

# THE AGREEMENT ON TEXTILES AND CLOTHING: SAFEGUARD ACTIONS FROM 1995 TO 2001

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## ABSTRACT

The Agreement on Textiles and Clothing is one of the most significant outcomes of the Uruguay Round. While the ATC promises to deliver a significant amount of liberalization during the 1995 to 2004 transition period, trade policy analysts and developing country representatives have expressed concern about the role of ATC Article 6 safeguard provisions. This paper reviews the safeguard activity under the ATC during the 1995 to 2001 period. In earlier years, there is evidence of abuse of the mechanism by the United States, but in later years, the primary use of ATC safeguards has been by Latin American countries. Overall, the ATC safeguard provisions have proved to be effective both in limiting most safeguard abuses and in carving out a new textiles and clothing regime within the WTO.

## INTRODUCTION

The Agreement on Textiles and Clothing (ATC) is one of the most significant outcomes of the Uruguay Round. It was crucial to the success of the Uruguay Round due to its implicit linkages to the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the minds of many developing country Members of the World Trade Organization (WTO).<sup>2</sup> Despite these promises, there has been

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<sup>2</sup> See Bernard M. Hoekman and Michel M. Kosteci, *The Political Economy of the World Trading System* (Oxford: Oxford University Press 2001). These authors state: ‘An implicit link was established between the demands by the US and EU to address issues such as services and TRIPS in the Uruguay Round, and the desire of many developing countries to see an improvement in the market access conditions for their manufactured exports, in particular clothing’ (p. 229). The difficult negotiating history of the ATC is presented by Marcelo Raffaelli and Tripti Jenkins, *The Drafting History of the Agreement on Textiles and Clothing* (Geneva: International Textiles and Clothing Bureau 1995). The previous MFA regime has been reviewed by Alice J.-H. Wohn, ‘Towards GATT Integration: Circumventing Quantitative Restrictions on

evidence of a lack of liberalization in the early stages of the 1995 to 2004 transition decade, and this has been cause of a great deal of concern among textile and clothing exporters.<sup>3</sup>

This paper focuses on Article 6 of the ATC on transitional safeguards, examining the evolution of safeguard actions over the 1995 to 2001 period.<sup>4</sup> During earlier years, there is evidence of abuse of the safeguard mechanism by the United States, but in later years, the primary use of safeguards has been by Latin American countries. In a number of instances, safeguard actions have been the subject of dispute settlement procedures, and these cases have contained some interesting precedents that we discuss below. Also, there appears to be some evidence that the United States is willing to pursue safeguard objectives outside of the Article 6 provisions, turning to the less restrictive provisions of ATC Articles 4 and 5. However, despite these issues, the evidence suggests that the ATC safeguard provisions have proved to be effective both in limiting most safeguard abuses and in carving out a new textiles and clothing regime within the WTO. In this way, the provisions have enhanced the prospects of textile and clothing trade being subject to GATT 94 disciplines beginning in 2005.

## ATC SAFEGUARD PROVISIONS

Under WTO rules, safeguard provisions involve both an investigation and a determination of whether increased imports cause or threaten to cause serious injury to domestic producers of a like or directly competitive product.<sup>5</sup> ATC Article 6.7 lays out a consultation process in which a WTO Member proposing a safeguard action informs the Chair of the Textiles Monitoring Body (TMB) of a consultation request. As is the case in the general WTO dispute settlement

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Textile and Apparel Trade under the Multi-Fiber Arrangement', 22 *University of Pennsylvania Journal of International Economic Law* 375 (2001), 390-408.

<sup>3</sup> See Dean Spinanger, 'Faking Liberalization and Finagling Protection: The ATC at Its Best', The World Bank, Washington, DC, [www.worldbank.org/trade](http://www.worldbank.org/trade).

<sup>4</sup> Earlier analyses can be found in Laura Baughman et al., 'Of Tyre Cords, Ties and Tents: Window-Dressing at the ATC?' 20 *The World Economy* 407 (1997), 416-31 and in Kenneth A. Reinert, 'Give Us Virtue But Not Yet: Safeguard Actions under the Agreement on Textiles and Clothing', 23 *The World Economy* 25 (2000), 30-40.

<sup>5</sup> On the general characteristics of WTO safeguard mechanisms, see J. Michael Finger, 'Legalized Backsliding: Safeguard Provisions in the GATT', in Will Martin and L. Alan Winters (eds.), *The Uruguay Round and Developing Countries* (Cambridge: Cambridge University Press 1996), 316-340 and G. Murray Smith, 'Import Relief Laws: The Role of Safeguards', in Miguel Rodriguez Mendoza, Patrick Low, and Barbara Kotschwar (eds.), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Washington, DC: Brookings 1999), 302-321. The role of serious damage in the ATC is

mechanism, the consultation process is given 60 days to proceed. If the consultation process yields a ‘mutual understanding that the situation calls for restraint on the exports’ (ATC Article 6.8), then an *agreed restraint* is the result. In this case, ‘details of the agreed restraint measure shall be communicated to the TMB within 60 days from the date of the conclusion of the agreement’ (ATC Article 6.9). Furthermore, the TMB shall determine whether the agreement is in accordance with the provisions of Article 6 in a review and recommendation process. If the consultation process does *not* lead to a mutual understanding, a *proposed unilateral restraint* may result (ATC Article 6.10). In this case, the restraint is referred to the TMB, which then has 30 days to investigate the matter and make recommendations.

