

Textiles Monitoring Body

REPORT OF THE FORTY-SIXTH MEETING

1. The Textiles Monitoring Body held its forty-sixth meeting on 13 and 14 July 1998.
2. Mr. Otto Wentzel (Norway) was appointed member as of 1 July 1998 and until 31 December 1998, to replace Mr. A. R. (Sandy) Moroz (Canada). Mr. Wentzel appointed Mr. Moroz as his alternate for the same period. Mr. Dong Won Kim (Korea) was appointed member as of 1 July 1998 to replace Mr. Timothy Tong (Hong Kong, China). Mr. Kim appointed Mr. Tong as his first alternate and Mr. Abdul Mannan (Bangladesh) as his second alternate.
3. Present at this meeting were the following members and alternates: Mr. Da Costa/Miss Gervasi/Mr. Grané; Messrs. Kim/Tong/Mannan: Kobayashi; Malik; Moroz; Mukerji; Rey/Grčar; Richards; Tadpitakkul; Tagliani.
4. The TMB adopted the report of its forty-fifth meeting (G/TMB/R/44). Furthermore, at the closure of the meeting, the TMB also adopted its report of the forty-sixth meeting (G/TMB/R/45).

Notifications under Articles 2.17 and 5 of the ATC

5. The TMB received a communication from the United States, pursuant to Article 5 of the ATC, in October 1996, informing it of the main features of "a mutually satisfactory solution [reached with Pakistan on 22 March 1996] with respect to the transshipment charges for [US] category 361 (cotton [bed]sheets) made by the United States [to Pakistan's quota for these products] on 11 August 1995", on account of alleged circumvention by Pakistani companies. According to this communication, the two "governments also reached a mutually satisfactory solution with respect to cotton bedsheets entering the United States incorrectly marked as man-made fibre". Furthermore, "in the context of this agreement, a mutually acceptable solution to the rules of origin changes [implemented by the United States] with respect to products in [some] categories had [also] been reached" (G/TMB/N/327).
6. Before the TMB could start its consideration of this communication, Pakistan requested that the TMB defer its consideration, as there was a possibility that the two Members would submit a joint notification to the TMB. The United States consented to this request. In response to subsequent inquiries by the TMB for this joint communication, the request for deferral was successively repeated.
7. In July 1997, a communication was received from Pakistan on the same matter, pursuant to Article 2.17 of the ATC. The Memorandum of Understanding (MOU) reached on 22 March 1996 between Pakistan and the United States was attached to this communication (G/TMB/N/328).
8. The TMB started its consideration of both communications, i.e. that by Pakistan submitted under Article 2.17 and that by the United States notified under Article 5, at its meeting in September 1997. Since the two communications regarding the same mutually satisfactory solution had been made pursuant to two different articles of the ATC, the TMB decided to seek clarification

from the two Members concerned and to revert to its review, also on the basis of the expected replies, at a subsequent meeting.¹ In particular, the TMB sought clarification from Pakistan as to the reasons why the notification of the MOU had been submitted pursuant to Article 2.17, and from the United States why the notification of the mutually satisfactory solution had been submitted pursuant to Article 5 of the ATC. In spite of reminders, no reply was received from either Member. Furthermore, there were no indications that any reply would be forthcoming.

9. Therefore, the TMB came to the view that, in such circumstances, it had to proceed with the examination of the substantive elements of the two communications, keeping also in mind the respective provisions under which they had been submitted. This decision was taken without prejudice as to whether the TMB would be in a position, or not, to reach a definitive conclusion on the justification of the measures in accordance with the provisions of the ATC, on the basis of the information made available to it and bearing in mind in particular the fact that the communications by Pakistan and the United States had been made pursuant to two different provisions of the ATC. The TMB expressed its most serious concern about the lack of cooperation by the two Members to provide the Body with replies to the questions that had officially been put to them. The TMB recalled that, according to Article 8.3 of the ATC, the Body "shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details ... it may decide to seek from them". In the view of the TMB, by not providing additional information or necessary details in response to the clarifications sought by the TMB, Pakistan and the United States failed to comply with an important obligation under the ATC. These circumstances could have a serious impact on the TMB's ability to discharge its functions as required under the Agreement. Furthermore, the unduly long delay in submitting the respective notifications prevented the TMB to conduct a prompt examination of the matter.

10. The TMB resumed the review of the two communications at its meeting on 19-21 January 1998. The discussion continued at the meetings of 11-13 March 1998, 26-27 May 1998 and 16-17 June 1998, and was concluded at the meeting of 13-14 July 1998.

11. In resuming its consideration, the TMB recalled, on the basis of the information available to it, the background of the two communications submitted, respectively, by Pakistan and the United States.

