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John M. Jennings

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# COMMENTS

## In Search of a Standard: “Serious Damage” in the Agreement on Textiles and Clothing

*John M. Jennings\**

### INTRODUCTION

The U.S. textile and apparel industries employed approximately two and a half million people in 1950.<sup>1</sup> Since then, the industries have lost close to one million jobs, of which 857,000 have been lost since 1970.<sup>2</sup> Competition from imported goods has contributed significantly to the decline.<sup>3</sup> Now the U.S. textile and apparel industries face the specter of accelerated job loss due to the “Agreement on Textiles and Clothing” (ATC)<sup>4</sup> – a product of the Uruguay Round of GATT nego-

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\* Juris Doctor Candidate, Northwestern University School of Law; Masters of Management Candidate, J.L. Kellogg Graduate School of Management, 1997. I would like to thank John McDonald, Jay Venzon, Allison Wing Takahashi, and L’Andra Branam for their comments.

<sup>1</sup> U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, 1 EMPLOYMENT, HOURS, AND EARNINGS, UNITED STATES, 1909-90 465, 506 (1991).

<sup>2</sup> Compare *id.* with U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, The Employment Situation: August 1996, USDL 96-365, Table B-1 (visited September 23, 1996) <ftp://stats.bls.gov/pub/news.release/emsit.txt> [hereinafter Employment Situation].

<sup>3</sup> Lane S. Hurewitz, Textiles, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 259, 297 (Terence P. Stewart ed., 1993).

<sup>4</sup> Agreement on Textiles and Clothing, Apr. 15, 1994, art. 2, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF

tiations<sup>5</sup> – which calls for the phasing out of import quota limitations in the textile and apparel industries.<sup>6</sup>

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MULTILATERAL TRADE NEGOTIATIONS 85, 86-90 (GATT Secretariat ed., 1994) [hereinafter ATC]. See *infra* notes 44-55 and accompanying text for related U.S. job loss projections.

<sup>5</sup> The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement which governs international trade. Ruth E. Olson, Note, *GATT – The Legal Application of Safeguards in the Context of Regional Trade Arrangements and its Implications for the Canada-United States Free Trade Agreement*, 73 MINN. L. REV. 1488 (1989). The GATT originated in 1947 as an attachment to the Final Act of the United Nations Conference on Trade and Employment. The agreement has subsequently been amended on numerous occasions. U.S. DEPARTMENT OF STATE, OFFICE OF THE LEGAL ADVISOR, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INT'L AGREEMENTS OF THE U.S. IN FORCE ON JAN. 1, 1995 (1995); see General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (hereinafter GATT 1947).

The Uruguay Round of Trade Negotiations was a seven year effort. It produced significant results, including the establishment of the World Trade Organization (WTO) to provide an institutional framework for managing trade relations among its members. Amelia Forges, Introductory Note, General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1, 2 (1994). The WTO Agreement includes several legal instruments annexed to the WTO agreement, including the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the ATC. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 143, 1153 (1994) (hereinafter Final Act); see also Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. II, para. 2, Annex 1A, reprinted in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess., 1337 (1994) (hereinafter IMPLEMENTING BILL). While GATT 1994 is legally distinct from GATT 1947, GATT 1994 includes and is essentially based on the prior GATT agreement. *Id.*, at 659, 660. The WTO will operate in much the same manner as the former GATT arrangement, but will oversee a wider variety of trade agreements and will utilize improved decision-making procedures. *Id.* at 659.

As of August 1, 1995 one hundred countries (including the United States) had accepted the Uruguay round agreements and become members of the WTO. WORLD TRADE ORGANIZATION, 2 GUIDE TO GATT LAW AND PRACTICE 1151 (6th ed. 1995).

In conformity with the Final Act's terminology, the author will refer to GATT 1947 where appropriate, but will also use the term GATT when referring to the multilateral trading system that has evolved under the GATT 1947 arrangement.

<sup>6</sup> See *infra* notes 24 to 43 and accompanying text. Developing nations, on the other hand, view the ATC's requirement of the gradual elimination of quotas as an opportunity to build their countries' textile and apparel industries thereby boosting employment. Consequently, administration of the ATC is a source of political conflict between the United States (and other developed countries) and developing countries. Cf. Frances Williams, *World Trade Fruits Fail to Ripen – Poor Nations Have Yet to See Benefits from Accord*, FIN. TIMES, Jan. 10, 1996, World Trade News Section, at 4.