Alternatively, ‘In highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair,’ a Member may impose a *provisional unilateral restraint* ‘on the condition that the request for consultation and notification to the TMB shall be effected within no more than five working days after taking the action’ (Article 6.11). If these consultations result in a mutual understanding, the resulting *agreed restraint* must be communicated to the TMB ‘no later than 90 days from the date of the implementation of the action’ (ATC Article 6.11). If the consultations do *not* result in a mutual understanding, the TMB is to be notified ‘no later than 60 days from the date of the implementation of the action’ (ATC Article 6.11). In this case, the TMB must undertake a review and make recommendations within 30 days.<sup>6</sup>

Safeguard actions taken on items not subsequently integrated into GATT 1994 according to the ATC schedule may be in effect for a maximum of three years. In each of the second two years, the restraint must grow by at least 6 percent of the previous year’s restraint level. By way of comparison, safeguard actions under Article XIX of GATT 1994 have a four-year limit with one four-year extension allowed. As we will discuss below, the three-year limit on actions under Article 6 distinguishes it from those under ATC Articles 4 and 5.

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analyzed by John M. Jennings, ‘In Search of a Standard: “Serious Damage” in the Agreement on Textiles and Clothing’, 17 *Northwestern Journal of International Law and Business* 272 (1996), 283-300.

<sup>6</sup> Note that the safeguard procedures of Article 6 conform the general principle that ‘Whenever the TMB is called upon to make reservations or findings, it shall do so, preferably within a period of 30 days’ (ATC Article 8.8).

## LEVELS OF ATC SAFEGUARD ACTIVITY

Levels of safeguard activity during the 1995 to 2001 period are presented Table 1. More detailed information on each of these 53 cases is presented in the Annex. The first notable fact from Table 1 is the large number of safeguard actions brought by the United States in 1995, actions which raised the consternation of textile and clothing exporters, trade policy analysts, and the TMB itself.<sup>7</sup> Eight of these 23 actions were sustained, and three resulted in dispute settlement processes (Annex cases 4, 11, and 12). The year 1996 saw only one US action but seven actions brought by Brazil and two actions brought by Ecuador. Five of the Brazilian actions (Annex cases 27 to 31), all against South Korea, were sustained.

The absence of any safeguard actions in 1997 gave some comfort to the TMB, which stated the following in the middle of that year:<sup>8</sup>

As from the second half of 1995, the slow-down in the recourse to Article 6 may have resulted from the interaction of a number of factors. Among these, in the view of the TMB, the recognition that Article 6 provides strict requirements could have played an important role... and by the availability of the possibility of having recourse to the provisions of the Dispute Settlement Understanding. The Ministerial Declaration adopted in Singapore has also had an important impact, in particular in directing the TMB to further increase transparency by providing more detailed explanations and rationale behind its findings and recommendations.

It now appears that the TMB spoke too soon. The year 1998 saw one case brought by the United States, and four cases brought by Colombia. The US action (Annex case 34 against Thailand) was sustained. The year 1999 saw another case brought by the United States but a total of 10 cases brought by Argentina. The US case (Annex case 39 against Pakistan) proved to be contentious and resulted in dispute settlement proceedings discussed in some detail below. All 10 of the 1999 Argentina actions (Annex cases 40 to 49), as well as three additional cases brought by Argentina in 2000 (Annex cases 50 to 52), were provisional unilateral restraints brought under ATC Article 6.11. The subject countries were Brazil, Pakistan, and Korea. Argentina's motivations in these 13 cases no doubt reflected the devaluation of the Brazilian *real* in January 1999, and the subsequent balance of payments and political problems that developed during 1999

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<sup>7</sup> See Baughman et al. and Reinert, above n. 4.

<sup>8</sup> WTO Textile Monitoring Body, *Comprehensive Report of the Textile Monitoring Body*, G/L/179, 31 July 1997, 51.

and 2000.<sup>9</sup> The TMB upheld only two of the 13 actions brought by Argentina (Annex cases 49 and 51), and even here, it imposed some additional conditions. In addition, as we discuss below, Argentina's actions against Brazil resulted in dispute settlement proceedings.

The use of the ATC Article 6 by Latin American countries is notable. Argentina, Brazil, and Colombia are members of the Geneva-based International Textile and Clothing Bureau (ITCB). The ITCB has taken a relatively strong position against ATC safeguard actions. For example, in its 2001 Rio de Janeiro Communiqué, the ITCB Council of Representatives stated that the Council 'resolved to resist any trade harassment by (major developed restraining countries), such as unjustified recourse to antidumping, safeguards and/or changes in rules of origin.'<sup>10</sup> There is thus some evidence of potential mixed motives within the ITCB membership.

The year 2001 saw only one case, that by Poland against Romania. This was the first time that the ATC safeguard provision was invoked by a European country.<sup>11</sup> The TMB found this action to be unjustified, and Poland subsequently rescinded the measure.

ATC Article 6 states that safeguard actions are to be used 'as sparingly as possible', and this language was reiterated at the Singapore Ministerial. The safeguard actions of the United States in 1995 and of Argentina in 1999 suggest that this language has not always been respected. On the positive side, however, the link of the ATC to the dispute settlement process of the WTO has worked remarkably well. We turn to this issue in the following section.

## USE OF THE DISPUTE SETTLEMENT PROCESS

Article 8.10 of the ATC allows Members considering themselves unable to conform to the 'further recommendations' of the TMB to bring the matter before the WTO Dispute Settlement Body (DSB). This occurred in nine of the 53 safeguard cases detailed in the Annex. These are safeguard cases 4, 11, 12, 39, and 40 to 44.<sup>12</sup> The first three cases involved exports of,

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<sup>9</sup> Argentina also imposed anti-dumping actions during this time, one of which, that against Italian ceramic tile, went to the Dispute Settlement Body.

<sup>10</sup> International Textile and Clothing Bureau, *Rio de Janeiro Communiqué*, CR/33/BRA/9, 14 June 2001.

<sup>11</sup> The lack of European involvement in ATC safeguards is not a sign of a lack of protection. Rather, it is a sign of a preference for anti-dumping actions within the European Union. See Edwin Vermulst and Polya Mihaylova, 'EC Commercial Defense Actions against Textiles from 1995 to 2000: Possible Lessons for Future Negotiations', 4 JIEL 527 (2001), 529-536.