- On 7 February 1995, the United States had requested consultations with Pakistan on grounds of alleged transshipment by Pakistani companies taking place with respect to products falling under US category 361 (cotton bedsheets). On 28-29 March and 11-12 July 1995, bilateral consultations had been held between the two Members but no mutually satisfactory solution had been reached. On 4 August 1995, the United States charged 691,082 pieces to the 1995 limit for US category 361, effective 11 August 1995. The 1995 limit for category 361 for Pakistan was 3,006,719 pieces. The United States submitted no notification on this action to the TMB.
- Subsequently, the 1995 limit for category 361 was, among others, adjusted, using available flexibility, and special shift previously applied to the 1995 limit was reduced.
- On 30 November 1995, Pakistan requested the TMB to consider this matter pursuant to Articles 5.4 and 8.5 of the ATC, and to recommend that the United States withdraw the debits made against Pakistan's quotas. The TMB began its review of this notification by Pakistan at its meeting in February 1996, inviting the participation of Pakistan and the United States, which sent delegations to present their respective

¹ G/TMB/R/35, paragraph 16.

cases. Both parties made a presentation and provided replies to questions. Among the elements presented, the TMB understood, *inter alia*, that the shipments containing the goods charged against the Pakistani quota by the United States comprised flat sheets, fitted sheets as well as pillowcases. Also, there was no agreement between the parties on the fibre content of the bedsheets in question. Under the US import regime, bedsheets with a composition of 50 per cent cotton and 50 per cent man-made fibre were to be considered as cotton bedsheets and therefore fell under US category 361. Some of the products exported by Pakistan as man-made fibre sheets had been identified as cotton sheets by the United States. The TMB decided to revert to its review at its subsequent meeting and invited both parties to that meeting. Subsequently Pakistan requested that the TMB review the US measure to deduct Pakistan's quota for US category 361 under, *inter alia*, Article 2.5 of the ATC.

- At its March 1996 meeting, the TMB was prepared to resume its review of the issue. However, during the course of the meeting, the TMB was informed by the two delegations that, following consultations, a mutually satisfactory understanding had been reached between them, and that this understanding would be notified to the TMB.

12. In its communication to the TMB, the subject of the present review, Pakistan stated that it wished to clarify that the operative paragraphs of the MOU concluded with the United States it had notified were subject to the provisions of its preamble and were without prejudice to the rights and obligations of Pakistan under the ATC.

13. The TMB noted that, though the respective notifications had been submitted to it in different forms and invoking different provisions of the ATC, both communications confirmed that the solution notified had been mutually agreed between Pakistan and the United States, and were an indication that both Members considered that the measures notified had been taken under the ATC. The TMB recalled that according to Article 8.1 of the ATC, the TMB's task was, *inter alia*, "to examine all measures taken under this Agreement and their conformity therewith". However, the TMB found it unusual that the same mutually agreed solution had been referred to it by the Members concerned under two different provisions of the ATC, which notwithstanding the requirements defined in Article 8.1 and cited above, conferred different tasks on the TMB in reviewing the measures brought before it. The review provision of Article 2, namely Article 2.21, provides that "[t]he TMB shall keep under review the implementation of this Article. It shall, at the request of any Member, review any particular matter with reference to the implementation of the provisions of this Article. It shall make appropriate recommendations or findings within 30 days to the Member or Members concerned, after inviting the participation of such Members". Recalling that the notification of Pakistan had been submitted in July 1997, pursuant to Article 2.17, the TMB observed that no request, in the sense of the second sentence of Article 2.21, had been addressed to it by Pakistan. Therefore, a review of this notification under Article 2.21 should be confined to the provisions of the first sentence of this Article. Under Article 5 of the ATC, the only provision which specifically required the notification of a mutually satisfactory solution to the TMB and, subsequently, a review by the TMB, as a result of which the Body "may make such recommendations to the Members concerned as it deems appropriate", was contained in Article 5.4. It was recalled that the notification submitted by the United States was made pursuant to Article 5, with no further specification of a paragraph of this Article.

14. The TMB observed also that, in addition to the above, neither of the two communications provided sufficient explanation for the different elements forming part of the mutually satisfactory solution reached between the two Members. The same applied to the possible link among the different elements so agreed. The MOU did not contain any such explanation or justification, and the accompanying notification submitted by Pakistan also remained silent in this regard. The notification

by the United States provided some reasoning for one of the particular elements agreed, but not for the others, and in the absence of any indication or explanation from Pakistan the particular reasoning given by the United States had to be seen as the views of one of the parties. In any event, the amount and quality of the information provided by the two Members did put limitations on the TMB's ability to review these communications as required under the ATC.

15. The TMB understood, also in the light of the elements mentioned in paragraph 11 above, that the mutually satisfactory solution agreed between Pakistan and the United States contained three main elements, which it considered in sequence:

- a reduction of the debit made by the United States to Pakistan's category 361 quota for 1995 to the extent of and in respect to cotton fitted sheets (subsequently, after discussions with Pakistan, the United States had decided to make the reductions in charges to the category 361 quota for 1996);
- the introduction of restrictions on man-made fibre bedsheets and pillowcases (US categories 666 - S and P); the increase in the base limits for categories 360 and 361; and
- the resolution of matters concerning US rules of origin changes with respect to bedsheets and pillowcases imports from Pakistan into the United States.

