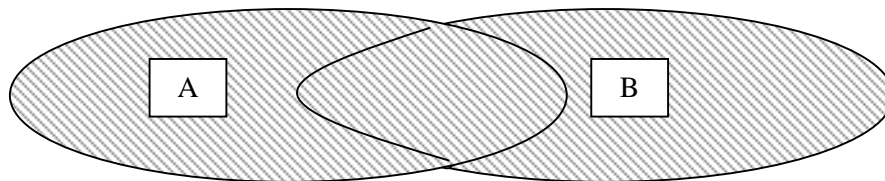


²⁷⁴ This and the following diagrams are illustrative only and not according to scale.

7.87 Both of the parties' interpretations of the term "and/or" are grammatically possible. However, in our view, the chart shows that the US interpretation is flawed in that among other things, one of the categories of a domestic industry, *i.e.* the producers of product A in the chart above, is a meaningless alternative. Imports of any textile product cannot damage producers of "like but not directly competitive products" through market competition. The United States itself conceded that "if the products of domestic producers are *not* directly competitive with imports – such as in the case of yarn manufactured by vertically integrated producers for their internal consumption – the need for safeguard action would not arise."²⁷⁵ Indeed, not only would the need not arise, but the case could not be made because causation could not be demonstrated. Thus, the treaty would give a meaningless right. In this respect, the US interpretation is inconsistent with the principle of effectiveness in treaty interpretation.²⁷⁶

7.88 In the case, which would be difficult to envision, where "like products" (A) is not a subset of "directly competitive products" (B), the more logical description of the category of "like and directly competitive products" would be $A \cup B$ (A plus B), *i.e.* the broader grouping, rather than the narrow US suggestion of $A \cap B$ (both A and B, which is shown in the previous illustration as "C"). This is the more logical reading of the language and is consistent with the usage everywhere else in the WTO Agreements. In our view, the correct illustration of "like and directly competitive" is as follows:

Diagram 4



²⁷⁵ US First Submission, para. 50. (emphasis in original) (*Also* paragraph 4.21.)

²⁷⁶ Appellate Body, in *US – Gasoline*, stated as follows:

"... One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

Appellate Body Report on *US – Gasoline*, op. cit., p. 23. *Also* Appellate Body Reports on *Japan – Alcoholic Beverages*, op. cit., p. 12; *US – Underwear*, op. cit., p. 16; *Argentina – Footwear*, op. cit., para. 95; and *Korea – Dairy*, op. cit., para. 81.

Thus, the category "like *and* directly competitive products" should consist of *A plus B* ($A \cup B$), rather than the mere overlap of the two ($A \cap B$).²⁷⁷

7.89 Further, in our view, the US interpretation is problematic in permitting Members to impose transitional safeguard measures for domestic producers of "unlike but directly competitive products". This means that "serious damage" would be found based upon the examination of the situation regarding these producers, without taking into consideration the situation regarding producers of "like and directly competitive products", which are *core* products competing with subject imports. To give an example of the absurdity of the potential result from the US formulation, take the following example of an investigation with respect to an industry producing directly competitive but unlike products. In such a case the imported products could be combed cotton yarn as in the present case, but the domestic industry would not be the cotton yarn industry; rather, it could be the synthetic yarn industry if such products were found to be directly competitive. But because the chosen category is unlike but directly competitive, then the combed cotton yarn producers would be excluded from the investigation.²⁷⁸ This would leave open the possibility of finding serious damage and causation thereof even where the domestic combed cotton yarn industry was flourishing, but the synthetic yarn industry was in trouble. This would seem to be in direct conflict with the requirement of the treaty language in Article 6.2 that "Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product *and not by such other factors as technological changes or changes in customer preferences.*" (emphasis added)

²⁷⁷ We note that the term "and/or" is used in the following places in the WTO Agreements: (i) DSU: Article 8.1; (ii) TRIPS: Articles 45.2 and 61; (iii) GATS: Articles V:1, XXVII(b)(ii) and XXVIII(f)(i); Annex on Air Transport, paragraph 6(d); (iv) SCM: Articles 8.2(c) and 25.3; Illustrative List, item (k); Annex V, para. 6; (v) Licensing: Articles 3.3, 3.5(a)(iv), and 3.5(b); (vi) Rules of Origin: Articles 9.2(c)(iii) and 9.3(a); (vii) Agriculture: Annex 5, Section A, para. 1; (viii) Textiles: Articles 5.1, 5.2, 5.3, 5.6, 6.2 and 6.13; (ix) Antidumping: Articles 2.2.1.1 and 9.5; (x) Preshipment Inspection: Articles 1.3 and 2.17; and (xi) Valuation: Articles 2.1(b) and 3.1(b); Annex I, Note to Article 2, para.3 and Note to Article 3, para. 3.

In the instances enumerated above, the items linked by the "and/or" are discrete factors not dependent on each other for their definitions. The "and/or" term allows the person applying it flexibility as to which of the factors to include. Either one may be used individually or both may be included collectively. A useful example may be found in Annex I to the Customs Valuation Agreement. It is provided there as a note to Article 2 as follows:

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:
 - (a) quantity factors only;
 - (b) commercial level factors only; or
 - (c) both commercial level and quantity factors.
3. The expression 'and/or' allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above."

While the use of the term "only" might superficially seem to support the US position, a closer look shows that, among others, the third category is constructed with "and" as a broad, inclusive meaning rather than referring to a narrow overlap.

²⁷⁸ While the United States did not explain the full functioning of their proposed system of applying the categories of domestic production, it could be argued that this category of directly competitive but unlike would only be applied if there were no like products. First, there is no basis in the treaty language for such an assertion. Second, this interpretation would mean that there would be no option of examining an industry producing directly competitive products when, as a factual matter, the like products were found to be a subset of directly competitive products (which as we have stated is by far the most common, if not the exclusive case). Thus, instead of the treaty language presenting options to the importing Member, the US approach would *dictate* which of the three possibilities must be used in a particular factual situation. And the most common factual situation where like products are a subset of directly competitive would be eliminated as one of the options.