<sup>12</sup> One additional dispute, between Thailand and Colombia (Annex case 38), also went to the DSB. This, however, was an appeal by Thailand to the TMB about Colombia's non-compliance with a TMB recommendation. Since the imposed safeguard action had already expired, Thailand was asked to drop the appeal.

respectively, cotton and man-made fibre underwear from Costa Rica to the United States, woven wool shirts and blouses from India to the United States, and women's and girls' wool coats from India to the United States. These three cases have been analysed elsewhere, so we will not discuss them in detail here.<sup>13</sup> We will, however, note the following points. The US-Underwear case was notable in that the Appellate Body ruled that safeguard restraints could not be applied retroactively as under the old Multi-fibre Arrangement (MFA) regime.<sup>14</sup> The US-Woven Wool Shirts and Blouses case was also notable in that the DSB Panel found that a lack of TMB endorsement was not sufficient grounds for an exporting country to demand the removal of a restraint.<sup>15</sup> This latter issue can arise when a consultation begins over 'serious damage' and the TMB makes a recommendation over 'actual threat thereof.'

Case 39 involved exports of combed cotton yarn from Pakistan to the United States, and cases 40 to 44 involved exports of a number of items from Brazil to Argentina. We will discuss these cases in some detail in the remainder of this section.

### **The US-Combed Cotton Yarn case**

In December 1998, the United States requested consultation with Pakistan regarding imports of product category 301 (combed cotton yarn). During this consultation, the United States and Pakistan failed to reach a mutual understanding. In March 1999, the United States gave the TMB notification that a proposed unilateral restraint would be imposed under ATC Article 6.10. The TMB reviewed this case in April 1999. It concluded that serious damage caused by imports from Pakistan had not been demonstrated and recommended that the United States withdraw the measure. In May 1999, the United States communicated its inability to comply with the TMB recommendation. In June 1999, the TMB reviewed the case again but was not able to reverse its previous decision. The United States continued to maintain the restriction.

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<sup>13</sup> See Reinert, above n. 4, K. Kristine Dunn, 'The Textiles Monitoring Body: Can It Bring Textile Trade into GATT?', 7 *Minnesota Journal of Global Trade* 123 (1998), 141-144, and Xiaobing Tang, 'The Integration of Textiles and Clothing into GATT and WTO Dispute Settlement,' in Cameron and Campbell (eds.), *Dispute Resolution in the World Trade Organization* (London: Cameron May 1998) 171-203.

<sup>14</sup> See WTO Appellate Body Report, *United States- Restriction on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, 10 February 1997.

<sup>15</sup> See WTO Panel Report, *United States-Measures Affecting Import of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997.

In April 2000, Pakistan requested the establishment of a DSB Panel. Pakistan complained about the inconsistency of the restraint with ATC Article 2.4 on new restrictions and the lack of evidence provided by the United States as justification for the safeguard measure under Article 6. The detailed arguments raised by Pakistan were:<sup>16</sup>

[T]he United States 1) did not examine the state of the entire domestic industry producing combed-cotton yarn; 2) based its determination of the state of the domestic industry on unverified, incorrect and incomplete data; 3) based its determination on the causal link between imports and serious damage on changes in economic variables during an eight-month period only; 4) did not conduct a prospective analysis of the effects of imports to determine whether they were causing a threat of serious damage; and 5) attributed serious damage to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects.

The Panel was established in June 2000, and it focused most closely on three issues: the definition of the domestic industry, the role of the MFA in ATC Article 6 deliberations, and the exclusion of Mexican exports from the US analysis. With regard to the definition of the domestic industry, ATC Article 6.2 states:

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

In its submission to the TMB justifying its actions, the United States defined its domestic combed cotton yarn industry to *exclude* vertically integrated fabric producers producing combed cotton yarn for their own consumption. It was the contention of the United States that the phrase ‘like and/or directly competitive products’ in Article 6.2 allows a Member to identify a domestic industry vis-à-vis the subject imports in one of three ways: as like and directly competitive, as like but not directly competitive, or as unlike but directly competitive. The United States used the second of these definitions, claiming that combed cotton yarn spun by vertically integrated producers was not competitive with imported cotton yarn. In its defence, the United States turned the Panel’s attention to Annex A of the MFA, which also used the term ‘like and/or directly competitive products.’<sup>17</sup>

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<sup>16</sup> See WTO Panel Report, *United States- Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, WT/DS192/R, 31 May 2001, 3.

<sup>17</sup> See para. I of Annex A to General Agreement on Tariffs and Trade, *Arrangement Regarding International Trade in Textiles*, 1974.

The Panel observed that ‘vertically integrated fabric producers purchase combed cotton yarn and also sell combed cotton yarn they produce, in the market, which includes imported cotton yarn, even though their amounts are small.’ Consequently, the Panel concluded that ‘combed cotton yarn produced by the integrated producers for their own use is “directly competitive” with imported combed cotton yarn.’<sup>18</sup> In the Panel’s view, this ‘product’ approach to the definition of the domestic industry is superior to the ‘producer’ view utilized by the United States. In our view, the Panel found correctly on this issues. Implicit in the US interpretation of ATC Article 6.2 is the possibility that serious damage could occur via imports of ‘like but not directly competitive’ products, an economic impossibility.<sup>19</sup>

The Panel also rejected the contention of the United States that the MFA composes part of the ‘context’ of the ATC. In doing so, the Panel confirmed the guidelines for interpretations of the WTO Agreement. The Panel referred to Article 3.2 of the Dispute Settlement Understanding (DSU) to illustrate the role of the dispute settlement systems for the interpretation of the WTO Agreement. Article 3.2 of the DSU states, ‘[t]he dispute settlement system of the WTO... serves... to clarify the existing provisions of those agreements in accordance with customary rules of interpretations of public international law.’ The Panel referred to Articles 31 and 32 of the Vienna Convention on the Laws of Treaties (the Vienna Convention) as the ‘customary rules of interpretations of public international law.’<sup>20</sup> The Panel justified its use of the Vienna Convention as a guideline by presenting the Appellate Body’s recurrent use of Articles 31 and 32.<sup>21</sup>

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<sup>18</sup> See above n. 16, 104.