Reduction of the debit made by the United States to Pakistan's category 361 quota

16. As regards the reduction of the charges made by the United States to Pakistan's category 361 quota, the TMB noted that imports into the United States of products of category 361 from Pakistan had been subject to a specific limit under the Arrangement Regarding International Trade in Textiles (MFA), and that this limit had been notified by the United States under Article 2.1 of the ATC. The TMB understood that, in 1995, the United States had made debits to that quota for Pakistan on grounds of alleged circumvention that had taken place prior to the entry into force of the ATC. The TMB observed that a few specific provisions of the ATC, such as Articles 2.5 and 4.4, referred to measures or actions taken under the MFA. These provisions, however, applied to measures that had actually been taken prior to the date of entry into force of the ATC. The ATC did not provide for cases when measures were decided after the entering into force of the ATC with reference to actions that had taken place under the previous regime, i.e. the MFA.

17. The TMB noted from both communications that the two parties had agreed that the United States would reduce the charges it had made in 1995 to the category 361 quota of Pakistan to the extent of and in respect to fitted sheets (the shipments containing the goods charged against the Pakistani quota comprised flat sheets, fitted sheets as well as pillowcases). The TMB also noted that the United States had, after subsequent discussions with Pakistan, decided to make the reductions in charges apply to the 1996 limit for category 361.

18. The TMB observed that this adjustment to the quota level resulting from a reduction of the debits made by the United States had been notified by both Members under different provisions of the ATC. Pakistan had notified it pursuant to Article 2.17, which states that "[a]dministrative arrangements, as deemed necessary in relation to the implementation of any provision of this Article, shall be a matter for agreement between the Members concerned. Any such arrangements shall be notified to the TMB". The TMB was aware that such administrative arrangements had been agreed

between Pakistan and the United States and had been notified to the TMB (G/TMB/N/149).² According to this notification, the provisions of the administrative arrangements had been agreed as being necessary for the proper implementation of restrictions (including on category 361 products) notified by the United States under Article 2.1 of the ATC. The TMB observed that the adjustment in the charges to the category 361 quota of Pakistan had an effect on the implementation of this restriction.

19. The United States had notified the same measure pursuant to Article 5 of the ATC. The TMB noted that the first two sentences of Article 5.4 provided the opportunity for Members agreeing on appropriate action, to the extent necessary, to address the problem, where, as a result of investigation, there was sufficient evidence that circumvention had occurred. Such action may include, *inter alia*, the adjustment of charges to restraint levels to reflect the true country or place of origin.

20. On the basis of the considerations mentioned in paragraphs 16 to 19 above, the TMB took note of the adjustment to the quota level for category 361 resulting from a reduction of the charges made by the United States, a reduction which had been applied to the 1996 limit. The TMB also took note that, accordingly, Pakistan had decided to withdraw its requests of 30 November 1995 and 4 March 1996 that the TMB review the US charges to category 361. In doing so, the TMB expressed concern that, in 1995 when it had made the debits to Pakistan's quota, the United States had not notified it to the TMB with full justification, as required in Article 5.4 of the ATC. The TMB also reiterated its concern that when the mutually satisfactory solution had been reached between Pakistan and the United States, it had not been notified to the TMB for more than six months. Moreover, the TMB observed that the respective communications submitted by Pakistan and the United States did not provide explicit reasoning or justification for the adjustment agreed between the parties.

Introduction of a limit on man-made fibre bedsheets and pillowcases (category 666 - S and P).

21. According to paragraphs 3 and 4 of the MOU agreed between the two Members, a restriction had been established on imports of products of US category 666 - S (man-made fibre bedsheets) at a level of 3.6 million kg. for 1996, and on imports of products of category 666 - P (man-made fibre pillowcases) at a level of 680,000 kg. The restrictions were agreed for the period 22 March 1996 to 31 December 2004. Growth rates for the restrictions were established at 6 per cent, swing at 7 per cent, with a maximum combined carryover/carry forward of 11 per cent. No carryover was available in the first agreement year, no carry forward in the last agreement year. Also, as part of the agreement, the 1996 base limit for category 361 (cotton bedsheets) was increased to 5 million pieces and that for category 360 (cotton pillowcases) to 4.3 million pieces.