7.90 Therefore, in our view, we agree with Pakistan's interpretation on "and/or", and find that the United States is in violation of Article 6.2 of the ATC in excluding the captively produced combed cotton yarn from the scope of the domestic industry.

F. FINDING OF SERIOUS DAMAGE

1. Reliability of AYSA Data

7.91 **Pakistan** claimed that the United States based its determination on the state of the domestic industry on the data supplied by the American Yarn Spinners Association (AYSA), which data, however, were unverified, incorrect and incomplete. Pakistan claimed that the data supplied by AYSA were inherently untrustworthy because this organization had previously supplied incorrect data. Pakistan recalled that combed cotton yarn, ring spun, from Pakistan had been subject to a request for restraint by the United States in 1997, and that the Market Statement²⁷⁹ presented on that occasion included data supplied by AYSA which turned out to be inconsistent with official data that were subsequently published. The US official statistics had not been available when the 1998 Market Statement was finalized in December 1998, and thus, without verification using any official statistics, the United States relied the data supplied by the AYSA, which is composed of domestic producers of combed cotton yarn, and thus, has an interest in the safeguard measure in question.²⁸⁰ The Census figures published subsequent to the finalization of the Market Statement cannot be reconciled with the data provided by AYSA for the period January-August 1998. While AYSA had reported a 10.2 per cent decline in production between January-August 1997 and January-August 1998, the Census figures show only a drop of 5 per cent between the calendar years 1997 and 1998. According to Pakistan, this confirms that the data provide by AYSA could not be trusted.²⁸¹

7.92 In response, the **United States** first argued that the Census data were not available to the US authority at the time of investigation, and as such, should be disregarded. Further, the aforesaid 1997 Market Statement is for ring spun yarn which is additional evidence outside the scope of our review. Should it be deemed relevant, it would enhance the integrity of the data contained in the 1998 Market Statement, because in the case of combed cotton ring spun yarn, the United States discovered evidence that called the 1997 Market Statement into question, and consequently, did not impose a transitional safeguard measure at that time.²⁸² Further, the United States stated that it decided on the reliability of the AYSA data by confirming that the 1996 and 1997 production data supplied by the AYSA were consistent with its official statistics;²⁸³ both the AYSA data and the official statistics showed a decline in domestic production despite the alleged discrepancy between them.²⁸⁴ Further, the United States pointed out that it verified the AYSA data not only by comparing them with official data but also by engaging in direct discussions with individual firms.²⁸⁵

7.93 On the issue of the reliability of the AYSA data, the **Panel** first notes that in Section E above, we already found that the United States excluded the captive production of combed cotton yarn from the scope of the domestic industry, and the measure at issue is inconsistent with Article 6.2. This is enough to recommend that the DSB find the US measure at issue inconsistent with the ATC.

²⁷⁹ Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Yarn for Sale, 85 Per cent or More by Weight Combed Cotton Ring Spun Category 301 Part, April 1997 (the "1997 Market Statement"), PAK Ex. 2.

²⁸⁰ See Pakistan First Submission, pp. 30-31, and Rebuttal Submission, paras. 52-53. (Also paragraphs 4.95-4.98.)

²⁸¹ See Pakistan First Submission, p. 31. (Also paragraph 4.96.)

²⁸² See US First Submission, paras. 157-158, and US Oral Statement at the Second Substantive Meeting with the Panel, para. 10. (Also paragraph 4.124.)

²⁸³ See US First Submission, para. 150. (Also paragraph 4.125.)

²⁸⁴ See US First Submission, paras. 152-153. (Also paragraph 4.125.)

²⁸⁵ See US First Submission, paras. 150 and 154. (Also paragraph 4.121.)

However, in order to provide the full explanation to the parties, we have declined to exercise judicial economy and have proceeded to examine the other claims of Pakistan.

7.94 Next, we have to decide, based on the correct standard of review, whether certain evidence submitted by Pakistan should be disregarded or not. Our conclusion, in paragraph 7.33 above, was that we can and should examine any evidence, not for the purpose of reinvestigating the market situation, but only for the purpose of reviewing the thoroughness and sufficiency of the decision of the US authority. Accordingly, in our view, the 1998 calendar year US Census data should be examined by the Panel, even though they were not available to the US government at the time of investigation, in order to confirm whether the reliance by the US investigation authority on the AYSA data is justifiable. Pakistan presented the data in order to contest the reliability of the AYSA data, rather than to claim that the decision of the US authority is unjustifiable in light of "developments subsequent to the ... determination."²⁸⁶

7.95 First, keeping this in mind, we will proceed to examine the parties' arguments, and we note that data supplied by AYSA in the 1997 investigation proceeding for a transitional safeguard measure on combed cotton ring spun yarn might not have been fully accurate. However, it would be exaggerated to conclude that because of that, data supplied by AYSA in the proceeding for the transitional safeguard measure at issue were "inherently untrustworthy." If evidence is supplied by a party which has interest in the proceeding, such evidence should be more carefully examined for reliability. However, this does not lead to a generalization that evidence supplied by trade associations consisting of domestic producers which are requesting trade remedies such as transitional safeguard measures is *per se* unreliable. It becomes then a question of verification and judgement by the investigating authority.

7.96 Second, we note that there is evidence the US investigation authority did seek to make an objective fact-finding in this regard. This is exemplified by the reaction of the United States to data supplied by AYSA in the 1997 proceeding; the United States pointed out as follows: "In the process of conducting ongoing verification of the data, the United States discovered evidence that called the 1997 statement in question. As a result, ... the United States did not impose an Article 6 safeguard with respect to combed cotton ring spun ...".²⁸⁷ Further, we note that the United States pointed out that it verified production data for 1996 and 1997 supplied by AYSA for the transitional safeguard measure at issue by comparing them with the official statistics, as shown in paragraph 1.4(b) of the 1998 Market Statement.²⁸⁸

7.97 In light of the foregoing, we consider that Pakistan has not established that data supplied by AYSA are inherently untrustworthy. It is not for panels to prescribe precise methodologies for information gathering and verification. In our view, the US methods used in this proceeding are not unjustifiable, even though we recognize that there may be other approaches.

