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Citation: 7 Minn. J. Global Trade 123 1998



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Notes

The Textiles Monitoring Body: Can It Bring Textile Trade into GATT?

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While many scholars regard the Uruguay Round of Multilateral Trade Negotiations¹ as enormously significant, several analysts have doubted both the legal and practical significance of the new rules and agreements of the General Agreement on Tariffs and Trade (GATT).² These skeptics question whether sufficient political will exists in developed countries to conform to the new negotiated schedule for eliminating trade restrictions.³ In particular, after decades of special rules in the realm of trade in textiles and apparel, the Uruguay Round secured commitments by member countries to progressively integrate this sector into the general GATT disciplines and multilateral rules. The Agreement on Textiles and Clothing (the Agreement or ATC)⁴ embodies these commitments. If effectively implemented, this Agreement would reinstate the price mechanism as the predominant guide in production and consumption decisions and allow trade and investment in textiles and apparel to more

* The author would like to express her thanks to Robert E. Hudec for his insightful comments on the topic.

1. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994) reprinted in 33 I.L.M. 1125 (1994).

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; see, e.g., Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715, 1715 and n.5 (1995) (acknowledging this skepticism and citing several articles discussing these doubts).

3. Geoff Raby, *Introduction to THE NEW WORLD TRADING SYSTEM: READINGS* 13, 16 (Geoff Raby ed., 1994).

4. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, 85 (GATT Secretariat ed., 1994) [hereinafter ATC].

closely reflect the competitive advantages of each member country.⁵ Whether member countries in fact realize the liberalizing objectives associated with this new Agreement remains to be seen,⁶ but the potential economic impact of such integration is substantial. It is estimated that one third of the total anticipated economic gain from trade liberalization under the Uruguay Round will result from the dismantling of the old rules governing trade in textiles and clothing.⁷

To supervise the day-to-day implementation of this arrangement and to adjudicate disputes arising between members in conjunction with the ATC, the Agreement establishes a quasi-judicial body, the Textiles Monitoring Body (TMB). The TMB, however, has suffered harsh criticism from both exporting and importing countries in its adjudicatory role. Following recent losses in disputes before the TMB, representatives of the United States' textile and apparel industries claim that the TMB is rigged against them. In the same spirit, exporting countries allege that the officials appointed by textile importing countries are "shamefacedly biased" and are unable to do a credible job of adjudicating disputes.⁸ Critics have asserted several additional complaints with regard to the functioning of the TMB since the Agreement became effective on January 1, 1995, including its lack of transparency and its inability to reach consensus in disputes.⁹

This Note will identify and examine the criticisms directed at the Textiles Monitoring Body. Part I briefly outlines the history of protectionism in textile and apparel trade. Part II introduces the Agreement on Textiles and Clothing and the Textiles Monitoring Body and its assigned duties under the Agreement. Part III identifies the substantial protectionist political pressures that exist in the United States, particularly

5. Maarten Smeets, *Main Features of the Uruguay Round Agreement on Textiles and Clothing, and Implications for the Trading System*, 29 J. WORLD TRADE 97, 97 (1995).

6. See *infra* note 67 and accompanying text (discussing the United States' strategy for postponing any commercially meaningful integration of products until the final stage of the ATC's liberalization program).

7. Raby, *supra* note 3, at 16.

8. Eduardo Lachica & Bhushan Bahree, *Pakistan, Textile Exporters Ask WTO Help in Dispute*, ASIAN WALL ST. J., July 19, 1996, available in 1996 WL-WSJA 10218501. At present, the European Union ranks as the world's largest textiles importer, and the United States is the second largest. Frances Williams, *Fruits of Textiles Pact Fail to Ripen: Poor Nations Have Yet to See Benefits from Accord*, FIN. TIMES, Jan. 10, 1996, at 4.

9. See *infra* part IV.D. (discussing these criticisms).

with respect to textile and apparel trade, and the corresponding reluctance of these industries to relinquish the protectionism they have enjoyed in recent decades. Part III further links these pressures with the U.S. Administration's failure to live up to the spirit of the new textiles Agreement. Part IV evaluates how the TMB has functioned under this pressure, especially in the context of recent disputes it has adjudicated and that were subsequently appealed to the World Trade Organization's Dispute Settlement Body (DSB). Part V initially argues that the TMB's alleged lack of transparency and inability to reach consensus on disputes are significant flaws in the functioning of this quasi-judicial body and that member countries ought to address these flaws. Finally, Part V contrasts the perceived role and review power of the TMB with the role of WTO Dispute Settlement Understanding (DSU) panels and offers some proposals for modifying the review and dispute settlement process in this sector to increase its efficiency.

I. HISTORY OF PROTECTIONISM IN THE TEXTILE AND APPAREL INDUSTRIES

The U.S. textile and apparel industries employ approximately 1.6 million workers.¹⁰ Broadly speaking, both the textile and apparel industries are fairly labor intensive. As a result, developing countries with low average wages have a substantial competitive advantage in these industries.¹¹ The United States,

10. Lauren A. Murray, *Unraveling Employment Trends in Textiles and Apparel*, 118 MONTHLY LAB REV. 62, 62 (1995) (detailing the trends in employment and capital investment in the textile and apparel industries).

11. Janet Patricia Farmer, *NAFTA and the Textile and Apparel Industries: "Made in North America,"* 19 N.C. J. INT'L L. & COM. REG. 293, 297-98 (1994). Less developed and developing countries have concentrated on textile and apparel industries in particular because the necessary raw materials are relatively common and the two industries require less capital than most manufacturing activities. Murray, *supra* note 10, at 66. In fact, developing countries now supply 90 percent of U.S. apparel imports. U.S. INTERNATIONAL TRADE COMMISSION, POTENTIAL IMPACT ON THE U.S. ECONOMY AND INDUSTRIES OF THE GATT URUGUAY ROUND AGREEMENTS, IV-14 (1994) [hereinafter USITC]. Textile and apparel imports comprised 7 percent of total U.S. imports during 1994. U.S. GENERAL ACCOUNTING OFFICE, TEXTILE TRADE: OPERATIONS OF THE COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS 1, 1 (1996) [hereinafter U.S. GAO]. One recent report documents the growth of these industries in less developed and developing countries; in the past twenty-five years, the number of textile, clothing, and footwear workers in the United States dropped 30 percent, while the number of such workers in Malaysia increased nearly 600 percent. Pamela M. Prah, *Shift in Textile, Garment Industry Jobs Will Be Spotlighted During ILO Meeting*, Int'l Bus. & Fin. Daily (BNA), Oct. 28, 1996, at D2. From 1970 to 1990 the number of textile, clothing, and

with average wages significantly higher than those in developing countries, regularly runs a trade deficit in these areas.¹² The textile industry encompasses the production of yarn and thread and the production of fabrics from these materials; in relation to the apparel industry, the textile industry is capital intensive, incorporates high technology, and typically uses highly skilled workers.¹³ In contrast, the apparel industry consists of the cutting and sewing of fabric into finished clothing products, is relatively labor-intensive, and requires considerably less infrastructure than the textile industry.¹⁴

Since the early 1960s, policies governing trade in textiles and apparel have departed from the fundamental principles of GATT—most notably with regard to Article I's most favored nation treatment and Article XI's prohibitions against quantitative restrictions.¹⁵ After a series of Short-Term and Long-Term Arrangements,¹⁶ the Arrangement Regarding International Trade

footwear workers in Bangladesh increased 416 percent; in Sri Lanka the number increased 385 percent; and in Indonesia, the number of such workers increased 334 percent. *Id.* Due to significant capital investments in the textile industry during the 1970s and 1980s and the slightly less labor intensive nature of the textile industry relative to the apparel industry, the United States textile industry has fared better than the United States apparel industry. Murray, *supra* note 10, at 64.

12. Farmer, *supra* note 11, at 298.

13. *Id.* at 297. ("Labor comprises more than thirty-one percent of total apparel production costs as compared to twenty-two percent to twenty-five percent for the textile industry.") *Id.*

14. *Id.* The United States International Trade Commission reported that the United States is one of the world's largest and most efficient producers of textile mill products due to its significant investment in new technology, restructuring, and coordination efforts. See USITC, *supra* note 11, at 27-28 (explaining that the greatest threat to the U.S. textile sector is the continued increase in garment imports, since the domestic apparel industry is its single largest market). It has been more difficult to mechanize the apparel sector. William R. Cline, *Textiles and Apparel*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 63, 75 (Jeffrey J. Schott, ed., 1990).

15. Jared L. Landaw, *Textile and Apparel Trade Liberalization: The Need for a Strategic Change in Free Trade Arguments*, 1989 COLUM. BUS. L. REV. 205, 206 (1989); see also GATT, *supra* note 2, arts. 1, 3, and 11. Landaw and several other scholars assert that this special treatment results from the politically powerful coalition of textile and apparel industries, unions, and associations. Landaw, *supra*, at 218; see also Craig R. Giesse & Martin J. Lewin, *The Multifiber Arrangement: "Temporary" Protection Run Amuck*, 19 LAW & POL'Y INT'L BUS. 51, 86 (1987).

16. See generally Rebecca Reese, *International Trade in Textiles and Apparel: The Legal Regime*, in *THE COMMERCE DEPARTMENT SPEAKS OUT* 381, 383 (Practicing Law Institute ed., 1994) (providing a detailed account of the agreements preceding the ATC).

in Textiles, commonly referred to as the Multi-Fiber Arrangement (MFA), was negotiated in 1973 and became effective on January 1, 1974.¹⁷ Member nations designed the MFA as a transitional arrangement to ease the structural adjustment in the textiles and apparel industries of developed countries confronting rapid shifts in comparative advantage towards developing countries.¹⁸ The MFA supplied a framework of rules and procedures under which members could bilaterally negotiate quota restrictions and voluntary restraint arrangements.¹⁹ These special policies created a system in which countries generally negotiated import quotas bilaterally. Additionally, the MFA authorized member nations to unilaterally impose quotas on a selective basis by alleging that imports of a particular product from a specific country were "disrupting" a member's domestic market.²⁰ Until this point, trade in textiles and apparel had existed within a complex system of bilateral agreements under the general framework of the MFA, which constituted a comprehensive violation of fundamental GATT principles.²¹

17. Landaw, *supra* note 15, at 210. Since 1974, the MFA has been renewed on six occasions. Williams, *supra* note 8, at 4.