22. The TMB observed that restrictions on imports of category 666 - S and 666 - P products from Pakistan had not been taken over from the previous MFA regime, as they had not been previously notified by the United States, pursuant to Article 2.1. The TMB also observed that restrictions on imports of these products had not been notified pursuant to Article 3.1. This indicated that new restrictions had been introduced, as from 22 March 1996 and until the end of the ATC. Recalling the provisions of Article 2.4, the TMB noted that neither Pakistan nor the United States had claimed that the new restrictions were justified under a GATT 1994 provision. Therefore, the question to be addressed was whether, on the basis of the information made available to it, the TMB could establish that these new restrictions were justified by a provision of the ATC, and if so, which one.

23. The TMB observed that the MOU itself did not mention any reasoning for the establishment of the new restrictions, nor did the accompanying letter submitted by Pakistan; the TMB also observed that the MOU had been submitted by Pakistan pursuant to Article 2.17 of the ATC. The

² The report of the review by the TMB of the administrative arrangements concluded, *inter alia*, between Pakistan and the United States is in G/TMB/R/31, paragraphs 6 to 23.

TMB recalled that, according to the communication of Pakistan, the operative parts of the MOU were subject to its preamble and without prejudice to Pakistan's rights and obligations under the ATC.

24. The US communication stated, *inter alia*, that the two "governments also reached a mutually satisfactory solution with respect to cotton bedsheets entering the United States incorrectly marked as man-made fibre. It became clear in our mutual investigation of this issue that the overwhelming majority of textile shipments from Pakistan to the United States that were marked as man-made fibre were in fact cotton. Consequently, our governments agreed to establish a limit on man-made fibre bedsheets (category 666 - S) and man-made fibre pillowcases (666 - P)". The TMB observed that the United States had notified the elements of the mutually agreed solution with Pakistan pursuant to Article 5 of the ATC.

25. In the absence of additional information from the Members concerned, the TMB considered the introduction of these new restrictions pursuant to those ATC provisions (i.e. Articles 2.17 and 5), under which the respective notifications had been referred to the Body.

Examination of the introduction of the new restrictions in the context of Article 2.17

26. In considering these restrictions, first in the context of Article 2.17, the TMB recalled that:

- the restrictions on imports of products of categories 666 - P and 666 - S from Pakistan had been introduced with effect as from March 1996 and, therefore constituted new restrictions;
- Article 2.4 stated that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions";
- the communication addressed to the TMB by Pakistan under Article 2.17 did not invoke any relevant GATT 1994 provision as a justification for the new restrictions, or any ATC provision other than Article 2.17.

27. The TMB also recalled that according to Article 2.17, "[a]dministrative arrangements, as deemed necessary in relation to the implementation of any provision" of Article 2 could be agreed between the Members concerned. As the restrictions on category 666 - S and 666 - P products had not been notified pursuant to Article 2.1 and, therefore, did not fall under the scope of the provisions of Article 2, the TMB did not see how the imposition of these new restrictions, even if mutually agreed between the two Members, could be considered to be necessary in relation to the implementation of the provisions of Article 2. The TMB also observed that the administrative arrangements concluded between the United States and Pakistan, referred to in paragraph 18, did not provide for the introduction of new quantitative restrictions

28. The TMB, therefore, concluded that there appeared to be no justification to apply new quantitative restrictions under Article 2.17.

Examination of the introduction of the new restrictions in the context of Article 5

29. Turning to the consideration of the same restrictions in the context of Article 5 of the ATC, which was the legal provision referred to by the United States, the TMB recalled that:

- the restrictions had been introduced after the entering into force of the ATC and, therefore constituted new restrictions;

- according to Article 2.4 "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions";
- the communication of the United States had not invoked any GATT 1994 provision as a justification for the measure;
- the communication had been submitted by the United States pursuant to Article 5 of the ATC, without mentioning any particular provision of that Article;
- in terms of explanation for the introduction of the restrictions, the fact that shipments of cotton bedsheets (category 361) had been marked incorrectly as being man-made fibre bedsheets (category 666) had been advanced by the United States.

30. The TMB recalled that under Article 5 the only provision that specifically required the notification of a mutually satisfactory solution agreed between Members was contained in Article 5.4. Article 5.4 of the ATC provides, *inter alia*, that "[w]here, as a result of investigation, there is sufficient evidence that circumvention has occurred (e.g. where evidence is available concerning the country or place of true origin, and the circumstances of such circumvention), Members agree that appropriate action, to the extent necessary to address the problem, should be taken. Such action may include the denial of entry of goods or, where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin. Also, where there is evidence of the involvement of the territories of the Members through which the goods have been transshipped, such action may include the introduction of restrictions with respect to such Members. Any such actions, together with their timing and scope, may be taken after consultations held with a view to arriving at a mutually satisfactory solution between the concerned Members and shall be notified to the TMB with full justification. The Members concerned may agree on other remedies in consultation. Any such agreement shall also be notified to the TMB, and the TMB may make such recommendations to the Members concerned as it deems appropriate".

Examination of the introduction of the new restrictions in the context of Article 5.4

31. In examining the introduction of the new restrictions in the context of Article 5.4, the TMB considered a number of elements, detailed in paragraphs 32 to 42 below.

