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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The *Agreement on Textiles and Clothing* (“ATC”) is one of a few sector-specific agreements in the WTO. It is limited in its scope and duration. It sets out provisions to be applied during a 10-year transitional period, starting from 1995. Its basic purpose is to secure the integration of trade in textile and clothing into the normal rules of the GATT, through gradual phase-out of quota restrictions that have long been applied by major developed countries to imports from developing countries and economies.

Reflecting the specific (and limited) scope of the ATC, not all disputes involving textile and clothing products come under its purview. For example, disputes relating to anti-dumping measures do not fall in the ambit of the ATC. These are covered by the *Anti-dumping Agreement*.

For disputes arising from violations of the ATC itself, the Agreement establishes a two-step procedure. This procedure is unique to the ATC in as much as it provides for an additional step in the shape of the Textiles Monitoring Body (“TMB”). A case has to be considered by the TMB before it can be referred to the panel process. During the seven and a half years that the ATC has been in force, there have been several dispute cases, some of which were resolved in the TMB. Three went through panels and the Appellate Body.

This Module gives an overview of the ATC, its main provisions, and how these have been clarified or interpreted by the TMB, or by panels and the Appellate Body.

The first Section gives a short introduction to the ATC and its main provisions. The second Section describes the role and procedures of the TMB and brings out some significant clarifications resulting from its work. The third Section reviews important panel and Appellate Body rulings in disputes raised under the ATC. It also reviews some pertinent findings from cases in which violation of ATC obligations was invoked as a supplementary issue. Finally, the fourth Section contains a summary overview of ATC dispute cases examined by panels and the Appellate Body.

1. INTRODUCTION

This section provides a brief background to the Agreement on Textiles and Clothing (ATC), why it was needed, what is its main purpose, and what is the scope of disputes under the ATC. The section also provides a summary overview of the main provisions of the Agreement.

1.1 Why ATC

ATC is essentially designed to correct a long standing anomaly in the multilateral trading system.

The background

Since 1961, international trade in textiles and clothing had been virtually excluded from the normal rules and disciplines of the GATT. It was governed by a system of discriminatory restrictions, which deviated from some of the basic principles of the GATT. The system was first incorporated in a so-called Short-Term Cotton Arrangement (“STA”), followed by a Long-Term Arrangement (“LTA”) and, later, by the Multi-fibre Arrangement (“MFA”). The MFA continued until the WTO Agreements came into effect on 1 January 1995.

While GATT rules prohibited the use of quantitative restrictions to provide protection to domestic industries, the system allowed the use of such restrictions. While the Most-Favoured-Nation (MFN) principle of the GATT required equal treatment for all supplying countries, the system permitted the imposition of restrictions against imports from particular countries.

Such an obvious departure from the basic principles of the multilateral trading system constituted a major distortion in international trade, more so as restrictions were applied mainly on imports from developing economies. It also meant an obstacle to the normal development of trade.

Among the principal aims of the Uruguay Round were the removal of such distortions and the further liberalization of trade. Consistent with these aims, it was agreed that negotiations should be undertaken to bring about the re-integration of the textiles and clothing sector into the same mainstream of multilateral rules as for any other industrial sector. Hence the ATC.

1.2 Purpose of the ATC

According to its terms, the purpose of the ATC is to integrate the textile and clothing sector into the normal rules and disciplines of the GATT.

Article 1:1 of the ATC

This Agreement sets out provisions to be applied by [WTO] Members during a transition period for the integration of the textiles and clothing sector into GATT 1994. (Emphasis added).

**“Integration”
explained**

The ATC however does not provide any explicit definition of the term “integration”. The ordinary meaning of the term “integration” is the act of unifying or ending the difference in treatment. Therefore, as used in the ATC, it implies the elimination of those practices from the sector which did not conform to the normal rules of the GATT.

Context of integration

In order to determine the practices which did not conform to the rules of the GATT, and which therefore constitute the context of the ATC, reference to Paragraph 2 of the Preamble to the ATC recalling the April 1989 Decision of the Trade Negotiations Committee can be helpful. That Decision specified that integration of the sector will cover the phase out of restrictions under the Multi-fibre Arrangement and other restrictions on textiles and clothing not consistent with GATT rules and disciplines. The Decision stipulated that:

**Trade Negotiations
Committee, April 1989
Decision¹**

(a) Substantive negotiations will begin in April 1989 in order to reach agreement within the time-frame of the Uruguay Round on modalities for the integration of this sector into GATT, in accordance with the negotiating objective;

(b) such modalities for the process of integration into GATT on the basis of strengthened GATT rules and disciplines should inter alia cover the phasing out of restrictions under the Multi-fibre Arrangement and other restrictions on textiles and clothing not consistent with GATT rules and disciplines, the time-span for such process of integration, and the progressive character of this process which should commence following the conclusion of the negotiations... (Emphasis added)

Thus the context of the ATC demonstrates that the object and purpose of “integration” is the phase-out of restrictions on textile and clothing products that were maintained under the Multi-fibre Arrangement and any other restrictions that were not consistent with GATT rules and disciplines.

Although the April 1989 Decision of the Trade Negotiations Committee also referred to “other restrictions not consistent with GATT rules and disciplines” in addition to restrictions under the multi-fibre agreement, such other restrictions were actually rather rare. Therefore the main purpose of the ATC is the phasing out of restrictions applied under the MFA. These restrictions were applied by major developed countries, almost exclusively, on imports from developing countries and economies.

1.3 Scope of ATC Disputes

The ATC is a sector-specific agreement pertaining to trade in textiles and clothing. However, as shown above, its scope is limited to securing the phasing out of restrictions on imports of textile and clothing products over a transitional period of ten years. The Agreement sets out the mechanics for bringing this about. *In addition*, ATC provides for disciplines to be observed for (i) the

¹ GATT, MTN.TNC/9.

operation and administration of restrictions until these are gradually removed and the respective products are integrated into the normal rules of the GATT 1994, (ii) the introduction of any new restrictions during the transitional period under carefully defined criteria, and (iii) a regular supervision of its implementation.

1.3.1 Disputes Involving Textile and Clothing Products

Due to the specific (and limited) scope and purpose of the ATC, not all disputes involving textile and clothing products come under its purview. Since the ATC does not cover such matters as tariff bindings, anti-dumping or countervailing measures, customs valuation issues or the like, disputes involving alleged breaches in these areas are covered by other relevant WTO agreements. The disputes that come under the purview of the ATC are those in which violations of ATC provisions are the main issue.

In some cases however, violation of some ATC provisions may be alleged *in addition* to violations under other WTO agreements. Indeed, there have been several cases in which violation of one or two ATC provisions was also invoked as supplementary issues.

The ATC has now been in force for over seven years. During this period (1995 to the beginning of 2002), there have been many disputes involving textile and clothing products. However, all of them were not raised under the ATC.

1.3.2 Disputes Under The ATC

The following table lists cases in which the violation of the ATC provisions was raised as the main issue.

Cases in which ATC was the main issue	Violations alleged
<i>United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear, complaint by Costa Rica, WT/DS24</i>	ATC Articles 2, 6 and 8
<i>United States - Measure Affecting Imports of Women's and Girls' Wool Coats, complaint by India, WT/DS32</i>	ATC Articles 2, 6 and 8
<i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses, complaint by India, WT/DS33</i>	ATC Articles 2, 6 and 8
<i>Colombia - Safeguard Measure on Imports of Plain Polyester Filaments, complaint by Thailand, WT/DS181</i>	ATC Articles 2 and 6



<i>Argentina - Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures</i> , complaint by Brazil, WT/DS190	ATC Articles 2, 6 and 8
<i>United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , complaint by Pakistan, WT/DS192	ATC Articles 2 and 6

1.3.3 Mixed disputes

There were several other cases in which the main violations were alleged with respect to obligations under other WTO agreements. In addition to such violations, breaches of some of the ATC obligations were also raised as supplementary issues.

Cases in which violation of the ATC was a supplementary issue	Violations alleged
<i>Turkey - Restrictions on Imports of Textiles and Clothing Products</i> , complaint by India; WT/DS34	GATT Art. XI, and XIII; ATC Art. 2
<i>Turkey - Restrictions on Imports of Textile and Clothing Products</i> , complaint by Thailand; WT/DS47	GATT Art. I, II, XI and XIII; ATC Art. 2
<i>Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , complaint by United States; WT/DS56	GATT Art. II, VII, VIII and X; TBT Agreement; Customs Valuation Agreement; ATC Art.7
<i>Argentina - Measures Affecting Textiles and Clothing</i> , complaint by European Communities; WT/DS77	GATT Art. II; ATC Art. 7
<i>United States - Measures Affecting Textiles and Apparel Products</i> , complaint by European Communities; WT/DS85	ATC Art. 2 and 4; Agreement on Rules of Origin; GATT Art. III and TBT Agreement
<i>United States - Measures Affecting Textile and Apparel Products</i> , complaint by European Communities; WT/DS151	ATC Art. 2 and 4; Agreement on Rules of Origin; GATT Art. III and TBT Agreement
<i>Brazil - Measures on Minimum Import Prices</i> , complaint by United States; WT/DS197	GATT Art. II and XI; Customs Valuation Agreement; Agreement on Import Licensing Procedures; ATC Art. 2 and 7; Agreement on Agriculture

1.3.4 Disputes Under Other WTO Agreements

In still other cases concerning textile and clothing products, ATC issues were not raised; only violations under other WTO agreements.