18. Richard Hughes, *The Uruguay Round: New Approach for the Textiles and Clothing Sector*, INT'L TRADE FORUM, 4/1995, at 4. In fact, the MFA detailed its objectives in the following manner:

"to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets . . . in both importing and exporting countries."

Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, art. 1(2) [hereinafter MFA]. As for the United States' domestic legal framework, the President established the Committee for the Implementation of Textile Agreements [hereinafter CITA], pursuant to authority contained in Section 204 of the Agricultural Act of 1956, as amended, to oversee execution of all textile trade agreements. David J. Weiler & Allyson L. Senie, *International Rules of the Textile and Apparel Trade Regime*, in THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 505, 511-12 (Practicing Law Institute ed., 1994). CITA is an interagency body, chaired by the Department of Commerce. *Id.* at 512. The Department of Commerce monitors all agreements and supplies statistical data upon which CITA actions are taken. *Id.* at 512-13. CITA has the authority to direct the Commissioner of Customs to unilaterally impose quotas or impose quotas on imports from countries with which the United States has a bilateral arrangement. *Id.* at 513.

19. See MFA, *supra* note 18, art. 3(3).

20. Xiaobing Tang, *Textiles and the Uruguay Round of Multilateral Trade Negotiations*, 23 J. WORLD TRADE 51, 53 (1989).

21. Protection accorded to the United States' textile and apparel industries in recent decades has been characterized as the "Mt. Everest of protection." *Testimony*, 102d Cong. (1994) (statement of Julia K. Hughes, Chair, U.S. Associa-

II. ON THE ROAD TO LIBERALIZATION

A. THE AGREEMENT ON TEXTILES AND CLOTHING

In the recent Uruguay Round, member nations negotiated the Uruguay Round Agreement on Textiles and Clothing, which effectively replaces the MFA.²² Contracting parties designed the ATC to provide for the progressive integration of textile and apparel trade into GATT and its disciplines through two key mechanisms: (1) eliminating quotas on selected products in four stages over a ten year period, culminating in 2005; and (2) increasing quota growth rates on remaining products at each of the first three stages.²³ The schedule for integration of covered products into GATT 1994 is structured as follows:

tion of Importers of Textiles and Apparel), available in 1994 WL 14167829 [hereinafter Singapore Hearing]. Addressing the implications of the protectionism in this sector, one importer representative complained that "[i]t's harder to import a pair of underwear than a gun." Amy I. Schatz, *GAO Report Claims U.S. Textile Agency Lacks Proof to Support Quota Demands*, WALL ST. J., Nov. 6, 1996, at A10. A number of studies estimate the potential growth in textile and apparel trade if tariffs in these sectors and MFA quotas were removed. The United Nations Conference on Trade and Development estimated that developing country apparel exports would increase by 135 percent and textile exports by 78 percent. Smeets, *supra* note 5, at 107 (citing United Nations Conference on Trade and Development, *Protectionism and Structural Adjustment* (1986)). Another study contends that exports to major Organisation for Economic Co-operation and Development countries would increase 93 percent for clothing and 82 percent for textiles. Smeets, *supra* note 5, at 107 (citing N. KIRMANI ET AL., *EFFECTS OF INCREASED MARKET ACCESS ON EXPORTS OF DEVELOPING COUNTRIES* (1984)). Yet another study suggests that if tariffs and quotas were removed, individual developing countries could increase their exports by several hundred percent. Smeets, *supra* note 5, at 107 (citing I. Trela & J. Whalley, *Unraveling the Threads of the MFA*, in *TEXTILES TRADE AND THE DEVELOPING COUNTRIES: ELIMINATING THE MULTI-FIBRE ARRANGEMENTS IN THE 1990s* (C. Hamilton ed., 1990)). Additional studies provide varying estimates of the quota premium on textile and apparel products. See John Whalley, *Agreement on Textiles and Clothing*, in *THE NEW WORLD TRADING SYSTEM: READINGS*, *supra* note 3, at 73, 74-75. One study estimates the annual consumer cost per direct job retained by domestic protection of textiles and clothing to be US\$124,686 in textiles and US\$81,973 in apparel. WILLIAM CLINE, *THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL 193-94* (1987).

22. Scholars observe, however, that the MFA will persist during the phase-out process established by the ATC, since restrictions pursuant to the MFA framework continue until each product is integrated into the GATT. Sanjoy Bagchi, *The Integration of the Textile Trade into GATT*, 28 J. WORLD TRADE 31, 33 (1994).

23. ATC, *supra* note 4, art. 2.

Stage I	January 1, 1995	16 percent ²⁴
Stage II	January 1, 1998	17 percent
Stage III	January 1, 2002	18 percent
Stage IV	January 1, 2005	all remaining covered products (potential 49 percent) ²⁵

Article 2 of the ATC leaves selection of specific products for integration during each stage largely to the discretion of member countries, but requires that these selections incorporate products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing.²⁶ Thus, through establishment and implementation of the ATC, member nations seek to restore market principles for trade in textiles and apparel and eliminate quantitative restraints that GATT has legitimized throughout recent decades.²⁷ If successfully enforced, this Agreement would fundamentally transform the current system of world trade in textiles and clothing.²⁸

Incorporated within the Agreement is a transitional safeguard mechanism to protect member nations from damaging increases in imports during the transition period for products not yet integrated into GATT and not already subject to a quota.²⁹ Before it may impose a quota on a particular foreign

24. Percentages in this schedule indicate products accounting for not less than the given percentage of total volume of a member's 1990 imports of the products listed in the Annex to the ATC. These figures are in terms of Harmonized Description and Coding System (HS) codes or categories. ATC, *supra* note 4, arts. 2(6) and 2(8).

25. ATC, *supra* note 4, art. 2; Jennifer Hillman, *Trade Activities Involving Textiles and Clothing, in THE GATT, THE WTO, AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES* 879, 882-83 (Practising Law Institute, 1995). The ATC explicitly provides that there shall be no extension of the agreement. ATC, *supra* note 4, art. 9.

26. ATC, *supra* note 4, arts. 2(6) and 2(8).

27. The recent Ministerial Declaration issued by the Ministerial Conference of the WTO in Singapore includes a section on textiles and clothing which emphasizes the importance of the ATC "because of its systemic significance for the rule-based, non-discriminatory trading system and its contribution to the increase in export earnings of developing countries." World Trade Organization, *Singapore Ministerial Declaration*, Dec. 13, 1996, <<http://www.wto.org/govt/mindec.htm>>.

28. See, e.g., Smeets, *supra* note 5, at 97-98. Unlike its predecessor, the MFA, in which countries could participate if and when they chose, the ATC applies to all WTO members, whether or not they were signatories to the MFA. Bagchi, *supra* note 22, at 33.

29. ATC, *supra* note 4, arts. 6(1) and (4); see *supra* text accompanying note 20 (identifying a comparable "anti-surge" provision in the MFA); see also Bagchi, *supra* note 22, at 38 (comparing the transitional safeguard rules under the MFA and the ATC). This provision, and particularly United States action pursuant to it, has been the subject of a substantial proportion of the disputes

supplier, a member country, pursuant to Article 6 of the ATC, must demonstrate that "a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products."³⁰ Moreover, the ATC mandates that claims of serious damage or actual threat of serious damage be evidenced by an increase in quantities of total imports of the product in question, rather than factors such as "technological changes or changes in consumer preference."³¹ Article 6 of the ATC specifies eleven factors which a country invoking the safeguard mechanism shall examine in making a determination of serious damage or actual threat of serious damage: output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits, and investment.³² This provision additionally stipulates, however, that none of these economic variables, "either alone or combined with other factors, can necessarily give decisive guidance."³³

Alleged serious damage or actual threat of serious damage must be attributed to an individual member country, and countries imposing quotas under the safeguard mechanism must apply them on a country-by-country and product-by-product basis.³⁴ Once a product is integrated into GATT pursuant to Article 2 of the ATC, recourse through this safeguard mechanism is no longer available, and a WTO member may not impose import quantitative restraints on those products unless permitted under Article XIX or other import relief provisions of GATT 1994.³⁵

under the ATC. For a discussion of TMB and WTO Dispute Settlement Body panel interpretations of the requirements of this provision, see *infra* part III.

30. ATC, *supra* note 4, art. 6(2).

31. *Id.*

32. *Id.* art. 6(3).

33. *Id.* For a criticism that this standard of "serious damage" or "actual threat thereof" is unacceptably vague and unworkable, see John M. Jennings, *In Search of a Standard: "Serious Damage" in the Agreement on Textiles and Clothing*, 17 Nw. J. INT'L L. & Bus. 272 (1996).