32. The TMB noted that the context in which Article 5.4 can be invoked is defined in Articles 5.1 to 5.3. Recalling that the explanation provided by the United States for the introduction of restrictions was the incorrect marking (of category 361 products), the TMB noted that Article 5.1, *inter alia*, defines circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents.

33. The TMB observed that, apart from the third sentence of Article 5.4, the introduction of a new restriction, even if mutually agreed between the Members concerned, was not mentioned in Article 5.4 as an "appropriate action, to the extent necessary to address the problem" when circumvention as defined in Article 5.1 had occurred. Furthermore, the TMB understood that the introduction of restrictions, set out in the third sentence of Article 5.4, related only to the true country or place of origin in case there had been evidence of its involvement in the transshipment. This provision, therefore, could not *per se* allow the introduction of new restrictions on imports from Pakistan in the particular case when circumvention had occurred.

34. The TMB also observed that while the second and third sentences of Article 5.4 specified possible actions that could be taken when circumvention had occurred, they did not provide an exhaustive list for such actions. This was made clear by the language of the second sentence as well as by the fifth sentence of Article 5.4, the latter providing that "[t]he Members concerned may agree on other remedies in consultation".

35. As for the fifth sentence of Article 5.4, the TMB observed that the Agreement did not specify what, in the context of this paragraph, could or could not constitute the "other remedies".

36. It could be argued that the "other remedies" referred to in Article 5.4 did not include the permission to introduce new quantitative restrictions, since Article 5.4 in itself as well as the broader context as determined by the ATC provided sufficient guidance to the Members concerned to develop a correct understanding on what could or could not constitute such "other remedies" in the sense of Article 5.4. It could be contended that Article 5.4 was sufficiently specific in defining what type of actions can be taken in response to well defined circumstances. The second sentence of this Article, in addressing the issue of what kind of action could be taken in the relationship between the importing Member (the United States) and the Member constituting the true place of origin (Pakistan) of the goods allegedly circumvented (cotton bedsheets), specified that "[s]uch action may include ..., where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin". This formulation seemed to imply that the action taken should affect the product that was subject to circumvention. Since only the exports of products that had already been subject to restrictions could be circumvented, the remedy for such circumvention could not affect products other than those with respect to which circumvention had been claimed. Reading the second sentence of Article 5.4 in conjunction with the fifth sentence, it appeared, therefore, that the two Members could have agreed on adjustments of charges to the restraint level established for the category 361 products or on "other remedies" affecting the same products, but not on "other remedies" affecting other products, like category 666 - S and 666 - P products.

37. In addition, the third sentence of Article 5.4 explicitly allowed the introduction of new restrictions, but did so only in cases where there was evidence of the involvement of the territories of (third) Members through which the goods had been transhipped (see also paragraph 33 above). If this provision were read together with the fifth sentence of Article 5.4, it appeared that remedies other than the introduction of restrictions on imports of category 361 products could also have been foreseen, but these actions had to be limited to the products transshipped and to the Member through which the transshipment was effected. The TMB understood that no restrictions had been introduced by the United States against imports of category 361 products from the Member through which the products of Pakistani origin had allegedly been transhipped. Also, the TMB was not aware of any other action taken by the United States *vis-à-vis* imports of the transshipped products from the Member involved in this transshipment. In any case, this sentence did not provide authorization for the introduction of new restrictions on imports from Pakistan.

38. It could be contended that the broader context as defined by the ATC also confirmed the statements included in paragraphs 36 and 37 above. It could be argued that, since the Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994 and thus the ultimate objective of the Agreement was to ensure the full integration of trade in the covered products into the GATT 1994 rules and disciplines, the ATC carefully circumscribed the possibilities for maintaining or introducing quantitative restrictions; (apart from the third sentence of Article 5.4) the relevant provisions were contained in Articles 2, 3 and 6. As indicated earlier, the provisions of Articles 2 and 3 were not applicable to the particular case in question. While Article 6 allowed for the introduction of new restrictions for a limited duration, if the conditions specified in that Article were fully met, it was observed, however, that neither of the two Members had invoked the provisions of Article 6 as a justification for the

introduction of the new restrictions. Keeping in mind also the provisions of Article 2.4, it could be concluded on the basis of the arguments presented above that the introduction of the new restrictions on imports of category 666 products from Pakistan, even if mutually agreed between the two Members, could not be justified under the ATC.

39. It could also appear, however, that the language of the fifth sentence of Article 5.4 was vague and permissive, not setting any limitation on the kind of actions that would constitute possible "other remedies". It could, therefore, be argued that this formulation provided broad discretion to the Members concerned in reaching an agreement, in consultation, on what they consider in a particular case to be appropriate remedies (other than those defined in the preceding sentences of the same Article). On the basis of such a reasoning, one could not exclude an argument that the introduction of restrictions on products previously not subject to such restrictions could be considered as a possibility for providing "other remedies".

