WORLD TRADE ORGANIZATION

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(97-0454)

Appellate Body

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear

AB-1996-3

Report of the Appellate Body

WORLD TRADE ORGANIZATION

APPELLATE BODY

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear	AB-1996-3
Costa Rica, Appellant	Present:
United States, Appellee	Ehlermann, Presiding Member
	Feliciano, Member
India, Third Participant	Matsushita, Member

I. Introduction: Factual Background and Statement of the Appeal

This is an appeal by Costa Rica from certain issues of law and legal interpretations set out in the Panel Report, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*[1] (the "Panel Report"). That Panel (the "Panel") had been established to consider a complaint by Costa Rica relating to a transitional safeguard measure imposed by the United States on imports of cotton and man-made fibre underwear from Costa Rica under Article 6 of the *Agreement on Textiles and Clothing* ("*ATC*").[2]

The factual background essential to understanding this appeal, may b 0 1 508.56 294.96 Tm/lbackground

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restraint level was published in the United States Federal Register on 21 April 1995. The consultations were held but the United States and Costa Rica failed to negotiate a mutually acceptable settlement during these consultations. The United States then invoked Article 6.10 of the *ATC*, and introduced a transitional safeguard measure in respect of cotton and man-made fibre underwear imports from Costa Rica on 23 June 1995. The measure was, by its terms, to be valid for a period of 12 months, effective as of 27 March 1995 (*i.e.*, the date of the request for consultations).

At the same time, the United States referred the matter to the Textiles Monitoring Body (the "TMB"). The TMB found that the United States had failed to demonstrate serious damage to the United States domestic industry. However, the TMB did not reach a consensus on the existence of an actual threat of serious damage. The TMB

(ii) the United States violated its obligations under Article 6.6(d) of the *ATC* by not granting the more favourable treatment to Costa Rican re-imports contemplated by that sub-paragraph;[4]

(iii) the United States violated its obligations under Article 2.4 of the *ATC* by imposing a restriction in a manner inconsistent with its obligations under Article 6 of the *ATC*;[5] and

(iv) the United States violated its obligations under Article X:2 of the *General Agreement on Tariffs and Trade 1994* (the "*General Agreement*") and Article 6.10 of the *ATC* by setting the start of the restraint period on the date of the request for consultations, rather than the subsequent date of publication of information about the restraint.[6]

The Panel recommended that the Dispute Settlement Body request the United States to bring the measure challenged by

1996.[10] On 6 December 1996, the United States filed an appellee's submission.[11] That same day, India submitted a third participant's submission.[12] No other submissions by either the United States or Costa Rica, whether *qua* appellant or *qua* appellee, were made. The complete record of the Panel proceedings was duly transmitted to the Appellate Body.[13]

The oral hearing contemplated by Rule 27 of the *Working Procedures* was held on 16 December 1996. At the hearing, oral arguments were made respectively by the participants and the third participant. Questions were put to them by the Division. All of these questions were answered orally. The participants and third participant did not take advantage of an invitation by the Division to submit post-hearing memoranda. On 18 December 1996, the United States submitted a written clarification and amplification of its oral response to one of the Division's questions. The next day, Costa Rica responded in writing to the United States' clarification.

II. The Basic Contentions of the Participants and the Third Participant

1. The Claims of Error by Appellant Costa Rica

Costa Rica appeals only from the Panel's conclusions relating to the permissible effective date of application of the United States' transitional safeguard measure.

It is claimed by Costa Rica that the Panel erred in finding that the United States' restraint measure could have legal effect between the date of publication of the notice of consultations (between the United States and several countries, including Costa Rica) in the Federal Register 21 April and the date of the application of that measure i.e. 23 June 1995). The restriction was "introduced" on 23 June 1995 for a period of 12 months starting on 27 March 1995, i.e., starting on the day the United Stat s r u st d the several Me ers concer d or consul

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[11]Pursuant to Rule 23(3) of the *Working Procedures*.

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

[13]Pursuant to Rule 25 of the *Working Procedures*.

[14]Costa Rica, however, did not submit any arguments in respect of Article XI, *General Agreement.*

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argues, Article XIII:3(b)

Agreement Establishing the World Trade Organization (the "*WTO Agreement*"):[16] the provisions of Article 6 of the *ATC* which do not provide for backdating must prevail over Article

Agreement"). According to Costa Rica, had the drafters of the *ATC* wanted to provide for retroactive safeguard restraints, they would have done so expressly.

