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

AB-2001-3

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan

United States, *Appellant*
Pakistan, *Appellee*
European Communities, *Third Participant*
India, *Third Participant*

AB-2001-3

Present:

Abi-Saab, Presiding Member
Ehlermann, Member
Ganesan, Member

I. Introduction

1. The United States appeals from certain issues of law and legal interpretations in the Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (the "Panel Report").[1] The Panel was established on 19 June 2000 to consider a complaint by Pakistan with respect to a transitional safeguard measure imposed by the United States under Article 6.2 of the *Agreement on Textiles and Clothing* (the "*ATC* ") on Category 301 imports of combed cotton yarn ("yarn") from Pakistan.

2. On 24 December 1998, the United States filed a request for bilateral consultations with Pakistan, pursuant to Article 6.7 of the *ATC*, on the proposed safeguard measure. The United States attached to this request its Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale: Category 301 (December 1998) (the "Market Statement"), which formed the basis for the proposed safeguard measure. This Market Statement set out the results of the investigation of the conditions prevailing in the United States' market for yarn. It defined the domestic industry to be investigated and concluded that increased imports had caused serious damage, and actual threat thereof, to the domestic industry, and that this damage and threat were attributable to Pakistan.

3. The United States held bilateral consultations with Pakistan in February 1999, which did not result in a mutually agreed solution. Consequently, the United States imposed the transitional safeguard measure at issue in this dispute in the form of a quantitative restriction on Category 301 imports of yarn from Pakistan. The safeguard measure was made effective for one year as of 17 March 1999 and was extended twice, each time for one further year, effective 17 March 2000 and 17 March 2001, respectively.

[1] WT/DS192/R, 31 May 2001.

4. The Textiles Monitoring Body (the "TMB") reviewed the matter, pursuant to Articles 6.10 and 8.10 of the *ATC*, in April and in June 1999. The TMB concluded on both occasions that the United States had not demonstrated successfully that yarn was being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products. Accordingly, the TMB recommended that the safeguard measure introduced by the United States on imports of yarn from Pakistan be rescinded.[2] On 6 August 1999, the United States informed the TMB that it believed its action was justified under the provisions of Article 6 of the *ATC* and that it would maintain the safeguard measure.[3] The United States and Pakistan held a further round of consultations in November 1999 but failed to reach a mutually agreed solution.

5. On 3 April 2000, Pakistan requested the establishment of a panel, pursuant to Article 8.10 of the *ATC*, Article XXIII:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). The factual aspects of this dispute are set out in greater detail in the Panel Report.[4] The Panel considered Pakistan's claims that, in imposing the transitional safeguard measure, the United States acted inconsistently with Articles 6.2 and 6.4 of the *ATC*. Pakistan also requested that the Panel suggest, in accordance with the second sentence of Article 19.1 of the DSU, that the most appropriate way to implement the Panel's ruling would be to rescind the safeguard measure.[5]

6. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 31 May 2001, the Panel concluded that the transitional safeguard measure imposed by the United States on imports of yarn from Pakistan was inconsistent with the provisions of Article 6 of the *ATC*. Specifically, the Panel found that:

> (a) Inconsistently with its obligations under [Article] 6.2, the United States excluded the production of combed cotton yarn by vertically integrated producers for their own use from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn.
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> (b) Inconsistently with its obligations under Article 6.4, the United States did not examine the effect of imports from Mexico (and possibly other appropriate Members) individually.

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[2]G/TMB/18, 29 April 1999, para. 32; G/TMB/19, 29 June 1999, para. 36.

[3]G/TMB/R/57, 28 October 1999, para. 5; G/TMB/N/346, 24 September 1999.

[4]Panel Report, paras. 2.1-2.10.

[5]*Ibid*., para. 3.1.

> (c) Inconsistently with its obligations under Articles 6.2 and 6.4, the United States did not demonstrate that the subject imports caused an "actual threat" of serious damage to the domestic industry.[6] (footnote omitted)

7. The Panel further concluded that:

> (a) Pakistan did not establish that the US determination of serious damage was not justified based on the data used by the US investigating authority.
>
> (b) Pakistan did not establish that the US determination of serious damage was not justified regarding the evaluation by the US investigating authority of establishments that ceased producing combed cotton yarn.
>
> (c) Pakistan did not establish that the US determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof.[7]

8. The Panel concluded that the United States' safeguard measure had nullified and impaired the benefits accruing to Pakistan under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement* "), and in particular, under the *ATC*.[8] Finally, the Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring its safeguard measure into conformity with its obligations under the *ATC*, and suggested this could best be achieved by the prompt removal of the safeguard measure.[9]

9. On 9 July 2001, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 19 July 2001, the United States filed its appellant's submission.[10] On 3 August 2001, Pakistan filed its appellee's submission.[11] On the same day, the European Communities and India each filed a third participant's submission.[12]

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[6]Panel Report, para. 8.1.

[7]*Ibid*., para. 8.2(a), (b) and (c).

[8]*Ibid*., para. 8.3.

[9]*Ibid*., para. 8.5.

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

[11]Pursuant to Rule 22 of the *Working Procedures*.

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

10. The oral hearing in the appeal was held on 16 August 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Standard of Review

11. The United States claims that the Panel erred and exceeded the mandate of WTO dispute settlement panels set forth in Article 11 of the DSU by finding that, in assessing the conformity of a transitional safeguard measure with Article 6 of the *ATC*, it could consider evidence that was not in existence at the time of the competent authority's determination.

12. In the United States' view, the Panel misinterpreted the standard of review applicable to its assessment of the conformity of the transitional safeguard measure at issue with Article 6 of the *ATC*. In challenges to a transitional safeguard measure, the question before a panel is whether the determination, at the time it was made, was consistent with the requirements of Article 6 of the *ATC*. Such an assessment can be made only on the basis of facts in existence at that time. Examining a Member's determination on the basis of evidence that did not exist at that time would permit panels to strike down the determination of the competent authority for failing to anticipate facts that could emerge in the future. The United States argues that such a review would not be an "objective assessment" of the matter at issue, but would instead constitute a *de novo* review.

13. The United States submits that WTO jurisprudence strongly supports limiting a panel's consideration of evidence to that in existence at the time the competent authority made its determination. For instance, the panel in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts and Blouses*"), an *ATC* dispute, found that an objective assessment must be based on facts in existence *at the time of the determination*.[13] The panels that reviewed the consistency of safeguard measures under the *Agreement on Safeguards* in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*

[13]Panel Report, 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, para. 7.21.

Safeguard ") and *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten Safeguard* ")[14] reached a similar conclusion.

14. The United States argues that, contrary to the Panel's reasoning, the finding of the panel in *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear Safeguard* ") that a panel may have to consider the raw information from which the data to be scrutinized were compiled, does not support the Panel's conclusion.[15] The Panel sought to distinguish between relying on post-determination evidence to (i) reinvestigate the market situation and (ii) evaluate the "thoroughness and sufficiency" of the "investigation" of the competent authority. Such a distinction might at most, and in limited circumstances, justify consideration of the underlying data used to support a determination.[16]

15. The United States also submits that the Panel implied that "subsequent developments" could be treated differently from post-determination evidence and, unlike post-determination evidence, "subsequent developments" could not be taken into account by a panel. There is, however, no meaningful distinction between those two categories, as information concerning neither would have been available to the competent authority at the time it made its determination.

16. The United States claims that the Panel further erred in relying on what it perceived to be certain deficiencies in the *ATC*, notably the absence of a right of exporting Members to participate in the national investigation prior to the determination, to justify its consideration of post-determination evidence. Under Article 11 of the DSU, the extent of a panel's review is circumscribed by the text of the agreement it is reviewing. Articles 6.7 and 6.10 of the *ATC* provide exporting Members ample opportunity to contest the fact-finding and determination of the importing Member on a bilateral and multilateral basis.

17. The United States further argues that under the *ATC*, evidence that came into existence after the competent authority's determination may be considered by the TMB pursuant to Article 6.10 of the *ATC*. WTO dispute settlement panels have a more limited mandate than the TMB, as confirmed by the panel in *United States – Shirts and Blouses*.[17]

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[14]Panel Report, *Korea – Dairy Safeguard*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, para. 7.30; Panel Report, *United States – Wheat Gluten Safeguard*, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R, para. 8.6.

[15]Panel Report, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, para. 8.126.

[16]United States' appellant's submission, para. 18.

[17]Panel Report, *supra*, footnote 13, para. 7.21.

18. In conclusion, the United States claims that if WTO dispute settlement panels were allowed to review a competent authority's determination on the basis of newly available evidence, competent authorities would be held responsible for facts unknown or unknowable at the time of their determinations. Under such circumstances, the United States submits, it would be impossible for a Member to make a determination that would withstand a panel review and respond in a timely manner to the damaging effects of an import surge, thus seriously impairing the transitional safeguard mechanism guaranteed by Article 6 of the *ATC*.

2. Definition of the Domestic Industry

19. The United States claims that the Panel erred in concluding that the United States breached Article 6.2 of the *ATC* by not including in its definition of the domestic industry yarn manufactured and consumed by vertically integrated fabric producers of the United States. According to the United States, the *ATC* permits the importing Member to define the domestic industry as the industry producing a product that was both like *and* directly competitive with the imported product. Vertically integrated fabric producers manufactured yarn that was like, but that was not directly competitive with the imported yarn, because the yarn produced by them was for their own consumption and was not destined "for sale" in the merchant market. Therefore, the United States' identification of the domestic industry, in this case, as the producers of yarn "for sale" in the merchant market, was consistent with the *ATC*.