Developing nations seek to develop their textile and apparel industries because the machinery involved is not too complex and because clothing is a basic necessity for the domestic market. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 182 (1989). Also, clothing industries are often a large part of national economies and can employ many people. Consequently, they are important to developed and developing nations and are politically significant. See *id.*

To mitigate the risk to the United States and other developed countries' textile and apparel industries, the ATC contains a transitional safeguard provision which allows importing countries to impose quotas during the phase-out period on unrestricted imports which cause "serious damage" or "actual threat thereof"<sup>7</sup> to a domestic industry. A transitional safeguard provides an adjustment period which buffers the adverse impact of sharply rising imports on the affected domestic group.<sup>8</sup> The limited reprieve allows workers and owners an opportunity to adjust to changing economic conditions.

Primary responsibility for regulating the use of transitional safeguards during the phase-out period falls on the Textile Monitoring Body (TMB), a body created by the ATC.<sup>9</sup> The TMB faces a significant challenge in carrying out this duty because the ATC does not define "serious damage" or "actual threat thereof." The difficulty of the TMB's task is compounded by the fact that the TMB, which must reach decisions by consensus, has members from both developing countries – which typically favor liberal trade in the textile and apparel industries – and developed countries – which typically favor restrictions on trade in these sectors.<sup>10</sup> In the event that countries involved in a transitional safeguard dispute are dissatisfied with decisions by the TMB, the countries can appeal TMB decisions to the WTO's Dispute Settlement Body (DSB).<sup>11</sup>

This Comment will demonstrate that the "serious damage" or "actual threat thereof" standard does not currently provide a predictable rule of decision and that the TMB must develop the standard in a common law manner in order for it to assume a consistent, non-polit-

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<sup>7</sup> ATC, *supra* note 4, art. 6, para. 2.

<sup>8</sup> 19 U.S.C. § 2251 (b) (1994) (domestic safeguards are intended to facilitate a positive adjustment of the domestic industry, which includes (1) enabling the domestic industry to better compete with imports after the safeguard is removed, (2) providing for an orderly transfer of resources to other productive pursuits, and (3) assisting an orderly transition of dislocated workers to productive pursuits); *Cf.* JACKSON, *supra* note 6, at 15-17, 148-53. Jackson also recognizes that transitional safeguards may exist primarily because of the political power of well organized special interest. *Id.* at 150-53. However, regardless of whether the economic adjustment or the special interest theory better explains why safeguards exist, safeguards should have the effect of providing a buffer and spreading the burden of economic adjustment.

For a scathing assessment of the motivations for and economic consequences of safeguards, see Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. Chi. L. Rev. 255 (1991) (discounting economic motivations for and benefits of safeguards and explaining the existence of safeguards with public choice theory).

<sup>9</sup> ATC, *supra* note 4, art. 8.

<sup>10</sup> See generally Williams, *supra*, note 6.

<sup>11</sup> *Id.*

ical meaning. Part I of this paper provides an overview of the trade regime which has governed textile and apparel trade over the past thirty years and the poor performance of the U.S. textile and apparel industries during that period. Part II summarizes key components of the new trade regime provided by the ATC and discusses the potential – primarily adverse – impact of the agreement on the U.S. industries. Part III describes the transitional safeguard, the dispute settlement procedure, and the transitional safeguard cases decided by the TMB to date. Part IV analyzes the cases decided to date and concludes that the serious damage standard as articulated by the ATC and applied by the TMB is unacceptably vague and subject to politically motivated interpretations. Part V recommends changes in the TMB's operating procedures which will facilitate development of a meaningful definition of "serious damage," thereby increasing the predictability and political neutrality of TMB decisions.

## I. HISTORICAL TEXTILE TRADE AND U.S. INDUSTRY PERFORMANCE

### A. The Managed Trade Regime

Management of international textile and apparel trade has historically operated outside of the general principles of GATT, including the prohibition of quantitative restrictions (*i.e.*, quotas) in GATT Article XI.<sup>12</sup> Instead, since the 1960s, the international textile and apparel market has been governed by multilateral and bilateral agreements between countries.

The first multilateral agreement was the "Short Term Arrangement," entered into in 1961. It was followed by a "Long Term Arrangement," which was in effect from 1962 through 1973.<sup>13</sup> In 1973, the Arrangement Regarding International Trade in Textiles (the MultiFiber Agreement or MFA) was signed by over thirty parties including the major textile suppliers to the United States such as India,

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<sup>12</sup> David J. Weiler and Allyson L. Senie, *The Commerce Department Speaks on International Trade and Investment 1994: International Rules of the Textile and Apparel Trade Regime*, 864 PLI/CORP. 505, 507 (1994). However, the departure from GATT principles has been sanctioned by GATT, as trade arrangements have been negotiated under the auspices of GATT. *Id.* at 507-08.

Quantitative restrictions refer to quotas, which impose limits on the total amount of imports which a country will accept, as opposed to tariffs which impose a duty (sometimes so high as to make trade prohibitive) on items but set no explicit limit on the amount of imports.