Cases in which violation of the ATC was not an issue	Violations alleged
<i>Turkey - Restrictions on Imports of Textile and Clothing Products</i> , complaint by Hong Kong, China, WT/DS29	GATT Art. XI, and XIII;
<i>Australia - Textiles, Clothing and Footwear Import Credit Scheme</i> , complaint by United States, WT/DS57	Subsidies and Countervailing Measures Agreement
<i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , complaint by United States, WT/DS90	GATT Art. XI, and XVIII; Agreement on Agriculture; Agreement on Import Licensing Procedures
<i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , complaint by Australia; WT/DS91	GATT Art. XI, and XVIII; Agreement on Agriculture; Agreement on Import Licensing Procedures
<i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , complaint by Canada, WT/DS92	GATT Art. XI, and XVIII; Agreement on Agriculture; Agreement on Import Licensing Procedures
<i>India - Quantitative Restrictions on imports of Agricultural, Textile and Industrial Products</i> , complaint by New Zealand, WT/DS93	GATT Art. XI, XVIII and XXIII Agreement on Agriculture; Agreement on Import Licensing Procedures
<i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , complaint by Switzerland, WT/DS94	GATT Art. XI, and XVIII; Agreement on Import Licensing Procedures
<i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , complaint by European Communities, WT/DS96	GATT Art. XI, XIII; XVII and XVIII; Agreement on Agriculture; Agreement on Import Licensing Procedures; SPS Agreement
<i>European Communities - Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics</i> , complaint by India, WT/DS140	Anti-Dumping Agreement; GATT Art. I and VI



<i>European Communities - Anti-Dumping Duties on Imports of Cotton Type Bed-Linen</i> , complaint by India, WT/DS141	Anti-Dumping Agreement; GATT Art. I and VI
<i>Brazil - Measures on Import Licensing and Minimum Import Prices</i> , complaint by European Communities, WT/DS183	GATT II, VIII, X and XI; Agreement on Agriculture; Agreement on Import Licensing Procedures; Customs Valuation Agreement
<i>Brazil - Anti-Dumping Duties on Jute Bags</i> , complaint by India, WT/DS229	GATT Art. VI and X; Anti-Dumping Agreement; WTO Agreement Art. XVI
<i>United States - Rules of Origin for Textiles and Apparel Products</i> , complaint by India, WT/DS243	Agreement on Rules of origin

It is worth noting however that all cases shown in the preceding tables did not result in the establishment of dispute settlement panels. From amongst those in which violation of ATC obligations was the principal issue, three were pursued through the dispute settlement process and resulted in panels and the Appellate Body issuing significant findings and rulings. The main aspects of these findings and rulings are reviewed in Section 3 of this Module. Section 3 also brings out important panel findings with reference to ATC provisions in some mixed disputes, in which violation of an ATC obligation was a supplementary claim.

1.4 Main Provisions of the ATC

In this subsection, a brief overview of the main provisions of the ATC is provided, without however going into any interpretative issues. These aspects are dealt with alongside the clarifications or findings resulting from the work of the TMB, or Panel and Appellate Body rulings in Sections 2 and 3 of this Module.

1.4.1 *An Introductory Point*

The ATC is designed with the central objective of bringing an end to the long-standing system of restrictions applied by major developed countries on textile and clothing imports from developing countries, because these restrictions deviated from some of the fundamental principles and rules of the GATT.

The Agreement sets out a framework by which to achieve this objective in a gradual and systematic manner over a transitional period of ten years.

The main elements of the ATC framework are fairly straightforward, despite the somewhat complex mechanics of the integration process. The principal

elements of the framework are explained below. The clarifications and findings developed by the Textiles Monitoring Body and, in certain cases, by panels and the Appellate Body will be reviewed in later sections of this Module.

1.4.2 Product coverage

The ATC sets out, in an Annex, a detailed list of products to which it applies. The list is based on the Harmonized Commodity Description and Coding System Nomenclature (the so-called HS), and defines particular products at the six-digit level of the HS.

Article 1:7 of the ATC

The textile and clothing products to which this Agreement applies are set out in the Annex.

In general, the products covered are those in Section XI (Textiles and Textile Articles) of the HS, excluding however natural fibres such as raw cotton, jute, silk, etc. In addition, the list includes products from outside Section XI defined under some HS lines or part lines. In all, the list consists of 781 full lines at the 6-digit level of the HS, and another 14 lines of which only certain portions are covered by the ATC.

This extensive product coverage that has been at the root of concerns about the so-called “back-loading” of the integration process.

1.4.3 The Integration Process and Its Mechanics

Article 2:6 and 2:8 ATC

The second, and the central element of the ATC framework relates to its integration process. Pursuant to this, each importing Member is required to notify and integrate products from the list covered by the Agreement, in accordance with the following schedule²:

As of 1 January 1995: Products that accounted for at least 16 per cent of the Member’s imports in 1990, in volume terms

As of 1 January 1998: Another at least 17 per cent

As of 1 January 2002: A further at least 18 per cent

As of 1 January 2005: All remaining products.

Article 9 of the ATC provides:

Article 9 of the ATC

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

² Articles 2:6 and 2:8(a), (b) and (c) of the ATC.

Once a particular product is integrated, all quota restrictions on its imports from WTO Members are terminated. Integration also means that the importing country is henceforth bound to observe full GATT rules and disciplines with respect to that product.

The Agreement left the actual choice of products for integration in the first three steps (i.e., from January 1995, 1998 and 2002 respectively) at the discretion of the importing Member concerned, the only condition being that the list at each stage should include a mix of products from all four sub-sectors, (i.e., tops and yarns, fabrics, made-up textile products, and clothing).

In actual implementation, the importing restraining countries took full advantage of this discretion and the extensive product coverage as follows:

- (i) First, the list of products covered by the Agreement included a significant number in which trade was never restricted under the MFA. According to estimates, in the case of the EU, such non-restrained products accounted for some 42 per cent of total imports. In the case of the United States, the comparable figure was about 40 per cent. The percentage for Canada was even higher.

All these countries chose to include the un-restrained products in their integration schedules notified for the first three steps. Consequently, they avoided integrating products in which trade was actually restrained.

- (ii) Second, since they had discretion on the choice of products, they also elected to first take up mostly tops and yarns, fabrics or made-up textile products, with as little as possible from clothing items in which developing countries have the most comparative advantage due to the labour intensive nature of the processes required in their manufacture and, on which quota restrictions have been most pronounced.

Thus, while the obligation in terms of fulfilling the mechanics of integrating the required minimum percentages might have been met, the same cannot perhaps be said of the realisation of the object and purpose of the Agreement.

This is why widespread concerns have been voiced about the process of implementation, in so far as the realization of the central objective of the ATC is concerned.

1.4.4 *Increases in Quota Growth Rates*

The third element of the ATC framework relates to the increases in quota growth rates. Under this element, the Agreement stipulated that, until the relevant products are integrated, the levels of quota restrictions on those products should be increased according to the following formulae³:

³ Articles 2:13 and 2:14(a) and (b) of the ATC.

<i>As of 1 January 1995:</i>	All annual quota growth rates, which existed in respective bilateral agreements prior to the ATC, be increased by a factor of at least 16 per cent. Thus an annual growth rate of 6 per cent should be increased to 6.96 per cent; 5 per cent to 5.80 per cent; 4 per cent to 4.64 per cent; 3 per cent to 3.48 per cent; 2 per cent to 2.32 per cent; 1 per cent to 1.16 per cent.
<i>As of 1 January 1998:</i>	The annual growth rates resulting from the above formula should be increased further by at least 25 per cent
<i>As of 1 January 2002:</i>	The rates resulting from the above (i.e. 1998) should be increased by at least another 27 per cent.

In actual practice, under MFA bilateral agreements, there existed a wide range of growth rates, the average being between 3 per cent and 5 per cent. They also varied in each of the three restraining countries. Consequently, quota levels have increased from their pre-ATC levels. However, the average overall increase in access (particularly for the main traded products) has not been significant enough to eliminate the restrictive effect of quotas.

1.4.5 Transitional Safeguard

This, the fourth key element of the ATC, recognizes that during the transition period it may be necessary to apply a specific transitional safeguard mechanism. Article 6 of the Agreement lays down the procedures and conditions under which an importing Member can introduce new restrictions on imports of particular products.

As a general matter, Article 6 stipulates that the transitional safeguard should be applied as sparingly as possible, consistent with the provisions of this Article and the effective implementation of the process of integration.

Article 6:1 of the ATC

Members recognize that during the transition period it may be necessary to apply a specific transitional safeguard mechanism (referred to in this Agreement as “transitional safeguard”). The transitional safeguard may be applied by any Member to products covered by the Annex, except those [products] integrated into GATT 1994 under the provisions of Article 2... The transitional safeguard should be applied as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement. (Emphasis added)

All transitional safeguard actions are required to be reviewed by the TMB. Even in cases where the importing and exporting countries concerned agree that the situation called for the establishment of a restraint, the TMB is required to determine whether the restraint is justified in accordance with the provisions of Article 6.⁴

1.4.6 Supervision of Implementation

Article 8:1 of the ATC

Fifthly, unlike the other agreements negotiated in the Uruguay Round, the ATC did not envisage a Committee to review and consult on the implementation of the Agreement periodically. Instead, it created a standing Textiles Monitoring Body to regularly supervise the implementation of the ATC and, perhaps most significantly, to examine *all* measures taken under the ATC and their conformity with its provisions.

Article 8:1 of the ATC

In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take actions specifically required of it by this Agreement, the Textiles Monitoring Body (“TMB”) is hereby established.

In addition, for oversight of implementation of the ATC at multilateral level, the Agreement provides for the WTO Council for Trade in Goods (“CTG”) to conduct a major review before the end of each stage of the integration process.

Article 8:11 of the ATC

In order to oversee the implementation of this Agreement, the Council for Trade in Goods shall conduct a major review before the end of each stage of the integration process. To assist in this review, the TMB shall, at least five months before the end of each stage, transmit to the Council for Trade in Goods a comprehensive report on the implementation of this Agreement during the stage under review, in particular in matters with regard to the integration process, the application of transitional safeguard mechanism, [etc.]... The TMB’s comprehensive report may include any recommendation as deemed appropriate by the TMB to the Council for Trade in Goods.

Article 8:12 of the ATC

In the light of these reviews, the CTG is required to take appropriate decisions to ensure that the balance of rights and obligations embodied in the Agreement is not being impaired.

Article 8:12 of the ATC

In the light of its review, the Council for Trade in Goods shall by consensus take such decisions as it deems appropriate to ensure that the balance of rights and obligations embodied in this Agreement is not being impaired.

⁴Articles 6:9 and 6:10 of the ATC.

1.4.7 Other Miscellaneous Provisions

Besides the main elements of the ATC summarized here, the Agreement contains provisions for preferential treatment in access for small suppliers⁵, for the administration of restrictions⁶, and for the prevention of circumvention⁷ of the Agreement. It also provides that Members take such actions as may be necessary to abide by GATT rules and disciplines so as to achieve improved access to markets and, ensure the application of policies relating to fair and equitable trading conditions in such areas as antidumping rules, subsidies and countervailing measures and the protection of intellectual property rights.⁸

⁵Articles 1:2, 2:18 and 6:6 of the ATC.

⁶Articles 2:17 and 4 of the ATC.

⁷Article 5 of the ATC.