7.98 With respect to Pakistan's challenge to data supplied by AYSA for January-August 1998, we do not agree that the US fact-finding based upon the data supplied by AYSA is unjustifiable. Pakistan pointed out that there is a discrepancy between the data and the official statistics, but in light of the difference for the subject period (*i.e.* AYSA data - the eight-month period for January-August 1998 and the Census data - the one-year period for 1998), in our view, this discrepancy is not sufficient for us to conclude that the factual situation was not "demonstrated" within the meaning of Article 6.2.

²⁸⁶ Panel Report on *US – Shirts and Blouses*, op. cit., para. 7.21.

²⁸⁷ US First Submission, para. 158. (*Also* paragraph 4.124.)

²⁸⁸ US Ex. 3, para. 1.4(b). *See also* US Answers to Panel's Questions, 28 November 2000, para. 84 and fn. 64. (*Also* paragraphs 4.104, 4.107 and 4.106.)

7.99 On this point, **Pakistan** further argued that if both sets of data were correct, monthly production by domestic producers during the period from September to December 1998 was nine per cent higher than the average monthly production during the period from January to August 1998 despite the fact that there were fewer establishments operating during the September to December period.²⁸⁹

7.100 The **United States** responded that this shows a decline in domestic production in 1998 and that the decline was most severe in the earlier part of the year, and accordingly, supports its position.²⁹⁰

7.101 In the **Panel's** view, Pakistan's calculation does not establish that AYSA data were incorrect, because a nine per cent increase in monthly production does not necessarily sound unrealistic, and Pakistan has not so proven. Thus, we do not find the US determination unjustifiable in this regard.

2. Treatment of Establishments Retooled to Produce Other Products

7.102 **Pakistan** also argued that the United States should not have treated as indicia of damage to the domestic industry the fact that establishments producing combed cotton yarn had been retooled to produce carded cotton yarn or any other products. In support of this proposition, Pakistan referred to Article 1.5 of the ATC, which provides that, in order to facilitate the process of integration of the textiles and clothing sector into the GATT disciplines, "... Members should allow for continuous autonomous industrial adjustment...".²⁹¹ In this connection, Pakistan argued that in the 1998 Market Statement, the United States erroneously mentioned that "three establishments which are producers of the subject yarn *closed*," because these establishments had not ceased operation during the investigation period.²⁹²

7.103 In rebuttal, the **United States** argued that the retooled establishments were now producing entirely different products, and thus, had exited the combed cotton yarn industry. Accordingly, this can be used as an indicator of "serious damage" to the domestic industry. In support, the United States pointed out that the ATC allows the textiles and clothing sector to restructure over a ten-year period.²⁹³ Also, in response to Pakistan's claim that the 1998 Market Statement is erroneous in stating that three establishments ceased operation during the investigation period, the United States noted that they ceased producing combed cotton yarn, and then switched to carded cotton yarn.²⁹⁴

7.104 In the **Panel's** view, this issue concerns the interpretation of the term "damage" under Article 6.2. Transitional safeguard measures are permitted to protect the domestic industry producing – rather than individual companies which are producers of – "like and/or directly competitive products" from import competition. Pakistan itself argues that the scope of the domestic industry is determined not by producers but by products.²⁹⁵ Otherwise, changes in ownership of domestic enterprises producing "like and/or directly competitive products" could be deemed as an indicator of "serious damage" to the "domestic industry".

²⁸⁹ Pakistan Rebuttal Submission, paras. 55-57, as corrected later by Pakistan's Answers to Panel's Questions, 14 December 2000, p. 4.

²⁹⁰ US Letter dated 15 December 2000 to the Chairman of the Panel.

²⁹¹ Pakistan First Submission, pp. 31-35. (*Also* paragraph 4.92.)

²⁹² Pakistan First Submission, pp. 32-34 (emphasis in original), and Rebuttal Submission, para. 64. (*Also* paragraphs 4.98, 4.101 and 4.133.)

²⁹³ See US First Submission, paras. 163-166. (*Also* paragraphs 4.142 and 4.144-4.146.)

²⁹⁴ US First Submission, paras. 161-162. (*Also* paragraph 4.137.)

²⁹⁵ Pakistan First Submission, pp. 4-5. (*Also* paragraphs 4.18-4.20.)

7.105 In this connection, we recall that Pakistan argued that "if a plant produces carded instead of combed yarn, thrives in its new capacity and retains its workforce, the increase in imports obviously did not cause *grave injury that impaired its value or usefulness*."²⁹⁶ However, we disagree with this argument. Assume that, in reaction to import surge, domestic producers of certain textile products merged into companies in another industry; and the establishments of the acquired producers, after retooling to produce totally different products, achieved the same level of production, sales, profit, employment, etc. In this situation, indeed, the "value" of the retooled establishments may not have been impaired in some overall sense, but it would be obviously unreasonable that no transitional safeguard measure would be permitted since the "domestic industry" producing the textile products was driven out by the import surge. In our view, the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of "serious damage" to a subject domestic industry.²⁹⁷

7.106 This is a corollary to our findings regarding the relevance of ownership in paragraphs 7.63-7.65 above. If the industry is defined by the *producers* of the *products*, then it follows that if the producers change products, they are no longer in the industry, and accordingly, the fact can be treated as indicia of "damage" to the industry.²⁹⁸

7.107 We further note that this conclusion is consistent with Article 1.5, in contrast to Pakistan's argument. Indeed, it might be a good example of "autonomous industrial adjustment" that plants were retooled to produce different products. However, Article 6.2 provides that Members may take transitional safeguard measures in order to react to "serious damage" to a domestic industry. Insofar as damage experienced by a domestic industry is not "serious", no transitional safeguard measure will be permitted and, accordingly, the importing Member must allow for "autonomous industrial adjustment" which the domestic industry will make to deal with the damage. In other words, it is a matter of degree. If a limited number of establishments exit the industry, that might be an indicator of some sort of damage, but of an amount consistent with "autonomous industrial adjustment." But if a larger number of establishments exit, it can be an indicator of serious damage. Thus, the exit of establishments is a relevant factor as long as properly weighted, and we do not find the US determination here to be unjustifiable in this regard.