40. Due to the fact that Article 5.4 had not been specifically invoked by either of the Members, and full justification for the action had not been provided, the TMB refrained at this stage from taking a definitive view on the applicability of this provision, as well as on the conformity of the actions taken with Article 5.4. The TMB noted that Article 5.4 envisaged that where there was sufficient evidence that circumvention had occurred the action taken should be "appropriate" and "to the extent necessary to address the problem". Should the arguments put forward in paragraph 39 be retained, it could also be necessary to assess whether the action was appropriate and whether it addressed the problem identified "to the extent necessary".

41. The TMB observed that if one followed the reasoning of paragraph 39, arguing that the introduction of new restrictions could be considered as a possibility for providing "other remedies" in the sense of Article 5.4, the action would be seen as being appropriate. Therefore, it could be viewed as being justified, provided that it corresponded to what was perceived as the necessary extent to address the problem. Since, according to the explanation given by the United States, the problem was related to the implementation of restrictions notified pursuant to Article 2.1 (by mismarking goods that were subject to such restrictions), one could argue that the mutually acceptable solution reached between the two Members did not go beyond what was necessary for the following reasons:

- while it provided a disincentive for mismarking the products in question by putting restrictions on the products that had been subject to such practices;
- at the same time, it allowed trade to proceed.

42. There could, however, be arguments against reaching such a conclusion. Firstly, if the reasoning contained in paragraphs 36 to 38 prevailed, according to which the introduction of the new restrictions could not be justified, the action taken could not be viewed, by definition, as being appropriate. Secondly, notwithstanding the arguments included in paragraph 39, it could be argued that the introduction of the new restrictions did not meet the requirement that the actions taken should be "to the extent necessary to address the problem". If the problem stemmed from the mismarking of the man-made fibre products, introducing restrictions on them did not seem to address the problem at all or to the extent necessary, as it allowed for the continuation of mismarking up to a certain limit which amounted to the level of the new restrictions. Taking an action "to the extent necessary to address the problem" involved another aspect too, which was related to the duration of the measure in question. On the basis of the respective communications, the TMB understood that the new restrictions would remain in place until the expiration of the ATC, i.e. during almost nine years. This was a much longer duration than the one envisaged in Article 6 of the ATC, which explicitly authorized the introduction of new restrictions provided the necessary conditions were met. The maximum time-frame envisaged in Article 6 was three years, this being a ceiling, not a duration that had to be automatically agreed or imposed. Since the proposed duration of the particular action at

issue went very much beyond that three-year ceiling, the reasons why this had been deemed necessary by the two Members should have been at least explained to the TMB convincingly. The TMB noted in this regard that no such explanation had been provided to it by either of the Members. On the basis of these arguments, one could conclude that the introduction of the new restrictions was neither appropriate, nor did it address the problem to the extent necessary.

Examination of the introduction of the new restrictions in the context of Article 5.6

43. The TMB recalled that the communication of the United States had been submitted pursuant to Article 5, without specifying the particular provision under this Article that had been considered to be applicable to the particular case. Therefore, if the arguments included in paragraphs 36 to 38 prevailed, in order to address all possible options, a consideration of the introduction of new restrictions could also be warranted in the context of the provisions of Article 5.6.

44. Article 5.6 provides that "Members agree that false declaration concerning fibre content, quantities, description or classification of merchandise also frustrates the objective of this Agreement. Where there is evidence that any such false declaration has been made for purposes of circumvention, Members agree that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Should any Member believe that this Agreement is being circumvented by such false declaration and that no, or inadequate, administrative measures are being applied to address and/or to take action against such circumvention, that Member should consult promptly with the Member involved with a view to seeking a mutually satisfactory solution. If such a solution is not reached, the matter may be referred by any Member involved to the TMB for recommendations. This provision is not intended to prevent Members from making technical adjustments when inadvertent errors in declarations have been made".

45. The TMB observed that the United States had stated that the overwhelming majority of textile shipments (i.e. cotton bedsheets) from Pakistan to the United States had been incorrectly marked as man-made fibre. The TMB further observed that this statement by the United States had not been formally contested, nor confirmed, by Pakistan.

46. The TMB was of the view that it was arguable whether or not such incorrect marking corresponded to a false declaration concerning fibre content, quantities, description or classification of merchandise, as set out in Article 5.6.