34. ATC, *supra* note 4, art. 6(4).

35. Hillman, *supra* note 25, at 881, 882. Article XIX of GATT is frequently referred to as the "escape clause provision," and it generally governs members' use of safeguard measures to provide temporary relief against imports that were causing or threatening to cause serious injury to a domestic industry. Jeffrey J. Schott, *Safeguards*, in *THE WORLD TRADING SYSTEM: READINGS*, *supra* note 3, at 113-14. Commentators suggest that once members phase out their MFA quotas there will be an increased reliance on other techniques, including antidumping and countervailing duties, to counter "unfair" trade. See, e.g.,

Countries may unilaterally act under the safeguard mechanism, but such actions are subject to review by the Textiles Monitoring Body established under the ATC.³⁶ Before invoking the transitional safeguard mechanism, an importing country must attempt to reach an agreement with the exporting country involved on a mutually acceptable quota level.³⁷ If the parties do not find common ground within 60 days, the importing country may impose the quota.³⁸ At that point, or at any point during the 60-day consultation period, either member may refer the matter to the TMB.³⁹ Moreover, the ATC specifies that the transitional safeguard "should be applied as sparingly as possible."⁴⁰

B. THE TEXTILES MONITORING BODY (TMB)

In order to supervise the operation of the accord, the ATC establishes a quasi-judicial body, the Textiles Monitoring Body.⁴¹ The TMB is a standing body which functions as a forum for disputes under the accord.⁴² According to Article 8(1) of the ATC, the TMB is to make decisions by consensus.⁴³ Article 8 merely directs that TMB membership be "balanced and broadly representative of the Members."⁴⁴ Of the ten members and one

Reinsch Says U.S. Plans Vigorous Enforcement of WTO Textile Accord, Opposes Renegotiation, 13 Int'l Trade Rep. (BNA) No. 38, at 1473 (Sept. 25, 1996).

36. See *infra* part II.B. (describing the TMB and its responsibilities under the ATC).

37. *Statement of Administrative Action Accompanying Uruguay Round Agreements Act*, in THE GATT, THE WTO, AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES, *supra* note 25, at 893.

38. *Id.*

39. ATC, *supra* note 4, art. 6(10).

40. *Id.* art. 6(1).

41. *Id.* art. 8(1). Disputes under the ATC, then, are governed by a specific set of rules, distinct from those governing most trade within GATT. For a brief explanation of the general GATT dispute settlement procedures, now strengthened through negotiations in the Uruguay Round, see John Jackson, *Dispute Settlement Procedures*, in THE NEW WORLD TRADING SYSTEM: READINGS, *supra* note 3, at 117.

42. ATC, *supra* note 4, art. 8(3).

43. To explain the intended interpretation of "consensus" in this context, the ATC merely stipulates "[i]t is understood, however, that consensus within the TMB does not require the assent or concurrence of members appointed by Members involved in an unresolved issue under review by the TMB." *Id.* art. 8(2). Moreover, in what is now recognized as a serious problem, the ATC specifies only that "[t]he TMB shall develop its own working procedures." *Id.* Subsequently formulated working procedures of the TMB declare that its reports on disputed cases shall include a factual presentation of the issues and a common rationale for its recommendations. U.S. GAO, *supra* note 11, at 63.

44. ATC, *supra* note 4, art. 8(1).

chairperson who constitute this body, half are from exporting countries and half from importing countries.⁴⁵ Despite the ATC provision directing that TMB members are to serve in an *ad personam* basis,⁴⁶ determining the composition of the TMB was a highly controversial matter.⁴⁷ This controversy perhaps indicates that representatives of member countries acknowledge not only the significance of the TMB and its duties, but also the potential for TMB members to make politically based decisions.⁴⁸

In accordance with Article 6(9) of the ATC, the TMB shall determine whether an agreement regarding a transitional safeguard reached between two countries is justified under Article 6 provisions.⁴⁹ If, through bilateral consultations, the parties are unable to develop a mutually agreeable solution, the ATC authorizes the TMB to investigate the matter upon the request of either party to the dispute.⁵⁰ In so doing, the TMB determines whether there was serious damage, or actual threat of serious damage, examines causes of the damage, and makes appropriate recommendations to the relevant parties.⁵¹

Member countries are to "endeavour to accept in full the recommendations of the TMB,"⁵² which also supervises the implementation of those recommendations. If a country does not accept the recommendations of the TMB and the matter remains unresolved, the ATC provides that either Member may bring the

45. The WTO General Council determined the following composition of the TMB for the initial 1995-1997 period: the United States, the European Union, Norway (representing Turkey, the Czech Republic, Hungary, Poland, Romania, and Slovakia), Canada, Japan, South Korea (to alternate with Hong Kong), India (to alternate with one of the following: Egypt, Morocco, and Tunisia), Brazil, Pakistan (to alternate with China), and Indonesia. Jim Ostroff, *TMB Verdicts: Are the Scales Off Balance?*, WOMEN'S WEAR DAILY, Oct. 24, 1995, at 5; *WTO Nominates Committee Heads at First Session of Council Meeting*, 12 Int'l Trade Rep. (BNA) No. 12, at 225-26 (Feb. 1, 1995). Andras Szepesi of Hungary was named chairperson of the TMB. *Id.* at 226.

46. ATC, *supra* note 4, art. 8(1). Instead of discharging their duties as representatives of their governments, TMB members are to serve in an individual, neutral capacity.

47. *See* Jennings, *supra* note 33, at 287-89 (describing this controversy in some detail).

48. *Id.* at 289.

49. ATC, *supra* note 4, art. 6(9). *See supra* notes 29-40 and accompanying text (detailing the provisions of the ATC's transitional safeguard mechanism).

50. ATC, *supra* note 4, art. 6(10).

51. *Id.*

52. *Id.* art. 8(9).

dispute before the Dispute Settlement Body of the WTO by invoking Article XXIII of GATT 1994.⁵³

Among its other assigned duties, the TMB assists the Council for Trade in Goods in conducting a major review of the integration program's implementation before the conclusion of each stage of the program.⁵⁴ The ATC authorizes the Council for Trade in Goods, at its discretion and by consensus, to ensure the rights and obligations of member countries remain balanced pursuant to the implementation of the Agreement.⁵⁵

Like the ATC, the MFA provided for a quasi-legal standing body, the Textiles Surveillance Body (TSB).⁵⁶ The supervisory duties, powers, and organization of the TMB roughly correspond with those assigned to the TSB.⁵⁷ The MFA authorized the TSB to conduct inquiries, to make recommendations to interested parties regarding any disputed matters, and to review annually all textiles restrictions pursuant to the MFA.⁵⁸ During the MFA era, the TSB shared power to interpret the MFA with the Textiles Committee, which was a larger entity consisting of all parties to the MFA.⁵⁹ Accordingly, if the TSB failed to resolve a dispute under the MFA, the parties could report any legal findings to the Textiles Committee.⁶⁰ Article 11(9) of the MFA further authorized the GATT Council, through normal GATT dispute settlement procedures, to hear textile disputes if the TSB was unable to resolve them.⁶¹

53. ATC, *supra* note 4, art. 8(10). A recent WTO Dispute Settlement Body panel report on a textiles matter ruled that the explicit endorsement of the TMB is not required for a member to impose quotas under the transitional safeguard mechanism. *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, Jan. 6, 1997, WT/DS33/R, para. 7.57 [hereinafter *Indian Imports Measure*].

54. ATC, *supra* note 4, art. 8(11).

55. ATC, *supra* note 4, art. 8(12).

56. Niels Blokker & Jan Deelstra, *Towards a Termination of the Multi-Fibre Arrangement*, 28 J. WORLD TRADE 97, 99-100 (1994).

57. *Id.* at 112. The TSB was comprised of eight members and one chairperson. Henry R. Zheng, *The Fourth Multifibre Arrangement and the New Legal Regime for International Trade in Textiles*, 25 COL. J. TRANSNAT'L L. 301, 334 (1987). See *infra* notes 191-196 and accompanying text (explaining the perceptions of the TSB's functioning and their possible impact on perceptions of the TMB).

58. ROBERT E. HUDEC, *ADJUDICATION OF INTERNATIONAL TRADE DISPUTES* 63 (1978); Zheng, *supra* note 57, at 334.

59. *Id.* at 334-35.

60. Hudec, *supra* note 58, at 63.

61. Zheng, *supra* note 57, at 343.

III. POLITICS, PRESSURE AND NONCOMPLIANCE IN THE UNITED STATES' TEXTILE REGIME

In general, the United States has "by far the worst compliance record" with the GATT, based on the findings of a comprehensive survey of GATT complaint outcomes.⁶² Thus far, the United States' compliance record appears to be equally poor specifically with regard to compliance with the ATC. This may be attributed to the fact that many textile and apparel industry representatives generally oppose the WTO and NAFTA based on their beliefs that these agreements undermine the sovereignty of the United States and do not serve the interests of the textile industry.⁶³ In a joint submission opposing the ATC, four apparel manufacturers associations argued that the Agreement will eliminate 33 to 75 percent of the domestic apparel production industry by accelerating import penetration.⁶⁴

Since the ATC took effect, developing countries in the Asia-Pacific region have questioned the commitment of richer, exporting countries, particularly the United States, to effectively implement the ATC.⁶⁵ They have protested that the European Union and the United States have not adequately fulfilled their obligations under the ATC.⁶⁶ These doubts are likely related to the United States' selection of products for integration at each stage of the liberalization program. Despite protest from the importing community, the American Textile Manufacturers Insti-

62. Robert E. Hudec et. al, *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 48 (1993) [hereinafter *Statistical Profile*]; see also Robert E. Hudec, *Dispute Settlement*, in COMPLETING THE URUGUAY ROUND 204 (1990) (explaining that "[t]he long chain of bad behavior on the US report card shows a rather deeply rooted one-sidedness in US attitudes toward GATT legal obligation").