3. Other Factual Claims

7.108 **Pakistan** contested the US fact-finding on employment and investment. First, according to Pakistan, the employment and production figures concerning combed cotton ring spun yarn for the year 1996 contained in the 1997 Market Statement seem inconsistent with those concerning combed cotton yarn for the same year contained in the 1998 Market Statement. Second, the 1998 Market Statement erroneously states that "investment in recent years has been to update and replace

²⁹⁶ Pakistan Rebuttal Submission, para. 65. (emphasis in original) (*Also* paragraph 4.91.)

²⁹⁷ We note that in support of its proposition, Pakistan emphasized that it is not difficult to switch from the production of combed cotton yarn to that of carded cotton yarn. *See* Pakistan Rebuttal Submission, para. 67. In our view, it might be relevant to the determination on "serious damage" how easy it is for establishments retooled to produce carded cotton yarn or any other product to resume the production of combed cotton yarn. However, the arguments of the parties on this point suggest that it costs more or less to switch from the production of combed cotton yarn to that of carded cotton yarn, and *vice versa*. *See* Pakistan's Answers to Panel's Questions, 28 November 2000, pp. 17-20 and US Answers to Panel's Questions, 28 November 2000, paras. 41-47. We further note that the US finding of "serious damage" does not rely exclusively on the fact that the two establishments ceased to produce combed cotton yarn. *See* US Ex. 3, para. 8.3. Thus, in our view, Pakistan has not established that the US finding of "serious damage" is unjustifiable in this respect.

²⁹⁸ In this connection, we further note that Pakistan did not include in the terms of reference a claim that the other products in question (*e.g.* carded cotton yarn) are like or directly competitive products.

equipment rather than to create new productive capacity,"²⁹⁹ in light of the fact that between 1993-1997, the units producing combed cotton yarn decreased by 37 per cent, but combed cotton yarn production rose by 44 per cent.³⁰⁰

7.109 Initially, **the Panel** recalls that the 1998 Market Statement found that the US industry suffered serious damage based primarily on the comparison of relevant economic variables between the period of January-August 1997 and that of January-August 1998.³⁰¹ Pakistan's figures regarding employment and production in the 1997 and 1998 Market Statements are not based on equivalent segments; in the 1997 Market Statement, for ring spun combed cotton yarn for sale while in the 1998 Market Statement, for all combed cotton yarn for sale.³⁰² The figures are not sufficient for us to conclude that the US fact-finding is unjustifiable. We also note that there are many ways of explaining changes in production; new machinery may be more efficient; labour may be employed more effectively, etc. In order to reach the conclusion Pakistan requests, we would need to engage in a *de novo* review of the factual situation.

7.110 In our view, Pakistan's aforesaid factual claims described in this section are not enough to sustain a challenge to the overall justifiability of the US fact-finding.

G. INVESTIGATION PERIOD, INCLUDING PERIOD FOR DETERMINING SERIOUS DAMAGE AND CAUSATION

7.111 **Pakistan** contested the US causation analysis.³⁰³ The correlation of an upward trend in imports and negative trends in the relevant economic variables of the domestic industry must be central to the causation analysis. But such correlation can be found only in the comparison of relevant economic variables on an eight-month basis, *i.e.* between the period of January-August 1997 and that of January-August 1998. Pakistan argued that the analysis on an eight-month basis is not enough, referring to the recommended guidelines adopted at the Committee on Anti-Dumping Practices for time period for investigation, which states that "the period of data collection for injury investigation normally should be *at least three years*." Pakistan also pointed out that "five-year investigation periods are common" under Article XIX of the GATT.³⁰⁴

7.112 In response, the **United States** pointed out that the ATC does not provide for a specific minimum time period for investigation. Article 6.7 of the ATC only requires that the Member proposing to take safeguard action provide "specific and relevant factual information, as up-to-date as possible...", which "shall be related, as closely as possible ..." to the 12-month period to be referenced under Article 6.8 to determine the level of restraints. When the United States made a request for consultation in December 1998, the data for the period of January-August 1998 was the best available data. Also, the United States based its determination on the comparison of relevant

²⁹⁹ US Ex. 3, para. 5.15.

³⁰⁰ See Pakistan First Submission, pp. 35-36. (*Also* paragraphs 4.99-4.153.)

³⁰¹ See US First Submission, paras. 81-82. (*Also* paragraphs 4.5 and 4.85-4.88.)

³⁰² See Pakistan First Submission, p. 35. (*Also* paragraph 4.124.) The 1997 Market Statement indicates that the US investigation authority "excluded from its investigation other combed cotton yarn for sale, including ... yarn produced by the open-ended spinning method", because it "distinguished ring spun from open-end because such products are not like and/or directly competitive products with the subject yarn due to their physical characteristics, commercial applications and price structure." 1997 Market Statement, PAK Ex. 2, para. 1.2. In contrast, the 1998 Market Statement does not exclude ring spun from the scope of the investigation. See 1998 Market Statement, US Ex. 3, paras. 1.1-1.2.

³⁰³ We note that this issue also included the proper period for assessing serious damage and we have considered it in this sense, as well.

³⁰⁴ Pakistan First Submission, pp. 36-39. (*Also* paragraph 4.152.)

economic variables between 1996 and 1997 as well, and as a result, on the two year and eight month investigation.³⁰⁵

7.113 **The Panel** first notes that Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports. The parties agreed on this point.³⁰⁶

7.114 Second, Article 6.7 of the ATC requires that when the Member invoking a transitional safeguard measure seeks consultations with the Member or Members which would be affected by such action, it shall provide the Member or Members with "specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors ... on which the Member invoking the action has based its determination of the existence of serious damage or actual threat of damage; and (b) the factors ... on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned." Also, that Article provides that "the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8", which period is defined under paragraph 8 as "the 12-month period terminating two months preceding the month in which the request for consultation was made." In our view, Article 6.7 does not address, directly or indirectly, the length of either investigation periods or periods during which damage occurs. For example, the requirement that the information to be provided to the exporting Member or Members "be related, as closely as possible, to the [12-month] reference period" does not give any guidance as to how long the investigation period should be or how long damage should continue in order to constitute "serious damage" and causation thereof.