<sup>19</sup> The US argument can be seen as a case of what Henrik Horn and Petros C. Mavroidis term the ‘unsophisticated market test’, and is inferior to a ‘sophisticated market test’ based on substitutability. See Horn and Mavroidis, ‘Economic and Legal Aspects of the Most-Favored-Nation Clause’, 17 *European Journal of Political Economy* 233 (2001), 241-242.

<sup>20</sup> Articles 31.1 and 31.2 of the Vienna Convention state: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: 1. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; 2. any instrument which was made by one or more parties in connection with the conclusion of the treaty.’ Article 32 states: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’

<sup>21</sup> See above n. 16, footnote 169.

The United States contended that the MFA was the part of context of the ATC by referring to the use of MFA by the Appellate Body in the above-mentioned US-Underwear case.<sup>22</sup> In refuting the United States, the Panel concluded that the MFA was used not as part of the ‘context’ of the ATC within the meaning of Vienna Convention Article 31.1, but as part of the ‘circumstances of the conclusion of the ATC’ within the meaning of Vienna Convention Article 32.<sup>23</sup> Consequently, the Panel did not support the US definition of the domestic industry. Instead, it affirmed that Article 32 is supplementary to Article 31 and concluded that the interpretation under Article 31 was enough to confirm the meaning of the provisions of the ATC. Furthermore, the Panel ruled that the MFA is *not* an integral part of the WTO Agreement, and therefore could *not* be invoked in support of the US definition of the domestic industry.

We mentioned above that the previous dispute settlement proceedings concerning the US-Underwear case had stymied US attempts to invoke MFA-era retroactive safeguard application. There thus seems to be a continuing tendency on the part of the United States to invoke the MFA as a legal precedent. The Panel was correct to draw a clear line and protect the integrity of the ATC as a legally distinct entity.

The Panel also concluded that the United States should have included imports from Mexico in its damage analysis. Given that Mexico is the largest exporter of combed cotton yarn to the United States and that its increases in exports were of equivalent order of magnitude to that of Pakistan, the Panel clearly found correctly. In doing so, it also supported multilateral principles over surreptitious regional favouritism.

The Panel ruled against Pakistan on a number of issues, but this was not enough to prevent the Panel from concluding that the United States failed to establish the actual threat of serious damage to the domestic industry. Consequently, it requested that the United States rescind the measure. The United States refused to conform to the Panel decision and appealed to the Appellate body in July 2001. Importantly, the United States disputed both the Panel’s finding with regard to the exclusion of vertically integrated producers from the domestic market and the exclusion of Mexico’s exports from the damage analysis.<sup>24</sup> It did not contest the role of the MFA in the ATC.

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<sup>22</sup> Ibid., para. 4.62.

<sup>23</sup> Ibid., para. 7.74.

<sup>24</sup> See Permanent Mission of the United States, *United States- Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan: Notification of Appeal*, WT/DS192/4, 9 July 2001 and *United*

The Appellate Body issued its report in October 2001.<sup>25</sup> It confirmed the Panel's finding that the definition of the domestic industry must be product oriented rather than producer oriented. For this reason, it found that yarn produced by vertically integrated fabric producers in the United States is indeed directly competitive with imported yarn from Pakistan. The Appellate Body also found that the United States acted incorrectly in excluding Mexican imports from its damage analysis. It concluded its report with the recommendation that the United States bring the safeguard measure into conformity with the ATC.

### **The Argentina-Woven Fabrics of Cotton and Cotton Mixtures case**

In July 1999, Argentina requested consultations with Brazil regarding the restriction on imports of product categories 218, 219/220, 224, 313/317 and 613/617/627.<sup>26</sup> In these consultations, held in September 1999, the two parties failed to reach a mutual understanding. The case was referred by Brazil to the TMB under Article 6.11 of the ATC in September 1999. In October 1999, the TMB examined the case category by category. On all categories except 613/617/627, the TMB could not find serious damage caused by imports. In the case of categories 613/617/627, the TMB was not able to reach the conclusion that imports were the primary cause of difficulties faced by the Argentina's domestic industry. The TMB made a recommendation for Argentina to withdraw the safeguard measures.

In November 1999, Argentina communicated its inability to comply with the TMB's recommendation. In December 1999, the TMB reviewed the case again but was not able to reverse its previous finding. Argentina communicated its continuing inability to comply, and in February 2000, Brazil requested the establishment of a DSB Panel. The considerations raised by Brazil were: 1) the inconsistency of the safeguard measure imposed by Argentina, with respect to

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*States- Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellant Submission of the United States, USTR, AB-2001-3.

<sup>25</sup> See WTO Appellate Body, *United States- Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001.

<sup>26</sup> Product categories: 218- woven cotton and cotton mixtures fabrics of yarns of different colours; 219/220- Duck/special-weave cotton and cotton mixtures fabrics; 224- Pile tufted cotton and cotton mixtures fabrics; 313/317- Sheeting/twill cotton and cotton mixtures fabrics; 613/617/627- Sheeting fabrics/twill and satin/staple-filament fibre combinations of cotton and cotton mixtures.

Articles 2, 6 and 8 of the ATC and 2) Brazil's loss of benefit caused by the measure in question.<sup>27</sup>

Before the Panel was established, the matter was resolved in favour of Brazil by an arbitral tribunal under the Brasilia Protocol, the dispute settlement mechanism for Mercosur. In June 2000, Argentina and Brazil notified the DSB of their intention to suspend the dispute procedure, retaining the right to resume it for twelve month's time.<sup>28</sup> It is important to note here that, the Brasilia Protocol and the DSU being *distinct legal entities*, the Mercosur arbitral tribunal ruled only the compatibility of the safeguard measure with Mercosur, *not* with the ATC.<sup>29</sup> Thus, there has been no ruling by the DSB on Argentina's safeguard actions against Brazil.