47. It could be argued that Article 5.6 did not allow for taking such measures as the introduction of new quantitative restrictions. The second sentence of Article 5.6 envisaged that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Therefore, it appeared that a mutually satisfactory solution reached pursuant to this provision would encompass appropriate measures against the firms involved (exporters and/or importers), as opposed to those against governments. In addition, while Article 5.6 was not precise in providing Members with modalities for taking "appropriate measures" in cases where false declarations had been made for purposes of circumvention, it could be contended that the loose disciplines attached to this provision (e.g. there was no requirement to notify the appropriate measures agreed to the TMB), compared to other provisions concerning the taking of measures having a restrictive effect embodied in the ATC, raised doubts as to whether the introduction of new restrictions could be contemplated under this particular provision. Based on these considerations as well as on the analysis regarding the broader context defined by the ATC, as reflected in paragraph 38 above, it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6

48. It could also be argued, that if one accepted that (i) incorrect marking of cotton bedsheets had been, at least in part, the root of the problem identified and that (ii) this practice amounted to a false

declaration as defined in Article 5.6, the language of this Article authorized the Members concerned to agree, in case when no, or inadequate, administrative measures were being applied to address and/or to take action against such circumvention, on any kind of mutually satisfactory solution, possibly including the introduction of new restraints. Such a conclusion would rely, *inter alia*, on the lack in this language of any explicit indication regarding the possible nature of the measures that could be agreed between the Members as a mutually satisfactory solution. The TMB declined to take a definitive position at this stage regarding the applicability of this provision, as well as on the conformity of the actions taken with Article 5.6.

Summary and recommendation

49. In summarizing the detailed considerations contained in paragraphs 21 to 48 above, the TMB recalled that:

- according to both communications, as part of the mutually agreed solution reached between Pakistan and the United States, a new restriction had been introduced (on category 666 - P and 666 - S products) for a duration of almost nine years, and the base limit for category 360 and 361 products had been substantially increased;
- these actions had been notified to the TMB by the Members concerned pursuant to two different provisions of the ATC;
- the two communications had provided little reasoning, explanation or justification for these actions, including possible links between them;
- Pakistan and the United States had not provided the clarifications sought by the TMB.

The TMB reiterated its serious concerns about the apparent unwillingness of the two Members to cooperate fully with the Body. The TMB also recalled that the provisions of the ATC regarding deadlines for notification as well as the need to assist the TMB in discharging its functions, have to be fully respected, without exception, by all Members and with respect to all measures taken under the ATC.

50. In terms of findings, in particular against the background described in paragraph 49 above, the TMB wished to draw the attention in particular to the following points:

- the actions referred to above had been agreed apparently in response to developments that had taken place prior to the entering into force of the ATC;
- any mutually satisfactory solution between Members under the ATC shall be consistent with the relevant provisions of the ATC, shall not nullify or impair benefits accruing to any Member under the Agreement, nor impede the attainment of any of its objectives;
- there appeared to be no justification for the introduction of new restrictions pursuant to Article 2.17, which was the only provision of the ATC invoked by Pakistan;
- it appeared to be more relevant to consider these measures in the context of Article 5 of the ATC, which was the provision referred to by the United States. The United States, however, had not provided further precision regarding the applicable paragraph under Article 5;

- in the absence of appropriate explanation and justification provided to it, the TMB carefully considered all possible options, arguments and counter-arguments in the context of Article 5. Though for the reasons explained above, the TMB had not been placed in a position to take a definitive stand at this stage on the conformity, or lack thereof, of the measures discussed with the ATC, the Body was of the view that its detailed considerations, especially as reproduced in paragraphs 29 to 42 would not only require, but also facilitate further reflection by Pakistan and the United States.

51. Consequently, the TMB recommended that Pakistan and the United States re-examine the measures in question, in the light of the Body's comments and considerations. With a view to exercising proper surveillance of the implementation of its recommendation, the Body expected that the two parties would report back to it on the outcome of this re-examination, in a way that would enable the TMB to pronounce itself definitively on the justification and conformity of the actions with the relevant provisions of the ATC.

Resolution of matters concerning changes in the US rules of origin

52. The TMB recalled that, according to both notifications, the mutually acceptable solution also resolved matters concerning changes to US rules of origin with respect to imports of bedsheets and pillowcases (products of categories 360, 361, 666 - S and 666 - P) from Pakistan into the United States. The TMB recalled that neither Pakistan nor the United States had previously referred to the TMB any matter regarding the changes in US rules of origin affecting the products mentioned above. Furthermore, the communications by Pakistan and the United States had been submitted, respectively, pursuant to Articles 2.17 and 5, while the relevant provisions of the ATC addressing issues related, *inter alia*, to changes in practices, rules, procedures and categorization of textile and clothing products, were contained in Article 4. In taking note of this element of the communications, the TMB observed that Article 4.4 of the ATC explicitly required the TMB to review such issues in cases where a mutually satisfactory solution was not reached between the Members concerned and any of those Members decided to refer the matter to the TMB for recommendations as provided for in Article 8.