20. The United States submits that the Panel, in rejecting its domestic industry definition, disregarded the ordinary meaning of the connector "and/or" expressly used in Article 6.2 of the *ATC* and, contrary to customary rules of treaty interpretation, reduced the meaning of the term "and" to inutility. The Panel found that the phrase "like and/or directly competitive products" means: (i) every like product; (ii) every directly competitive product; and (iii) any overlap between the two. The Panel interpreted Article 6.2 as if it read "like or directly competitive", completely writing out the word "and" from the Article. The United States contends that the combination of the connectors "and/or" generally means "either together or as an alternative", and allows a range of industry identifications, including the one that it chose in this case.

21. The United States also submits that the Panel ignored customary rules of treaty interpretation by referring first to other WTO agreements rather than to the *ATC* itself in analyzing the context of Article 6.2 of the *ATC*. In accordance with Appellate Body jurisprudence, the Panel should have focused on the particular provision to be interpreted[18] and should have begun its interpretation within

[18]Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp* "), WT/DS58/AB/R, adopted 6 November 1998, para. 114.

the "four corners" of the *ATC*.[19] Specifically, the Panel erroneously relied on jurisprudence pertaining to Article III of the GATT 1994, namely, the panel and Appellate Body reports in *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*").[20] That dispute involved the interpretation of a different phrase ("directly competitive or substitutable") of a different provision of a different agreement (Article III:2 of the GATT 1994). Therefore, the Panel erred in relying on the Appellate Body statement in *Korea – Alcoholic Beverages* that "'like products' are, by definition, directly competitive and a subset of 'directly competitive or substitutable products' ". Unlike the present case, *Korea – Alcoholic Beverages* dealt exclusively with products competing in the marketplace, and not with products consumed within a vertically integrated company. When actually in the marketplace, all like products may also be directly competitive. Products consumed captively within vertically integrated companies never reach the marketplace and, therefore, they cannot be regarded as "directly competitive" with like products that are actually in the marketplace.

22. In the United States' view, the Panel failed to properly account for the context provided by Article 6 of the *ATC*. The United States believes that its identification of the domestic industry was consistent with the Preamble and Article 6.1 of the *ATC*. Moreover, the United States does not consider that its definition creates an overly broad authority for an importing Member to take transitional safeguard measures. In this context, the United States points out that the definition of the domestic industry was only a starting-point and that a WTO Member could take safeguard measures only after fulfilling all the additional conditions set forth in Articles 6.2, 6.3 and 6.4 of the *ATC*.

23. The United States asserts that its identification of the domestic industry is also consistent with the object and purpose of the *ATC*, which carefully balances the interests of exporting and importing Members. In the United States' view, the *ATC* definition of the domestic industry affords Members a certain degree of flexibility to use the transitional safeguard mechanism to address the issue of damaging surges in imports, thereby facilitating any necessary adjustment pending full integration of the textiles and clothing sector into the framework of the GATT 1994.

24. Finally, the United States contends that the Panel's finding that yarn manufactured and consumed by vertically integrated fabric producers is directly competitive with imported yarn, is factually incorrect. The Panel "presumed" that imported yarn was *actually competing* with yarn produced by vertically integrated fabric producers for their internal consumption. However, this is not the case. According to the United States, the consistent *de minimis* nature of yarn purchases and

[19]Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*United States – Underwear*"), WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, at 20.

[20]Panel Report, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R; Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999.

sales of vertically integrated fabric producers over the years is further evidence of the fact that there is no direct competitive relationship between the yarn produced by them and the imported yarn.

3. Attribution of Serious Damage

25. The United States requests that the Appellate Body reverse the Panel's findings concerning the attribution of serious damage under Article 6.4 of the *ATC*. The Panel incorrectly interpreted Article 6.4 to require attribution to *all* Members causing serious damage or actual threat thereof. The Panel, therefore, erred in concluding that the United States' attribution of serious damage and actual threat thereof to Pakistan was inconsistent with Article 6.4 of the *ATC* because it did not examine the effect of imports from Mexico and possibly other Members *individually*. Article 6 does not require identification of, and attribution to, the individual Members from whom imports cause serious damage or actual threat thereof. Causation is determined under Article 6.2 of the *ATC* on the basis of *total* imports and not on the basis of *individual* imports. Article 6.4 does not deal with "causation", but establishes the methodology for determining to which Member(s) to assign the serious damage and actual threat thereof and, in turn, to apply the transitional safeguard measure to such Member(s). The United States claims the Panel misunderstood the two distinct concepts of causation and attribution.

26. The United States points out that the transitional safeguard mechanism envisaged under Article 6 is a *non*-most-favoured-nation safeguard mechanism and that the plain language of Article 6.4 requires the application of a transitional safeguard measure on a Member-by-Member basis. This precludes the requirement that (i) an importing Member attribute serious damage individually to *all* exporting Members that individually cause or contribute to the serious damage, or (ii) an importing Member attribute serious damage individually to *all* exporting Members that meet the criteria of Article 6.4. The United States adds that the negotiating history indicates that the drafters of the *ATC* rejected such an approach. Article 6.4 of the draft agreement in the *Chairman's Text of the Negotiating Group on Textiles and Clothing*, which had provided that the Member invoking a safeguard measure "shall determine the party or parties contributing to the serious damage … through a sharp and substantial increase in imports" [21], was not retained.

27. The United States further submits that its interpretation of Article 6.4 is consistent with the context of that provision. For example, Article 6.6 requires the importing Member to account for and provide special treatment to certain Members in applying a transitional safeguard measure. Article 6.1 exhorts importing Members to apply transitional safeguard measures "as sparingly as possible". The United States argues that under the Panel's interpretation, Members would be bound to

[21] MTN.GNG/NG4/W/68, 19 November 1990.

contravene these requirements by applying the transitional safeguard to *all* those Members meeting the criteria of Article 6.4.

28. According to the United States, the Panel's interpretation of Article 6.4 is inconsistent with the object and purpose of the *ATC*, which is to provide for a safeguard mechanism during the transition period for the integration of the textiles and clothing sector into the GATT 1994. The requirement to attribute serious damage and actual threat thereof to all Members whose imports cause serious damage would increase the burden imposed on importing Members and would undermine the responsiveness and value of the transitional safeguard mechanism. The United States adds that the Panel overlooked how Article 6.4 relates to the carefully negotiated balance of rights and obligations set out in the *ATC*.

29. The United States also argues that the Panel erred in relying primarily on non-transitional WTO agreements in making its findings under Article 6.4 of the *ATC*. Under customary rules of treaty interpretation, the Panel should have first and foremost interpreted the ordinary meaning of the terms of Article 6.4 in the light of their context and the object and purpose of the *ATC*. Appellate Body jurisprudence underscores this requirement[22] as well as the need to remain within the "four corners" of the *ATC*.[23] In contrast, the Panel attempted to impute to the *ATC* words and concepts from the *Agreement on Safeguards* in the guise of "context" and thereby disregarded the unique, *non*-most-favoured-nation transitional safeguard mechanism under Article 6 of the *ATC*. The Panel conducted its analysis as if the textiles and clothing sector was *already* integrated into the GATT 1994 and as if the GATT 1994 rules *already* applied to it. The *ATC* intentionally created a mechanism *different* from Article XIX of the GATT 1994 and the *Agreement on Safeguards* for products not yet integrated into the GATT 1994. In addition, the *Agreement on Safeguards*, pursuant to its Article 11.1(c), does not apply to transitional safeguard measures taken under Article 6 of the *ATC*.

30. In conclusion, the United States claims that Article 6.4 of the *ATC* requires only a consideration of the factors enumerated therein as it relates to the Member or Members to whom the importing Member attributes serious damage and actual threat thereof. In the present case, the United States attributed serious damage and actual threat thereof to Pakistan based on each of the relevant requirements of Article 6.4. To require more — such as an individual assessment of each exporting Member meeting the criteria of Article 6.4 — would, in the United States' view, impute words and concepts into the *ATC* that are not there.

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[22]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 18, para. 114.

[23]Appellate Body Report, *United States – Underwear, supra*, footnote 19, at 20.

B. *Arguments by Pakistan – Appellee*

1. Standard of Review

31. Pakistan submits that the United States' claims and arguments are largely based on a mischaracterization of the Panel's rulings. There is nothing in the Panel's findings to suggest that a panel may conduct a *de novo* review of the determination of the competent authority. On the contrary, the Panel specifically stated that the competent authority's determination under Article 6.2 may *not* be reviewed in the light of subsequent events or developments.

32. According to Pakistan, the Panel ruled that it may, consistently with Article 11 of the DSU, examine evidence not available or submitted to the competent authority at the time of the investigation for the sole purpose of determining whether the substantive conditions for safeguard action were satisfied at that time. Pakistan points out that, in its ruling, the Panel further considered such evidence to be relevant under Article 6 of the *ATC* only if it related to *crucial or decisive facts* that were in existence at the time of the investigation.