Costa Rica also rejects the Panel's statements concerning the possibility of speculative trade being caused by the request of the importing country for consultations required in Article 6.7 of the *ATC*. Since no evidence had been presented to the Panel on the matter, appellant Costa Rica denies that the Panel made a factual finding establishing the general prevalence of speculative trade. While acknowledging that a speculative "flood of imports" could arise in unusual and

the Appellant would draw from the absence in Article 6.10 of the *ATC* of language equivalent to the express permission for backdating a restraint measure under Article 3.5(i) of the *MFA*. The United States states that there was no debate on this point during the negotiations of the *ATC*.

(b) *Concerning Article XIII:3(b) of the General Agreement*

The United States, turning to Costa Rica's arguments relating to Article XIII:3(b), supports the Panel's decision to distinguish *Chilean Apples*[17] on its facts. It also traverses Costa Rica's claim that Article XIII:3(b) was infringed because the United States gave public notice merely of the initiation of a procedure which could possibly lead to the imposition of a restraint measure, rather than of the imposition of the restraint measure itself. The principal contention of the Appellee here is that the wording of Article XIII:3(b) recognizes the possibility that the quota announced in the original public notice may change, and does not prohibit notice of future quotas that may be subject to a contingency, such as the contingency that consultations may not be successful and the proposed restraint may in fact be adopted.

3. The Arguments of the Third Participant

The Third Participant endorses all of the arguments submitted by Costa Rica, providing additional statements on a number of particular points. For example,

III. The Issues Raised in this Appeal

We must note at the outset the narrowness of the present appeal. Costa Rica appeals from only one finding of the Panel: the finding allowing the backdating of the transitional safeguard measure here involved to the date of publication in the Federal Register of the request for consultations with, *inter alia*, Costa Rica. At the same time, Costa Rica questions certain legal interpretations adopted by the Panel in the course of reaching that finding.

The United States has not appealed from any of the findings of the Panel, either by filing an Appellant's submission under Rule 23(1) of the *Working Procedures* or by bringing a separate appeal under Rule 23(4) of the same *Procedures*. In its submissions, written and oral, as Appellee,

into the *General Agreement*. A transitional safeguard mechanism is in essence a measure establishing, for a certain period of time, a quantitative restraint on the importation of specified categories of goods from an identified Member or Members. Many legal and operating aspects of this mechanism are defined and regulated in varying degrees of detail by Article 6 of the *ATC*.

In its Report, the Panel formulated the particular issue we are here addressing in the following manner:

> Costa Rica argues that the United States retroactively applied the restriction in violation of Article 6.10 of the ATC. The restriction was introduced on 23 June 1995 for a period of 12 months starting on 27 March 1995, which was the date of the request for consultations under Article 6.7 of the ATC. Although Article 6.10 of the ATC allows the importing country to "apply the restraint, … within 30 days following the 60-day period for consultations", it is silent about the initial date from which the restraint period should be calculated. In contrast, Article 3.5(i) of the Multifibre Arrangement (MFA) stated that the restraint could be instituted "for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries". Thus, the question before the Panel is whether the silence of the ATC in this regard should be interpreted as prohibition of a practice which was explicitly recognized under the MFA, and if so, what should be the appropriate date from which the restraint period is to be calculated under the ATC.[18] (Emphases added)

Apparently taking its assumed premise literally - i.e. that Article 6.10 "is silent about the initial date from which the restraint period should be conducted …" and describing the issue as "a technical question regarding the opening date of a quota period",[19] the Panel went outside the four corners of the *ATC*. Proceeding to the provisions of the *General Agreement*, the Panel then took Article X:2 thereof as its applicable and controlling text. The Panel held that the United States' safeguard restraint measure was "a measure of general application" within the meaning of Article X:2,[20] and concluded;

> … that the prevalent practice under the MFA of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the ATC. However, we note that if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint. In the present case, the United States violated its obligations under Article X:2 of GATT 1994 and consequently under Article 6.10 of

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> the ATC by setting the restraint period for 12 months starting on 27 March 1995. However, had it set the restraint period starting on 21 April 1995, which was the date of the publication of the information about the request for consultations, it would not have acted inconsistently with GATT 1994 or the ATC in respect of the restraint period. The United States argues that it did not "enforce" the restraint until 23 June 1995. We note the US argument. However, in so far as the restraint was applied to exports from Costa Rica which had taken place prior to the publication, it was implemented and therefore enforced within the meaning of Article X:2 of GATT 1994.[21] (Emphases added)

While we agree with the Panel, as pointed out below,[22] that the United States' restraint measure here involved is appropriately regarded as "a measure of general application" for purposes of Article X:2 of the *General Agreement*, we are unable to share and affirm the above conclusion of the Panel.