7.115 In this respect, we recall Pakistan's argument that "since the damage must be determined to be 'serious', the period must be adequately long to discern that the effect of imports was more than just temporary."³⁰⁷ However, it is unclear how this general consideration demands that the period during which the serious damage occurred must be longer than the eight months utilised by the United States. In our view, whether or not the chosen period is justifiably long would depend on, at least partly, the extent of the damage suffered by a subject domestic industry during that period. Thus, we deem it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC.

7.116 In light of this, we interpret Pakistan's claim as requesting the Panel to examine the factual question of whether the US fact-finding on serious damage and causation is accurate, rather than to address the legal issue of whether Article 6 of the ATC requires that the period during which the damage occurs be longer than the period the United States focused on in this particular case.³⁰⁸ Thus, we will make an "objective assessment of facts" on this point using the "justifiability" standard discussed in Section 3 above.

7.117 We further note that Pakistan also contested the US focus on the eight-month period in finding serious damage and causation, based on the specific set of facts in this case. Pakistan argued that economic variables of the domestic industry during a longer period would present a much more positive picture of the US domestic industry, noting that the domestic production declined only between 1997 and 1998 after having reached unprecedented heights in 1997.³⁰⁹ Pakistan also claimed that the "focus on the evolution during an eight-month period only made it impossible to segregate the effect of rapidly declining exports from the effect of imports"; the decline in exports between 1997

³⁰⁵ US First Submission, paras. 101-107. (*Also* paragraph 4.103.)

³⁰⁶ *See* Pakistan First Submission, p. 37 and US First Submission, para. 101. (*Also* paragraph 4.103.)

³⁰⁷ Pakistan First Submission, p. 37. (*Also* paragraph 4.152.)

³⁰⁸ In this respect, we recall that Pakistan indicated that "Article 6 of the ATC does not explicitly impose a specific minimum period for which data must be collected, nor has such a period been established by jurisprudence." Pakistan First Submission, p. 37. (*Also* paragraph 4.100.)

³⁰⁹ Pakistan First Submission, pp. 38-39. (*Also* paragraphs 4.96-4.98.)

and 1998 "is due to the fact that Mexico, which as recently as 1996 had accounted for two-thirds of United States exports of combed cotton yarn, is now producing this yarn itself."³¹⁰

7.118 We note that in support of its conclusion that "the increase in imports in 1998 has caused serious damage to the industry," the 1998 Market Statement found and considered, among others, the following changes in the situation of the US domestic industry, the domestic market and imports from all sources, between the calendar years 1996 and 1997, and between January-August 1997 and January-August 1998:

- (a) Three out of twenty-two establishments had closed since 1996, and two of them closed during January-August 1998;
- (b) there was a loss of 423 jobs in the domestic industry from 1996 through August 1998, of which 340 jobs were lost in January-August 1998;
- (c) US production increased by 1.6 per cent between 1996 and 1997, and decreased from 98,371,000 kilograms to 88,337,000 kilograms (10.2 per cent lower) between January-August 1997 and January-August 1998;
- (d) US shipments decreased by 0.4 per cent between 1996 and 1997, and also decreased from 99,818,000 kilograms to 85,644,000 kilograms (14.2 per cent lower) between January-August 1997 and January-August 1998;
- (e) US exports increased by 2.8 per cent between 1996 and 1997, and decreased from 10,690,000 kilograms to 7,168,000 kilograms (32.9 per cent lower) between January-August 1997 and January-August 1998;
- (f) Capacity utilization decreased by 3.6 per cent between 1996 and 1997, and also decreased from 84.3 per cent to 75.7 per cent (8.6 percentage points lower) between end of August 1997 and end of August 1998;
- (g) End-of-period inventories increased by 43.8 per cent between 1996 and 1997, and also increased by 145.9 per cent between January-August 1997 and January-August 1998;
- (h) Unfilled orders increased by 22.8 per cent between the year-end 1996 and the year-end 1997, but decreased 15.8 per cent between the end of August 1997 and the end of August 1998;
- (i) The average number of employees decreased by 1.6 per cent between 1996 and 1997 and also decreased by 6.6 per cent between January-August 1997 and January-August 1998; the number of hours worked increased by 1.2 per cent between 1996 and 1997, and decreased by 6.6 per cent between January-August 1997 and January-August 1998; and hourly wages increased from \$8.34 to \$8.67 between 1996 and 1997 and also increased from \$8.67 in January-August 1997 to \$9.02 in January-August 1998³¹¹;

³¹⁰ Pakistan First Submission, p. 39. (*Also* paragraph 4.169.)

³¹¹ The 1998 Market Statement explains that "[t]he increase in the average hourly wage rate was attributed to the upward pressure exerted by exogenous factors outside the control of the companies in this industry including the influence of the mandated rise in the US minimum wage, ...". US Ex. 3, para. 5.10.

- (j) Profitability ratio decreased from 4 per cent to 3.5 per cent between 1996 and 1997, and also decreased from 3.9 per cent to 2.1 per cent between January-August 1997 and January-August 1998;
- (k) New investment in productive capacity was stagnant;
- (l) Imports from all sources increased 12.1 per cent between 1996 and 1997, and also increased by 9,828,000 kilograms or 91.3 per cent between January-August 1997 and January-August 1998, to 20,595,000 kilograms;
- (m) The apparent domestic market remained relatively constant during the period increasing by 0.8 per cent between 1996 and 1997, and decreasing by 0.8 per cent in January-August 1998 from the January-August 1997 level;
- (n) US producers' market share decreased from 87.1 per cent to 85.7 per cent (1.4 percentage points lower) between 1996 and 1997, and also decreased from 89.2 per cent to 79.2 per cent (10 percentage points lower) between January-August 1997 and January-August 1998;
- (o) The ratio of imports to domestic production increased from 13.4 per cent to 14.8 per cent between 1996 and 1997, and also increased from 10.9 per cent to 23.3 per cent between January-August 1997 and January-August 1998; and
- (p) The average landed duty-paid value of imports was \$4.54 per kilogram during the period January-August 1998, 7.8 per cent below the average US producers' price.³¹²