We see in this case that, although the ATC temporarily became the victim of the asymmetric exchange rate regimes of Mercosur, the institutions of Mercosur were able to rise to the occasion and resolve the matter.<sup>30</sup> However, Brazil and Argentina agreed in October 2001 that Argentina could impose further safeguards 'inspired by the rules of the World Trade Organization.'<sup>31</sup> It remains to be seen whether these will include further ATC Article 6 actions.

### **Assessment of dispute settlement processes**

At the conclusion of the Uruguay Round, it was claimed that the DSU would well serve the interests of developing countries.<sup>32</sup> From the point of view of safeguard actions under the ATC, this has undoubtedly been the case. In major disputes, Costa Rica, India, and Pakistan have been able to confront the United States and carve out a new textile and clothing regime distinct from

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<sup>27</sup> See Permanent Mission of Brazil, *Argentina- Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil: Request for the Establishment of a Panel*, WT/DS190/1, 11 February 2001.

<sup>28</sup> See Permanent Mission of Brazil, *Argentina- Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil: Notification of Mutually Agreed Solution*, WT/DS190/2, 30 June 2000.

<sup>29</sup> See Dispute Settlement Body, *Minutes of Meeting Held on 20 March 2000*, WT/DSB/M/77, 17 April 2000, 8. Note also that, under the DSU, Article 3.6 states: "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."

<sup>30</sup> Mercosur's dispute resolution procedures have been reviewed by Cherie O'Neal Taylor, 'Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?', 17 *Northwestern Journal of International Law and Business*, 850 (1996/97), 854-897.

<sup>31</sup> See *The Economist*, 'South American Trade: Sticking-Plaster for Mercosur', 13 October 2001, 38. The devaluation of Argentina's currency in January 2002 might help to resolve these issues.

the old MFA regime. This is no small accomplishment and bodes well for the future of textile and clothing trade under the WTO. Further concerns exist, however, with actions pursued outside of Article 6. We turn to these in the next section.

#### ACTIONS OUTSIDE OF ARTICLE 6

There have been some fears expressed about the TMB being bypassed by use of provisions other than Article 6.<sup>33</sup> Given actions take by the United States under ATC Articles 4 and 5, it appears that these fears have some justification. Consider first ATC Article 4 on ‘the introduction of changes.’<sup>34</sup> Article 4.2 states:

Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products, ... (and) in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between the Members concerned under this Agreement; adversely effect the access available to a Member; impede full utilization of such access; or disrupt trade under this Agreement.

Article 4 spells out a consultation process, and in the event that these consultations do not resolve the matter, any Member *may* refer it to the TMB. In these respects, Article 4 is similar to Article 6. It does, however, hold one important advantage over Article 6 in that it does not specify a time limit to any agreed changes and is therefore ‘superior’ from the point of view of protecting domestic industry in an importing country.

As indicated in Annex case 8, the United States and Turkey had reached a mutual agreement on import restrictions of category 352/652 under Article 6.9 on December 1995.<sup>35</sup> Once it expired in 1998, the two countries renewed the restriction without reporting it to the TMB. More specifically, the United States and Turkey announced an Article 4 agreement negotiated in April 1998 under which Turkey accepted quotas on its exports of item 352/652

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<sup>32</sup> See, for example, Raed Safadi and Sam Laird, ‘The Uruguay Round Agreement: Impacts on Developing Countries’, 24 *World Development* 1223 (1996), 1238.

<sup>33</sup> See Reinert, above n. 4, 42 and Dean Spinanger, ‘Textiles Beyond the MFA Phase-Out’, 22 *The World Economy* 455 (1999), 473-475.

<sup>34</sup> Article 4 has its roots in Paragraph 18 of the 1986 Protocol of Extension of the MFA (MFA IV). This path dependence is evident in that Article 4.4 mistakenly refers to the TMB as the TSB, the Textile Surveillance Body of the MFA era.

<sup>35</sup> The product category 352/652 is cotton and man-made fibre underwear.

until year 2003 in exchange for increased quotas on item 338/339/638/639.<sup>36</sup> Subsequently, the TMB requested both countries to clarify which provision of ATC applied to the renewed restriction. The two countries responded with a joint statement, stating ‘the measure was mutually agreed between two governments, was consistent with our rights under the ATC, and was taken pursuant to a provision of the ATC which does not require notification to the TMB.’<sup>37</sup>

Since specific provisions were not given in this notification, the TMB considered the matter further. It concluded that the measure was not in conformity with ATC provisions. Though several reasons were given, the main issue related to the interpretation of Article 4. The TMB ruled that Article 4 was intended to help Members adjust the implementation and administration of *existing* restrictions, but not to enable Member countries to impose *new* restrictions. This is a very significant finding on the part of the TMB. Unfortunately, the United States chose to ignore it. To our knowledge, no further actions on this matter have been taken by any of the parties involved. Resolution of this issue would require a challenge by another WTO Member through dispute settlement procedures.

Next consider Article 5 on ‘transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents.’ As with Article 4, Article 5 spells out a consultation process, and in the event that these consultations do not resolve the matter, any Member *may* refer it to the TMB. Also as with Article 4, there are no time restrictions. The United States introduced a new restriction on product category 666-S and P from Pakistan under Article 5 of the ATC.<sup>38</sup> This matter was first notified to the TMB in October 1996, reflecting a memo of understanding between the two countries involved, but the TMB has considered it many times since then. The relevant paragraph here is 5.6 on ‘false declaration concerning fibre contents, quantities, description or classification of merchandise.’ The United States imposed this new restriction because it concluded that Pakistani companies allegedly mislabelled category 361 as category 666-S and P.<sup>39</sup> In their memo of understanding, the United States and Pakistan agreed on a new restriction on category 666-S and P while cutting the restriction on category 361.