63. Hudec, *Statistical Profile*, *supra* note 62.

64. USITC, *supra* note 11, at 22.

65. *EU/WTO: EU Begins Shaping Its Singapore Agenda*, EUR. REP., Sept. 14, 1996, available in 1996 WL 11073006. This region depends in large part on the North America and European Union markets for its textile exports. *Id.* Representatives of Central American countries complain about the "unrestrained use of the safeguard mechanism" under the ATC and accuse importing countries of "foot-dragging." *Central American States Assail WTO Inaction on Textiles*, AGENCE FRANCE PRESSE, Dec. 10, 1996, available in LEXIS, Library News and Business (World) file. They assert it was precisely those promises to dismantle the quota system that led them to agree to negotiate on intellectual property and services issues. *Id.*; see also *India: New Challenges in World Textile Trade*, BUS. LINE, (THE HINDU), July 11, 1997, available in 1997 WL 12314250 ("no product of commercial significance has been integrated in the first stage" (1995-97)).

66. Shada Islam, *Safety in Numbers: Asia's Textile Exporters Fret Over Quota*, FAR E. ECON. REV., Apr. 11, 1996, at 74.

tute, which represents the American textile industry, aggressively urged Congress to specify that tariffs on import sensitive products would be the last targeted for integration under the ATC.⁶⁷ By manipulating its data, the United States plans to maintain fully 89 percent of its quotas on clothing until the final stage of the ATC's integration scheme and has freed many products which were not initially under quota restrictions, such as parachutes and seatbelts.⁶⁸ This U.S. strategy has caused some importer and retailer representatives to refer to the final stage of the integration program as "the cliff."⁶⁹ Although the WTO Ministerial Conference in Singapore responded to this issue in the Ministerial Declaration noting importers' concerns, the importers and many exporters are disappointed with the outcome. They believe the Conference provided no substantive commitment from importing countries to remove restrictions on popular items.⁷⁰

Textile and apparel lobbies in the United States have already voiced their dissatisfaction with the GATT, as well as with many other articulated movements toward trade liberalization. Having enjoyed heavy protection under the special treatment of the MFA and justified job loss and industry harm, the U.S. textile and apparel industries and their representatives in Congress are reluctant to restructure and allow market forces to govern trade in this sector.⁷¹ In response, wholesalers and re-

67. Jim Morrissey, *Jury Remains Out on WTO, NAFTA*, TEXTILE WORLD, Mar. 1996, at 40, 42. For a schedule of U.S. integration of textile and apparel products under quota, see U.S. GAO, *supra* note 11, at 33-34 tbl.III:1.

68. U.S. GAO, *supra* note 11, at 2-3; *International Trade: Implementation Issues Concerning the World Trade Organization: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means* 104th Cong. 9-10 (1996) [hereinafter *Implementation Hearings*] (statement of Jayetta Z. Hecker, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division).

69. U.S. GAO, *supra* note 11, at 3.

70. Somporn Thapanachai, *WTO Meeting — Narongchai Claim Thais Win Concessions All Round*, BANGKOK POST, Dec. 16, 1996, at 1, available in LEXIS, Library News and Business (World) file; World Trade Organization, *supra* note 27, para. 15. The Ministerial Declaration includes, "[w]e attach importance to the implementation of this Agreement so as to ensure an effective transition to GATT 1994 by way of integration which is progressive in character We reiterate the importance of fully implementing the provisions of the ATC. . . ." *Id.*

71. See generally Landaw, *supra* note 15 (examining the political strength of the domestic textile and apparel coalition and its effects on the formulation of U.S. trade policy). In the context of recently proposed legislation before the U.S. House of Representatives, which would instruct the United States administration to negotiate a free trade agreement with countries of sub-Saharan Af-

tailers argue that the United States textile industry has exaggerated the negative impacts of the ATC and point to several of its significant positive effects: reduced costs of both domestic and imported clothing, broader selection of available apparel products, improved competitiveness both abroad and in the United States, and elimination of the welfare costs associated with MFA quotas.⁷² Still others argue that after decades of postponing adjustment to intense global competition, traders in this sector should “plan their international marketing strategies rationally to meet the new competitive challenges.”⁷³

Commentators consistently acknowledge that implementation of the major liberalizing objectives of the ATC, and more generally of the new GATT agreements and rules, requires “substantial high-level political commitment and resources.”⁷⁴ For years, legislators have been operating in a climate of general consensus in favor of restrictive trade legislation.⁷⁵ In particular, textile and apparel industries, unions, and associations have developed a “politically powerful coalition that has enjoyed extraordinary success in mobilizing the support of congressmen across a wide spectrum of the political landscape.”⁷⁶ One author suggests that until legislative measures recognize and confront this coalition, “liberalization of textile and apparel trade will be little more than a theorist’s dream.”⁷⁷

TMB members themselves report that the United States engaged in more safeguard activity under the ATC than members of the Body had expected.⁷⁸ Since the ATC was intended to be a liberalizing agreement, some TMB members expected less safe-

rica, one ranking Democrat appealed, “We can’t afford to lose even one more textile job.” *House Committee Approves Legislation to Boost Ties with Sub-Saharan Africa*, 14 Int’l Trade Rep. (BNA) No. 27, at 1165 (July 2, 1997).

72. *House Committee Approves Legislation to Boost Ties with Sub-Saharan Africa*, *supra* note 71, at 23.

73. *See* Hughes, *supra* note 18, at 29.

74. *See, e.g.*, Raby, *supra* note 3, at 22 (identifying the primary issues and challenges in the “New World Trading System” after the Uruguay Round).

75. Landaw, *supra* note 15, at 217. Administration officials recently reported that they anticipate the likely revival of United States trade deficits with Asia will provoke a backlash in Congress. *U.S. Fears Revival of Trade Deficits*, STAR TRIB., Sept. 21, 1997, at A5.

76. Landaw, *supra* note 15, at 218. Landaw’s article assesses the organizational strength, large numbers and regional concentration, direct support of congressional candidates, and other political considerations with regard to the strength of the textile and apparel coalition. *Id.*

77. *Id.* at 234.

78. U.S. GAO, *supra* note 11, at 66.

guard activity than occurred under the MFA.⁷⁹ In the first twenty months of the ATC, the United States had already attempted to establish thirty new quotas, twenty-five of which targeted trade with WTO members.⁸⁰ Indeed, at the close of the first year of the ATC, the United States had more quotas than at the beginning of the year.⁸¹

The ATC, however, does not limit the number of times a member country may invoke the transitional safeguard mechanism. One U.S. Trade Representative official for textile matters emphasized that the ATC is a negotiated document.⁸² Both textile exporting and importing countries secured benefits in the negotiation process; textile exporters secured the ATC provisions for integration of textile and apparel trade into GATT disciplines, while the textile importers secured the provisions for a remedy in the transitional safeguard mechanism.⁸³ As a result of the negotiating process, then, member countries have the right to seek a remedy in accordance with the relevant ATC rules for damage caused by the implementation of the new liberalizing rules.

Significantly, only one other country—Brazil—invoked the safeguard clause of the ATC between January 1995 and the third quarter of 1996,⁸⁴ and the TMB has yet to agree with a United States determination of serious damage in the context of the transitional safeguard mechanism. More specifically, TMB members remarked that the Committee for the Implementation

79. *Id.*

80. Singapore Hearing, *supra* note 21. Indeed, since the ATC expanded the range of products which it governs, the United States has so far succeeded in evading integration of quota products. "Thus, the first stage of integration, which ostensibly accounted for 16 percent of the trade covered by the ATC, included only products that had been outside the quota program and were never likely to have been considered sensitive or vulnerable to the imposition of quotas." *Id.* Other evidence that the United States is not living up to the spirit of the ATC is the fact that its already published integration schedule postpones the integration of 70 percent of imports by value until the very end of the ten-year liberalization period. Williams, *supra* note 8. Critics assert that such postponement will only result in increased resistance by the domestic industries to future elimination of import restraints. *Id.*

81. Article 6 of the ATC permits countries to introduce new quantitative restrictions on products which have not yet been covered by the agreement. See *supra* notes 29-40 and accompanying text (discussing the safeguard mechanism of the ATC).

82. Telephone Interview with Alicia Greenidge, Office of the United States Trade Representative (Oct. 8, 1997).

83. *Id.*

84. *WTO Panel Favors India on Woolen Exports to U.S.*, BUS. LINE (THE HINDU) Jan. 9, 1997, available in 1997 WL 8202639.

of Textile Agreements (CITA) did not adequately consider "the amount of a country's world market share of the category in question when making a call."⁸⁵ Additionally, TMB members doubted whether import increases had met the ATC's requisite "sharp and substantial" threshold and questioned why there were changes in the direction of data levels during the time from the consultation period to the TMB review.⁸⁶

While U.S. officials target the TMB for its lack of transparency, the U.S. Administration's own procedures and policies in this area suffer comparable inadequacies. A recent report from the General Accounting Office charges that United States trade officials routinely impose quotas on foreign textiles without proof that there is serious damage or actual threat of serious damage to U.S. industry, as required under the transitional safeguard measure.⁸⁷ Additionally, this report charges that CITA functions in great secrecy, noting that CITA has no documented procedures or guidelines for deciding when to impose quotas.⁸⁸ Furthermore, CITA does not release voting records or minutes of its meetings.⁸⁹

Importers and retailers in the United States document these deficiencies in their complaints as well. One representative has noted:

[u]ntil now, decisions to regulate textiles and apparel trade have been in closed rooms. There is no public notice of the meetings and minutes of those meetings. There is no opportunity for public comment before a decision is made . . . trade policy decisions concerning the use of the transitional safeguard should be subject to public process and consultation with all interested parties.⁹⁰

The recent WTO panel report on the dispute between Costa Rica and the United States over underwear quotas⁹¹ supports

85. *Id.* See also U.S. GAO, *supra* note 11, at 66, 67 (describing further criticisms directed at U.S. calls involving products exported under the Special Access Program). For a brief explanation of CITA, see *supra* note 18.

86. U.S. GAO, *supra* note 11, at 11.

87. *Id.* at 6.