7.119 Further, in support of its conclusion that "serious damage to this industry is directly attributable to a sharp and substantial increase in imports of the subject yarn from Pakistan,"³¹³ the 1998 Market Statement found and considered, among others, the following changes in imports from Pakistan of combed cotton yarn between January-August 1997 and January-August 1998:

- (a) Imports from Pakistan, in volume, increased from 942,756 kilograms to 3,612,652 kilograms (283.2 per cent higher);
- (b) Pakistan is the second largest supplier;
- (c) Imports from Pakistan, as a percentage of total imports, increased from 8.8 per cent to 17.5 per cent, and as a percentage of US production, increased from 1.0 per cent to 4.1 per cent, between January-August 1997 and January-August 1998; and
- (d) The average landed duty-paid value of imports from Pakistan was \$3.63 per kilogram during the period January-August 1998, 26.2 per cent below the average US producers' price.³¹⁴

7.120 In light of the magnitude of the aforesaid changes in economic variables of the US domestic industry,³¹⁵ the surge in imports from Pakistan between January-August 1997 and January-August

³¹² 1998 Market Statement, US Ex. 3, Sections V and VI. *See also* US First Submission, para. 115. (*Also* Table 2, paragraph 4.173.)

³¹³ 1998 Market Statement, US Ex. 3, para. 7.1. (*Also* paragraphs 3.2, 4.5 and 4.157-4.159.)

³¹⁴ 1998 Market Statement, US Ex. 3, paras. 7.2-7.5. *See also* US First Submission, para. 131. (*Also* paragraph 4.158.)

³¹⁵ In light of the specific data set out here, we wish to recall our finding that the United States did not properly identify the domestic industry. The specific facts would thus be different if a proper definition were used.

1998, and the price-undercutting of imports from Pakistan, together with changes in all relevant economic variables between 1996 and 1997, in our view, Pakistan has not established that the US choice of the period is unjustifiable. The "period of investigation" was sufficiently comprehensive, and the question of whether an eight-month period of damage caused by imports was sufficiently long to find serious damage and causation is a case-by-case determination.

7.121 In this case, for the reasons discussed above, we conclude that in respect of the length of the investigation period and the period in which serious damage occurred, Pakistan has not established that the United States failed to demonstrate "serious damage" to the domestic industry, and the causal link between the serious damage and imports from Pakistan.³¹⁶

H. ATTRIBUTION

7.122 The **United States** argued that Article 6.4 of the ATC authorizes Members to apply safeguard measures on a Member-by-Member basis. According to the United States, this is consistent with the requirement that a sharp and substantial increase in imports be assessed on an individual Member basis. The requirement is only that a Member subject to investigation have its exports compared to "all other sources", that is, to the basket of other exporters. The United States asserted that the breakdown of exporters, as done in Table V of the 1998 Market Statement, goes further than is required by Article 6.4, which requirements could be satisfied by a simple comparison of Pakistan to a grouping of all other exporters. It then follows that a safeguard measure may be applied to any, but not all, Member or Members that are a cause of the serious damage.³¹⁷

7.123 **Pakistan** responded that a proper attribution analysis cannot be done if the largest exporter, in this case Mexico, is simply ignored. Mexico's exports of the subject product had increased rapidly and from a higher base. It is inconceivable that the United States could do a proper attribution analysis without also individually examining Mexico's exports.³¹⁸

7.124 In **the Panel's** view, it is clear from Article 6 of the ATC that safeguard measures need not be applied on an MFN basis. They are to be applied only to those imports causing serious damage, not to all imports. Furthermore, they are not to be imposed on imports already subject to restraint. However, we do not agree that this means that restraints can be imposed only on some of the imports which may be responsible for causing serious damage. We think that that approach stretches both the logic and the language of Article 6.4 too far.

7.125 In our view, the analysis should proceed in the following manner. First, there is an assessment of the state of the domestic industry. This can be seen as determining the level of actual damage caused to the industry. Next, it must be determined if this actual damage constitutes "serious damage". If there is serious damage to the domestic industry, the next step is to determine pursuant to paragraphs 2 and 3 of Article 6 whether imports are causing such damage. Damage from other factors such as technological changes or changes in consumer preferences must not be attributed to imports in assessing whether such imports have caused serious damage.

7.126 However, unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, the analysis cannot stop there. The Member imposing a safeguard under the ATC must then do a further attribution analysis and narrow the causation down to only those Members whose exports are causing the serious damage. This does not mean, however, that a

³¹⁶ We recall that this must be read *mutatis mutandis* with our conclusion that the United States did not properly define the domestic industry.

³¹⁷ See US First Submission, paras. 125-141 and Rebuttal Submission, paras. 73-79. (Also paragraphs 4.161-4.163.)

³¹⁸ See Pakistan First Submission, pp. 41-42 and Rebuttal Submission, paras. 85-94. (Also paragraphs 4.160, 4.164, 4.165 and 4.167.)

Member imposing a safeguard restraint can then pick and choose for which Member(s) it will make an attribution analysis. The attribution cannot be made only to some of the Members causing damage, it must be made to all such Members. The language of Article 6.4 leads to this conclusion. The first sentence contains a requirement that safeguard measures shall be applied on a Member-by-Member basis. However, this is a reference to the *application* of the measure, not the attribution analysis of which Members are subject to such measure(s). That is covered by the second sentence which specifically speaks of "attribution" of causation of serious damage in contrast to the first sentence which describes how the measure is to be "applied". The second sentence reads:

"The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, 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 the import and domestic prices at a comparable stage of commercial transaction. . ."

7.127 Obviously, we first look to this language of the treaty itself. The reference is to the Member or Members to whom serious damage is attributed and it refers specifically back to the previous two paragraphs which describe the obligations in making such a determination of serious damage. This explicit linking back to the serious damage determination, in our view, requires that *all* the Members causing the serious damage must have it so attributed.³¹⁹ Thus the question is which Member(s)' exports caused the serious damage as determined pursuant to paragraphs 2 and 3, rather than identifying some new sub-group that is not specified by the treaty language. The rest of the sentence merely describes a methodology. It does not permit a reading to the effect that only one of such Member or Members to whom causation of serious damage is attributed may be subjected to restraints. As a factual matter, it may end up being only one to whom causation is properly attributed, but that can only be determined *after* a proper attribution analysis is done, not *before* as the United States has done in the present investigation.