⁸Article 7 of the ATC.

2. TEXTILES MONITORING BODY

The ATC establishes a two-step procedure for the resolution of disputes arising from violations of its provisions. Any unresolved issue has first to be reviewed by the Textiles Monitoring Body (“TMB”) before it can be referred to the Dispute Settlement Body for the establishment of a panel.

This Section to provides an overview of (i) the role and functions of the TMB, (ii) the TMB procedures with respect to dispute cases, and (iii) some pertinent findings and clarifications resulting from the TMB’s work. These clarifications can be seen as means to prevent recourse to dispute panels.

2.1 TMB Functions

Article 8 ATC

Article 8 of the ATC describes the role and functions of the TMB. It provides that the TMB was established: (i) to supervise the implementation of the ATC, (ii) to examine all measures taken under the ATC and their conformity with its provisions, and (iii) to take other actions specifically required of the TMB under various Articles of the Agreement.

The TMB thus performs a dual function: (1) a review and supervisory function; and (2) a dispute resolution function. In its review and supervisory role, the TMB undertakes regular, ongoing oversight of the operation and implementation of the Agreement. It may make observations and recommendations as deemed appropriate. In its dispute resolution role, the TMB’s remit is not to conciliate between the parties. Rather, in a certain sense, it acts as a tribunal of first instance and examines the conformity of the disputed measure with the provisions of the ATC. While the TMB may make findings and recommendations in cases of disagreement brought before it, the parties are not bound to accept its recommendations.

2.1.1 The TMB’s Review and Supervisory Role

The TMB’s review and supervisory role is spread in the ATC over a number of articles. Without describing this role in detail, the following are a few significant areas in which the TMB is required to review and supervise the implementation of the ATC.

Firstly, the TMB receives, reviews and circulates notifications required of WTO Members with respect to their implementation under specific provisions of the ATC. Thus, it serves as a sort of inventory of information relating to textile matters.

Secondly, in so far as the implementation of integration obligations is concerned, the TMB is required to keep under review the implementation and progress of

the integration process.

Thirdly, where in cases of alleged circumvention, Members agree to any remedies in mutual consultations, the TMB can make appropriate recommendations to them.

Fourthly, if, following requests for consultations made for establishing new restrictions under transitional safeguards of the ATC, Members reach mutual understanding on establishing restraint measures, the ATC requires that the TMB determine whether the agreement between the Members is justified in accordance with the provisions of Article 6 of the Agreement. If there is no agreement between the parties and the safeguard action is taken, the matter has also to be referred to the TMB to decide whether the action taken by the importing Member is justified and to make recommendations to the Members concerned.

2.1.2 TMB's Dispute Resolution Role

Article 8:5 and 8:6 ATC

The ATC provides that in the absence of mutually agreed solutions in bilateral consultations, the matter may be referred to the TMB by any Member. In such cases, the ATC requires the TMB to conduct a thorough and prompt consideration of the matter and make recommendations to the Members concerned. Going through the TMB process in a dispute case is a necessary first step before it can be referred to the DSB for establishing a panel under the DSU.

Articles 8:5 and 8:6 of the ATC

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

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

Article 8:9 and 8:10 ATC

However, Members are not obliged to accept the recommendations of the TMB, only to endeavour to do so. If following any TMB recommendations, the matter remains unresolved, the Member concerned may bring it before the DSB and directly invoke Article XXIII of the GATT 1994. It is not necessary to ask for any further consultations pursuant to Article 4 of the DSU. In this sense, the TMB process replaces the consultation phase of the dispute settlement process under the DSU.

**Articles 8:9 and 8:10
of the ATC**

The Members shall endeavour to accept in full the recommendations of the TMB...

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

Article 1.2 DSU

It is worth noting that the DSU also provides that, to the extent that there is a difference between rules and procedures of the DSU and the special or additional rules and procedures contained in different covered Agreements (including the ATC), the special or additional rules and procedures of the covered Agreements shall prevail.⁹

2.2 TMB Composition

Article 8:1 ATC

The TMB consists of a Chairman and 10 members. The TMB members are appointed by WTO Members designated by the Council for Trade in Goods. TMB members are required to discharge their functions on the TMB on an *ad personam* basis.

Article 8:1 of the ATC

The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the [WTO] Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by [WTO] Members designated by the Council for Trade in Goods to serve on the TMB, discharging their functions on an ad personam basis.

Article 8:3 ATC

As a standing body, the TMB meets frequently to discharge its functions. It is given significant latitude in terms of getting information from a variety of sources.

Article 8:3 of the ATC

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

⁹Article 1.2 of the DSU.

2.3 TMB Procedures

Article 8:2 of the ATC

The ATC authorized the TMB to develop its own working procedures.¹⁰ According to a decision of the WTO General Council adopted in January 1995, the TMB is required to take all decisions by consensus.¹¹ This is however subject to the condition that consensus does not require the concurrence of TMB members that are appointed by WTO Members involved in an unresolved issue under review by the TMB.¹²

2.3.1 Working Procedures

TMB Working Procedure

Accordingly, the TMB developed detailed procedures for its work.¹³ With respect to dispute cases, these procedures require that the TMB invite representatives of WTO Members that are parties to a dispute to present their views and answer questions that may be asked by TMB members. Parties to the dispute are also invited to designate a representative who can be present in the deliberations of the TMB but cannot participate in the actual drafting of its findings, observations or recommendations.

Rules 6:1 and 6:2 of the TMB Working Procedures

The TMB shall invite representatives of the WTO Members that are parties to a dispute to present their views fully and answer questions put by TMB Members...

Parties to a dispute shall each be invited to designate a representative who... may be present in ... the discussion up to, but not including, the drafting of recommendations, findings or observations. Interventions by such representatives should be limited to key aspects relevant to the discussion...

2.3.2 TMB Reports

The TMB Working Procedures provide that the reports of the TMB shall be composed of (a) factual presentation of the issues examined, (b) in the case of a dispute, a summary of the main arguments, (c) the text of any recommendations, observations or findings made by the TMB, and (d) a common (agreed) rationale for such recommendations, observations or findings.¹⁴

2.3.3 TMB Limitations

By the terms of its mandate, the TMB is required to review and supervise the implementation of the ATC, in all its aspects, in an impartial manner and strictly on the basis of the same standards as required under any other WTO agreement, the ATC being an integral part of the WTO.

¹⁰ Article 8:2 of the ATC.

¹¹ WT/L/26, para. 6.

¹² Article 8:2 of the ATC.

¹³ G/TMB/R/1.

¹⁴ Ibid., Rule 8.

In its dispute resolution role it is expected also to observe the same high standards.

However as the TMB is required to take all its decisions by consensus, this can sometimes be difficult to achieve because in a large group of ten members, there can be genuine differences of views about the meaning of various provisions of the ATC. Furthermore, the TMB's performance is conditioned by the fact that its members are designated by WTO Members representing particular approaches to the issue of protection of domestic producers in the sector. Likewise, due to long experience with the MFA, whose standards were rather lax and ambiguous, certain TMB members, at least in the initial years of the ATC, viewed the role of the TMB as one of promoting conciliation and accommodation among contesting views. Finally, the ATC provided for rotation of the members of the TMB. In reality however, those designated by countries applying restrictions have generally been serving on the TMB for long periods. Those nominated by countries on whose export these restrictions are applied change quite frequently. This produces an inherent imbalance in the effective functioning of the TMB.

2.4 Significant TMB Findings

This Section provides an overview of some key TMB findings, first under its review or supervisory role, and second, under its dispute resolution role. In most cases, TMB findings can be seen as contributing to preventing recourse to the procedures of the DSU. They also contribute to full and effective implementation of the Agreement.

2.4.1 TMB Findings Under Its Supervisory Role

Pursuant to its review or supervisory role, the TMB scrutinizes all aspects of ATC implementation. It has some latitude in seeking information from a variety of sources. Although, its findings or recommendations are not binding on the parties, yet its scrutiny can shed light on the validity or otherwise of some issues and thereby contribute to preventing unnecessary recourse to dispute settlement procedures of the DSU.

Over the past seven and a half years that the ATC has been in effect, the TMB has had to review and scrutinize a host of notifications by WTO Members pursuant to the requirements of various ATC provisions. This sub-section is devoted to bringing out some significant areas in which TMB scrutiny resulted in correcting errors in ATC implementation.

The cases referred to the TMB under its dispute resolution function will be dealt with in a later section.

ex-HS positions question

In the section describing the products covered by the ATC, it was noted that the ATC Annex lists these products at the 6-digit level of the HS but that, in case of 14 HS lines, only parts of products falling under the 6-digit HS lines

are covered by the ATC. Such parts are defined by a short description of the covered portion.

For example, in the HS classification, heading 3921.90 relates to “other plates, sheets, film, foil and strip, of plastics of non-cellular materials”. The ATC includes this heading but covers only “woven, knitted or non-woven fabrics that are coated, covered or laminated with plastics”.

When the TMB reviewed the integration programmes notified by some WTO Members pursuant to Article 2:6 and 2:8 of the ATC, it was pointed out that the European Communities had counted the volume of trade falling under the entire 6-digit lines rather than limiting to the portions that were covered by the Agreement. The TMB upheld this view and recommended that the EC re-examine its programme. Following such re-examination, the EC corrected the list by withdrawing a volume of trade accounting for over 2 per cent of its total imports which it had otherwise counted as belonging to the ATC.

A similar phenomenon was found during TMB scrutiny of the integration lists filed by Canada. In this case too, questioning by the TMB resulted in Canada correcting the lists by withdrawing about 9.5 per cent of volume of trade which it had reckoned as belonging to the ATC.

It was thus a concrete example in which review and supervision by the TMB contributed to ensuring correct and proper implementation of a key provision of the ATC, and prevented unnecessary recourse to dispute settlement procedures.

In examining the issue however, the TMB observed that the corrections made by the EC, Canada, etc., were on the basis of their estimates as to what proportions of total trade registered under the relevant 6-digit HS lines could have conformed to the definitions of products covered by the ATC and that it was not in a position to verify the estimates provided by Members.¹⁵

Visa requirements question

Under the MFA regime of bilateral agreements, various restraining countries developed their own procedures to control and administer trade in products subject to quota restrictions.

Since, in essence, quotas were voluntary export restrictions, these procedures required exporting countries to issue export certificates. The United States named these export certificates as “visas”, devised as an administrative tool to monitor and control imports in restrained textiles and clothing products. It required these visas to accompany all shipments in addition to the normal shipping documents.