88. *Id.* CITA officials report they typically use majority voting when making decisions about whether to impose quotas. *Id.* at 7. CITA generally relies on the "continuous monitoring and analysis of trade and economic data" that the Department of Commerce's Office of Textiles and Apparel provides as a source for information on domestic industry. *Id.* at 6. For an overview of CITA's process in determining when to impose import restraints, see *id.* at 41 fig. IV.1.

89. U.S. GAO, *supra* note 11, at 41 fig. IV.1.

90. Singapore Hearing, *supra* note 21.

91. WTO-Report of the Panel, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT105241R (Nov. 8, 1996) [hereinaf-

the proposition that the United States' implementation of the Agreement is deficient. The WTO Dispute Settlement Body panel severely criticized the United States' invocations of the ATC's transitional safeguard mechanism.⁹² The Panel recommended that the United States immediately remove the disputed import quota because it found the United States failed to demonstrate that its industry had suffered, or was threatened with, serious damage caused by those imports.⁹³ The Panel found that the data offered by CITA to rationalize imposition of the quota was insufficient to show even "threat of serious damage" to United States textile industry.⁹⁴

The report assessed CITA's decision to impose the restriction on imports of Costa Rican underwear. In this assessment, the Panel criticized CITA's review for being vague, speculative, and indefinite, and further noted numerous discrepancies in information and statistics.⁹⁵ In particular, the Panel noted that CITA frequently supported its statements with information on only one company, which the panel deemed insufficient.⁹⁶ Furthermore, the Panel encountered neither a discussion or showing of causality in the market statement, which Article 6.2 of the ATC requires.⁹⁷ Another flaw the Panel noted in the United States' procedure was a lack of comparative assessment of Costa Rican imports and imports from other exporting Members mentioned in the U.S. statement.⁹⁸

The panel also concluded that the United States failed to demonstrate actual threat of serious damage, thereby violating

ter Underwear Restrictions Report]; see *infra* part IV.A (detailing the history of this case and panel report issued in this matter).

92. Underwear Restrictions Report, *supra* note 91.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*, para. 8.3. The U.S. GAO reports that in creating statements to support imposing quotas, the Department of Commerce's Office of Textiles and Apparel (OTEXA) generally limits its focus to import surges and declines in domestic production and merely assumes a causal link between these two factors. U.S. GAO, *supra* note 11, at 53. Officials from OTEXA rejected the possibility of performing econometric analysis to analyze the strength of this causal link because quotas distort correlation between domestic imports and demand and because such modeling is more appropriate for broader measures of economic activity. *Id.* at n.3.

98. Underwear Restrictions Report, *supra* note 91, para. 7.51. In its analysis, the Panel examined the U.S. agreements with other exporters: "[w]e find that the United States cannot enter into agreements permitting imports of 170,305,774 dozen units of a product . . . and at the time claim that imports of 14,423,178 dozen units are contributing to serious damage." *Id.*

its obligations under Article 6.2 and 6.4 of the ATC.⁹⁹ The panel based this conclusion on the fact that CITA's market statement contained no analysis of, or even reference to, prospective damage, which the panel determined is required for a showing of actual threat of serious damage pursuant to the ATC.¹⁰⁰

The panelists who authored the recent Dispute Settlement Understanding (DSU) report on the matter of Indian wool imports also expressed the opinion that CITA's procedure for invoking the ATC's transitional safeguard mechanism is severely flawed.¹⁰¹ Like the Underwear Restrictions Report panel, the Indian wool imports panel severely criticized the U.S. market statement for its absence of evidence that increased imports caused serious damage or threat thereof.¹⁰² Specifically, the panel noted again the absence of the requisite precise industry statements in the submitted U.S. market statement.¹⁰³ For example, the U.S. market statement incorporated general wage and employment information for the woven shirt and blouse industry, but not for the woven *wool* shirt and blouse industry.¹⁰⁴ Under the terms of the ATC, any member country invoking the safeguard mechanism must examine the eleven designated economic variables before deciding to impose a quota, and the panel noted the U.S. market statement did not consider eight of these eleven factors with regard to the specific industry.¹⁰⁵ The panel criticized the data provided in the U.S. market statement, frequently characterizing the data as "vague," "imprecise," and

99. *Id.* para. 8.3.

100. The panel described the distinct requirements it determined that the ATC mandates for demonstrating serious damage or actual threat thereof: "[c]onsequently, in our view, a finding on serious damage requires the party . . . to demonstrate that damage has already occurred, whereas a finding on 'actual threat of serious damage' requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future." *Id.* para. 7.55.

101. See *infra* part IV.B. (describing the history and outcome of this case).

102. See Indian Imports Measure, *supra* note 53, para. 7.51 ("Since the United States did not include any specific information for the particular industry concerned, it therefore, could not make any convincing analysis as to the causation of serious damage or actual threat thereof to that particular industry of woven wool shirts and blouses.").

103. See Indian Imports Measure, *supra* note 53, para. 7.33 (The market statement "defines specifically the product category on which the safeguard action was to be applied: woven wool shirts and blouses, category 440. However, much of the data are not related to that 'particular industry' or to that specific segment of production, as required by article 63 of the ATC.").

104. *Id.* para. 7.33.

105. *Id.* para. 7.51.

"contradictory."¹⁰⁶ Additionally, the Panel concluded the United States failed to prove, and, in fact, neglected to even address, against ATC requirements, that Indian imports, rather than technological changes or consumer preference, caused the alleged condition of U.S. domestic industry.¹⁰⁷ Despite these substantial criticisms from the panel, one U.S. official retorted that the report would have no impact on the United States' textile program.¹⁰⁸

IV. HOW THE TMB FUNCTIONS UNDER PRESSURE

A. THE COSTA RICAN UNDERWEAR DISPUTE

In March of 1995, the United States, acting pursuant to Article 6 of the ATC, unilaterally restricted imports of underwear from Costa Rica for the year ending March 26, 1996.¹⁰⁹ In the fall of 1995, the TMB ruled that the United States failed to demonstrate Costa Rican underwear imports had caused serious damage to United States producers.¹¹⁰ The TMB, however, failed to reach the necessary consensus on the issue of whether actual threat of serious damage existed.¹¹¹ As a result, Costa Rica directed its complaint to the WTO Dispute Settlement Body for arbitration, since lengthy consultations with the United States were ineffective.¹¹²

On November 8, 1996, the Dispute Settlement Body panel issued its report in this matter, heavily criticizing the United States' actions.¹¹³ The panel recommended that the United States immediately remove the import quota because it found the United States had grossly failed to demonstrate that its domestic industry had suffered serious damage as a result of those

106. *Id.* paras. 7.37-7.48.

107. *Id.* para. 7.50. This panel rejected India's argument that a member may maintain a safeguard under the ATC only if the TMB adequately endorses such action. *Id.* para. 7.57.

108. *WTO Panel Favours India on Woolen Exports to U.S.*, *supra* note 84.

109. *United States — Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, WT/DS24/AB/R, at 2 (Feb. 10, 1997). As a justification for this action, the United States asserted that imports were causing job loss and damaging domestic underwear makers. *Id.*

110. *Id.* at 3; see *supra* notes 85-94 and accompanying text (explaining the panel's lengthy criticism of CITA's procedure for invoking the transitional safeguard mechanism in this case).

111. *Id.*

112. *Id.*

113. *Underwear Restrictions Report*, *supra* note 91, para. 8.3. This is the first panel report on textiles since the end of the Uruguay Round negotiations. *Id.*

imports.¹¹⁴ Moreover, the panel concluded that the data which CITA supplied to justify the imposition of the quota was insufficient to demonstrate even a "threat of serious damage" to United States industry.¹¹⁵

In this report, the panel articulated a standard for a finding of "serious damage" and "threat of serious damage."¹¹⁶ To demonstrate "serious damage," the panel required the party to show damage had already occurred.¹¹⁷ To demonstrate "actual threat of serious damage," a party must supply evidence that, unless action is taken, damage will most likely occur in the future.¹¹⁸ Generally, the panel determined that Article 6 of the ATC should be interpreted narrowly to effect its clear objective that transitional safeguards are to be used as sparingly as possible.¹¹⁹

B. THE INDIAN DISPUTE

In another recent dispute, India ultimately invoked the formal WTO dispute settlement procedures after the TMB failed to settle its dispute with the United States regarding restrictions on woolen clothing.¹²⁰ In April 1995, the United States, pursuant to Article 6 of the ATC, requested consultations with India for the purposes of imposing quotas on woven wool shirts and blouses.¹²¹ The parties failed to reach a mutual settlement within the 60-day consultation period, so the United States imposed the restraint and notified the TMB of its actions.¹²² In the fall of 1995, the TMB ruled that the significant increase in Indian shipments of woven wool shirts and blouses to the United States caused actual threat of serious damage to U.S. manufacturers.¹²³ Although India requested that the TMB examine its arguments in this matter, in accordance with Article 8(10) of the ATC, the TMB considered its review complete, and thus made

114. *Id.*

115. *Id.* para. 7.53-55.

116. *Id.* para. 7.55.

117. *Id.*

118. *Id.*

119. *Id.* para. 7.19; see ATC, *supra* note 4, art. 6(1) ("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").

120. Indian Imports Measure, *supra* note 53, para. 2.12.

121. *Id.* para. 2.5.

122. *Id.* para. 2.7.

123. *Id.* para. 2.9.

no additional recommendations.¹²⁴ The United States blocked India's request for the establishment of a Dispute Settlement Understanding panel to examine these complaints.¹²⁵ Three weeks later, at a special meeting, India again requested that the WTO Dispute Settlement Body establish a panel to reexamine its complaints.¹²⁶ Under the new WTO rules, a second such request must be granted.¹²⁷

On January 6, 1997, a WTO dispute resolution panel issued a report on this matter which ruled that the United States import restrictions violate the ATC.¹²⁸ Again, the dispute settlement panel determined that the United States did not adequately document even an actual threat of serious damage.¹²⁹ Despite the panel's failure to find the United States had suffered damage, U.S. trade officials maintain this decision was, in fact, a victory for the United States.¹³⁰ They claim the Dispute Settlement Body panel report merely demands that the U.S. Administration incorporate more data in those petitions it submits to the TMB.¹³¹ In its decision, the panel clarified that it was examining merely the legality of the relevant United States actions, rather than the responses of the TMB in this matter.¹³²

124. *Id.* para. 2.10-2.11.