33. In Pakistan's view, is not entirely clear whether the United States uses the term "evidence" in a general sense (any fact capable of furnishing a proof) or in a legal sense (statement or document submitted as a means of ascertaining the truth). The United States also does not distinguish clearly between facts that did not exist at the time of the investigation (subsequent developments) and facts that could not be demonstrated at the time of the investigation (for which evidence subsequently emerged). Therefore, when the United States requests the Appellate Body to rule that panels should not consider *evidence that was not in existence at the time of the determination of the competent authority*, one does not know to which category of facts the United States refers. According to Pakistan, the United States' argument implies that a safeguard measure imposed in error need not be brought into conformity with the *ATC*, and may be maintained.

34. Pakistan contends that the United States confuses the question of which evidence a panel must consider pursuant to Article 11 of the DSU with the question of whether the evidence submitted by the complainant supports a finding of inconsistency of a transitional safeguard measure with Article 6 of the *ATC*. The United States also confuses the question of a panel's *de novo* review of the competent authority's appreciation of the facts with the question of a panel's assessment of whether the facts invoked to justify a safeguard measure ever existed. According to Article 3.2 of the DSU, the dispute settlement system of the WTO "serves to preserve the rights and obligations under the covered agreements". Pakistan, therefore, points out that the ruling the United States is seeking from the Appellate Body would diminish the rights of Members under Article 6 of the *ATC* by curtailing the competence of panels under Article 11 of the DSU.

35. To illustrate its argument, Pakistan submits the following hypothetical example: the United States determined, on the basis of data provided by the American Yarn Spinners Association ("AYSA") (the complainant before the competent authority), that the domestic production of yarn has *declined* by 50 percent. The United States Bureau of Census data, published subsequent to the determination of the competent authority, show that AYSA had provided incorrect data and that the domestic production had in fact *increased* by 50 percent. These newly available data leave no doubt that imports of yarn did not cause serious damage to the domestic yarn industry. Pakistan submits that, according to the contention of the United States, if the United States nevertheless maintains the safeguard measure and Pakistan brings a complaint under the DSU, the panel examining this complaint would be barred from considering the new Census data.

36. In Pakistan's view, the United States' arguments imply that a Member may impose a safeguard measure whenever a competent authority could legitimately conclude, on the basis of the facts before it, that the conditions for taking a safeguard action under Article 6 are met. However, Article 6.2 states that such an action may be taken "when, on the basis of a determination by a Member, *it is demonstrated* " (emphasis added) that increased imports cause serious damage or actual threat thereof. A determination that was based on completely false data does not provide the required demonstration. The role of a panel is not merely to make an objective assessment of the competent authority's investigation. The basic issue is whether the Member invoking Article 6 had the right to take the safeguard action. Therefore, in Pakistan's view, the challenge to an Article 6 safeguard measure does not necessarily call into question the integrity of the original investigation conducted by the competent authority.

37. Finally, Pakistan points out that, in contrast to other WTO agreements providing for safeguards or contingency protection, the *ATC* does not establish any specific requirements for public notice and comment during the investigation. In the case of many safeguard measures under Article 6, there will be evidence that only the exporting Member can furnish (for instance, its own statistics on recent exports) and that is, therefore, not "available" to the competent authority, under the procedures it is permitted to follow under the *ATC*. There will also be evidence that only the exporting Member has an interest in generating (such as precise data on plant closures) and which was, therefore, not "in existence" at the time of the investigation. If the United States' contentions were accepted, such evidence could be submitted, neither before the competent authority, nor before a panel, even though such evidence may be crucial or decisive in determining the conformity of a safeguard measure with the substantive requirements of Article 6.

2. Definition of the Domestic Industry

38. Pakistan submits that the Panel correctly interpreted the phrase "like and/or directly competitive products". According to the ordinary meaning of these words, the domestic industry to be examined includes all domestic manufacturers that produce: (i) a product "like" the imported product; (ii) a product directly competitive with the imported product; or (iii) *both* a product that is "like", *and* a product that is directly competitive, with the imported product. Pakistan contends that with such an interpretation, the term "and" is given meaning and effect and is, contrary to the assertions of the United States, not reduced to inutility.

39. Pakistan also submits that vertically integrated producers manufacturing yarn for internal consumption, rather than for sale on the merchant market, cannot be excluded from the domestic industry. The interpretation of the term "to produce", suggested by the United States, implying that vertically integrated fabric producers are part of the fabric — not yarn — industry, cannot be reconciled with the purpose of Article 6.2 of the *ATC*. An establishment producing yarn for processing into fabric can suffer damage *both* as a result of rising yarn imports *and* as a result of rising fabric imports. Article 6.2 is meant to permit safeguard action in both situations. However, no safeguard measure could be imposed to protect vertically integrated establishments if the yarn they manufacture for internal consumption were not "produced" in the sense of Article 6.2 as contended by the United States. Pakistan adds that the United States' interpretation of the term "producing" would, in effect, as the Panel correctly found, equate "producing" with "selling". [24]

40. In support of its argument that the Panel correctly interpreted Article 6 of the *ATC* in the context of the *WTO Agreement* in its entirety, notably Article III of the GATT 1994, Pakistan submits that the Panel noted the differences in the terms and facts at issue in *Korea – Alcoholic Beverages* and the present case, and based its conclusions only on the common features. The examination of the *ATC*, in the light of other WTO agreements, is called for under customary rules of treaty interpretation and is also required by the terms of the *ATC* itself. In the view of Pakistan, the Panel correctly concluded that captively produced yarn and imported yarn are "directly competitive", even if they are not actually competing with each other for any given sale. In *Korea – Alcoholic Beverages*, the Appellate Body noted that the dictionary meaning of the term "competitive" is "characterised by competition", and concluded therefrom that products are competitive if they are interchangeable on the market. In examining whether a product is competitive, *both latent and extant demand* must, therefore, be considered. [25]

[24]Panel Report, footnote 203 to para. 7.40.

[25]Appellate Body Report, *supra*, footnote 20, paras. 114-116.

41. Pakistan further submits that the Panel correctly rejected the contention of the United States that fabric producers which manufacture the yarn they consume are hermetically segregated from the merchant market for yarn. Fabric processed from captively produced yarn is sold on the same market as fabric processed from yarn purchased on the merchant market. A company that owns both a yarn plant and a fabric plant, therefore, cannot ignore the opportunity costs of manufacturing yarn. According to Pakistan, the yarn produced internally and the yarn available on the merchant market are thus, actually, in a competitive relationship.

42. In Pakistan's view, the United States' interpretation of the term "and/or" fails to give meaning and effect to all the terms of the *ATC*. The United States' interpretation would give Members the right to define the domestic industry, *inter alia,* as the producers of "like but not directly competitive products". Pakistan submits that the drafters of the *ATC* would not have provided for such a meaningless alternative under which the requirement of causation could never be met, given the lack of competitive relationship to the surging "like" imports.[26]

43. Pakistan also argues that if Members were permitted to exclude captive yarn producers from the domestic industry within the definition of the domestic industry under Article 6.2 of the *ATC,* the result would be a domestic industry whose size and output would vary according to changes in the ownership and commercial practices of yarn plants. Specifically, the integration of yarn manufacturers, which formerly sold their production on the merchant market, would reduce output of the identified domestic industry and facilitate a finding of serious damage. Pakistan submits that such changes, unrelated to the definition of the domestic industry, should not support a finding of serious damage and permit a Member to impose a transitional safeguard measure on imports.[27]

44. Pakistan argues that the very purpose of the obligation to demonstrate the causation of serious damage to the domestic industry in its entirety is to ensure that the domestic industry is *not* divided into segments supplying different markets. If such segmentation were permitted, Members could focus exclusively on the segment supplying the market in which imports are sold and thereby exclude the producers less exposed to import competition and less likely to suffer serious damage. Pakistan submits that this would create a bias in favour of affirmative determinations of serious damage.

45. Finally, Pakistan points out that vertical integration is one way to adjust to import competition. As the integration of the textiles and clothing sector into the framework of the GATT 1994 proceeds, the discrepancy between the number of producers examined, and the number of producers benefiting from the safeguard measure, would increase, in contradiction to the object and

[26]Panel Report, para. 7.87.

[27]*Ibid*., para. 7.65.

purpose of the *ATC*. Pakistan also argues that if the United States were permitted to define the domestic industry as the manufacturers of yarn *for sale*, it would have been required to impose its restraint *only* on imports of yarn *for sale* and not, as it has done, on *all* imports.

3. Attribution of Serious Damage

46. Pakistan requests the Appellate Body to uphold the Panel's finding that Article 6.4 of the *ATC* obliges Members to examine the effect of imports from different Members individually. The terms "Member-by-Member" and "attribute" in Article 6.4 do not give the importing Member the right to arbitrarily "pick and choose" the Members included in the attribution analysis. According to its dictionary definition, the term "by" appearing between two nouns indicates a succession of groups, quantities or individuals of the same class, such as in *two-by-two* or *man-by-man*.[28] The requirement that the safeguard "shall be applied on a Member-by-Member basis" means, therefore, that the restrictions shall be imposed on a Member-specific basis. "Member-by-Member" does not mean "any Member", and hence does not suggest that certain exporting Members may be arbitrarily excluded from the attribution of the serious damage. Pakistan adds that the requirement to apply restrictions on a Member-by-Member basis is intended to permit exporting Members to administer the restrictions in accordance with Article 4.2 of the *ATC* and to capture the quota rents. It also permits the importing Member to determine the level of the restrictions individually, in accordance with the criteria set out in the second sentence of Article 6.4.