<sup>13</sup> *Id.* These agreements were primarily a response by the United States and Great Britain to the increased textile production capabilities of then newly developed countries such as Japan, Hong Kong, India, and Pakistan. John S. McPhee, *Agriculture and Textiles: The Fare and Fabric of Current GATT Negotiations*, 3 *IND. INT'L & COMP. L. REV.* 155, 161 (1992).

Hong Kong, and China.<sup>14</sup> The MFA provided a general framework and guiding principles under which countries reached bilateral agreements on quota levels and imposed unilateral quota restraints on a product-by-product basis.<sup>15</sup> Prior to the creation of the WTO and the ATC in 1994, the MFA governed an estimated 65 to 70 percent of the \$200 billion (U.S. dollars) world textile trade.<sup>16</sup>

The Uruguay Round of Trade Negotiations produced the ATC, which calls for the phasing out of the quotas under the MFA and for the integration of textiles into GATT 1994 over a ten-year period.<sup>17</sup> The ATC will bring an end to 30 years of managed trade in the textile industry.

### B. Historical U.S. Textile and Apparel Industry Performance

Despite the protection afforded by quotas negotiated or imposed under the MFA and other forms of protection such as tariffs, imported products have captured an increasing amount of the U.S. market. Between the introduction of the MFA in 1973 and 1994, there were jobs lost in the U.S. textile and apparel industries (see Table I). These job losses were due primarily to increased imports and technological advancements in production.<sup>18</sup> Textile companies also suffered sub-par profitability during this period.<sup>19</sup>

Nevertheless, the U.S. textile industry would likely have seen even greater declines if it were not for U.S. trade relief.<sup>20</sup> In theory, protection from imports increases the potential for future profitability and, consequently, induces investment in the protected industry. Increases in investment, research and development, productivity, and new product offerings of the domestic textile and apparel industries since 1980 support this theory.<sup>21</sup> The United States now has one of

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<sup>14</sup> Weiler and Senie, *supra* note 12, at 508. India and Hong Kong are also WTO Members; China is not a WTO Member. See *WTO Nominates Committee Heads at First Session of General Council*, INT'L TRADE DAILY (BNA), (Feb. 1, 1995), at d7 [hereinafter *WTO Nominates*].

The MFA extended trade regulations to manufactured fiber products and wool as well as cotton. Subsequent extensions of the original MFA have further expanded coverage to vegetable fibers and silk blends. Weiler and Senie, *supra* note 12, at 507.

<sup>15</sup> Weiler and Senie, *supra* note 12, at 508-09.

<sup>16</sup> McPhee, *supra* note 13, at 167.

<sup>17</sup> Weiler and Senie, *supra* note 12, at 519. See *infra* notes 24 to 43 and accompanying text.

<sup>18</sup> Hurewitz, *supra* note 3, at 298.

<sup>19</sup> See *id.*; AMERICAN TEXTILE MANUFACTURERS INSTITUTE, TEXTILE HILIGHTS: THE QUARTERLY ECONOMIC REVIEW OF THE TEXTILE INDUSTRY 13 (September 1994)(hereinafter ATMI HILIGHTS).

<sup>20</sup> See Alan Tonelson, *Beating Back Predatory Trade*, FOREIGN AFFAIRS, July/August 1994, at 123.

<sup>21</sup> *Id.* at 131-33.

TABLE I: ECONOMIC TRENDS IN THE TEXTILE AND APPAREL INDUSTRIES DURING THE MULTI-FIBER ARRANGEMENT

	1975	1980	1985	1990	1994
Domestic Employment: (a)					
Apparel	1,310	1,234	1,115	1,008	847
Textile	919	835	699	674	673
Total	2,229	2,069	1,814	1,682	1,520
Import Penetration Percentage: (b)					
Apparel (c)	14.5	18.9	30.3	37.0	43.4
Non-Apparel Textiles	3.8	4.7	16.3	19.2	28.2
Total Textiles (d)	14.2	16.8	33.4	40.0	49.8

(a) In thousands. 1975-1985 figures are from *supra* note 1. 1990 figures are from U.S. Department of Labor, Bureau of Labor Statistics, *EMPLOYMENT AND EARNINGS*, Aug. 1992, at 97,104 (1992). 1994 figures are from U.S. Department of Labor, Bureau of Labor Statistics, 43 *EMPLOYMENT AND EARNINGS*, Jan. 1996, at 50 (1996).

(b) Underlying data in square meter equivalents. ATMI HiLIGHTS, *supra* note 19 at 24.

(c) Apparel figures herein include only imported finished garments and do not reflect imported fabric that went into domestically produced apparel. *See id.*

(d) Includes non-apparel textiles, finished garments, and an estimated percentage of fabric and yarn imports that went into domestically produced apparel. *See id.*

the world's most efficient textile industries.<sup>22</sup> While job and market share losses have continued, increased efficiency resulting from investment has helped in preserving companies and jobs in the United States.<sup>23</sup> Import quotas have arguably helped to make these improvements in the U.S. industries possible. However, this protection will be phased out under the ATC.