1. Interpreting Article 6.10 of the *ATC*: Textual and Contextual Considerations and the Principle of Effectiveness

We must focus upon Article 6.10 of the *ATC* which needs to be quoted in full:

> Article 6
>
> x x x
>
> 10. If, however, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of this Article, T1 0 0 1 207.84 661.44 Tm45.2 659.52 37.68 0.72 re f0 Tm/F17 11 Tf(of) Tj TjETBT1

The first thing which must be noted about Article 6.10 of the *ATC* is that its terms make no express reference to backdating the effectivity of a safeguard restraint measure to some date prior to the promulgation or imposition of such measure. To this extent, we agree with the Panel that Article 6.10 *ATC* is silent on the question of backdating a safeguard restraint measure. We do not, however, believe that Article 6.10 does not substantively address that issue. To the contrary, we

Article 6.1, *ATC* offers some reflected light on the question of backdating a restraint. Article 6.1 reads, in pertinent part:

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

Article 6.1 directs that transitional safeguard measures be applied "as sparingly as possible" on the one hand and, on the other, applied "consistently with the provisions of [Article 6] and the effective implementation of the integration process under [the *ATC*]". It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint

Member "proposing to take safeguard action", or who "proposes to invoke the safeguard action" and to the level at which imports of the goods specified "are proposed to be restrained". The common, day-to-day, implication which arises from this language is clear to us: the restraint is to be applied in the future, after the consultations, should these prove fruitless and the proposed measure not withdrawn. The principle of effectiveness in treaty interpretation[24] sustains this implication.

We turn to another element of the context of Article 6.10 of the *ATC*: the prior existence and demise, as it were, of the *MFA*. Article 3(5)(i) of the *MFA* provided as follows:

> If, however, after a period of sixty days from the date on which the request has been received by the participating exporting country or countries, there has been no agreement either on the request for export restraint or on any alternative solution, the requesting participating country may decline to accept imports for retention from the participating country or countries referred to in paragraph 3 above of the textiles and textile products causing market disruption (as defined in Annex A) at a level for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries not less than the level provided for in Annex B. Such level may be adjusted upwards to avoid undue hardship to the commercial participants in the trade involved to the extent possible consistent with the purposes of this Article. At the same time the matter shall be brought for immediate attention to the Textile Surveillance Body. (Emphases added)

It is recognized by Appellant and Appellee and the Thi TjETBT1 0 0 1 1961 342 343.44 Tm/F17 11 937(r

from the disappearance of the *MFA* clause.[27] Appellant Costa Rica urges that the absence of an equivalent clause in Article 6.10 of the *ATC* means that backdating of a restraint measure may no longer be resorted to under Article 6.10, *ATC*. Appellee United States, in contrast, insists that such backdating is nevertheless

ATC, in the United States' view, must be considered as impliedly granting such authority if that paragraph is to be an "effective component" of the transitional safeguard mechanism of the *ATC*.

We have been unable to locate such a broad-ranging "factual finding" in the Panel's Report.

At the same time, we must recognize that in the world of international trade and commerce as we know it, a speculative "flood of imports" could in fact materialize, in a particular case, upon public announcement of consultations. We cannot exclude *a priori* the possibility of such a situation arising. Whether or not, in a specific given case, a "flood of imports" would actually follow publication of a call f(call) TjETBT1 0T1 0 0 1 288 582.96 Tm0 1 144.24 622.08 Tm/F.96 Tm/F17 11 Tf(n)5BT1 0 0 1 348.

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permissible under Article X:2 of the *General Agreement*. The importing Member is, however, not defenceless against a speculative "flood of imports" where it is confronted with the circumstances contemplated in Article 6.11. Its appropriate recourse is, in other words, to action

> burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published. (Emphases added)
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> x x x

The Panel found that the safeguard restraint measure imposed bTBT1 0 0 1 300.24 688 1 339.12 648.48 Tm/

Signed in the original at Geneva this 5th day of February 1997 by:

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Claus-Dieter Ehlermann
Presiding Member

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Florentino Feliciano
Member

_____
Mitsuo Matsushita
Member