The procedure obligated the exporting countries to designate officials to issue the visas. Each visa should indicate the precise category of the product, the quantity of the shipment, the date of issuance of the visa, and signature of the

¹⁵ *G/TMB/R/41, paras. 4-26.*

designated official. Without a visa, the entry of the shipment could be denied. Any error in the visa certificate could also result in the shipment being denied entry.

To accommodate such administrative practices and procedures, a provision in the ATC stipulated that these administrative arrangements will be a matter of agreement between the Members concerned.

Article 2:17 of the ATC

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

The visa certificates are not required of all exporting countries; only from those on whose exports quota restrictions were imposed. They are therefore discriminatory and, hence, inconsistent with the GATT rule of Most-Favoured-Nation (MFN) treatment. They can amount to an indirect means to restrict imports and, therefore, are inconsistent with Article XI of the GATT 1994 which requires that no restrictions “whether made effective through quotas, import or export licences or other measures shall be instituted or maintained”.

Furthermore, the preparation and issuance of visa documents involves an additional administrative burden and cost for processing export shipments.

The visa requirement was established for the purpose of implementing quota restrictions and was inconsistent with normal GATT rules. It followed that, with the integration of relevant textiles and clothing products and consequential elimination of quota restrictions on them, the requirement should be abolished. The United States however, did not do so. Instead, it announced that the visa requirement would continue even after the relevant products had been integrated into GATT 1994.¹⁶

As the purpose of integration is that once a particular product is integrated, WTO Members are bound to observe full GATT rules and disciplines with respect to that product, some Members referred the matter to the TMB. Following this, the United States conceded and withdrew the visa requirement in respect of integrated products.

Later, the TMB confirmed that full integration under the ATC meant not only the elimination of quota restrictions but also that of any related administrative procedures.

TMB report

The TMB recalled that the respective visa arrangements had been notified by the United States, pursuant to Article 2:17 as parts of administrative arrangements and that, under Article 2:17, administrative arrangements could



¹⁶See TMB report in G/L/459, para. 58.

be deemed necessary [only] in relation to the implementation of restrictions applied under Article 2.¹⁷

Penalizing quota circumvention

Article 5 of the ATC provides for Members to cooperate to address problems arising from circumvention of restrictions by trans-shipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents. It also provides that they agree to take necessary action to prevent, to investigate and, where appropriate, to take legal and/or administrative action against circumvention practices.

Where, as a result of investigation, there is sufficient evidence that circumvention had occurred (e.g., where evidence is available concerning the country or place of true origin, and the circumstances of such circumvention), Article 5 provides for procedures for appropriate action, to the extent necessary to address the problem. Such action may include denial of entry of goods, or where goods have already entered, adjustment to charges to quotas to reflect the true country or place of origin.

Shortly before the coming into effect of the WTO and the ATC, and as a result of concerted United States campaign, the exporting countries accepted modifications in administrative arrangements falling within the purview of Article 2:17 of the ATC (also described in the previous subsection). These arrangements added a detailed procedure to the administrative arrangements by which the exporting countries were required to cooperate in instances of circumvention or alleged circumvention to address the problem, and to establish relevant facts including facilitation of joint visits to production plants in the exporting countries.

A significant further stipulation in the United States administrative arrangements however, added that in instances of repeated circumvention by exporters from a particular country, the United States *may deduct amounts from quotas up to three times the amounts trans-shipped*. The United States claimed this provision to be consistent with Article 2:17 of the ATC and included this so-called triple charges clause in its notifications to the TMB under that Article.

However, in reviewing the United States Article 2:17 notifications, the TMB did not agree with the United States contention.

TMB report

The TMB noted, inter alia, that Article 5:4 of the ATC seemed to provide some flexibility in terms of remedies or agreed actions that could be foreseen in cases when circumvention had occurred, but observed, however, that Article 5 contained no reference to the possibility for the importing Member to impose triple charges on quotas, as a deterrent to circumvention... The TMB recalled that the United States had stated that when provisions of the administrative arrangements were inconsistent with the ATC, the provisions of the ATC would apply.¹⁸

¹⁷ Textiles Monitoring Body, Report of the Seventy-seventh meeting, G/TMB/R/76, para. 8.

¹⁸ G/L/179, para. 221.

Here again a close scrutiny by the TMB discouraged the United States to resort to what could amount to an unfair situation of penalizing the exporting country.

Question of new restrictions

Article 2:1 of the ATC provided that all WTO Members notify the TMB of any quantitative restrictions that they maintained under the MFA, within 60 days following the entry into force of the WTO Agreement. The restrictions thus notified shall constitute the totality of restrictions by the respective Members and shall, henceforth, be governed by the provisions of the ATC. Any new restrictions can only be introduced in accordance with the provisions of the ATC, i.e., under Article 6 relating to transitional safeguards.

Article 2:4 of the ATC

... No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.¹⁹

During the seven and a half years of the ATC, there have been a number of cases of the introduction of new restrictions. A majority of these have been pursuant to the transitional safeguard mechanism of the ATC. Such restrictions are however permitted, if justified under the requirements of Article 6 of the ATC.

In several cases the invocation of Article 6 safeguards was contested by affected Members, including by recourse to the DSU. In three such cases, panels and the Appellate Body made key findings and developed important interpretations. These will be reviewed under Section 3 of this Module.

In addition however, there have been some instances in which new restrictions were introduced without any apparent justification under any provision of the ATC. Such restrictions could potentially undermine the disciplines of the ATC. In one case, the United States introduced a new restriction on a particular product from Turkey, *albeit* after the two countries had reached a mutual understanding.

The TMB became seized of the issue and invited the two parties (United States and Turkey) to notify the restriction to the TMB. The United States took the plea that the restriction in question was justified by “a provision” of the ATC, which did not require a notification to the TMB.

Following this and on its own initiative pursuant to its general mandate under Article 8:1 of the ATC which requires the TMB “to examine all measures taken under [the ATC] and their conformity therewith...”, the TMB undertook to examine all provisions of the ATC with a view to identifying whether there was any provision under which such a measure could be agreed without notifying the TMB. *The TMB concluded that the measure agreed upon between the two parties did not conform to any provision of the ATC.*

¹⁹ *The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.*

In addition, the TMB made a number of observations clarifying that new restrictions could not be introduced except under Article 6 transitional safeguards.

TMB report

The TMB observed ... that Articles 1, 7, 8 and 9 do not provide the possibility of introducing restraint measures on imports from other WTO Members.

... No provision under Article 2 provides the possibility of introducing new restrictions.

Article 3 does not exclude the possibility, inter alia, of introducing new restrictions on textile and clothing products. However... [it] limits the possibility of applying... new restrictions to those cases where the measures were taken under any GATT 1994 provision [not the ATC]

A reading according to which the introduction of a new restriction in the sense of Article 2:4... pursuant to Article 4... was, in the view of the TMB, not consistent with the intentions of the drafters of the ATC, since Article 4 relates to the implementation or administration of restrictions referred to in Article 2 [i.e., those already existing] or applied under Article 6.²⁰ (Emphasis added)

2.4.2 TMB Findings Under Its Dispute Resolution Role

In cases of disagreement between WTO Members on any matter affecting the operation of the ATC, the matter is required to be referred to the TMB before recourse can be made to the procedures of the DSU. In this sense, the TMB acts as a tribunal of first instance. Its process replaces the consultation stage of Article 4 of the DSU. If a matter remains unresolved as a result of the TMB process, then it can be referred to the DSB for the establishment of a panel without any need for further consultations under the DSU.

Since the ATC has been in effect, several cases have been referred to the TMB for its examination and recommendation. These have largely pertained to the invocation of transitional safeguard actions. As explained elsewhere in this Module, the TMB is required to determine the justification of all safeguard actions whether these are referred to it following failure of bilateral consultations, or after two Members agree on establishing a restraint measure.

Transitional safeguard actions

This Section gives an overview of TMB findings with respect to safeguard actions.

In such cases, if there is mutual understanding between the Members concerned that the situation calls for the establishment of a new restriction, details of the agreed restraint measure are required to be communicated to the TMB. The TMB in turn is required to determine whether the agreement is justified in accordance with the provisions of Article 6 of the ATC.

²⁰ G/TMB/R/60, paras. 30 and 31.

Article 6:9 of the ATC

Details of the agreed restraint measure shall be communicated to the TMB within 60 days following the conclusion of the agreement. The TMB shall determine whether the agreement is justified in accordance with the provisions of [Article 6].

If there is no agreement between the parties concerned and the safeguard action is taken, the matter has to be referred to and examined by the TMB.²¹

Initially the TMB review of some safeguard actions gave rise to concerns about the standards followed by the TMB. Subsequently however its examination of these actions improved significantly, especially in light of panel and Appellate Body rulings (discussed in Section 3 of this Module).

Out of a total of 46 safeguard actions reviewed by the TMB from the start of the ATC to the beginning of 2002, it ruled a large majority of these actions to be inconsistent with the provisions of Article 6. It thus contributed to preventing recourse to the DSU.

TMB examination of safeguard actions also clarified a number of the requirements of Article 6. The following section (relating to WTO jurisprudence under the ATC) is devoted largely to the review of these requirements. However, it is necessary to highlight out a very significant clarification given by the TMB relating to the structure of Article 6.

TMB report

The TMB noted that a determination of serious damage caused by increased quantities of imports was a staged process comprised of the following parts:

- *Verification of whether the product in question was being imported in increased quantities;*
- *Determination of serious damage caused to the domestic industry;*
- *Establishment of the causal link between the increased quantities of imports and the serious damage.*

If any of the three above conditions had not been met, the safeguard measures could not be found to be justified in accordance with the provisions of Article 6 and, in such a case, the TMB, therefore, was not required to make findings and conclusions on all the three parts.²²

²¹Article 6:10 of the ATC.

²²G/TMB/R/60, para. 14.

3. DISPUTE SETTLEMENT UNDER THE ATC

To date, three ATC cases have been the subject of litigation in panels and the Appellate Body, all pertaining to transitional safeguard actions taken by the United States. Although three further cases of transitional safeguard actions were also referred to the panels, these were not pursued by the complaining Members as the restrictions in question were withdrawn. In addition, in a few other cases, ATC issues were raised as supplementary matters.

In all three cases in which the validity of transitional safeguard actions was challenged, panels and the Appellate Body found that they were not justified under the ATC. Their reports contain a number of pertinent rulings.