47. Pakistan points out that "to attribute" means to ascribe an effect to its cause. In the context of Article 6.4, it means to ascribe the effect of the *overall* increase in imports to the imports from particular Members. The attribution thus requires a causation analysis limited to imports from individual Members. The difference in meaning of "cause" and of "attribute" does not, therefore, support the United States' interpretation of Article 6.4 of the *ATC*. This provision requires that the attribution of serious damage to individual Members be made, among other things, on the basis of "the level of imports *compared* with imports from other sources, market share and import and domestic prices". (emphasis added) As the panel in *United States – Underwear* concluded, Article 6.4 requires Members to assess *comparatively* the imports from different sources and their respective effects.[29] In Pakistan's view, the terms "individually" and "compared" found in Article 6.4, leave no doubt that the importing Member must asses all potential sources of serious damage and cannot limit its attribution analysis arbitrarily to one Member.

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[28]*The New Shorter Oxford English Dictionary*, L. Brown (ed.), (Clarendon Press, 1993), Vol. I, p. 310.

[29]Panel Report, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, *supra*, footnote 19, DSR 1997:I, 31, para. 7.49.

48. Pakistan further argues that Articles 6.1 and 6.6 of the *ATC* do not support the "pick-and-choose" approach advocated by the United States. Article 6.1 exhorts importing Members to apply safeguards as sparingly as possible, not to attribute the damage to as few importing Members as possible. Pakistan stresses that Article 6.6 does not deal with the attribution of damage to Members, but with "the *application* of the transitional safeguard". (emphasis added) It is intended to create benefits for certain Members, not to shift burdens from some Members to others.

49. Pakistan also submits that the Panel correctly analyzed Article 6 of the *ATC* in the context of the entire *WTO Agreement*. Even if one were to regard the GATT 1994 and the *Agreement on Safeguards* as treaties separate from the *ATC*, rather than as elements of a single treaty, they would nevertheless form part of the context of the *ATC* pursuant to Article 31.2(a) of the *Vienna Convention on the Law of Treaties*.[30] In addition, the preamble of the *ATC* specifically states as its purpose the integration of the textiles and clothing sector into the framework of the GATT 1994. Pakistan submits that in the light of this purpose, a panel must consider the basic principles of the GATT 1994, including those reflected in the *Agreement on Safeguards*, when interpreting the terms of the *ATC*.

50. Pakistan further points out that, according to Article 1.6 of the *ATC*, the rights and obligations of Members under the other multilateral trade agreements are not affected "*unless otherwise provided in this Agreement*". (emphasis added) The rules of the GATT 1994 and the *Agreement on Safeguards*, therefore, apply, unless the *ATC* contains a different rule. This does not mean that the *ATC* provisions should be interpreted narrowly as an exception, or that the principles of the GATT 1994 should be imputed to the *ATC*. However, the *ATC* provisions must be understood as temporary departures from the principles of the GATT 1994. If the provisions of the *ATC* are silent on a particular point, the drafters of the *ATC* intended the principles of the GATT 1994 to apply. Given that under the GATT 1994 the most-favoured-nation principle applies, Pakistan asserts that the Panel had to determine to what extent Article 6.4 provides otherwise.

51. In conclusion, Pakistan submits that Article 6.4 of the *ATC* does not allow importing Members to attribute damage to one Member only, because that Member would then suffer a disproportionate share of the effect of the safeguard measure. An appropriate attribution analysis must result in a restraint that is distributed appropriately to all Members whose exports have caused the serious damage. According to Pakistan, the Panel correctly found that an ability to "pick and choose" would be the least consistent with a most-favoured-nation approach and thus the least conducive to the progressive integration of the textiles and clothing sector into the GATT 1994.

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[30]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

C. *Arguments of the Third Participants*

1. European Communities

52. In its third participant's submission, the European Communities confines itself to the question of permissible evidence and submits that a panel's review concerns the work of the competent authority at the time of its determination.

53. The European Communities argues that panels are not empowered to evaluate the work of the competent authority on the basis of evidence that was *objectively* not available, for example, not in existence, at the time of the determination. This would go beyond the "independent duty of investigation" of the competent authority, which clearly cannot be asked to take into account what is not reasonably available to it while conducting a proper and thorough investigation. However, the European Communities considers that there may be cases where a panel needs to consider evidence that comes into existence after the competent authority's determination, in order to examine the sufficiency and thoroughness of the investigation. As an example, the European Communities refers to a statement from a statistical agency, dated after the investigation, to the effect that it could have produced reliable import statistics if asked, but that it was not.

54. The European Communities emphasizes that, despite the irrelevance of information *objectively not available* at the time of the determination to assess the WTO-consistency of that determination, panels should strictly scrutinize the accuracy of the competent authority's investigation. This scrutiny is all the more necessary for safeguard measures taken under the *ATC*, since that Agreement does not provide for any right to seek removal of a measure that has been adopted without the necessary conditions being fulfilled. In the European Communities' view, this means, for example, that panels should review whether the competent authority seriously tried to verify data which did not come from official sources.

2. India

(a) Standard of Review

55. India submits that the Panel correctly concluded that it could "examine any evidence … for the purpose of evaluating the thoroughness and sufficiency of the … [determination by the competent] authority."[31] Article 6.2 of the *ATC* states that a safeguard action may be taken "when, on the basis of a determination by a Member, *it is demonstrated* " (emphasis added) that increased imports cause serious damage or actual threat thereof. A determination based on completely incorrect data does not provide this required demonstration. Moreover, under Article 6.3 of the *ATC*, the determination

[31]Panel Report, para. 7.33.

must be based on an examination of changes in specified economic variables. A determination based on an examination in which completely false data on those variables were used, does not meet that requirement. The role of a panel is, therefore, not merely to make an objective assessment of the competent authority's investigation. In India's view, a panel must also assess whether the results of that investigation are capable of demonstrating that the conditions for imposing the safeguard measure were met at the time the determination was made.

56. India submits, therefore, that panels, pursuant to Article 11 of the DSU, may examine evidence not available or submitted to the competent authority at the time of the investigation for the purpose of determining whether the conditions for a safeguard action were satisfied at that time. The Panel further made it clear, in its ruling, that such evidence would be relevant under Article 6 of the *ATC* only if it related to crucial or decisive facts in existence at the time of the investigation. Accordingly, India requests the Appellate Body to find that the Panel's conclusions were consistent with the DSU and the *ATC*.

(b) Definition of the Domestic Industry

57. India requests the Appellate Body to uphold the Panel's finding that the United States' exclusion of captively produced yarn from the definition of the domestic industry is inconsistent with Article 6.2 of the *ATC*. This provision refers to the "domestic industry producing like and/or directly competitive products", not to the domestic industry *selling* those products. In India's view, the *ATC* defines the domestic industry as the *entire* domestic industry producing like and/or directly competitive products.

58. India, therefore, disagrees with the United States' interpretation of the domestic industry definition as allowing a range of different industry definitions. India submits that such flexibility would undermine the objective of the *ATC* of orderly transition and integration of the textiles and clothing sector into the framework of the GATT 1994. India stresses that vertical integration is one form of autonomous industrial adjustment in response to the liberalization of trade in textiles and clothing. The United States' interpretation of Article 6.2 of the *ATC* is prejudicial to meaningful liberalization of trade in textiles and to autonomous industrial adjustment.

(c) Attribution of Serious Damage

59. India also requests the Appellate Body to uphold the Panel's finding that the United States acted inconsistently with Article 6.4 of the *ATC* by not examining the effect of imports from Mexico and other sources, while attributing serious damage of its industry to imports from Pakistan. The Panel correctly pointed out that the text of Article 6.4 of the *ATC* does not support the United States'

interpretation that an importing Member may pick and choose the Member(s) for which it carries out an attribution analysis.

60. India submits that the Panel correctly concluded that the application of safeguards on a "Member-by-Member" basis and the individual attribution of the damage in Article 6.4 of the *ATC* do not enable an importing Member to arbitrarily limit its attribution analysis to the imports of one Member only. India asserts that this Member would then suffer a disproportionate share of the effect of the safeguard measure. That result would also be the least consistent with the most-favoured-nation principle and hinder the progressive integration of the textiles and clothing sector into the framework of the GATT 1994. India submits that the Panel's conclusions are firmly based on the text of Article 6.4, its context and the object and purpose of the *ATC*.

III. Issues Raised in this Appeal

61. This appeal raises the following issues:

(a) Whether the Panel erred and exceeded the mandate of WTO dispute settlement panels set forth in Article 11 of the DSU by finding that, in examining the conformity of a transitional safeguard measure with Article 6 of the *ATC*, it could consider evidence that was not in existence at the time of the Member's determination;

(b) Whether the Panel erred in finding that the United States acted inconsistently with Article 6.2 of the *ATC* by excluding from the scope of the domestic industry the production of combed cotton yarn by vertically integrated producers for their own internal use; and

(c) Whether the Panel erred in (i) stating that Article 6.4 of the *ATC* requires attribution to all Members whose exports cause serious damage or actual threat thereof, and (ii) finding that the United States acted inconsistently with Article 6.4 by failing to consider the effect of imports from Mexico.