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<sup>36</sup> The product category 338/339/638/639 is certain knit shirts and blouses.

<sup>37</sup> Textiles Monitoring Body, *Report of the Sixty-First Meeting*, G/TMB/R/60, 28 January 2000.

<sup>38</sup> The product category 666-S and 666-P is other man-made fibre furnishings.

<sup>39</sup> The product category 361 is cotton bed sheets.

Two TMB concerns were important here. The first was whether new restriction on category 666-S and P was justified under the ATC. Due to insufficient information, the TMB was not able to make a decision on this point. Hence, the TMB left open the possibility of introducing new restrictions under Article 5. The second concern pertains to the time period of the restriction on category 666-S and P, as well as on category 361. The restriction was imposed for 9 years from 1995 to 2004, which is far beyond the three-year reach of safeguard measures allowed under Article 6. The TMB requested clarification of the reasons for the long period of the restriction from both countries, but it did not receive what it considered to be a satisfactory reply. The TMB was also concerned by the lack of cooperation from both countries with regard to keeping the TMB informed about the conformity of their agreement with the ATC. The matter appears to be unsettled at the time of this writing.

In many respects, actions taken under Articles 4 and 5 are similar to those taken under Article 6. However, the main concerns regarding Article 4 and 5 actions are the fact that notification to the TMB is not explicitly required and the extended time period for which restrictions can be in place. Unless other Members are willing to challenge these measures through dispute settlement procedures, however, the power of the TMB to resolve the associated issues is limited.

## CONCLUSION

The ATC is due to expire at the end of 2004. Interest in textile and clothing safeguard actions, however, will extend through 2008 under the provisions of China's accession to the WTO. The analysis of this paper makes clear that, from the point of view of safeguards, the ATC era is distinct from the MFA era. This has been established in Panel and Appellate Body reports concerning ATC safeguard actions and is of great benefit to the trading interests of the developing countries. However, Latin American countries have used ATC safeguard actions as a way to address macroeconomic and balance of payments issues. Fortunately, in the cases examined here, the TMB and Mercosur dispute settlement procedures have been able to successfully address these issues. All told, the history of ATC safeguard actions during the 1995 to 2001 period speaks to the importance of multilateral disciplines in the textiles and clothing sector and to the accomplishments of the Uruguay Round in this arena. It is clear that the ATC safeguard provisions have proved to be effective both in limiting most safeguard abuses and in

carving out a new textiles and clothing regime within the WTO. In this way, these provisions have enhanced the prospects of textiles and clothing trade being subject to GATT 94 disciplines beginning in 2005.

**Table 1. A Summary of ATC Safeguard Actions 1995 to 2001**

<b>Item</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>Total</b>
Total Number	23	10	0	5	11	3	1	53
Number by US	23	1	0	1	1	0	0	26
Number by Argentina	0	0	0	0	10	3	0	13
Number by Brazil	0	7	0	0	0	0	0	7
Number by Ecuador	0	2	0	0	0	0	0	2
Number by Colombia	0	0	0	4	0	0	0	4
Number by Poland	0	0	0	0	0	0	1	1
Article 6.9 <sup>a</sup>	9	0	0	1	0	0	0	10
Article 6.10 <sup>a</sup>	14	1	0	4	1	0	1	21
Article 6.11 <sup>a</sup>	0	9	0	0	10	3	0	22

<sup>a</sup> At introduction, though the category might have subsequently changed.

### Annex: Safeguard Actions under the ATC

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB panel	Restraint sustained?
1	US 351/651 El Salvador	March 1995	Agreed restraint under Art. 6.9	US rescinded measure in July 1996 before review.		No
2	US 351/651 Honduras	March 1995	unilateral restraint under Art. 6.10	July 1995. Serious damage or actual threat thereof not demonstrated. Recommended that US rescind measure. US rescinded measure in Sept. 1995.		No
3	US 351/651 Jamaica	March 1995	Agreed restraint under Art. 6.9	US decided to rescind measure before review.		No
4	US 352/652 Costa Rica	March 1995	Unilateral restraint under Art. 6.10	July 1995. Serious damage not demonstrated. No consensus on threat of serious damage. Further consultation recommended.	Established March 1996. November 1996 report concluded US quotas not substantiated. Costa Rica appealed some aspects of findngs. Appellate Body issued report in February 1997.	Withdrawn in March 1997.
5	US 352/652 Dominican Republic	March 1995	Agreed restraint under Art. 6.9	Dec. 1995		Yes
6	US 352/652 El Salvador	March 1995	Agreed restraint under Art. 6.9	Dec. 1995		Yes
7	US 352/652 Honduras	March 1995	Unilateral restraint under Art. 6.10	July 1995. Serious damage not demonstrated. No consensus on threat of serious damage. Further consultations recommended.		Yes
8	US 352/652 Turkey	March 1995	Agreed restraint under Art. 6.9	Dec. 1995		Yes

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB Panel	Restraint sustained?
9	US 352/652 Colombia	March 1995	Agreed restraint under Art. 6.9	Dec. 1995		Yes
10	US 352/652 Thailand	March 1995	Unilateral restraint under Art. 6.10	US decided to rescind measure in July 1995.		No
11	US 440 India	April 1995	Unilateral restraint under Art. 6.10	Aug./Sept. 1995. Threat of serious damage demonstrated.	Established in April 1996. US withdrew restraint after interim report issued in November 1996. Panel concluded US quotas not substantiated in Jan. 1997. India appealed some aspects of findings. Appellate Body report in April 1997.	Withdrawn in December 1996
12	US 435 India	April 1995	Unilateral restraint under Art. 6.10	Aug./Sept. 1995. Serious damage not demonstrated. No consensus on threat of serious damage.	Established in April 1996. US withdrew restraint, and India requested termination of panel.	Withdrawn in April 1996
13	US 434 India	April 1995	Unilateral restraint under Art. 6.10	Aug./Sept. 1995. Serious damage or actual threat thereof not demonstrated. Recommended that US rescind measure. US rescinded measure in Oct 1995.		No
14	US 435 Honduras	April 1995	Unilateral restraint under Art. 6.10.	Aug./Sept. 1995. Consultations resumed.		Yes, through Sept. 1997
15	US 670-L Philippines	April 1995	Unilateral restraint under Art. 6.10	US rescinded measure in Sept. 1995 before review.		No
16	US 670-L Sri Lanka	April 1995	Agreed restraint under Art. 6.9.	US rescinded measure in June 1996.		No