125. *Textiles: U.S. Temporarily Blocks Move by India on Textile Import Curbs*, 13 Int'l Trade Rep. (BNA) No. 14, at 577 (Apr. 3, 1996).

126. *Id.*

127. *Textiles: WTO to Probe Indian Complaints Against U.S. Textile Safeguards*, 13 Int'l Trade Rep. (BNA) No. 17, at 670 (Apr. 24, 1996).

128. Indian Imports Measure, *supra* note 53, para. 8.1. See *supra* notes 95-102 and accompanying text (detailing the panel's criticisms of the market statement CITA provided to justify imposing the import restraint). One month prior to this ruling CITA withdrew the import restriction under examination. *WTO Rules Against U.S. on India Quotas*, WOMEN'S WEAR DAILY, Jan. 8, 1997, at 200. Addressing this withdrawal, the Chair of CITA explained it was a mere coincidence, stating, "[t]rade had declined dramatically, and that is why the quota was dropped." *Id.*

129. Indian Imports Measure, *supra* note 53, para. 7.53.

130. *U.S. Insists It Didn't Lose WTO Ruling On India Textiles*, Dow Jones News Service, Jan. 6, 1997, available in 1997 WL, ALLNEWS PLUS. U.S. textile negotiator Rita Hayes commented, "[t]o say the U.S. lost is wrong. We won the case." *Id.* This statement may be, in part, an acknowledgment of the one point on which the Dispute Settlement Body panel ruled in favor of the United States. The panel ruled that no explicit endorsement of the TMB is necessary for an importing member country to impose new quotas pursuant to the ATC's transitional safeguard mechanism. *WTO Panel Rules Against U.S. on Shirts, Sidesteps Broader Issues*, 15 INSIDE U.S. TRADE No. 2, at 6 (Jan. 10, 1997).

131. *U.S. Insists It Didn't Lose WTO Ruling On India Textiles*, *supra* note 130.

132. *WTO Panel Rules Against United States in Case of Woven Wool Shirts from India*, 14 Int'l Trade Rep. (BNA) No. 2, at 47 (Jan. 8, 1997).

In response to this report, however, it is expected that the TMB will "tighten its requirements of proof of damage."¹³³

C. OTHER DISPUTES BEFORE THE TMB

During 1995, the United States, under the direction of CITA, issued 28 calls.¹³⁴ Of these 28 calls, the TMB reviewed and issued reports on seven disputed invocations of the safeguard mechanism.¹³⁵ In two of these seven disputes, the TMB concluded that the United States had demonstrated neither serious damage nor threat thereof.¹³⁶ For three of these calls, the TMB determined that the United States had not demonstrated serious damage but was unable to reach a consensus on whether actual threat of serious damage existed.¹³⁷ The TMB found that one call was justified based on actual threat of serious damage,¹³⁸ and the TMB disposed of another dispute without an analysis of serious damage.¹³⁹ The other calls were either rescinded or the involved parties reached an agreement before the TMB completed its review.

In surveying the activity of the TMB during 1995, it is clear that the TMB did not entirely submit to the political pressures the United States exerted. In fact, some propose that the United States has learned, as a result of these outcomes, that it cannot resort to the safeguard mechanism so often, which may be deduced from the fact that the United States invoked it only once between January and September 1996.¹⁴⁰ Nevertheless, the TMB ruled that the United States had demonstrated actual threat of serious damage from Indian imports of woven wool shirts and blouses, and could not reach consensus on whether the United States had demonstrated actual threat of serious

133. Frances Williams, *US Loses WTO Textiles Case*, FIN. TIMES, Jan. 7, 1997.

134. U.S. GAO, *supra* note 11, at 4.

135. *Id.* at 64.

136. *Id.* These calls involved: (1) imports of cotton and manmade fiber nightwear and pajamas from Honduras; and (2) imports of men's and boys' wool coats from India. *Id.* at 64-65.

137. *Id.* at 64. These calls involved: (1) Costa Rican imports of cotton and manmade fiber underwear; (2) Indian imports of women's and girls' wool coats; and (3) imports of cotton and manmade fiber underwear from Honduras. *Id.* at 64-65.

138. *Id.* at 64. This is the call involving Indian imports of woven wool shirts and blouses. *Id.* at 65.

139. *Id.* at 64.

140. *WTO Rules in India's Favour*, THE HINDU, Jan. 9, 1997, available in 1997 WL 7215468, ALLNEWS PLUS.

damage in the case of Costa Rican imports of underwear. Without information clarifying how the TMB developed these determinations, one must question how the TMB arrived at such conclusions in light of the severe criticisms the DSU panels directed at CITA's proffered evidence.

D. OTHER CRITICISMS DIRECTED AT THE TMB

Almost since its inception, the TMB has suffered a constant attack by industries and countries with regard to its functioning. Specific criticisms of the TMB from both exporters and importers include the body's lack of transparency, a sense of impartiality in the body, and an inability to reach consensus in a number of cases.¹⁴¹ Developing countries continue to protest that the TMB has failed to prevent developed countries from retaining their non-tariff barriers.¹⁴² Among the non-tariff barriers cited are transitional safeguards, unilateral changes in rules of origin, new restrictions resulting from regional integration, and lack of awareness of commitments in quota growth rates.¹⁴³ As a result, several countries demanded that the WTO's Ministerial Conference in Singapore empower the TMB to act as a mechanism for liberalization in the textiles industry.¹⁴⁴

1. *Lack of Transparency in the TMB*

Both exporters and importers heavily criticize the lack of transparency in the TMB. The recent Ministerial Declaration

141. Frances Williams, *Poorer Nations Plan Attack on Textile Barriers*, FIN. TIMES, July 25, 1996, at 5.

142. *EU/WTO: EU Begins Shaping Its Singapore Agenda*, EUR. REP., Sept. 14, 1996, available in 1996 WL 11073006.

143. *Id.* In fact, textile industry advocates in the United States injected a rule of origin change into the GATT-implementing legislation. Under the modified rule, the site of sewing is designated as the country of origin, while previously it was the country where the apparel was cut. Joyce Barrett, *House Drafts Textile Bill Designed to Open Markets*, 26 DAILY NEWS REC. 114, June 13, 1996, available in 1996 WL 8654004. In July of 1996, Philippines formally requested the TMB to examine this change in rules of origin. *Textiles: Philippines Wants New U.S. Origin Rules Scrutinized by Textile Monitoring Body*, 13 INT'L TRADE REP. (BNA) No. 23, at 1131 (July 10, 1996). The European Union has also requested WTO consultations with the United States on this rule of origin change, claiming that the new rules violate obligations pursuant to, *inter alia*, Articles 2.4, 4.2 and 4.4 of the ATC. WTO, *Overview of the State-of-play of WTO Disputes, Pending Consultations*, para. 24 (Sept. 9, 1997) (visited Sept. 27, 1997) <<http://www.wto.org/wto/dispute/bulletin.htm>>. This complaint has been referred to the WTO Dispute Settlement Body and the TMB. *EU Challenges U.S. Textile Origin Rules in WTO Dispute Settlement Proceeding*, 14 INT'L TRADE REP. (BNA) No. 23, at 999 (June 4, 1997).

144. *Id.*

issued by the Ministerial Conference of the WTO in Singapore recognized this concern.¹⁴⁵ Representatives have referred to the proceedings of the TMB as “secretive” and complain that the TMB does not even circulate the agenda for its proceedings.¹⁴⁶ In recent Congressional testimony, a practitioner in the area of international trade remarked:

The initial decisions of the Textiles Monitoring Body have not been particularly helpful to U.S. Administrators or industry in understanding the real basis for decisions by the TMB. In the years of transition from the MFA, guidance from the Textiles Monitoring Body will lose credibility if its decisions do not appear to follow a consistent standard that permits countries to take actions when appropriate.¹⁴⁷

Indeed, officials in member countries have urged a mandate for transparency in the TMB to make its work more accountable. Specifically, they call for open meetings and “public issuance of written decisions and recommendations that articulate the factors and rules considered and the reasons for the findings or recommendations.”¹⁴⁸ One U.S. industry representative commented, “[c]ryptic two or three sentence conclusory statements do not provide interested persons with an understanding of why the particular conclusion was reached. Nor do they provide useful precedent for future decisions.”¹⁴⁹ That representative further argued that “[r]ationales and precedents are especially necessary in the case of the TMB because the membership of the body will change on an annual basis . . . To educate future members of the TMB and to ensure continuity and consistency, a solid body of precedents is essential.”¹⁵⁰ In December of 1995, Hong Kong’s WTO ambassador explained that WTO member countries must secure more knowledge about the functioning of the TMB, particularly with regard to the rationale behind its

145. *Singapore Ministerial Declaration, Textiles and Clothing*, para. 15 (Dec. 13, 1996) (visited Sept. 27, 1997) <<http://www.wto.org/govt/mindec.htm>>. The text of the Ministerial Declaration states “[w]e agree, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the agreement.” *Id.*

146. *Hong Kong Urges TMB to Reveal Reasons for Its Recommendations*, DAILY NEWS REC., Dec. 22, 1995, at 12.

147. *Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 2d Sess. 146 (1996) (statement of Terence P. Stewart, Managing Partner, Stewart and Stewart).