IV. Standard of Review

62. The investigation by the competent authority of the United States leading to the imposition of the transitional safeguard measure on Category 301 imports of combed cotton yarn ("yarn") from Pakistan covered the period from January 1996 until the end of August 1998. The United States relied on data supplied by the American Yarn Spinners Association ("AYSA") and on official data collected by the United States' Bureau of Census for the period up to the end of 1997. For the eight-month period from January to August 1998, the competent authority relied exclusively on AYSA data because official Census data for the calendar year 1998 ("1998 Census data") were published only in the course of 1999, after the United States had made its determination within the meaning of Article 6.2 of the *ATC*.[32] We note that the participants agree that the date of determination was 24 December 1998, when the United States published its Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale: Category 301 (December 1998) (the "Market Statement") and requested bilateral consultations with Pakistan pursuant to Article 6.7.[33]

63. Pakistan argued before the Panel that the determination made by the United States was based on "unverified, incorrect and incomplete data"[34], and submitted the 1998 Census data in support of its contention. The United States objected to the use of such data by the Panel because that data did not exist when it made its determination. The Panel concluded:

> [W]e shall not examine any evidence for the purpose of reinvestigating the market situation, but we *should examine any evidence, without regard to whether it was available or considered at the time of investigation*, for the purpose of evaluating the thoroughness and sufficiency of the investigation underpinning the decision of the US authority. (footnote omitted, emphasis added)
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> …
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> Accordingly, in our view, the 1998 calendar year US Census data should be examined by the Panel, even though they were not available to the US government at the time of investigation, in order to confirm whether the reliance by the US investigation authority on the AYSA data is justifiable.[35]

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[32]Official United States' Census data are published on an annual basis only.

[33]Participants' responses to questioning at the oral hearing.

[34]Panel Report, para. 7.25.

[35]*Ibid*., paras. 7.33 and 7.94, in relevant part. The Panel made a similar statement at paragraph 7.35:

> [W]e will examine whether the US fact-finding is justifiable in light of all the facts submitted by the parties, including those which were not considered by, or not available to the US authority at the time of investigation. (footnote omitted)

64. The Panel, therefore, took into account the 1998 Census data, but concluded that the new data did not vitiate the determination of serious damage by the United States.[36]

65. The United States argues on appeal that the Panel erred and exceeded the mandate of WTO dispute settlement panels set forth in Article 11 of the DSU by finding that, in assessing the conformity of the transitional safeguard measure with Article 6 of the *ATC*, it could examine evidence that was not in existence at the time the United States made its determination of serious damage or threat thereof to the domestic industry.

66. The United States' appeal does not concern the question whether a panel may consider *evidence* relating to *facts* that occurred *subsequent* to the determination.[37] Nor does this appeal relate to the question whether a panel may consider *evidence* which existed *before* the date of determination, but which was *not submitted* to the importing Member, or, although *submitted*, was *not considered* by that Member.[38] This appeal also does not concern the question whether the Member, before making its determination, *could have* and *should have taken additional investigative steps* to gather more evidence in order to verify data on all relevant economic variables pertaining to the state of the domestic industry.

67. The issue raised in this appeal is thus limited to whether a panel exceeds its mandate under Article 11 of the DSU by considering, in the context of reviewing a determination under Article 6.2 of the *ATC*, evidence relating to facts which predate the determination, but which was not in existence at the time the determination was made.[39] In other words, the question before us is whether a panel is entitled, in assessing the due diligence of an importing Member in making a determination under Article 6.2 of the *ATC*, to take into account evidence that could not possibly have been examined by that Member when it made that determination.

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[36]Panel Report, paras. 7.98 and 7.101.

[37]We note that the participants agree with the Panel that panels cannot consider "developments" subsequent to the determination. (*Ibid.*, footnote 190 to para. 7.33)

[38]The United States stresses that the question "whether a panel may consider evidence that might have been available to the national authority at the time of the determination but was not considered", is not before the Appellate Body. (United States' appellant's submission, para. 9)

[39]In this dispute, we are dealing with evidence in the form of *data* that had not been compiled at the time of the determination and, hence, could not have been known. We do not rule on other kinds of evidence.

68. Article 11 of the DSU lays down the standard of review for panels in disputes under the covered agreements[40] in the following terms:

> [A] panel should make an objective assessment of the matter before it, including *an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. … (emphasis added)

69. We have considered this standard of review on several occasions.[41] In *EC Measures Concerning Meat and Meat Products (Hormones)*, we stated:

> So far as *fact-finding* by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is *neither de novo review* as such, *nor "total deference*", but rather the "objective assessment of the facts".[42] (emphasis added)

70. This is the first time we are required to consider a panel's standard of review under Article 11 in a dispute under the *ATC*. We note that the panels in *United States – Underwear* and *United States – Shirts and Blouses* considered this standard of review when examining the consistency of transitional safeguard measures with Article 6 of the *ATC*. The panel in *United States – Underwear* stated:

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[40]Article 1.1, first sentence, of the DSU. For disputes under the *Anti-Dumping Agreement*, Article 17.6 of that Agreement "prevails" over Article 11 of the DSU "[t]o the extent that there is a difference" between these provisions. (Article 1.2, second sentence, of the DSU) *See*, Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*United States – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, paras. 50-62; and, Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, paras. 131-138.

[41]Appellate Body Report, *Argentina – Footwear Safeguard*, WT/DS121/AB/R, adopted 12 January 2000, para. 118; Appellate Body Report, *United States – Wheat Gluten Safeguard*, WT/DS166/AB/R, adopted 19 January 2001, paras. 147-151; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*United States – Lamb Safeguard*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paras. 101-116.

[42]Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 117. We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. (Appellate Body Report, *United States – Lamb Safeguard*, *supra*, footnote 41, para. 106)

> [A]n objective assessment would entail an examination of whether the CITA had examined all relevant facts before it …, whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States.[43]

71. We have, however, examined a panel's standard of review in several cases under the *Agreement on Safeguards*. In *Argentina – Footwear Safeguard*, we reiterated that a panel must not conduct a *de novo* review of the evidence nor *substitute* its analysis and judgment for that of the competent authority.[44] Yet, we emphasized:

> [T]he Panel was obliged, by the very terms of Article 4 [of the *Agreement on Safeguards*], to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[45]

72. In *United States – Lamb Safeguard*, we held that, in considering a claim under the *Agreement on Safeguards*, a "panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'."[46] We stated further that, in reviewing determinations of competent authorities, panels should not simply *accept* the conclusions of that authority:

> Panels must … review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to *other plausible interpretations* of that data. A panel must find, in particular, that an *explanation is not reasoned, or is not adequate*, if some *alternative explanation* of the facts is *plausible*, *and if* the competent authorities' explanation does *not seem adequate* in the light of that *alternative* explanation.[47] (emphasis added)

73. In *United States – Wheat Gluten Safeguard*, concerning a claim under the *Agreement on Safeguards*, we considered the duties of competent authorities and stated that an investigation by a competent authority requires a proper degree of activity. Their "duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence

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[43]Panel Report, *supra*, footnote 29, para. 7.13. *See also*, Panel Report, *United States – Shirts and Blouses*, *supra*, footnote 13, paras. 7.16 and 7.21.

[44]Appellate Body Report, *supra*, footnote 41, para. 121.

[45]*Ibid*.

[46]Appellate Body Report, *supra*, footnote 41, para. 103.

[47]*Ibid*., para. 106.

submitted".[48] They "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors."[49] In describing the duties of competent authorities, we simultaneously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities.

74. Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.

75. Turning to the application of Article 11 of the DSU in the context of the *ATC*, we recall that Article 6.2 of that Agreement provides as follows:

> Safeguard action may be taken under this Article when, *on the basis of a determination by a Member, it is demonstrated* that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. (footnote omitted, emphasis added)

76. Unlike Article 3 of the *Agreement on Safeguards*, which provides explicitly for an investigation by competent authorities of a Member, Article 6 of the *ATC* does not specify either the organ or the procedure through which a Member makes its "determination". Nevertheless, the above principles concerning the standard of review under Article 11 of the DSU with respect to the *Agreement on Safeguards* apply equally, in our view, to a panel's review of a Member's determination under Article 6 of the *ATC*. We note that Article 6 does not require the participation of all interested parties in the process leading to the determination. We consider, therefore, that the exercise of due diligence by a Member is all the more important in reaching a determination under Article 6 of the *ATC*.

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[48] Appellate Body Report, *supra*, footnote 41, para. 55.

[49] *Ibid*.

77. The exercise of due diligence by a Member cannot imply, however, the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination. The demonstration by a Member 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 can be based only on facts and evidence which existed at the time the determination was made. The urgent nature of such an investigation may not permit the Member to delay its determination in order to take into account evidence that might be available only at a future date. Even a determination on the existence of threat of serious injury must be based on projections extrapolating from *existing* data.[50]

78. In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the *ATC* has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*.[51] 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 judgement 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.

79. Moreover, if a Member that has exercised due diligence in complying with its obligations of investigation, evaluation and explanation, were held responsible before a panel for what it *could not have known* at the time it made its determination, this would undermine the right afforded to importing Members under Article 6 to take transitional safeguard action when the determination demonstrates the fulfilment of the specific conditions provided for in this Article.