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB panel	Restraint sustained?
17	US 670-L Thailand	April 1995	Unilateral restraint under Art. 6.10	US rescinded measure in Sept. 1995 before review.		No
18	US 603 Thailand	April 1995	Unilateral restraint under Art. 6.10	US rescinded measure in Sept. 1995 before review.		No
19	US 342/642 Guatemala	May 1995	Agreed restraint under Art. 6.9	March 1996. Found to be justified.		Yes
20	US 444 Colombia	May 1995	Agreed restraint under Art. 6.9	Feb./March 1996. Found to be justified.		Yes
21	US 444 Philippines	May 1995	Unilateral restraint under Art. 6.10	US decided to rescind measure in Sept. 1995 before review.		No
22	US 351/651 Costa Rica	June 1995	Unilateral restraint under Art. 6.10	US decided to rescind measure in Oct. 1995 before review.		No
23	US 440 Hong Kong	July 1995	Unilateral restraint under Art. 6.10	Sept. 1995. Item already restricted. Safeguard action not justified. Recommended that US rescind measure. US rescinded measure in No. 1995.		
24	US 342/642 El Salvador	Oct. 1996	Unilateral restraint under Art. 6.10	Oct. 1996. Found to be justified.		Yes
25	Brazil 618 Hong Kong	Sept. 1996	Unilateral restraint under Art. 6.11.	Found that serious damage could be attributed in part to imports from Hong Kong. Recommended that Brazil rescind measure by Dec. 1997.	Hong Kong made statement at DSB meeting in April 1997 but never called for a panel.	Yes, through Dec. 1997.
26	Brazil 838 Hong Kong	Sept. 1996	Unilateral restraint under Art. 6.11.	Serious damage not demonstrated and recourse to Art. 6.11 not appropriate. Recommended that Brazil rescind measure. Brazil rescinded measure in Jan 1997.		No
27	Brazil 611 Korea	Sept. 1996	Unilateral restraint under Art. 6.11.	Review deferred at request of both parties in Dec. 1996.		Yes
28	Brazil 618 Korea	June 1996	Unilateral restraint under Art. 6.11.	Review deferred at request of both parties in Dec. 1996.		Yes

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB panel	Restraint sustained?
29	Brazil 619 Korea	Sept. 1996	Unilateral restraint under Art. 6.11.	Review deferred at request of both parties in Dec. 1996.		Yes
30	Brazil 620 Korea	Sept. 1996	Unilateral restraint under Art. 6.11.	Review deferred at request of both parties in Dec. 1996.		Yes
31	Brazil 627 Korea	Sept. 1996	Unilateral restraint under Art. 6.11.	Review deferred at request of both parties in Dec. 1996.		Yes
32	Ecuador "several textile and clothing items" Korea	Nov. 1996	Unilateral restraint under Art. 6.11.	Review postponed in Dec. 1996. TMB expressed concern over timetable violation. In Jan. 1997 TMB found measures to be in violation of Art. 6 and directed Ecuador to disinvoke article.		No.
33	Ecuador "several textile and clothing items" Korea	Nov. 1996	Unilateral restraint under Art. 6.11.	Review postponed in Dec. 1996. TMB expressed concern over timetable violation. In Jan. 1997 TMB found measures to be in violation of Art. 6 and directed Ecuador to disinvoke article.		No.
34	US 603 Thailand	Jan. 1998	Agreed restraint under Article 6.9	Postponed in March 1998. In April 1998, found to be justified.		Yes
35	Colombia 5209.42 Brazil	July 1998	Unilateral restraint under Article 6.10	July 1998. Found not to be justified.		No
36	Colombia 5209.42 India	July 1998	Unilateral restraint under Article 6.10	July 1998. Found not to be justified.		No
37	Colombia 5402.43 Korea	Nov. 1998	Unilateral restraint under Art. 6.10	No. 1998. Found not to be justified		Expired at the one year
38	Colombia 5402.43 Thailand	Nov. 1998	Unilateral restraint under Art. 6.10	No. 1998. Found not to be justified	Thailand requested the establishment of a panel in Sep. 1999. In Oct. 1999, Thailand withdrew request	Expired at the one year

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB panel	Restraint sustained?
39	US 301 Pakistan	April. 1999	Unilateral restraint under Art. 6.10	Review postponed in March 1999. In April 1999, found not to be justified.	Established in June 2000. The panel concluded that the US failed to demonstrate the actual threat of serious damage to the domestic industry in Dec. 2000. The US appealed to the Appellate body in July 2001.	The Appellate Body ruled in October 2001 that the United States should remove the restraint.
40	Argentina 218 Brazil	Oct. 1999	Unilateral restraint under Art. 6. 11	Oct. 1999 Found not to be justified. TMB noted that the recourse by Argentina to the provisions of Art. 6.11 had not been appropriate.	Brazil requested the establishment of a panel in Feb. 2000. The procedure for the composition of the panel was suspended due to mutually agreed solution in June 2000.	No
41	Argentina 219/220 Brazil	Oct. 1999	Unilateral restraint under Art. 6. 11	Oct. 1999 Found not to be justified. TMB noted that the recourse by Argentina to the provisions of Art. 6.11 had not been appropriate.	Brazil requested the establishment of a panel in Feb. 2000. The procedure for the composition of the panel was suspended due to mutually agreed solution in June 2000.	No
42	Argentina 224 Brazil	Oct. 1999	Unilateral restraint under Art. 6. 11	Oct. 1999 Found not to be justified. TMB noted that the recourse by Argentina to the provisions of Art. 6.11 had not been appropriate.	Brazil requested the establishment of a panel in Feb. 2000. The procedure for the composition of the panel was suspended due to mutually agreed solution in June 2000.	No