148. Singapore Hearing, *supra* note 21.

149. *Id.*

150. *Id.*

recommendations and its frequent inability to reach consensus after lengthy deliberation.¹⁵¹

Subsequently formulated working procedures of the TMB state that its reports on disputed cases shall include a factual presentation of the issues and a common rationale for its recommendations. In the past, the reports have not supplied detailed reasoning to support the Body's conclusions with regard to the existence of threat or actual threat of serious damage.¹⁵² To achieve effective implementation of the ATC, countries must clearly know the extent of their rights and obligations under the Agreement.

Comments from some representatives on this issue of transparency in the TMB seem to insist upon a *stare decisis* rule.¹⁵³ The international TMB legal system, however, does not espouse the mandate of common law jurisprudence for courts to observe under a strict legal precedent or *stare decisis* rule.¹⁵⁴ Thus, a GATT panel or the TMB, in issuing its recommendations, need not rely on the findings of previous panels or adhere to its previous rulings.¹⁵⁵ Nevertheless, GATT panels tend to "follow what they deem to be the 'wisdom' of prior panel reports."¹⁵⁶

The Clinton Administration has made transparency in the WTO as a whole a priority. Indeed, achieving transparency would allow the United States to gain a better understanding of how the WTO works as well as specific rationales behind its actions.¹⁵⁷ Importers in the United States argue that this objective ought to extend to textile trade and the TMB.¹⁵⁸ Information about the logical structure and analysis of TMB decisions may well be of particular value in devising domestic trade policies and administrative procedures for safeguard action. Nonetheless, there is no guarantee that the TMB, especially when comprised of different members,¹⁵⁹ will adjudicate similar matters in an identical fashion.

151. *Hong Kong Urges TMB To Reveal Reasons for Its Recommendations*, *supra* note 146, at 12.

152. U.S. GAO, *supra* note 11, at 63.

153. *See supra* notes 146-48 and accompanying text (setting forth the criticisms voiced by Julia K. Hughes).

154. Jackson, *supra* note 41, at 120.

155. *Id.*

156. *Id.*

157. Singapore Hearing, *supra* note 21.

158. *Id.*

159. The complicated compromise which the WTO ultimately secured for composition of the TMB calls for several positions to alternate between countries. *WTO Nominates Committee Heads at First Session of Council Meeting*, 12

2. *Lack of Impartiality in the TMB*

There have been serious questions as to whether TMB members act in their personal capacities as the ATC directs or instead act as representatives of their governments, considering their own governments' economic policy and interests. These doubts threaten the credibility of the Body as a whole.¹⁶⁰ In particular, Hong Kong has publicly protested that the TMB has not ruled against the United States' establishment of quotas which violated the ATC.¹⁶¹ In response to these concerns, several WTO officials emphasized that because of powerful anti-WTO sentiment in the United States Congress, the TMB must maintain its neutrality and legal credibility.¹⁶² Some commentators more generally maintain that the GATT dispute resolution process is and will continue to be "characterized by political 'abuse.'"¹⁶³

On the other hand, discouraged by the early rulings of the TMB against the United States, a representative of the American Textile Manufacturers Institute has alleged some members of the Body appointed by exporting countries have ignored the merits of United States' safeguard measures, favoring instead the interests of their own countries.¹⁶⁴ Industry advisors argue that once the TMB becomes politicized, dispute resolution is unpredictable.¹⁶⁵ One trade official commented, "[t]he impartiality of the TMB is a must, if we are to keep the phaseout . . . from turning into a north-south confrontation."¹⁶⁶ If the TMB is not impartial in its decision-making capacity, "exporting countries

Int'l Trade Rep. (BNA) No. 5, at 225-26 (Feb. 1, 1995); see also *supra* note 45 (detailing the composition of the TMB for the 1995-1997 period).

160. *Id.* One representative for the American Textile Manufacturers Institute claims that the TMB regularly attacks the United States' efforts to avert market disruption with use of the safeguard mechanism. Morrissey, *supra* note 67, at 41.

161. Williams, *supra* note 8, at 4.

162. *Id.*

163. Note, *supra* note 2, at 1726-27 n.83.

164. Ostroff, *supra* note 45, at 5.

165. *Id.* Others explain the poor record of the United States by alleging that the Committee for the Implementation of Textile Agreements simply made calls which were unjustified. *Id.* Some dismiss the United States' complaints, attributing them to the desires of domestic industry to maintain quotas in the face of WTO strategies to liberalize. *Id.* They contend the fact that United States' allies such as Canada, the EU, and Japan voted against the United States supports this assertion. *Id.*

166. John Zarocostas, *Global Board Hears Case on Underwear Quotas*, WOMEN'S WEAR DAILY, July 14, 1995, at 11.

could find their textile industries at the mercy of CITA.”¹⁶⁷ Conversely, lack of impartiality in the TMB could also “produce inadequate transitional protection for U.S. industries and cause excessive disruption in the lives of U.S. employees and investors.”¹⁶⁸

3. *Inability to Resolve Disputes*

The TMB has frequently failed to reach consensus in adjudicating disputes.¹⁶⁹ The Agreement, however, does not stipulate what shall happen in such an event.¹⁷⁰ Thus, when disputes have arisen within the context of trade in textiles and apparel, the TMB has seldom provided adequate guidance for subsequent disputes, drawing additional criticism.¹⁷¹ In 1995 alone, three textile matters have been brought to the WTO Dispute Settlement Body after the TMB failed to resolve the disputes.¹⁷² In addition, there are many matters which have been pending for long periods of time and which the TMB has not yet reviewed.¹⁷³ This inaction allows nonconforming actions to stand. Some assert that this frustrates the goal of the Agreement, since the ATC provides for automatic review specifically to avoid the necessity of a formal challenge.¹⁷⁴ Frequently, the TMB returns a case to the parties and asks them to reopen negotiations, after the parties have asked the TMB to make recommendations.¹⁷⁵ This response, one representative of the International Textile and Clothing Bureau asserts, amounts to bilateral rather than global administration of the ATC.¹⁷⁶ For these reasons, advocates argue the TMB ought to be more decisive.

167. Jennings, *supra* note 33, at 302-03.

168. *Id.*

169. *See supra* notes 134-139 (outlining 1995 calls).

170. *See* U.S. GAO, *supra* note 11, at 63 (discussing the absence of specific directives for the TMB in this context).

171. Somporn Thapanachai, *Thailand: Textile Exporters Urge Speedier Liberalisation*, BANGKOK POST, May 25, 1996, at 1, available in LEXIS, News Library.

172. U.S. GAO, *supra* note 11, at 64. Two of these disputes are discussed throughout this Note. The third dispute involved Indian imports of womens' and girls' wool coats, and no Dispute Settlement Understanding panel issued a report on this matter because the United States ultimately rescinded the safeguard. As a result, India terminated further action under the Dispute Settlement Understanding. Indian Imports Measure, *supra* note 53, at n.3.

173. U.S. GAO, *supra* note 11, at 64-65.

174. *Id.* *See infra* part V. (examining this perception).

175. Thapanachai, *supra* note 171, at 1.

176. *Id.*

V. SOME POSSIBLE RATIONALES AND SUGGESTIONS FOR CHANGE

Given the DSU panels' findings of severe deficiencies in U.S. market statements provided to justify use of the transitional safeguard mechanism, it is necessary to question how the TMB arrived at its own, substantially different conclusions. There seem to be at least two possible explanations for the varying conclusions from these two separate bodies. First, the TMB determinations may simply be the product of political corruption or influence from the dominant textile importing countries. Another potential rationale, however, is that the two bodies arrived at drastically distinct conclusions because they are performing different functions.

If the first explanation is correct, TMB members should focus on eradicating the political influences in this Body and encouraging the Body to be more honest in its review. As discussed throughout this Note, numerous commentators and countries have already encouraged these efforts. Theoretically, at least, Members are more likely to accept adverse rulings if they perceive the TMB as an impartial and credible body.¹⁷⁷ If Members feel the TMB is not adjudicating their disputes in an impartial fashion, they may appeal to the WTO Dispute Settlement Body more frequently. This involves substantial legal and administrative costs which adversely affect the efficiency of the dispute settlement mechanism within the textiles sector.¹⁷⁸ Ideally, if TMB decisions were viewed as unbiased and predictable, not only would the system avoid legal and transactional costs associated with appeals, but Members could also negotiate more efficiently.¹⁷⁹

The second explanation posits that the two bodies perform different functions which may have contributed to the divergent results. Thus, it may be possible to explain the differing conclusions the TMB and the WTO Dispute Settlement Body panels have reached by contrasting the approaches these two bodies use in reviewing and resolving disputes. The rather informal, conciliatory approach of the TMB is markedly different from the

177. See Jennings, *supra* note 33, at 308. "Given the TMB's lack of enforcement powers, domestic acceptance is needed to achieve enforcement." *Id.*

178. *Id.* at 303-04; see generally Robert Hudec, *Dispute Settlement, in THE NEW WORLD TRADING SYSTEM* 135-37 (Organisation for Economic Co-operation and Development ed., 1994) (discussing the substantial expenditures of legal resources associated with the strengthened dispute settlement procedure).