7.128 As always, we should examine the context and the object and purpose of this language for guidance in interpreting its meaning. We recall that the four corners of the treaty is the WTO Agreement as a whole. As we discussed above, we do not agree with the US argument that the ATC should be interpreted in isolation from the rest of the GATT/WTO.³²⁰ It is distinct where it specifically states that it is such in the treaty language, but it must be interpreted in the context of the WTO Agreement as a whole when there is a question as to its meaning. We also recall that the Preamble of the ATC provides that the ATC is meant to be an agreement embodying the progressive integration of the sector into GATT/WTO on the basis of strengthened GATT/WTO rules and disciplines. In our view the method most consistent with the WTO Agreement', including the Safeguards Agreement's, requirements of MFN treatment and with the ATC's object and purpose is to require attribution to *all* Members found to be causing serious damage, not just one or some of such Members. Such an ability to pick and choose Members as proposed by the United States would be the least consistent with an MFN approach and, therefore, would be the least conducive to the progressive integration of the sector into the WTO system.

7.129 A further review of the context of applying safeguards measures under Article 6, even on a non-MFN basis, supports this conclusion. Article 5.1 of the Safeguards Agreement provides that: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and facilitate adjustment." While we recognize the distinction between general safeguard actions and safeguard measures applied pursuant to the ATC, we consider this particular statement

³¹⁹ This is supported by the French and Spanish texts of the agreement which use definite articles in referring to the serious damage determination, namely "le préjudice grave" and "el perjuicio grave", respectively, both of which refer directly to the earlier determination.

³²⁰ See the discussion in paragraphs 7.46-7.47 above.

one of general applicability. Applying this logic to Article 6 of the ATC implies that a safeguard restraint will be imposed at such a level presumably to alleviate the serious damage. If this were not the case, *i.e.* a solution sufficient to cure the problem, it would hardly make sense to impose any restraint. However, if the restraint could be imposed on only one Member contributing to the serious damage, then such a Member would suffer a disproportionate level of the pain for the remedy. If, however, an appropriate attribution analysis is undertaken, then the restraint will be spread appropriately to all Members whose exports have caused the serious damage.

7.130 Thus, the correct interpretation of Article 6.4 requires an analysis of the imports from individual Members, but it does not mean that such analysis may be limited to only some of the Members of those which are the cause of the serious damage. The treaty language of the second sentence of Article 6.4 provides the method for proceeding; compliance with this method is mandatory, as indicated by the term "shall" used in this provision. The first step is that there must be an examination of the imports from all the Members which have shown the characteristics of a sharp and substantial increase. We take the term "sharp" to refer to the percentage increase and the term "substantial" to refer to the absolute increase. Thus, for example, it would not be necessary to examine the imports from a Member which showed a sharp percentage increase if such imports were from a low base because they would not then represent a substantial increase in imports. This obviously must be done on an individual Member basis or there could be a blurring of the two criteria and it could result in sweeping in Members whose exports possibly met one but not both of the criteria. But to say it needs to be done individually does not imply that it can be limited only to some individual Members. Then the required second step of the attribution analysis is to take all the Members whose exports have met the criteria of the first step and examine them according to the other listed criteria in Article 6.4, namely, a comparative assessment of levels of imports from other sources, market share and import and domestic prices at a comparable stage of commercial transaction. Only at this point can the investigating authority come to a justifiable conclusion as to which Member or Members the causation of serious damage can be attributed. To simply stop after finding that one Member is contributing to serious damage does not satisfy the obligations of Article 6.4.

7.131 Thus, there are three categories of exporters in each case: (1) those causing the serious damage and not subject to existing restraints; (2) those to which the serious damage is not attributable; and (3) those already subject to restraints. New restraints may only be imposed on individual Members in the first group.³²¹ Identifying that first group means certain examinations on an individual Member basis, as discussed above. It also means imposing the restraint on a Member-by-Member basis, as restraints in this sector are administered by the exporting Member, not by the importing Member. However, it does not mean that only some of the Members in the first category will be subject to the restraint while others in that same category are excluded from the restraint.

7.132 In the 1998 Market Statement, the United States compared the impact of Pakistan's exports only to those of the rest of the world, which included Mexico. However, the United States clearly did not assess the impact of Mexico's exports individually in such a manner.³²² In this case, we do not see how that can be avoided. Imports from Mexico showed a significant percentage increase in shipments during the period of investigation and, therefore, the increase appeared to be sharp. Mexico was also the largest exporter and, therefore, the increase could reasonably be considered substantial. There was also some evidence that Mexico met the criteria of the second step. We must be clear, however, that

³²¹ We note that the United States grouped Mexico in a category labelled "FTA's". The United States did not assert that Mexico was exempt from investigation based on its membership of an FTA with the United States, so we do not need to reach that issue here.

³²² We note the US argument that it assessed imports from Mexico. US Rebuttal Submission, para. 78. However, the 1998 Market Statement does not state that the US investigation authority assessed the impact of imports from Mexico *individually*, where no specific reference is made to the import amount or price from Mexico. See US Ex. 3.

we are not suggesting that the serious damage³²³ must also be attributed to imports from Mexico because panels are not to make *de novo* reviews of that sort. It may be the case that Mexico did not contribute to serious damage to a properly defined domestic industry. It may not always be the case that the largest exporter will be found to be contributing to the serious damage. However, there is adequate evidence in the record to show that this assessment of imports from Mexico (and any other appropriate assessments of imports from other Members) must be done by the investigating authority and it was not done in the present case.³²⁴

I. ACTUAL THREAT OF SERIOUS DAMAGE

7.133 **Pakistan** argued that the United States should have made a "prospective analysis" of relevant economic variables in order to find "actual threat of serious damage, referring to the finding of the panel on *US – Underwear*, which required a prospective analysis. Pakistan also argued that the United States should have considered the prospective increase in imports from Mexico in order to find actual threat of serious damage. In particular, "a mere assertion that import and price trend will continue does not meet the requirement of a prospective analysis."³²⁵