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[50]*See*, *United States – Lamb Safeguard*, where we said as follows:

> *As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts.* There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. *Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is "clearly imminent".* (emphasis added)

(Appellate Body Report, *supra*, footnote 41, para. 136)

[51]We do not rule upon other forms of evidence, such as an expert opinion submitted to a panel that is based on data which existed when the Member made its determination. (Appellate Body Report, *United States – Lamb Safeguard, supra*, footnote 41, paras. 114-116) *See further, supra*, footnote 39.

80. For these reasons, we find that the Panel exceeded its mandate under Article 11 of the DSU by considering United States Census data for the calendar year 1998.

81. There is no need for the purpose of this appeal to express a view on the question whether an importing Member would be under an *obligation*, flowing from the "pervasive"[52] general principle of *good faith* that underlies all treaties[53], to *withdraw* a safeguard measure if post-determination evidence relating to pre-determination facts were to emerge revealing that a determination was based on such a critical factual error that one of the conditions required by Article 6 turns out never to have been met.

V. Definition of the Domestic Industry

82. The United States defined the domestic industry as the producers of yarn who produced it for sale on the merchant market, thereby excluding from the scope of its definition the vertically integrated fabric producers who produce yarn for their own internal use.[54] Pakistan claimed before the Panel that the United States violated Article 6.2 of the *ATC* because it did not investigate the entire domestic industry producing yarn.

83. The Panel found that:

> Inconsistently with its obligations under [Article] 6.2, the United States *excluded* the production of combed cotton yarn by vertically integrated producers *for their own use* from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn.[55] (emphasis added)

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[52]Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166. *See also*, Appellate Body Report, *United States – Hot-Rolled Steel*, *supra*, footnote 40, para. 101, where we noted that this principle "informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements."

[53]We recall that in *United States – Shrimp*, we stated:

> This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. (footnote omitted)

(Appellate Body Report, *supra*, footnote 18, para. 158)

[54]United States' Market Statement, paras. 1.2-1.3.

[55]Panel Report, para. 8.1(a). *See also*, Panel Report, para. 7.90.

84. The United States appeals this finding of the Panel. The United States submits that Article 6.2 permits a definition of the domestic industry on the basis of products that are not only like but also directly competitive with the imported product. According to the United States, yarn sold on the merchant market and yarn produced by vertically integrated fabric producers for their own internal consumption are like, but they are not directly competitive with each other. The United States argues that, by rejecting its definition of the domestic industry, the Panel failed to give full meaning and effect to the term "*and/or*" in Article 6.2 and reduced the word "*and* " to inutility. The United States also argues that the Panel should have interpreted the definition of the domestic industry within the four corners of the *ATC* without having recourse to the wider context of other agreements of the WTO containing a definition of the domestic industry.

85. We begin our analysis of this issue with the definition of the domestic industry as stated in the relevant part of Article 6.2 of the *ATC*, which provides:

> 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*. (footnote omitted, emphasis added)

86. A plain reading of the phrase "domestic industry producing like and/or directly competitive products" shows clearly that the terms "like" and "directly competitive" are characteristics attached to the domestic products that are to be compared with the imported product. We are, therefore, of the view that the definition of the *domestic industry* must be product-oriented and not producer-oriented, and that the definition must be based on the products[56] produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive.[57]

87. We also consider that the term "producing" in Article 6.2 means producing for commercial purposes and that it cannot be interpreted, in itself, to be limited to or qualified as producing for sale on the merchant or any other segment of the market. 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.

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[56]In *United States – Lamb Safeguard*, we also found that the *product* defines the scope of the definition of the domestic industry under the *Agreement on Safeguards*. In that case, the "like" product at issue was lamb *meat*. (Appellate Body Report, *supra*, footnote 41, paras. 84, 86-88 and 95)

[57]At this stage, we analyze the terms "like" and "directly competitive" in isolation. For the interpretation of the connectors "and/or" in Article 6.2, *see, infra*, paragraph 104.

88. We now turn to the next two components of the definition of the domestic industry under Article 6.2 of the *ATC*, namely, like products and directly competitive products.

89. We note that there is no disagreement between the participants[58] that yarn imported from Pakistan and yarn produced by the producers of the United States, regardless of whether they are vertically integrated fabric producers or independent yarn producers, are like products. The United States has made it clear in its arguments[59] that its exclusion of yarn produced by vertically integrated fabric producers from the definition of the domestic industry was not because they are not producing a like product, but because they are not producing a directly competitive product. It is, therefore, not necessary for us to address the meaning of the term "*like products*" for the purposes of this appeal.

90. Before we examine the term "directly competitive" in the specific context of Article 6.2 and the facts of this particular case, we consider it useful to recall our interpretation of this term on previous occasions.

91. We have interpreted the term "directly competitive " in *Korea – Alcoholic Beverages*[60] and *Japan – Taxes on Alcoholic Beverages*.[61] We are cognizant of the fact that these two reports interpreted this term in the context of the Interpretative Note *Ad* Article III:2 of the GATT 1994. We will refer to this aspect later. The key elements of the interpretation of the term "directly competitive" in our Report in *Korea – Alcoholic Beverages* are:

(a) The word "*competitive*" means "characterised by competition". The context of the competitive relationship is necessarily the marketplace, since that is the forum where consumers choose different products that offer alternative ways of satisfying a particular need or taste. As competition in the marketplace is a dynamic and evolving process, the competitive relationship between products is not to be analyzed exclusively by current consumer preferences[62]; the competitive relationship extends as well to potential competition.[63]

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[58]Panel Report, para. 7.41.

[59]United States' appellant's submission, paras. 33 ff.

[60]Appellate Body Report, *supra*, footnote 20, paras. 108-124.

[61]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 117-118.

[62]*Supra*, footnote 20, paras. 114-115.

[63]*Ibid*., paras. 115 and 117.

(b) According to the ordinary meaning of the term "directly competitive", products are competitive or substitutable when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste. [64]

(c) In the context of Article III:2, second sentence, the qualifying word "directly" in the *Ad* Article suggests a degree of proximity in the competitive relationship between the domestic and imported products. The word "directly" does not, however, prevent a consideration of both latent and extant demand. [65]

(d) "Like" products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all "directly competitive or substitutable" products are "like". [66]

92. The United States argues that the Panel's over-reliance on our Report in *Korea – Alcoholic Beverages* is mistaken for two reasons. First, that dispute involved interpretation of a different phrase ("directly competitive or substitutable"), of a different provision and agreement (Article III:2 of the GATT 1994), and in a different factual setting. In particular, the word "substitutable" is not used in juxtaposition with "directly competitive" in Article 6.2 of the *ATC*. Second, the Appellate Body emphasized, in that case, the importance of the marketplace in judging the competitive relationship between products because that is the forum where consumers choose between different products. According to the United States, a proper reading of the Appellate Body's reasoning reveals that if a domestic product does not enter the marketplace at all, it cannot be regarded as being "directly competitive" with the imported product, even though the two products may admittedly be "like products".

93. We are not persuaded by these arguments of the United States with respect to the relevance and interpretation of our Report in *Korea – Alcoholic Beverages*.

94. With respect to the first argument of the United States, a careful reading of our Report in that case would show that we used the terms "directly competitive" and "directly substitutable" without implying any distinction between them in assessing the competitive relationship between products. [67] We do not consider that the mere absence of the word "substitutable" in Article 6.2 of the *ATC* renders our interpretation of the term "directly competitive" under Article III:2 of the GATT 1994

[64] *Supra*, footnote 20, para. 115.

[65] *Ibid*., para. 116.

[66] *Ibid*., para. 118.

[67] *See, ibid*., paras. 114-116.

irrelevant in terms of its contextual significance for the interpretation of that term under Article 6.2 of the *ATC*.

95. We now turn to an examination of the term "directly competitive" in the specific context of Article 6.2 of the *ATC* and the dispute before us. We must bear in mind that Article 6.2 permits a safeguard action to be taken in order to protect a domestic industry from serious damage (or actual threat thereof) caused by a surge in imports, provided the domestic industry is identified as the industry producing "like and/or directly competitive products" in comparison with the imported product. The criteria of "like" and "directly competitive" are characteristics attached to the domestic product in order to ensure that the domestic industry is the appropriate industry in relation to the imported product. The degree of proximity between the imported and domestic products in their competitive relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product.

96. According to the ordinary meaning of the term "competitive", two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. "Competitive" is a characteristic attached to a product and denotes the *capacity* of a product to compete both in a current or a future situation. 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.

97. It is significant that the word "competitive" is qualified by the word "directly", which emphasizes the degree of proximity that must obtain in the competitive relationship between the products under comparison. As noted earlier, a safeguard action under the *ATC* is permitted in order to protect the domestic industry against competition from an imported product. To ensure that such protection is reasonable, it is expressly provided that the domestic industry must be producing "like" and/or "directly competitive products". Like products are, necessarily, in the highest degree of

competitive relationship in the marketplace.[68] In permitting a safeguard action, the first consideration is, therefore, whether the domestic industry is producing a like product as compared with the imported product in question. If this is so, there can be no doubt as to the reasonableness of the safeguard action against the imported product.