179. Jennings, *supra* note 33, at 312.

comparatively legalistic, rigid, formal approach of the WTO panels. This precise issue was among the central points of contention in the Indian woolen clothing case. The panel report in this matter addressed this issue in a section of its report entitled "The Role of the TMB Process Versus the Role of the Dispute Settlement Mechanism of the DSU [Dispute Settlement Understanding]."¹⁸⁰

The panel thought it was important to distinguish

between the role of panels under the DSU and the role of the TMB under the ATC as regards safeguard actions . . . The role of the TMB, in light of the object and purpose of the ATC, may be understood better if the application of the ATC is described as providing two tracks: a TMB track and a DSU track.¹⁸¹

The panel pointed out that, unlike the DSU panels, the TMB is not limited to any specific terms of reference.¹⁸² Additionally, the panel viewed the functions of the TMB as broad and multifaceted, as contrasted with the more narrow responsibilities of a DSU panel.¹⁸³ The panel asserted that "the TMB process can replace the consultation phase in the dispute settlement process under the DSU and is distinct from the formal adjudication process by panels."¹⁸⁴ In fact, in a recent report, one TMB member emphasized the TMB's role as a facilitator of ATC implementation and insisted that the TMB is not a substitute for WTO dispute settlement.¹⁸⁵

The TMB is not limited, as the DSU panel is, to the initial information submitted by the importing member because the parties involved may choose to submit additional information to the TMB to support their positions, even if the information is related to subsequent events.¹⁸⁶ The panel described the formal dispute settlement process of the DSU track as the "second track," in which the DSU panel does not reinvestigate the market situation.¹⁸⁷ Rather, the DSU limits its consideration to the evidence the importing member used in developing its own determination to impose the import restraint.¹⁸⁸ The appellate body report in the Indian woolen clothing matter dismissed the panel's comments as "purely a descriptive and gratuitous com-

180. Indian Imports Measure, *supra* note 53, paras. 7.18-7.21.

181. *Id.* para. 7.18.

182. *Id.* para. 7.19.

183. *Id.*

184. *Id.*

185. U.S. GAO, *supra* note 11, at 63, 64.

186. Indian Imports Measure, *supra* note 53, para. 7.20.

187. *Id.* para. 7.21.

188. *Id.*

ment providing background concerning the Panel's understanding of how the TMB functions."¹⁸⁹ The appellate body did not consider the Panel's comment to be a "legal finding or conclusion."¹⁹⁰ This issue, however, was one of the primary bases for appeal in this matter, and it is significant in attempting to resolve the inconsistent conclusions of the TMB and DSU panels.

Examination of the history of textiles dispute resolution may also be useful in both attempting to understand the operations of the TMB and reconciling the two bodies' inconsistencies. The TMB was structured in a manner substantially similar to its predecessor, the TSB. The TSB was frequently regarded as "a largely toothless body."¹⁹¹ In fact, barely half of the MFA participants responded to one TSB request for information necessary to perform its designated monitoring functions pursuant to the MFA.¹⁹² Some MFA signatories never provided any such information during the entire MFA era, and others remained silent for six to seven years.¹⁹³ While the MFA specified that unresolved legal disputes related to textile trade could be referred to higher levels in GATT, "action by the Textiles Committee was in fact expected to be the final step in the process."¹⁹⁴ The TSB functioned in a more informal and "pseudo-conciliatory," rather than a rigorously adjudicatory, fashion.¹⁹⁵ In establishing the TMB to supervise the new textiles agreement, the ATC assigned to the TMB duties (and even a name) which are very similar to those assigned to the TSB under the MFA.¹⁹⁶

There are at least two potentially feasible solutions to the problems with the dispute settlement process in the textile and apparel sectors. First, members could negotiate a new dispute settlement system which would offer them the option to either bring their dispute to the TMB or, alternatively, proceed immediately to the WTO Dispute Settlement Body if the member be-

189. *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter after Appellate Body Indian Imports Measure], at V.

190. *Id.*

191. *U.S.-Canada Position Still Far from That of Other Countries in Textile Talks*, 7 Int'l Trade Rep. (BNA) No. 25, at 907 (Jun. 19, 1990).

192. *GATT Textile Board Chairman Calls for More Cooperation with WTO Monitoring*, 11 Int'l Trade Daily (BNA), Dec. 6, 1994.

193. *Id.*

194. HUDEC, *supra* note 58.

195. This statement is based on telephone interviews conducted in September and October of 1997 by the author and Robert Hudec with a United States Trade Representative official responsible for textile matters.

196. *Id.*

lieves the TMB will not do a credible job adjudicating the matter. This system would likely encourage the TMB to develop a more rigorous and structured approach in its review of textile disputes.

It is possible that so long as the opportunity exists to appeal any unfavorable decision to another, "higher-level" dispute resolution body, unsatisfied member countries will in fact do so. Based perhaps on the mere co-existence of the broader Dispute Settlement Body and the ability to "appeal" TMB decisions before it, the notion that the TMB is a "lower-level WTO panel" seems to exist.¹⁹⁷ This notion likely contributes to member countries' unwillingness to accept the TMB decisions which they do not find fully satisfactory. When an appeal to a DSU panel is necessary, the appeal involves substantial time and other costs.¹⁹⁸ Member countries bring many of these panel decisions to an appellate body, requiring expenditure of additional time and resources.

Recent disputes discussed herein involving United States imports of underwear from Costa Rica and woven wool blouses and shirts from India represent the inability of the TMB to resolve disputes.¹⁹⁹ Consequently, textile exporting countries would like the opportunity to take their disputes directly to the WTO's dispute settlement system instead of allowing complaints to lie dormant for months in the TMB.²⁰⁰ This would, however, require modifications to the ATC, since the Agreement specifically mandates that Members first be unsuccessful in bringing their dispute to the TMB before invoking the DSU dispute settlement mechanisms.²⁰¹ On the other hand, Norway, the European Union, and Canada disapproved of India's bringing a textile case before the Dispute Settlement Body after the TMB

197. See *WTO Rules Against U.S. on India Quota*, WOMEN'S WEAR DAILY, Jan. 8, 1997, at 20 (using the term, "lower-level WTO panel," when referring to the TMB).

198. Obtaining a decision from a Dispute Settlement Body panel may take up to 12 months. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1226 (1994).

199. See *supra* notes 109-33 and accompanying text (explaining these controversies and the decisions rendered in these matters).

200. Lachica & Bahree, *supra* note 8.

201. See ATC, *supra* note 4, art. 8(10).

had already ruled on the dispute.²⁰² They asserted that such action undermines the credibility of the TMB.²⁰³

These criticisms necessarily urge consideration of the wisdom of establishing a separate and specific dispute settlement body for a delineated sector of trade. One benefit of a separate body to adjudicate disputes within the arena of textile and apparel trade is that, presumably, the members of the body are selected because they possess specific personal expertise in this area. In continuously adjudicating disputes in this area and thus continuously applying the same provisions of the same agreement, members can be expected to become increasingly familiar with the specific applicable law, thereby developing an institutional expertise in this area. Additionally, member countries implementing the ATC can theoretically expect more consistent decision-making under the ATC, given that the same group of experts settle the disputes under the Agreement. On the other hand, the coexistent dispute settlement bodies may merely encourage appeals upon rendering of a decision unfavorable to one of the involved parties. While this appeal process involves considerable legal resources, an accepted system of appeals exists in many domestic legal systems.

Disputes relating to textile trade are typically quite urgent, since patterns of trade in this sector are heavily dependent on current market conditions, fashions, and seasonal changes.²⁰⁴ Thus, with the exception of fundamental and enduring textile trade policy issues, the more formal, lengthy GATT dispute settlement procedure is less feasible.²⁰⁵

The other potential solution is to renegotiate the dispute settlement provisions of the ATC to provide that, once the TMB has reviewed a textiles dispute, Members could bypass the DSU panel and directly appeal the matter to an Appellate Body. This solution is less duplicative, while it retains the personal and institutional expertise of the TMB in all disputed textile and apparel trade matters under the ATC.

202. *WTO to Probe Indian Complaints Against U.S. Textile Safeguards*, 13 Int'l Trade Rep. (BNA) No. 17, at 671 (Apr. 24, 1996).

203. See Robert Evans, *WTO Sets Panels in India-U.S. Textile Disputes*, REUTER EUR. BUS. REP., Apr. 17, 1996, at 1, available in LEXIS, News Library ("U.S. ambassador Booth Gardner urged India 'to reflect on the wisdom of establishing a panel in a case where the TMB has issued an unequivocal finding.'").

204. See Zheng, *supra* note 57, at 343.

205. *Id.*

VI. CONCLUSION

Some of the recent criticism levelled against the TMB is indeed warranted. The phaseout of the MFA is more likely to be successful if the TMB is viewed as an impartial, credible, and transparent body. Generally, the effectiveness and efficiency of dispute settlement procedures are essential for realizing the benefits of trade liberalization in any sector.²⁰⁶ While the credibility of the multilateral system of rules governing textile and apparel trade is contingent on the extent to which its results are enforceable, it is also clear that there is a lack of transparency in the U.S. Administration's own application of the ATC, particularly in its process for determining when to impose import restraints. As illustrated in recent DSU panel reports on textile matters and a variety of other reports discussed herein, CITA's procedures for invocation of the safeguard mechanism of the ATC are severely flawed. The U.S. Administration's departure from the requirements of the ATC in this regard and its initial selection of products for progressive integration may be at least partially attributed to the sheer political power of the U.S. textile and apparel industries. Additionally, the more general opposition of U.S. Congressional members to the objectives of the WTO and the GATT may also contribute to the Administration's conduct in textiles and apparel. Another broader dynamic at play in these disputes, among so many others within the WTO, is GATT's vulnerability to economically powerful nations in the international marketplace.²⁰⁷ In the face of such political pressure, the TMB has in recent disputes failed to effectively deny the United States use of the ATC's safeguard mechanism when it submitted market statements which were, in the judgment of DSU panels, grossly inadequate. The TMB's behavior in such instances may be the result of bias or corruption. Alternatively, the TMB's conduct could be explained by the substantially different review functions which the TMB and the DSU perform. If the latter is true, even in part, at least two potential solutions have been posited and should be considered to improve the efficiency of the dispute settlement process in textile and apparel trade.

206. Raby, *supra* note 3, at 17.

207. See generally Note, *supra* note 2, at 1726 ("Not infrequently, this dynamic resulted in manipulation not only of the rules themselves, but also of the degree to which violations of the rules resulted in sanction.") *Id.*