While brief summaries of the three cases of transitional safeguard actions litigated in the panels are provided in Section 4 of this Module, this section provides an overview of key aspects of panel and Appellate Body rulings. It also discusses some findings from cases in which ATC was not the main issue. It does not however discuss general interpretative issues such as those relating to apportioning or distributing the burden of proof, the principle of judicial economy, or similar other matters. Although these issues did come up in cases of ATC disputes, they are of more general application and appropriately belong to another Module of this Course.²³

Outcome of ATC disputes

The following table lists the outcome in cases referred to the panel process under the ATC, including those in which ATC issues were raised only as supplementary concerns.

Cases in which the ATC was the main issue	Panel / Appellate Body Outcome
<i>United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , complaint by Costa Rica, WT/DS24	Panel and AB ruled measure violated ATC obligations
<i>United States - Measure Affecting Imports of Women's and Girls' Wool Coats</i> , complaint by India, WT/DS32	The United States withdrew the measure. Complainant terminated panel process

²³ See Modules 3.1, 3.2, 3.3 and 3.4 of this Course.

<i>United States - Measure Affecting Imports of Woven Wool Shirts and blouses</i> , complaint by India, WT/DS33	Panel and AB ruled measure violated ATC obligations
<i>Colombia - Safeguard Measure on Imports of Plain Polyester Filaments</i> , complaint by Thailand, WT/DS181	Panel process not pursued, one-year measure expired
<i>Argentina – Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures</i> , complaint by Brazil, WT/DS190	Panel process discontinued due to withdrawal of measures
<i>United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , complaint by Pakistan, WT/DS192	Panel and AB ruled measure violated ATC obligations
Cases in which violation of ATC was a supplementary issue	
<i>Turkey - Restrictions on Imports of Textile and Clothing Products</i> , complaint by India, WT/DS34	Panel and AB ruled restrictions were inconsistent with ATC Article 2:4 also

The following sub-sections present an overview of key panel and Appellate Body rulings under topical headings.

3.1 Standard of Review

In all three cases, the issue of standard of review that should be applied under the ATC was extensively argued: as a general interpretative issue, as to the applicability of jurisprudence from other WTO agreements, and regarding the relationship of MFA to the ATC.

Applicable standard

In *US - Underwear* case, the United States advocated a standard of review similar to the *Fur Felt Hat* case in which the US authorities were afforded considerable discretion by a GATT Working Party.²⁴ The Working Party had concluded that, in reviewing the US safeguard measure applied against Czechoslovak imports pursuant to Article XIX of GATT 1947, the United States were entitled to the benefit of reasonable doubt.

²⁴United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, *complaint by Costa Rica, WT/DS24* (“US – Underwear”).

The the *US – Wool Shirts and Blouses* Panel was also confronted with the same line of reasoning by the United States.²⁵ In the latest *US - Cotton Yarn* case, too, the United States argued that the Panel was to review only whether the United States measure was based on the *best available data* as provided in the market statement at the time when the United States conducted its determination that the situation called for the establishment of a restriction.²⁶

The panels and the Appellate Body rejected the United States line of reasoning. They ruled, instead, that the ATC did not have any particular provision concerning the standard of review. Therefore, Article 11 of the DSU should be used to review the measures taken by a Member under the ATC. Article 11 of the DSU provides that “... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and conformity with the relevant covered agreements...”. The Panel in *US – Underwear* held:

Panel, US – Underwear

... 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.

... 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.²⁷

Relevance of WTO jurisprudence

Another issue extensively examined by panels in connexion with transitional safeguard actions under the ATC relates to the relevance or otherwise of WTO jurisprudence developed under other WTO agreements. The United States has vigorously argued that the ATC was a specific agreement, for a transition period and negotiated with a specific purpose. Therefore, applying the interpretations developed with reference to similar concepts or terms under other WTO agreements was not appropriate.

In the United States view the ATC differs significantly from other, non-transitional WTO agreements in terms of its status as a transitional agreement, in its purpose of gradually integrating the sector into GATT, and in its language, etc. Accordingly, the panels should interpret ATC provisions by remaining within its ‘four corners’, they should look to the text and the unique purpose of the ATC, and to no other agreements or to interpretations under other agreements. It asserted that interpretations of similar terms from Articles III and XIX of the GATT 1994, or the agreements on anti-dumping, safeguards, etc., were not relevant to the context of the ATC.²⁸

²⁵ United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, *complaint by India*, WT/DS33/R, (“US – Wool Shirts and Blouses”).

²⁶ United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, *complaint by Pakistan*, WT/DS192/R (“US – Cotton Yarn”).

²⁷ *Panel Report*, United States-Underwear, paras. 7.10 and 7.12.

²⁸ *Panel Report*, United States – Cotton Yarn, paras. 4.9 and 7.43.

Disagreeing with the United States, the complaining countries argued that the ATC was an integral part of the *WTO Agreement* and that therefore interpretations of similar terms under other WTO agreements were relevant.

The Panel in *US - Cotton Yarn* seems to have put the controversy to rest, ruling against the United States line of reasoning and interpreting that, as an integral part of the *WTO Agreement*, ATC provisions should be seen as only one part of the whole WTO treaty.

**Panel, US –
Cotton Yarn**

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 interpretation 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. 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.” ...

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

In this case, the “treaty as a whole” is the WTO Agreement and all its annexes; it is not just the ATC.²⁹

**Relationship
with the MFA**

A third interpretative issue that has been litigated is the relationship of the ATC with the MFA. The United States stressed that in interpreting the ATC the panels should be guided by the fact that the ATC replaced the MFA and retained several concepts and phrases from the MFA. It argued that the MFA was therefore relevant as “context” for interpreting the ATC and that the panels should draw strong inferences from the MFA and, in fact, from United States practices under the MFA.³⁰

Here again the Panel in *US - Cotton Yarn* appears to have settled the issue. It rejected the United States assertion and ruled that the MFA could not be taken as part of the “context” of the ATC in the sense of Article 31(2) of the Vienna Convention which was the guiding basis for all WTO jurisprudence. In the *US-Underwear* case, the Appellate Body had also ruled on the same lines.

²⁹Ibid., para. 7.46.

³⁰Ibid., paras. 4.62 and 7.72.

**Panel, US –
Cotton Yarn**

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 instrument 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”. They are occurrences rather than “any agreement” or “any instrument”. Clearly, in our view, the Appellate Body used the MFA not as part of the “context” of the ATC within the meaning of Article 31(2) of the Vienna Convention, but as part of the circumstances of the conclusion of the ATC.³¹

3.2 Structure of Article 6 of the ATC

Article 6 ATC

As all disputes under the ATC have so far pertained to transitional safeguard actions and, therefore Article 6 of the ATC has been the relevant ATC provision at issue, it is advisable to reproduce here the major provisions of this Article. Article 6 states in relevant part:

- 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*

³¹ Panel Report, United States – Cotton Yarn, para. 7.73.

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 imminent³², 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.

Structure of Article 6

Just as the TMB panels also devoted considerable attention to uncovering and clarifying the structure of Article 6 of the ATC, they noted that the overall purpose of Article 6 is to give Members the possibility to adopt new restrictions on products not yet integrated into GATT, and that Article 6 establishes a *three-step approach* which has to be followed for a new restriction to be imposed.

First, the importing country must make a determination that the particular product, subject of a safeguard action, was being imported in increased quantities (in absolute terms, not merely relative to domestic production as is permitted, e.g., under the *Agreement on Safeguards*).

Second, the importing country must determine that the increase in imports was such as to cause serious damage or actual threat thereof to the domestic industry producing like and/or directly competitive products and, that the serious damage or threat of serious damage was due to increased imports, not to other factors.

Third, after having satisfied the above conditions, the Member must attribute the serious damage or actual threat of serious damage to a particular Member or Members whose exports were responsible for it.

A determination as above is necessary because no safeguard action can be taken on the basis of any of the above steps alone.

Panel, US - Underwear

... Article 6 of the ATC, in our view, establishes a three-step approach which has to be followed for a new restriction to be imposed. Articles 6.2 and 6.4 of the ATC constitute the first two steps which, taken together, amount to a determination that serious damage has occurred or is actually threatening to occur and that it may be attributed to a sharp and substantial increase in imports from a particular Member or Members: No action can be taken on the basis of Article 6.2 alone.

A determination under Article 6.2 of the ATC is, therefore, a necessary but not sufficient condition to have recourse to bilateral consultations under Article

³² Original footnote: "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."

*6.7 of the ATC. Only when serious damage or actual threat thereof has been demonstrated under Article 6.2 and has been attributed to a particular Member or Members under Article 6.4 of the ATC, can recourse to Article 6.7 of the ATC be made in a way consistent with the provisions of the ATC.*³³

The Appellate Body also clarified the structure of Article 6 on the same lines as the Panel in *US - Underwear*, although it did so in the context of attribution analysis under Article 6:4 of the ATC, and specifically with reference to the interpretation of the terms ‘application’ and ‘attribution’ therein.

**Appellate Body, US –
Cotton Yarn**

*... we have to distinguish three different, but interrelated, elements under Article 6: first, causation of serious damage or actual threat thereof by increased imports; second, attribution of that serious damage to the Member(s) the imports from whom contributed to that damage; and third, application of transitional safeguard measures to such Member(s).*³⁴

3.3 Relevant Information to Be Examined

A new restriction under transitional safeguards of the ATC can be imposed, in a manner consistent with its Article 6, only after making a determination which can demonstrate (a) that imports of the particular product have increased, (b) that this increase is such as to be the cause of serious damage or actual threat of damage to the domestic industry producing like and/or directly competitive products, (c) that damage is not the result of factors unrelated to increased imports, and (d) that the increase is attributable to particular Members whose exports are not already under restriction. Article 6:7 obliges the importing Member to provide factual information on the basis of which these phenomena can be demonstrated.

The provision concerning factual information is therefore central to determining whether the restraint action is justified. The precise nature and scope of this information has however been a matter of contention. A few points from WTO jurisprudence, so far, are discussed here.

First, Article 6:3 provides that a demonstration of serious damage or actual threat thereof must be based on the examination of the effects of imports reflected in such variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment.

The Panel in *US – Wool Shirts and Blouses* ruled that the importing Member must examine *at least each one* of these factors. Moreover, the importing country must demonstrate that it also considered and addressed the issue that the damage or threat of damage was not due to other factors, such as technological changes or changes in consumer preferences.