98. When, however, the product produced by the domestic industry is not a "like product" as compared with the imported product, the question arises how close should be the competitive relationship between the imported product and the "unlike" domestic product. It is common knowledge that unlike or dissimilar products compete or can compete in the marketplace to varying degrees, ranging from direct or close competition to remote or indirect competition. The more unlike or dissimilar two products are, the more remote or indirect their competitive relationship will be in the marketplace. The term "competitive" has, therefore, purposely been qualified and limited by the word "directly" to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike. Under this definition of "directly", a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product.

99. We will now examine whether, in this case, yarn produced by the vertically integrated fabric producers of the United States for their own captive consumption is directly competitive with the imported yarn for the purposes of Article 6.2 of the *ATC*. The United States argues that such yarn is not directly competitive because it is not offered for sale on the market except when the captive production is "out of balance"[69], and even then only in *de minimis* quantities. In addition, vertically integrated fabric producers are not dependent on the merchant market for meeting any of their requirements of yarn except to a *de minimis* extent. In the United States' view, these factors are clearly reflected in the very low and stable rate of yarn sold or purchased by vertically integrated fabric producers to or from the merchant market over the last several years.[70]

100. We are unable to subscribe to this static view which makes the competitive relationship between yarn sold on the merchant market and yarn used for internal consumption by vertically integrated producers dependent on what they choose to do at a particular point in time.

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[68]Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 20, para. 118; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 473. In these cases, we stated that "like" products are perfectly substitutable and that "directly competitive" products are characterized by a high, but imperfect, degree of substitutability.

[69]United States' response to questioning at the oral hearing.

[70]According to the United States, approximately two percent of captive consumption is purchased from the merchant market and approximately one percent of captive production is sold on the merchant market. (United States' appellant's submission, para. 80)

101. If the competitive relationship between the two products is properly considered, it will be clear that they are "directly competitive" within the meaning of that term in Article 6.2. Our view is illustrated by the following considerations:

(a) The vertically integrated *fabric* producers compete with the independent fabric producers who purchase their requirements of yarn in the merchant market. It is, therefore, unlikely that vertically integrated fabric producers would make their "make-or-buy" decisions with respect to their input of yarn without considering the opportunity cost of doing so.[71] The low and stable rate of their relationship with the merchant market for yarn observed in the past does not imply that the opportunity cost does not enter into their calculations.

(b) Individual vertically integrated fabric producers may enter the merchant market to different degrees for selling their production or buying their requirements of yarn.[72] One may do it for two percent, another for five percent and yet another for 10 or more percent depending on their own individual commercial decisions at a particular point in time. A *force majeure*, or any other serious difficulty, may suddenly compel a vertically integrated fabric producer to rely heavily on the merchant market for its requirement of yarn. Likewise, the competitive conditions in the fabric market may compel a producer to offload a greater part of its yarn production in the merchant market. The low and stable rate of sales and purchases of yarn by vertically integrated fabric producers, observed in the past, is, therefore, not a sufficient reason to conclude that such yarn is not directly competitive with imported yarn sold on the merchant market.

(c) The approach of the United States would lead to constant variations in the size of the domestic industry. In addition to the variations resulting from the *ad-hoc* sale and purchase decisions mentioned above, the size of the domestic industry would depend on ownership or control of yarn plants. The yarn produced by an independent domestic producer would cease to be directly competitive the moment that producer is taken over by a fabric producer, to the extent the latter transforms this yarn into fabric.[73] Likewise, if a vertically integrated fabric producer were to sell its plant producing yarn and that plant were to become an independent producer, the yarn that

[71]Panel Report, para. 7.58.

[72]*See also*, *ibid*., para. 7.64(b).

[73]*See*, *ibid*., para. 7.64(a).

was previously regarded as non-directly competitive would suddenly become directly competitive.

(d) The approach of the United States would lead to another result which, in our view, cannot be justified. The domestic captive production of yarn by vertically integrated fabric producers would be excluded from the determination of serious damage (or actual threat thereof). However, a safeguard action taken against imported yarn would benefit the vertically integrated fabric producers with respect to the totality of their yarn production, not only with respect to the yarn they sell in the merchant market, but also with respect to yarn they produce for their own consumption.

(e) Finally, the approach of the United States would have major consequences for the justification and scope of the safeguard action. The exclusion of domestic captive production of yarn from the definition of the domestic industry would imply that if a fabric producer imports such yarn from a foreign plant that it owns, such import would also have to be excluded from the calculation of the surge in imports and from the application of the safeguard action. In the case before us, the safeguard action applies to *all* imports. The United States points out that, in this case, this issue does not arise as there are no imports of captively produced yarn from Pakistan; all the imports from Pakistan are destined for the merchant market. This may have been so until now, but the situation may well change in the future. Captively produced imports which had been exempt from the safeguard action could be sold on the merchant market if their prices were lower than those on the merchant market. This would undermine the effectiveness of the safeguard measure.

102. The United States also argues that our ruling in *United States – Hot-Rolled Steel* supports its contention that the captive segment of the market can be separated from the merchant market segment because we observed that captive production was "shielded from direct competition".[74] We did not hold, however, that captive production can be excluded from either the definition of the domestic industry or from the injury analysis. We said that, while an injury analysis can be carried out segment-by-segment before assessing damage to the domestic industry as a whole, an analysis of the captive segment of the market cannot be excluded. Our observation that captive steel production was "shielded from direct competition" did not mean that steel produced in the captive market segment is not directly competitive with imported steel destined for the merchant market. Our ruling in *United States – Hot-Rolled Steel,* therefore, does not support the argument of the United States.

[74]United States' statement at the oral hearing; Appellate Body Report, *supra*, footnote 40, paras. 198 and 207.

103. For all these reasons, we do not accept the contention of the United States that yarn produced by the vertically integrated fabric producers of the United States is not "directly competitive" with yarn imported from Pakistan.

104. We now turn to the interpretation of the connectors "and/or" in Article 6.2, on which the participants disagree.[75] We note that the definition of the domestic industry adopted by the United States in this case would be consistent with Article 6.2 only if we were to find: (i) that captively produced yarn is not directly competitive with imported yarn; and (ii) that the connectors "and/or" in Article 6.2 permit defining the domestic industry on the basis of a product which is not only like but also directly competitive with the imported product. We have reached the conclusion that captively produced yarn *is* directly competitive with imported yarn sold on the merchant market. We, therefore, do not need to address the interpretation of the connectors "and/or" in Article 6.2.

105. For all these reasons, we find that combed cotton yarn produced by vertically integrated fabric producers for their internal consumption is "directly competitive" with combed cotton yarn imported from Pakistan. Accordingly, we uphold the Panel's finding, in paragraph 8.1(a) of its Report, that the United States acted inconsistently with Article 6.2 of the *ATC*, by excluding from the scope of the domestic industry the production of combed cotton yarn by vertically integrated producers for their own internal use.

VI. Attribution of Serious Damage

106. Pakistan claimed before the Panel that the United States acted inconsistently with the requirements of Article 6.4 of the *ATC* because it "attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects."[76]

[75] *See*, *supra*, paras. 19, 20, 38 and 84.

[76] Panel Report, paras. 3.1 and 7.2(a).

107. The Panel stated:

> 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. (emphasis added)
>
> …
>
> This explicit linking back to the serious damage determination, in our view, requires that *all* the Members causing the serious damage must have it so attributed.[77] (emphasis in the original)

In consequence, the Panel found that:

> Inconsistently with its obligations under Article 6.4, the United States did not examine the effect of imports from Mexico (and possibly other appropriate Members) individually.[78] (footnote omitted)

108. On appeal, the United States requests the Appellate Body to reverse (i) the Panel's finding that the United States acted inconsistently with Article 6.4 by failing to consider the effect of imports from Mexico and possibly other Members, and (ii) the Panel's interpretation that Article 6.4 requires attribution to all Members whose exports cause serious damage or actual threat thereof.[79]

109. Before addressing these issues, we have to distinguish three different, but interrelated, elements under Article 6: first, *causation* of serious damage or actual threat thereof by increased imports[80]; 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).[81]

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[77]Panel Report, paras. 7.126-7.127, in relevant part.

[78]*Ibid*., para. 8.1(b).

[79]*See*, United States' appellant's submission, paras. 4 and 85, and executive summary, para. 2.

[80]The element of *causation* of serious damage is referred to in paragraph 2 of Article 6 of the *ATC*. The second sentence of paragraph 2 provides that serious damage "must demonstrably be caused by such increased quantities in total imports of that product" and not by "*other factors*" such as technological changes or changes in consumer preferences.

[81]The element of *application* of transitional safeguard measures to exporting Member(s) is dealt with in the first and the last sentences of paragraph 4 of Article 6 of the *ATC*. It is also dealt with in various places in paragraphs 6 through 16 of that Article. The first sentence of Article 6.4 provides that transitional safeguard measures "shall be applied on a Member-by-Member basis".

110. We note that the claims made by Pakistan before the Panel[82] related to the question of *attribution* of serious damage or actual threat thereof to the Members the imports from whom contributed to that damage or threat. However, these claims did not relate to the question of *application* of safeguard measures. The Panel did not make a ruling on application *per se*, although, in the course of its reasoning on the question of attribution of serious damage, it interpreted the phrase "shall be applied on a Member-by-Member basis" in the first sentence of Article 6.4[83], an interpretation that has not been appealed. The Panel also found that "Pakistan did not establish that the US determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof "[84], and this finding has not been appealed either. Hence, the issues raised by the United States in this appeal concern only the *attribution* of serious damage or actual threat thereof to Member(s) imports from whom contributed to that damage.