Communication under Articles 2.21 and 8.1 of the ATC

53. The TMB received a communication, dated 17 June 1998, from Hong Kong, China; India and Pakistan, jointly requesting the TMB "to review, in accordance with Article 8.1 and 2.21 of the Agreement on Textiles and Clothing, the implementation of the Stage 2 integration programme of the United States of America with respect to the continuation of visa requirements for products included in this programme". The communication stated, *inter alia*, that such visa requirements had been "notified to the Textiles Monitoring Body as administrative arrangements under Article 2.17 of the Agreement on Textiles and Clothing. [...] The measures applied pursuant to the ATC should cease to apply to products when they are integrated. If, instead, some of these measures continue to apply, it follows that the products have not been fully integrated into the GATT 1994". Since the Committee for the Implementation of Textile Agreements of the United States had announced in a notice, dated 29 September 1997, that the United States would continue to require visas for products integrated on and after 1 January 1998 before entry is permitted in the United States, it was the notifying Members' view that "in maintaining the visa requirements for integrated products, the United States of America is not fulfilling its obligations under Article 2.8(a) of the Agreement on Textiles and Clothing. Accordingly, these Members request the TMB to review the matter in terms of Article 8.1 and 2.21 of the ATC and make appropriate recommendations" (G/TMB/N/329).

54. The TMB decided to consider this communication at its meeting initially scheduled for 6-8 July 1998. In accordance with the provisions of Article 2.21 of the ATC as well as TMB's own

working procedures, representatives of Hong Kong, China; India, Pakistan and the United States were invited to participate.

55. Subsequently the United States, in a letter dated 25 June 1998, informed the TMB and the interested Members that the US Government "is seriously considering the issues raised in the referenced letter from the representatives of Hong Kong, China, Pakistan and India". The United States "will not be in a position to respond to these issues in time for the meeting of the TMB starting July 6". However, it was the US' "intention to provide a definitive response by the time of the next meeting of the TMB, which [...] is scheduled for the week of July 20" (G/TMB/N/330).

56. In a letter dated 26 June 1998, Hong Kong, China, having noted the US letter, referred to in paragraph 55 above, confirmed that a delegation of Hong Kong, China would be available for the meeting scheduled for 6-8 July 1998. Alternatively, Hong Kong, China was "prepared to consider attendance at the TMB review at another date provided that the time-frame for the making by the TMB of recommendations or findings under Article 2.21 is observed. Hong Kong, China notes that the 30-day period prescribed in Article 2.21 will expire on 17 July 1998" (G/TMB/N/331).

57. Following this, and in consultation with Hong Kong, China; India; Pakistan and the United States, it was decided to re-schedule the TMB meeting of 6-8 July 1998 to 13-15 July 1998, with the intention of reviewing the issues raised in the communication referred to in paragraph 53. Consequently, Hong Kong, China; India; Pakistan and the United States were invited to participate in this review.

58. Subsequently, Hong Kong, China addressed a letter to the United States, copied to the TMB, dated 6 July 1998 (G/TMB/N/332).

59. On 10 July 1998, the United States informed the TMB that "[...] without conceding its right to maintain such measures, the United States [...] would eliminate visa requirements with respect to products integrated in Stage 2, without condition and as soon as practicable, but in any event no later than 31 December 1998" (G/TMB/N/333).

60. Subsequently India and Pakistan addressed letters to the United States, copied to the TMB, dated 10 July 1998 and 13 July 1998, respectively (G/TMB/N/334 and 335).

61. In starting the review of the communication, at the meeting of the TMB, the representatives of Hong Kong, China; India and Pakistan communicated to the TMB the contents of a joint letter addressed by the three Governments to the Chairman of the TMB, stating that while remaining of the view "that the maintenance of visa requirement for integrated products is not consistent with obligations under Article 2.8(a) of the ATC", and "on the clear understanding that the said United States visa requirement is to be eliminated, without conditions and as soon as practicable, but in any event not later than 31 December 1998, we agree that it is not necessary for the TMB to continue with the review under Article 2.21 of the ATC requested in our earlier letter, subject to the records of the TMB incorporating, *inter alia*, the texts of the relevant correspondence you have received relating to this review. This is without prejudice to the right of any of us to submit a further request for a similar review should this become necessary" (G/TMB/N/336).

62. In light of the above, the TMB took note of the communication by the United States, contained in its letter of 10 July 1998, that as a definitive response to the issues raised "without conceding its right to maintain such measures, the United States [...] would eliminate visa requirements with respect to products integrated in Stage 2, without condition and as soon as practicable, but in any event no later than 31 December 1998". It was the TMB's understanding that such elimination of visa requirements shall be effected on a MFN basis. The TMB also took note of the communication of Hong Kong, China; India and Pakistan that under the conditions contained in

their letter, referred to in paragraph 61, they agreed that it was not necessary for the TMB to continue with the review under Article 2.21 of the ATC.

63. The TMB agreed to keep in view this matter under the provisions of Article 2.21 of the ATC. The TMB expected that it would be informed by the United States at the time the visa requirements with respect to products integrated in Stage 2 would be eliminated.