³³ Panel Report, *US - Underwear*, paras. 7.23 and 7.24.

³⁴ Appellate Body Report, *US - Cotton Yarn*, para. 109.

**Panel, US – Wool
Shirts and Blouses**

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

The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide — in its assessment of whether or not serious damage or actual threat thereof has been caused to the domestic industry — that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC

Article 6.2 of the ATC requires that serious damage or actual threat thereof to the domestic industry must not have been caused by such other factors as technological changes or changes in consumer preferences. The explicit reference to specific factors imposes an additional requirement on the importing Member to address the question of whether the serious damage or actual threat thereof was not caused by such other factors as technological changes or changes in consumer preference.³⁵ (Emphasis added)

Second, and perhaps more importantly, the precise nature and scope of information to be examined has been the subject of some controversy. The Panel in *US – Underwear* ruled that its examination of the matter should be restricted to the review of information provided by the United States to Costa Rica in a so-called March Statement and that any subsequent information should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof.³⁶ In the course of its examination however, the Panel went on to remark that it could legitimately take [a subsequent] July Statement into account as evidence submitted by the United States in our assessment of the overall *accuracy* of the March Statement.³⁷

The Panel in *US – Wool Shirts and Blouses* also remarked that it was bound to examine the case only on the basis of information that had actually been used by the national investigating authority at the time when it made its determination. In other words, that any subsequent information could not be taken into account.

**Panel, US – Wool
Shirts and Blouses**

... Unlike the TMB, a DSU panel is not called upon, under its terms of reference, to reinvestigate the market situation. When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination...³⁸

³⁵ Panel Report, *US – Wool Shirts and Blouses*, paras. 7.25-7.27.

³⁶ Panel Report, *US - Underwear*, para. 7.26.

³⁷ *Ibid*, para. 7.29.

³⁸ Panel Report, *US – Wool Shirts and Blouses*, para. 7.21.

In the *US - Cotton Yarn* case, the complainant, Pakistan, alleged that the United States had based its determination on the state of its domestic industry on unverified, incorrect and incomplete data supplied by an association of United States yarn producers who were seeking protection for the industry. While agreeing with the finding of the Panel in *US – Wool Shirts and Blouses* that panels should not reinvestigate *de novo* the market situation when reviewing decisions by national authorities, the Panel in *US – Cotton Yarn* remarked that “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 underpinning the decision of the United States authority.*”³⁹ The Panel consequently examined later evidence for purposes of verification.

The Appellate Body however faulted the Panel and reversed its aforesaid finding, ruling that it exceeded its mandate under Article 11 of the DSU.

**Appellate Body, US –
Cotton Yarn**

A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. If a panel were to examine such evidence, the panel would, in effect, be conducting a de novo review and it would be doing so without having had the benefit of the views of the interested parties. The panel would be assessing the due diligence of a Member in reaching its conclusions and making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgment for that of the Member. In our view, this would be inconsistent with the standard of a panel’s review under Article 11 of the DSU.⁴⁰

The controversy does not seem to have come to an end however. Pakistan vigorously protested in the DSB at the time of adoption of the Panel and Appellate Body reports arguing that without the benefit of testing the accuracy of information used by the national authorities which is often provided by interested parties, the panels are left with the choice of relying only on the good faith of the importing Member, rather than making an objective assessment of the facts of the case.

3.4 Reference Period for Purposes of Information Used

In the *US -Cotton Yarn* case, the complainant argued that an analysis on the basis of data for a mere eight-month period was not enough for determining serious damage to the domestic industry. It referred to the recommended guidelines adopted by the Committee on Anti-Dumping Practices for the time period for investigation, which states that “the period of data collection for injury investigation normally should be *at least three years.*” It also pointed out that “five-year investigation periods are common” under Article XIX of the GATT. The United States contended that the ATC did not provide for a specific minimum time period for investigation.

³⁹ *Panel Report, US – Cotton Yarn, para. 7.33.*

⁴⁰ *Appellate Body Report, US – Cotton Yarn, para. 78.*

The Panel disagreed with the complainant on the notion of a general guideline as to the length of period during which damage could occur.

**Panel, US –
Cotton Yarn**

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.⁴¹

3.5 Definition of Domestic Industry

In the *US - Cotton Yarn* case, the central issue was the definition of the domestic industry producing cotton yarn in the United States.

This same issue was the basis on which the United States had adopted another safeguard action restricting the imports of yarn of artificial staple fibre from Thailand. Following a mutual understanding between the two, the TMB, after its consideration of the restriction pursuant to Article 6:9 of the ATC, had declared the restriction to be justified.⁴²

In both these cases, the United States defined the domestic industry as the producers of yarn who produced it for sale on the merchant market. It excluded from the scope of its definition of domestic industry the vertically integrated fabric producers who produced yarn for their own internal use.

Pakistan claimed that in doing so the United States violated Article 6.2 of the ATC because it did not investigate its entire domestic industry producing cotton yarn. It referred to long-standing GATT/WTO jurisprudence under Article III of the GATT in which the term “directly competitive products” has been consistently interpreted as referring not only to products in actual competition at a particular time, but also to those that have the potential to compete. Thus the term “competitive products” has also been seen as including products that are capable of competing.⁴³

The United States argued that production by so-called integrated fabric producers did not compete directly with imports. The United States asserted it was necessary to give full meaning to the connector “and/or” in the phrase “domestic industry producing like and/or directly competitive products” in Article 6:2 of the ATC and, ignoring it would amount to rendering the word “and” useless. It went on to assert that the connector “and/or” was unique to the ATC. It is not found in any other WTO agreement where the relationship between domestic and imported products has been defined.⁴⁴

⁴¹ *Panel Report, US – Cotton Yarn, para. 7.115.*

⁴² *G/TMB/R/42, paras. 5-13.*

⁴³ *US-Cotton yarn, para. 7.37.*

⁴⁴ *Appellate Body Report, US - Cotton Yarn, para. 84.*

The Panel held that yarn produced by the integrated producers was directly competitive with the yarn imported from outside and that the United States violated the requirement of Article 6:2 by excluding the captively-produced yarn from the scope of domestic industry.

The Appellate Body confirmed and ruled that “...we do not accept the contention of the United States that yarn produced by the vertically integrated fabric producers is not directly competitive with yarn imported from Pakistan.”⁴⁵

Appellate Body, US – Cotton Yarn

The definition of the domestic industry, in terms of Article 6.2, is determined by what the industry produces, that is, like and/or directly competitive products. In our view, the term “producing”, in itself, cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with its product.

...
The word “competitive” must be distinguished from the words “competing” or “being in actual competition”. It has a wider connotation than “actually competing” and includes also the notion of a potential to compete. It is not necessary that two products be competing, or that they be in actual competition with each other, in the marketplace at a given moment in order for those products to be regarded as competitive. Indeed, products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers’ decisions. Thus, a static view is incorrect, for it leads to the same products being regarded as competitive at one moment in time, and not so the next, depending upon whether or not they are in the marketplace.⁴⁶

3.6 Threat of Serious Damage

In terms of Article 6:2 of the ATC a safeguard action may be taken on the basis of a determination demonstrating that there was serious damage or actual threat of serious damage to the domestic industry.

The United States seemed to take the two concepts of serious damage and threat of serious damage as though they were interchangeable, and that a determination in either case could be made on the basis of the same assessment of facts, i.e., without conducting an independent assessment in cases alleging threat of serious damage.

The panels however have interpreted these concepts as being different. Thus, the Panel in *US-Underwear* ruled that while a finding on serious damage “requires the party that takes action to demonstrate that the damage has already occurred, a finding on threat of serious damage requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future.”⁴⁷ In other words that a determination of threat of serious damage requires a ‘prospective analysis’.

⁴⁵ Appellate Body Report, US – Cotton Yarn, para. 103

⁴⁶ Appellate Body Report, US – Cotton Yarn, paras. 87 and 96.

⁴⁷ Panel Report, US - Underwear, para. 7.55.

The Panel in *US - Cotton Yarn* ruled likewise. It found that: “... 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 [i.e., dependant just on the determination of serious damage]”⁴⁸

3.7 Attribution of Serious Damage

In the *US-Cotton Yarn* case, the issue of attribution of serious damage was also a key consideration. In its determination, the United States attributed the alleged damage to imports from Pakistan without making a comparative assessment of imports from Pakistan and Mexico and their respective effects. The Panel as well as the Appellate Body concluded that by not examining the effect of imports from Mexico (and possibly other appropriate Members) individually, the United States acted inconsistently with Article 6 of the ATC.

The question of attribution is addressed in Article 6:4 of the ATC.

Article 6:4 of the ATC

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 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. (footnote omitted)

The United States argued that Article 6:4 authorizes the importing Member to apply safeguard measures on a Member-by-Member basis, and that the obligation of the importing Member is only that it compare imports from any particular Member to imports from “all other sources taken together”, not from each of them individually. The opposing view was that a proper attribution of damage could not be done if the largest exporter, in this case, was simply ignored. Doing so would in effect shift the responsibility for entire damage to the other Member.

The Panel in *US – Cotton Yarn* rejected the United States argument and found that analysis of the effect of imports from individual Members was necessary, in order for it to be consistent with the requirement of Article 6:4.

Panel, US – Cotton Yarn

... unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, ... 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

⁴⁸Panel Report *US - Cotton Yarn*, para. 7.138.

the serious damage. This does not mean, however, that a 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 [to] 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...”

[The] 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.⁴⁹

The Appellate Body also ruled as the Panel:

**Appellate Body,
US – Cotton Yarn**

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

...

An assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually.⁵⁰

⁴⁹ Panel Report, US – Cotton Yarn, paras. 7.126 and 7.127.

⁵⁰ Appellate Body Report, US – Cotton Yarn, paras. 119 and 124.

3.8 Backdating of Safeguard Measures

The date from which the application of a safeguard measure should take effect was raised in both the *US - Underwear* and *US – Wool Shirts and Blouses* cases. The United States imposed the restrictions (unilaterally), after the parties failed to reach mutual understanding on the measures, backdating the effective date of restrictions to the dates on which it had requested consultations with the respective exporting Members. The complaining exporting Members – Costa Rica and India – took issue with the United States approach.