7.134 In response, the **United States** contended that it is not clear whether "serious damage" and "actual threat of serious damage" are distinct concepts, and that the panel on *US – Underwear* did not require a prospective analysis in all cases.³²⁶ Further, the United States conducted a prospective analysis by considering the correlation between the increase in imports from Pakistan in 1998 and negative trends in relevant economic variables of the domestic industry, and the price differences between imports from Pakistan and domestically produced products.³²⁷

7.135 **The Panel** notes that on these issues, the panel on *US – Underwear* stated as follows:

"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. The March Statement contains no elements of such a prospective analysis. In our view, even if the mention of 'actual threat' in the Diplomatic Note accompanying the March Statement were to be considered, the fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual threat of serious damage."³²⁸

7.136 Also, we note that Article 6.4, second sentence, reads as follows:

³²³ Once again, we must note that this statement must be read in light of our finding that the United States did not properly demonstrate the existence of serious damage due to the incorrect definition of the industry.

³²⁴ It is not the case that *each and every* exporter necessarily needs to be examined individually in such a comparative manner. For example, some Members' exports may be low or dropping and, therefore, may not meet the criteria in the first step of the Article 6.4 analysis.

³²⁵ Pakistan First Submission, p. 39. (*Also* paragraphs 4.189-4.191.)

³²⁶ US First Submission, paras. 109-112. (*Also* paragraphs 4.192-4.195.)

³²⁷ US First Submission, paras. 113-117. (*Also* paragraphs 4.192-4.195.)

³²⁸ Panel Report on *US – Underwear*, op. cit., para. 7.55. (footnote omitted)

"The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually ..."

The footnote to this sentence refers to "imminent" and states as follows:

"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."

7.137 In our view, the US finding on actual threat of serious damage contained in the 1998 Market Statement is essentially a finding that the existing "serious damage" to the domestic industry would continue if imports were to continue as before.³²⁹ It would seem a reasonable inference to assume that if the trend in imports were to continue, the trend in domestic sales would continue, and consequently, the existing "serious damage" would continue. Under the terms of Article 6.4, there seems to be no basis for demanding any further "prospective analysis" than taking into consideration the prospect that the price-undercutting of imports from Pakistan would likely continue, in contrast to Pakistan's argument.

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

7.139 As an example of what we mean, Article 6.4, and footnote thereto, indicate that it is insufficient to look only at foreign production capacity to determine actual threat. Specifically, Article 6.4 contains a reference to "a sharp and substantial increase in imports, actual or *imminent*" (emphasis added). The footnote is to the word "imminent" and it reads as follows:

"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."

7.140 It is a clear implication that a determination of production capacity in exporting Members would normally be a useful step, albeit an insufficient one. Other steps to substantiate the possibility of continuation or increased magnitude of increasing import trends could also be done, such as determining the likelihood of continued or increased price undercutting by imports (perhaps through a forward review of offers for sale). We do not mention these points to suggest there is a prescribed manner of doing a prospective analysis to substantiate an independent finding of actual threat of serious damage. The treaty language does not provide a specific list of factors that must be addressed; therefore, it is left to a case-by-case assessment of what is a justifiable determination. Instead, we are merely highlighting what was not done in the present case.

³²⁹ See US First Submission, paras. 115-116, and the 1998 Market Statement, US Ex. 3, paras. 8.1-8.2. (Also paragraphs 4.192-4.195 and 4.197-4.199.)

7.141 A review of the 1998 Market Statement makes it clear that the United States did not demonstrate the existence of an actual threat of serious damage from imports of combed cotton yarn. An adequate prospective analysis could serve as the basis for such an independent determination,³³⁰ but no such analysis was done here. Therefore, because the finding of serious damage has been found to be flawed, we also conclude that the US determination of "actual threat" was not justifiable.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings made in Section I above, the Panel concludes that the transitional safeguard measure (quantitative restriction) imposed by the United States on imports of combed cotton yarn from Pakistan as of 17 March 1999, and extended as of 17 March 2000 for a further year is inconsistent with the provisions of Article 6 of the ATC. Specifically, we find that:

- (a) Inconsistently with its obligations under 6.2, the United States excluded the production of combed cotton yarn by vertically integrated producers for their own use from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn.
- (b) Inconsistently with its obligations under Article 6.4, the United States did not examine the effect of imports from Mexico (and possibly other appropriate Members) individually.³³¹
- (c) Inconsistently with its obligations under Articles 6.2 and 6.4, the United States did not demonstrate that the subject imports caused an "actual threat" of serious damage to the domestic industry.

8.2 With respect to the other claims, we find that Pakistan did not establish that the measure at issue was inconsistent with the US obligations under Article 6 of the ATC.³³² Specifically, we find that:

- (a) Pakistan did not establish that the US determination of serious damage was not justified based on the data used by the US investigating authority.
- (b) Pakistan did not establish that the US determination of serious damage was not justified regarding the evaluation by the US investigating authority of establishments that ceased producing combed cotton yarn.
- (c) Pakistan did not establish that the US determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof.

8.3 Pursuant to Article 3.8 of the DSU which 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 Pakistan under the WTO Agreement, in particular under the ATC.

³³⁰ We specifically note in this regard that the industry must be properly defined before a justifiable determination can be demonstrated. We do not wish to imply that a prospective analysis in this case could have salvaged a determination of actual threat without first properly defining the relevant industry.

³³¹ The findings in Items (b) and (c) in this paragraph are provided on the basis that the United States defined the domestic industry in conformity with Article 6.2 of the ATC. See paragraph 7.93 above.

³³² As discussed in the relevant sections of our findings, these conclusions must be read in light of our findings that the United States did not properly define the domestic industry.

8.4 We note that Pakistan requested that the Panel suggest in accordance with Article 19.1, second sentence, of the DSU that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard action forthwith. Article 19 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."

8.5 In this case, we recommend that the Dispute Settlement Body request that the United States bring the measure at issue into conformity with its obligations under the ATC. We suggest that this can best be achieved by prompt removal of the import restriction.