<b>No.</b>	<b>Filing country/ product/ subject country</b>	<b>Date taken up by TMB</b>	<b>Type of measure introduced</b>	<b>Initial TMB review</b>	<b>DSB panel</b>	<b>Restraint sustained?</b>
43	Argentina 313/317 Brazil	Oct. 1999	Unilateral restraint under Art. 6. 11	Oct. 1999 Found not to be justified. TMB noted that the recourse by Argentina to the provisions of Art. 6.11 had not been appropriate.	Brazil requested the establishment of a panel in Feb. 2000. Procedure for composition of this panel was suspended due to mutually agreed solution in June 2000.	No
44	Argentina 613/617/62 7 Brazil	Oct. 1999	Unilateral restraint under Art. 6. 11	Oct. 1999 Found not to be justified. TMB noted that the recourse by Argentina to the provisions of Art. 6.11 had not been appropriate.	Brazil requested the establishment of a panel in Feb. 2000. The procedure for the composition of the panel was suspended due to mutually agreed solution in June 2000.	No
45	Argentina 218 Pakistan	Dec. 1999	Unilateral restraint under Art. 6.11	Review postponed in Dec. 1999. Found not to be justified in Jan. 2000. In March 2000, Argentina communicated intention to comply with the recommendation.		No
46	Argentina 219/220 Pakistan	Dec. 1999	Unilateral restraint under Art. 6.11	Review postponed in Dec. 1999. Found not to be justified in Jan. 2000. In March 2000, Argentina communicated intention to comply with the recommendation.		No
47	Argentina 224 Pakistan	Dec. 1999	Unilateral restraint under Art. 6.11	Review postponed in Dec. 1999. Found not to be justified in Jan. 2000. In March 2000, Argentina communicated intention to comply with the recommendation.		No
48	Argentina 313/317 Pakistan	Dec. 1999	Unilateral restraint under Art. 6.11	Review postponed in Dec. 1999. Found not to be justified in Jan. 2000. In March 2000 Argentina communicated intention to comply with recommendation.		No

No.	Filing country/ product/ subject country	Date taken up by TMB	Type of measure introduced	Initial TMB review	DSB panel	Restraint sustained?
49	Argentina 613/617/62 7 Pakistan	Dec. 1999	Unilateral restraint under Art. 6.11	Review postponed in Dec. 1999. Found to be justified in Jan. 2000.		Yes, with a TMB- imposed time limit of Jan 2001
50	Argentina 229/629 Korea	April 2000	Unilateral restraint under Art. 6.11	Review postponed in March 2000. TMB expressed concern over timetable violation. In April 2000, found not to be justified. Argentina communicated its intention to comply with the recommendation.		No
51	Argentina 619 Korea	April 2000	Unilateral restraint under Art. 6.11	Review postponed in March 2000. TMB expressed concern over timetable violation. In April 2000, found not to be justified. Argentina communicated its intention to comply with the recommendation.		Yes, with a TMB- imposed minimum import level and 6% annual increase for subsequent years.
52	Argentina 620 Korea	April 2000	Unilateral restraint under Art. 6.11	Review postponed in March 2000. TMB expressed concern over timetable violation. In April 2000, found not to be justified. Argentina communicated its intention to comply with the recommendation.		No
53	Poland 5509.31/ 5509.32/ 5509.61 Romania	Sept. 2001	Unilateral restraint under Art. 6.10	Initial TMB review Sept. 2001. Found not to be justified. Poland communicated its inability to conform to the TMB recommendation in Oct. 2001. In Nov. 2001, the TMB did not reverse its previous finding.		No

Note: Dates refer to TMB meetings.

*Product categories:*

- 218: Woven cotton and cotton mixtures fabrics of yarns of different colours
- 219/220: Duck/special-weave cotton and cotton mixtures fabrics
- 224: Pile tufted cotton and cotton mixtures fabrics
- 229/629: Woven fabrics of synthetic filament mixed with other fibres, except cotton, coated and/or impregnated woven fabrics, except for those covered with polyvinyl chloride or polyurethane
- 301: Combed cotton yarn
- 313/317: Sheeting/twill cotton and cotton mixtures fabrics
- 342/642- Cotton and man-made fibre skirts
- 351/651- Cotton and man-made fiber pyjamas and other nightwear
- 352/652- Cotton and man-made fiber underwear
- 434- Men's and boys' wool coats other than suit-type
- 435- Women's and girls' wool coats
- 440- Woven wool shirts and blouses
- 444- Women's and girls' wool suits
- 603- Artificial staple yarn
- 611- Woven fabric containing 85% or more by weight artificial staple
- 613/617/627: Sheeting fabrics/twill and satin/staple-filament fibre combinations of cotton and cotton mixtures
- 618- Woven artificial filament fabric
- 619: Woven fabric of pure polyester filament, whether or not textured
- 620: Woven fabrics of pure polyamide and other filament
- 627- Sheeting of staple filament fibre combinations
- 670-L- Man-made fiber luggage
- 838 - Men's and boy's shirts, knitted or crocheted, of other textile material
- 5209.42 – Denim
- 5402.43- Plain polyester filaments
- 5509.31- Single acrylic/modacrylic staple yarn
- 5509.32- Multiple acrylic/modacrylic staple yarn
- 5509.61- Acrylic staple yarn mixed with wool or fine animal hair