The Panel in *US – Wool Shirts and Blouses* declined to rule on the question, saying that since it had concluded that the restriction itself was not consistent with the requirements of Article 6:2 and 6:3, it was not necessary to consider whether the date of application of the measure was also consistent (or not) with the WTO rules.⁵¹

The Panel in *US - Underwear* ruled that the restrictions could justifiably be imposed from the date on which the United States published the request for consultations.

Panel, US - Underwear

... [W]e conclude that the prevalent practice under the MFA of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the ATC. However, we note that if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint. In the present case, the United States violated its obligations under Article X:2 of GATT 1994 and consequently under Article 6.10 of the ATC by setting the restraint period ... starting on 27 March 1995. ... Had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period.⁵²

On appeal by Costa Rica, the Appellate Body concluded that the Panel in *US - Underwear* erred in law and reversed its finding, ruling that the restriction could be applied only *after* the consultations provided for under Article 6. The Appellate Body ruling is extremely instructive in this regard.

Appellate Body, US - Underwear

It is essential to note that, under the express terms of Article 6.10, ATC, the restraint measure may be “applied” only “after the expiry of the period of 60 days” for consultations, without success, and only within the “window” of 30 days immediately following the 60-day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, ATC, to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively.

⁵¹ Panel Report, *US – Wool Shirts and Blouses*, para. 7.58.

⁵² Panel Report, *US – Underwear*, para. 7.69.

...
It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint measure will encourage return to the practice of backdating restraint measures which appears to have been widespread under the regime of the MFA, a regime which has now ended, ... Such an introjection would moreover loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later.⁵³

3.9 New Restrictions Only Under the ATC

Article 2:4 of the ATC provides that any new restrictions on textile and clothing products, that are not yet integrated into the GATT, can be applied only if justified under the ATC or relevant provisions of the GATT 1994 excluding however Article XIX thereof.

Article 2:4 of the ATC

... No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions...

In many dispute cases involving textile and clothing products, the complaining Members alleged violation of this provision, in addition to violations of other provisions of the ATC (such as its Article 6) or other GATT provisions (such as Articles XI, XIII, etc.)

In such instances, the panels and the Appellate Body ruled that if a restriction on textile and clothing products were found to be violative of Article 6 of the ATC or Article XI and/or XIII of the GATT it should *ipso facto* be deemed to be violative of Article 2:4 of the ATC also.

Panel, US - Underwear

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

We note our previous conclusion that the United States imposed the restriction in a manner inconsistent with its obligations under Articles 6.2, 6.4 and 6.6(d) of the ATC. In our view, the United States by violating its obligations under Article 6 of the ATC has ipso facto violated its obligations under Article 2.4 of the ATC as well.⁵⁴

⁵³ Appellate Body Report, US – Underwear, p. 22 and 23.

⁵⁴ Panel Report, US - Underwear, paras. 7.70 and 7.71.

In this regard, it is significant to note that Turkey applied restrictions on imports of textile and clothing products following the establishment of the customs union between Turkey and the European Communities.⁵⁵ It argued that these restrictions were necessary for the formation of the customs union. On a WTO challenge by India, the Panel concluded that Turkey's measure was inconsistent with the provisions of Article XI and XIII of GATT 1994 and *consequently* also with that of Article 2:4 of the ATC. The Panel in *Turkey - Textiles* rejected Turkey's claim that the subject measure was permitted by Article XXIV of GATT 1994 relating to the formation of customs union.⁵⁶

The Appellate Body upheld the Panel's conclusion stating that "...Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Union, quantitative restrictions on imports of 19 categories of textile and clothing products which were found to be inconsistent with Article XI and XIII of the GATT 1994 and *Article 2:4 of the ATC*."⁵⁷ [Emphasis added]

In another important finding, the Panel in *Turkey - Textiles* reasoned as follows:

**Panel, Turkey –
Textiles**

The prohibition on "new restrictions" must be interpreted taking into account the preceding sentence [of ATC Article 2:4]: "The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement". The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a "new restriction", would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a "new" restriction.⁵⁸

In the *Argentina – Textiles and Apparel* case too, the complainant, the United States, had claimed that because Argentina had violated Articles II and VIII of the GATT with respect to textiles and apparel, it had also consequently violated Article 7 of the ATC. The Panel however declined to rule on this claim, exercising the principle of judicial economy.

⁵⁵Turkey – Restrictions on Imports of Textile and Clothing Products, *complaint by India, WT/DS34/R* ("Turkey – Textiles").

⁵⁶ *Panel Report, Turkey – Textiles, para. 10.1.*

⁵⁷ *Appellate Body Report, Turkey - Textiles, para. 64.*

⁵⁸ *Panel Report, Turkey – Textiles, para. 9.71.*

**Panel, Argentina –
Textiles and Apparel**

The parties and third parties have entered into long and well-argued debates as to whether Article 7 covers only actions and obligations covered by the ATC, i.e., quantitative restrictions, or whether the purpose of Article 7 is [also] to ensure that measures other than quantitative restrictions such as tariffs, non-tariff barriers, licensing provisions and intellectual property provisions are not used in a manner which undermines market access in the textile and apparel sector for all WTO Members.

We have decided to exercise judicial economy and not address the US claim related to the ATC. Such decision is consistent with the findings of the Appellate Body report in the Shirts and Blouses case. We do not see how a finding on Article 7 of the ATC would help the parties to resolve their dispute.⁵⁹

⁵⁹ Panel Report, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (“Argentina – Textiles and Apparel”), WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1, DSR 1998:III, 1033, paras. 6.86 and 6.87.

4. SUMMARY OVERVIEW OF ATC DISPUTE CASES

The central purpose of the ATC was to secure the progressive phasing out of quota restrictions on textiles and clothing maintained by major developed countries on imports from developing countries under the MFA and its predecessor arrangements. Yet the Agreement also provided for the possibility of new restrictions in the interim, by means of a “transitional safeguard” on products that remained to be integrated.

Article 6 of the ATC lays down the conditions and procedures for “transitional safeguard” which an importing Member must follow to introduce any new restrictions. Paragraphs 1 - 4 of the Article set out the substantive requirements whereas the main procedural requirements are laid out in paragraphs 7 - 11. In brief, an importing Member may resort to a transitional safeguard action if it is demonstrated that the product subject to the action is being imported in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products, and that such damage or threat is attributable to a sharp and substantial increase in imports from the Member to which the action is applied (Articles 6:1 to 6:4).

The importing Member proposing to take the safeguard action is required to seek consultations with the Member or Members which would be affected by such action (Article 6:7). In its request for consultations, it must provide specific information justifying the new restriction. If during consultations, there is mutual understanding between the importing and exporting Member, the restriction may be put into effect, with details of the agreed restraint measure communicated to the TMB. If there is no mutual understanding, the importing Member may apply a restriction and, at the same time, refer the matter to the TMB. In both cases, the TMB is required to examine the measure and determine whether it is justified in accordance with the provisions of Article 6. If after TMB examination, the matter remains unresolved, either Member may invoke the dispute settlement procedures of the DSU.

As noted earlier, to date, three cases of transitional safeguard action by the United States have been litigated in dispute settlement panels. In all three cases, certain findings of the panels were appealed to the Appellate Body. While key aspects of the Panel and Appellate Body rulings in these cases have been considered in Section 3 of this Module, the following account is designed to provide brief summaries of the cases. The various stages of the three cases are tabulated below:

Stage	Underwear	Wool Shirts and Blouses	Cotton Yarn
United States consultation request (Article 6.7)	27 March 1995	18 April 1995	24 Dec. 1998
Result of consultations	No agreement	No agreement	No agreement
Unilateral restraint introduced (Art. 6.10)	23 June 1995	14 July 1995	5 March 1999
Restraint effective from	27 March 1995 ⁶⁰	18 April 1995 ⁶¹	17 March 1999
After TMB process	Matter unresolved	Matter unresolved	Matter unresolved
Panel request	22 February 1996	14 March 1996	3 April 2000
Panel established	5 March 1996	17 April 1996	19 June 2000
Panel report	8 November 1996	6 January 1997	31 May 2001
Panel findings appealed	11 November 1996	24 february 1997	9 July 2001
Appellate Body report	10 February 1997	25 April 1997	8 October 2001

The issues in each case are summarized below.

4.1 US - Underwear

In this, the first case concerning a safeguard action under the ATC, the TMB ruled that the United States had failed to demonstrate that its domestic industry had been damaged due to increased imports. However, the TMB could not reach a consensus on whether a situation of actual threat of damage to the United States industry had been proven. It recommended further consultations between the parties which, Costa Rica believed, the TMB was not entitled to do under the ATC. Nevertheless, even following further consultations, the matter remained unresolved. The TMB again examined the case pursuant to

⁶⁰ In other words, the effectivity of the restraint back-dated to the date of request for consultation.

⁶¹ Idem.

Costa Rica's request under Article 8.10 and maintained its previous findings, prompting Costa Rica to request the establishment of a dispute settlement panel.

Costa Rica claimed before the Panel that the United States, by imposing a unilateral quantitative restriction, acted in violation of Articles 2, 6 and 8 of the ATC and requested that the Panel recommend that the United States withdraw the measure in question. Specifically, it claimed that the United States violated its obligations by:

- (a) imposing the restriction without having satisfied the conditions of Article 6.2 and 6.4 of the ATC, namely, by not having been able to demonstrate that serious damage or actual threat thereof resulted from imports from Costa Rica;
- (b) not granting, when applying the restriction, more favourable treatment to re-imports from Costa Rica in contravention of Article 6.6(d) of the ATC;
- (c) not consulting with Costa Rica on the issue of actual threat of serious damage contrary to its obligations under Article 6.7 and 6.10 of the ATC (because the United States request for consultations had only claimed damage to its industry, not actual threat thereof);
- (d) applying the restriction retroactively in contravention of Article 6.10 of the ATC;
- (e) violating Article 2.4 of the ATC, by introducing a new restriction which was not justified under Article 6; and
- (f) not respecting the TMB recommendation, contrary to Article 8 of the ATC.

The panel upheld Costa Rica's claims with the exception of the one at (f) above. It recommended the DSB to request that the United States bring the measure into compliance with its obligations under the ATC. It also suggested that "such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure..."

Costa Rica appealed the Panel findings with respect to the backdating of the restriction. In essence, the Panel had found that the United States was wrong in setting the start of the restraint period as from the date of the request for consultations with Costa Rica; but, that it would have been justified to set this date as from the day on which it had published its consultation request

The Appellate Body set aside this Panel finding and ruled, instead, that the restraint measure could not be back-dated even as implied from the Panel ruling. The Appellate Body ruled the restriction could be applied only "after the expiry of the period of 60 days" for consultations, and only within the "window" of 30 days immediately following the 60-day period.