111. The question of attribution is addressed in the following sentence of Article 6.4:

> 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)

112. Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, "[s]erious damage … must demonstrably be caused by such increased quantities in *total* imports of that product and not by … other factors". (emphasis added)

113. Article 6.4 governs the attribution of serious damage to individual Members. This attribution must conform to the two requirements stipulated in Article 6.4, second sentence.

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[82]In its request for the establishment of a panel, Pakistan claimed, *inter alia*, that the United States failed to comply with Article 6.4 because it attributed the alleged damage, or actual threat thereof, *solely to imports from Pakistan to the exclusion of imports from other sources*, including unrestrained sources. (WT/DS192/1, para. 6, in relevant part)

[83]Panel Report, paras. 7.124, 7.129 and 7.131.

[84]*Ibid*., para. 8.2(c).

114. The first requirement is that the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase. Such Members will be identified on an individual basis by virtue of the wording in Article 6.4, second sentence, "on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually". (footnote omitted). The Panel interpreted the term "sharp" to refer to the rate of the import increase, and the term "substantial" to the amount of that increase.[85] These interpretations of the Panel have not been appealed and are, therefore, not before us.

115. The second requirement of Article 6.4, second sentence, is a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports.[86] The conduct of the comparative analysis is governed by the latter part of the second sentence of Article 6.4, which requires the analysis to address certain specific factors, namely: (i) the level of imports as compared with imports from other sources; (ii) market share; and (iii) import and domestic prices at a comparable stage of commercial transaction. Article 6.4 further specifies that none of these factors, either alone or combined with other factors, can necessarily give decisive guidance.

116. The United States argues that Article 6.4, second sentence, permits a comparative analysis of the effect of imports from a particular Member, without conducting a similar kind of analysis for the other Members from whom imports have also increased sharply and substantially.[87] Pakistan contends that such a comparative analysis requires an assessment of the effect of imports from other such Members taken individually.

117. We note that the wording of Article 6.4, second sentence, does not state expressly how to conduct a comparative analysis of the effects of imports from a particular Member. However, in order to be able to answer this question we have first to address the question *why* a comparative analysis is required.

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[85]Panel Report, para. 7.130.

[86]We note that the panel in *United States – Underwear* stressed that such a comparative analysis of the effects of imports is indispensable in attributing serious damage to a Member. The panel noted that, while there had been a significant increase in imports of underwear from Costa Rica, the position of Costa Rica was not significantly different from that of the other five exporting Members considered in the United States' determination. Nonetheless, the determination failed to undertake a *comparative assessment* of the effects of imports from Costa Rica with those five exporting Members. The panel further reasoned that the United States could not enter into agreements permitting an overall increase of imports of 478 percent over the current import levels from those five Members and, at the same time, claim that an import increase of 22 percent from Costa Rica contributed to serious damage. (Panel Report, *supra*, footnote 29, paras 7.49 and 7.51) The issue of attribution was not appealed in that case.

[87]We note that the United States compared imports from Pakistan only with "total world imports", which included those from Pakistan. *See*, United States' Market Statement, para. 8.9.

118. Article 6.4 provides, in relevant part, that "[t]he Member or Members to whom serious damage … is attributed, shall be *determined on the basis* of a sharp and substantial *increase in imports … from such a Member or Members*". (emphasis added) The clear inference from this phrase is that the sharp and substantial increase of imports from *such a* Member determines not only the basis, but also the *scope* of attribution of serious damage to that Member.

119. In consequence, 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.[88] 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[89], unless the imports from that Member alone have caused all the serious damage.

120. Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.[90] In the same vein, we note that Article 22.4 of the DSU[91] stipulates that the suspension of concessions shall be equivalent to the level of nullification or impairment. This provision of the DSU has been interpreted consistently as not justifying punitive

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[88]*See, supra*, footnote 53.

[89]This position was clearly stated by the United States in its response to questioning at the oral hearing.

[90]Article 51 of the International Law Commission's draft articles on Responsibility of States reads:

> Proportionality
>
> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

(International Law Commission, *State Responsibility: Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading*, A/CN.4/L.602/Rev.1, 26 July 2001)

[91]Article 22.4 of the DSU reads:

> The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

damages.[92] These two examples illustrate the consequences of breaches by states of their international obligations, whereas a safeguard action is merely a remedy to WTO-consistent "fair trade" activity.[93] It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, "punitive", attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case.

121. Finally, and most significantly, if the totality of serious damage could be attributed to only one of those Members the imports from whom have contributed to it, there would be no need to undertake a comparative analysis of the effects of imports from that one Member, once the imports from that Member have been found to have increased sharply and substantially; such an interpretation would reduce a whole segment of Article 6.4 to inutility.

122. We now turn to the question of how to conduct the comparative analysis required by Article 6.4. This analysis is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member. We recall that Article 6.4 enjoins the importing Member to conduct this comparative analysis on a multi-factor basis including "levels of imports", "market share" and "prices", while specifying that none of these factors alone or in combination with other factors can necessarily give decisive guidance. The comparison is to take place between the effects of imports from the Member in question, on the one hand, and those of imports from other sources, on the other. The comparison must thus be based on a variety of factors, each of which has a different significance and weight, and is to be measured on a different scale.

123. It is of course possible to compare the level of imports of one Member with the level of imports from other sources taken together. Likewise, it is possible to establish the market share of one Member in comparison with all other imports and the output of the domestic industry. However, the full effects of the level of imports from, and the market share of, one Member can only be assessed if this level and this share are compared *individually* with the level of imports from, and the market share of, the other Members from whom imports have also increased sharply and substantially.

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[92]The Arbitrators in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* stated that "there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature." (Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999, para. 6.3) *See also*, Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 20 August 2000, para. 3.55.

[93]Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 41, para. 94.

This conclusion is even more obvious for the comparison of import and domestic prices. The price of imports from one Member can be compared with the average price of imports from other sources and with domestic prices. However, prices of imports from the other Members may vary widely from one another. A fair assessment of the effects of the price of imports from one Member will therefore require a comparison with the price of imports from other Members taken individually. Moreover, these different factors interact in different ways, producing different effects, under different circumstances, not to mention the possible existence of other relevant factors (and their effects) that must be taken into account in the comparison according to the proviso at the end of Article 6.4, second sentence.

124. 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.

125. In the appeal before us, Pakistan is not the only Member from whom imports have increased sharply and substantially. It is not in dispute that Mexico also falls into this category.[94] We, therefore, consider that the share of the serious damage attributable to imports from Pakistan can be properly assessed only in the light of the effects of the imports from Mexico.

126. Accordingly, albeit for reasons partly different from those given by the Panel, we *uphold* the finding in paragraph 8.1(b) of the Panel Report that the United States acted inconsistently with Article 6.4 by not examining the effect of imports from Mexico (and possibly other appropriate Members) individually when attributing serious damage to Pakistan.

127. We finally turn to the United States' appeal against the Panel's interpretation that Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. In this respect, we note that the scope of this dispute is defined by Pakistan's claims before the Panel. Pakistan claimed that the United States acted inconsistently with Article 6.4 because it "attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects".[95] The Panel considered it necessary, in its reasoning, to rule on the broader interpretative question of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof.[96] The United States also appeals the Panel's interpretation on this broader question. However, our

[94]*See*, Panel Report, para. 7.132.

[95]*Ibid*., paras. 3.1 and 7.2(a).

[96]*Ibid*., paras. 7.126-7.127.

findings[97] resolve the dispute as defined by Pakistan's claims before the Panel. We, therefore, do not rule on the issue of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. In these circumstances, the Panel's interpretation on this question is of no legal effect.

VII. Findings and Conclusions

128. For the reasons set out in this Report, the Appellate Body:

(a) concludes that the Panel exceeded its mandate under Article 11 of the DSU by considering United States Census data for the calendar year 1998;

(b) upholds the Panel's finding, in paragraph 8.1(a) of its Report, that the United States acted inconsistently with Article 6.2 of the *ATC*, by excluding from the scope of the domestic industry the production of combed cotton yarn by vertically integrated producers for their own internal use;

(c) upholds the Panel's finding, in paragraph 8.1(b) of its Report, that the United States acted inconsistently with Article 6.4 of the *ATC*, by not examining the effect of imports from Mexico (and possibly other appropriate Members) individually when attributing serious damage to Pakistan; and

(d) declines to rule on the issue of whether Article 6.4 of the *ATC* requires attribution to all Members the imports from whom cause serious damage or actual threat thereof and concludes that the Panel's interpretation on this issue is of no legal effect.

129. The Appellate Body *recommends* that the DSB request the United States to bring its measure, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *Agreement on Textiles and Clothing*, into conformity with its obligations under that Agreement.

[97] *See, supra*, paras. 119 and 125-126.

Signed in the original at Geneva this 27th day of September 2001 by:

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Georges Michel Abi-Saab
Presiding Member

_____ _____

Claus-Dieter Ehlermann
Member

A. V. Ganesan
Member