4.2 US – Wool Shirts and Blouses

In this case, after exhausting the TMB process, India requested the Panel to rule that the restraint introduced by the United States was inconsistent with a number of substantive and procedural requirements of Articles 6, 8 and 2 of the ATC, thus nullifying or impairing benefits accruing to India. India further requested supplementary findings that, according to Article 6 of the ATC, the onus of demonstrating serious damage or its actual threat was on the United States and that it had to choose, at the beginning of the process, whether it claimed the existence of “serious damage” or “actual threat thereof”, these two situations not being interchangeable. India also claimed that there was nothing in the ATC under which the United States could impose a restraint with retrospective effect.

The Panel found that the restraint measure in question violated the substantive provisions of Articles 2 and 6 of the ATC. However, it declined to rule on India’s supplementary claims. Invoking the principle of judicial economy, the Panel held that as it had concluded that the United States measure did not respect the requirements of Articles 6.2 and 6.3 of the ATC and was, therefore, violative of the Agreement and that the Panel need not consider and rule on those supplementary issues.

Notwithstanding this Panel’s refusal to make all the findings requested by India, the Panel and the Appellate Body rulings in *US - Underwear* were instructive, at least in so far as the back-dating of the restraint measure and the separate requirements for determination of threat of damage (as opposed to damage) were concerned.

India appealed the Panel’s approach with regard to the issues of (i) the burden of proof, and (ii) the exercise of judicial economy. It also appealed the finding in which the Panel had ruled that the TMB was not limited to considering only the initial information submitted by the importing Member.

The Appellate Body upheld the Panel with respect to the first two issues. Regarding the third, it ruled that the Panel’s statement was only a gratuitous comment, and therefore, it was not to be considered as “a legal finding or conclusion”.

4.3 US – Cotton Yarn

As in the two previous cases, after going through the TMB process, Pakistan requested the Panel to find that the United States failed to demonstrate, before taking the safeguard action, that imports caused serious damage or actual threat thereof to its domestic industry and that such damage or threat was attributable to Pakistan because the United States:

- did not examine the state of the entire domestic industry producing combed cotton yarn, only the yarn produced by units selling to outsiders;
- 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 (imports from whom had similarly increased) and their respective effects.

Furthermore, Pakistan requested the Panel:

- to rule, on the basis of the above findings, that the safeguard action was inconsistent with the United States' obligations under Article 6 of the ATC;
- to rule further that the United States had 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 itself 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.

This Panel decided not to exercise judicial economy and examined all claims submitted by Pakistan. It upheld all these claims with the exception of those pertaining to: (i) the data used by the United States to base its determination on; and (ii) the short time period of eight months in determining the causal link between imports and serious damage.

The United States appealed the Panel findings with regard to the issues of: (i) the standard of review; (ii) the definition of domestic industry in which the United States had excluded the portion of yarn produced by the so-called vertical producers for their own use; and (iii) the attribution of serious damage (in which the Panel had faulted the United States for not examining the imports from Mexico and possibly some other Members *individually* and attributing, instead, the entire alleged damage to imports from Pakistan).

The Appellate Body rejected the United States contention and upheld the Panel with respect to the latter two issues. However, it concluded that the Panel exceeded its mandate by considering data which was not available to the importing Member, the United States, when it had made its determination concerning the damage caused to its industry by increased imports.

5. TEST YOUR UNDERSTANDING

After having studied this Module, can you answer the following questions? The answers should not be simple yes or no. Consider brief explanations.

1. The textile and clothing sector is not yet integrated into the GATT. In this situation, how is the DSU relevant for dispute settlement under the ATC?
2. The ATC replaced the MFA that had long regulated trade in textiles and clothing. In what respect is the MFA still relevant? Does it also have relevance in cases of disputes under the ATC?
3. Why is it that a dispute case involving imposition of anti-dumping measures on wearing apparel cannot be raised under the ATC?
4. A WTO Member is considering requesting consultations with another WTO Member to take issue with changes made by the latter in its rules of origin for textile products. What is the correct process and procedure for the requesting Member to follow?
5. A WTO Member has imposed a quota restriction on import of a clothing product from another WTO Member without requesting or undertaking any consultations pursuant to Article 6 of the ATC. Is the measure justified under the ATC?
6. The TMB has recommended that an importing Member should withdraw a restriction imposed by it under transitional safeguard of the ATC. The Member insists on the justification of its measure and declines to accept the TMB recommendation. Can this Member do so? What recourse is available to the exporting Member under the WTO? Cite the relevant provisions in support of the approach you suggest.
7. What did the TMB say with respect to the issue of triple deduction of quotas due to repeated instances of trans-shipments?
8. Two WTO Members have agreed to establish a quota restriction for a period of three years as of May 15 2002, pursuant to Article 6 of the ATC. Will this restriction be consistent with the ATC and the WTO Agreement after 1 January 2005?

6. CASE STUDY

This section identifies a hypothetical case with reference to certain provisions of the ATC. It is proposed that readers of this Module try to develop detailed arguments and reasoning regarding the case, assuming it is to be litigated under the WTO.

It may be recalled from Section 1.4.4 of this Module that Article 2.13 and 2.14 of the ATC stipulated that quota levels for products that are not yet integrated into GATT 1994 shall be increased during the transitional period in accordance with the following formulae:

As of 1 January 1995: All annual quota growth rates, which existed in respective bilateral agreements prior to the ATC, be increased by a factor of at least 16 per cent⁶².

Thus an annual growth rate of 6 per cent should be increased to 6.96 per cent; 5 per cent to 5.80 per cent; 4 per cent to 4.64 per cent; 3 per cent to 3.48 per cent; 2 per cent to 2.32 per cent; 1 per cent to 1.16 per cent.

As of 1 January 1998: The annual growth rates resulting from the above formula shall be increased further by at least 25 per cent.⁶³

As of 1 January 2002: The rates resulting from the above (i.e. 1998) shall be increased by another at least 27%.⁶⁴

However, for exporting countries considered small suppliers, the ATC provided for preferential treatment for such increases in quotas. Thus Article 1.2 of the ATC stipulated:

*Members agree to use the provisions of paragraph 18 of Article 2... in such a way as to permit meaningful increases in access possibilities for small suppliers ...*⁶⁵ [Emphasis added]

Furthermore, Article 2.18 of the ATC provided:

As regards those Members whose exports are subject to restrictions on the day before the entry into force of the WTO Agreement and whose restrictions

⁶² Article 2:13 of the ATC.

⁶³ Article 2:14(a) of the ATC.

⁶⁴ Article 2:14(b) of the ATC.

⁶⁵To the extent possible, exports from a least-developed country Member may also benefit from this provision.

represent 1.2 per cent or less of the total volume of the restrictions applied by an importing Member as of 31 December 1991 ... , meaningful improvement in access for their exports shall be provided, at the entry into force of the WTO Agreement and for the duration of this Agreement, through advancement by one stage of the growth rates set out in paragraphs 13 and 14 [brought out above], or through at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions. Such improvements shall be notified to the TMB. [Emphasis added]

In giving effect to the preferential treatment for small suppliers however, the importing countries maintaining quota restrictions (“restraining countries”) gave varying interpretations of the provisions cited above.

Thus, at the first stage from January 1995, restraining country ‘A’ increased the rates existing prior to the ATC first by 16 per cent and, then, by 25 per cent, i.e., cumulatively. Consequently, the pre-ATC growth rate of 6 per cent was increased to 8.7 per cent. Subsequently, in the second stage from 1998, the resulting rate was increased by 27 per cent to 11.05 per cent. The rate was then again raised by 27 per cent to 14.03 per cent in the third stage starting from 2002.

But restraining country ‘B’ simply brought forward the growth factors prescribed for subsequent stages. Thus, for stage 1, it applied 25 per cent; for stage 2, 27 per cent; and for stage 3, another 27 per cent. Consequently, the pre-ATC growth rate of 6 per cent was increased to 7.5 per cent, 9.53 per cent, and 12.10%, respectively.

It may be noticed that the rates allowed by restraining country ‘B’ produced lower market access increases to the small suppliers concerned than that allowed by restraining country ‘A’.

	Country A	Country B
As of 1 January 1995	8.7 %	7.5 %
As of 1 January 1998	11.05 %	9.53 %
As of 1 January 2002	14.03 %	12.10 %

In the light of the principles of interpretation applied by panels and the Appellate Body to cases reviewed in this Module, readers are invited to develop arguments with regard to the justification or otherwise of the two approaches. They may also specify the process under the ATC and the DSU, where a dispute case is to be pursued by a small exporting country, Member of the WTO.

7. FURTHER READING

7.1 Books and Articles

- **Bagchi, S.**, *International Trade Policy in Textiles: Fifty Years of Protectionism* (Geneva, ITCB, 2001)
- **Baughman, L., et al.**, “Of Tyre Cords, Tyres and Tents: Window-Dressing in the ATC?”, *The World Economy*, Vol. 20, No. 4
- **Raffaelli, M. and Jenkins, T.**, *The Drafting History of the Agreement on Textiles and Clothing* (Geneva, ITCB, 1995)
- **Tang, Xiaobing**, “The Integration of Textiles and Clothing into GATT and WTO Dispute Settlement”, in *Dispute Resolution in the World Trade Organization* (Cameron May, London)

7.2 Panel and Appellate Body Reports

- Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (“US – Underwear”)*, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31.
- Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (“US – Underwear”)*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.
- Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (“US – Wool Shirts and Blouses”)*, WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R and Corr.1, DSR 1997:I, 343.
- Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (“US – Wool Shirts and Blouses”)*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.
- Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (“Turkey – Textiles”)*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R.
- Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (“Turkey – Textiles”)*, WT/DS34/AB/R, adopted 19 November 1999.
- Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (“US – Cotton Yarn”)*, WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R.
- Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (“US – Cotton Yarn”)*, WT/DS192/AB/R, adopted 5 November 2001.

7.3 Documents and Information

- International Textiles and Clothing Bureau (ITCB) “Conduct of Textile Trade Relations under GATT/WTO – A Chronological Account” (www.itcb.org)
- WTO, *Reports of the Textiles Monitoring Body* (G/TMB/R/-) and (G/L/459).