## II. THE NEW ORDER AND ITS POTENTIAL EFFECTS ON THE U.S. TEXTILE AND APPAREL INDUSTRIES

### A. Overview of the ATC

The ATC calls for increased market access for textile and apparel trade and for the integration of textile and apparel products into the GATT 1994 regime over a ten-year period. Prominent features of the ATC include the gradual and complete elimination of quotas, increased market access requirements, stronger means of enforcement of quotas during the phase-out period, the provision of a transitional safeguard measure for the temporary protection of domestic industries from increased imports, and the establishment of the TMB to oversee implementation of the agreement.<sup>24</sup>

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<sup>22</sup> UNITED STATES INTERNATIONAL TRADE COMMISSION, *POTENTIAL IMPACT ON THE U.S. ECONOMY AND INDUSTRIES OF THE GATT URUGUAY ROUND AGREEMENTS*, Vol. 1, Ch. 25, IV-10 (June 1994) (hereinafter *POTENTIAL IMPACT*).

<sup>23</sup> *See* Tonelson, *supra* note 20, at 123.

<sup>24</sup> *See* IMPLEMENTING BILL, *supra* note 5, at 764-67.

The most significant provision of the ATC is Article 2 which calls for a phase-out of quotas through: (a) the gradual integration of all textile items into GATT 1994, thereby eliminating the quotas on these items, (b) growth in quota levels prior to each item's integration into GATT 1994, and (c) the prohibition of new quotas.<sup>25</sup> Products are to be integrated into GATT 1994 in three stages, resulting in 51% of all products listed in the Annex of the ATC being integrated within approximately seven years of the date of entry into force of the WTO Agreement and the remaining 49% being integrated in year ten.<sup>26</sup> Products not yet integrated into GATT 1994 and subject to quotas are to have annual quota growth rates accelerated.<sup>27</sup> Integration and quota growth acceleration is to occur according to the following schedule:<sup>28</sup>

Stage	Starting Date	Percentage of Products Integrated	Increase in Quota Growth Rates <sup>29</sup>
1	Date of Entry Into Force of WTO Agreement	16	16
2	37 Months After Above Date	17	25
3	85 Months After Above Date	18	27
4	121 Months After Above Date	All Remaining	N/A

All restrictions between WTO members (Members) in place before the entry into force of the WTO Agreement are to be governed

<sup>25</sup> ATC, *supra* note 4, art. 2. New quotas are permitted in limited circumstances by the ATC and relevant GATT 1994 provisions. *Id.* art. 2, para. 4.

<sup>26</sup> *Id.* art. 2, paras. 6, 8.

<sup>27</sup> *Id.* art. 2, para. 13-14. For example, if a quota growth rate of 1 percent per annum existed for a product pursuant to a bilateral agreement reached under the MFA, then the growth rate of the quota would be 1.16 percent per annum during the first phase of the transition period. Weiler and Senie, *supra* note 12, at 533.

Historically, quotas in the textile and apparel industries have generally had 6 percent per annum growth rates. JACKSON, *supra* note 6, at 182.

<sup>28</sup> ATC, *supra* note 4, art. 2. The WTO entered into force on January 1, 1995. Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L & COMM. REG. 111, 114 (1995).

Importing nations have discretion in selecting which items to integrate at different stages. POTENTIAL IMPACT, *supra* note 22. The United States has deferred the integration of seventy percent of imports by value to the end of the transition period which contributes to exporters concerns that, despite the language of the ATC, the United States will attempt to extend the quota system. Williams, *supra* note 6. However, the quota growth acceleration provided by the ATC will arguably increase the amount of quota availability prior to final integration of all items to such an extent that the impact of final integration on the U.S. industry may be only marginal. Jim Ostroff, *TMB Verdicts: Are The Scales Off Balance?*, WOMEN'S WEAR DAILY, Oct. 24, 1995, at 5.

<sup>29</sup> The acceleration of quota growth will be advanced by one stage for countries that accounted for 1.2 percent or less of an importing country's total quotas. ATC *supra* note 4, art. 2, para. 18.



by the ATC.<sup>30</sup> No new restrictions in terms of either products or Members are allowed to be implemented except as provided by the ATC or relevant GATT provisions.<sup>31</sup> The ATC and all restrictions thereunder are to be terminated ten years after the WTO Agreement enters into effect, at which time textiles and clothing will be fully integrated into GATT 1994.<sup>32</sup> There are to be no extensions of the ATC.<sup>33</sup>

The ATC also requires Members to increase market access to textile and clothing products by cutting and binding<sup>34</sup> tariffs, reducing or eliminating non-tariff barriers, and facilitating customs, administrative, and licensing procedures.<sup>35</sup> The ATC does not quantify market access requirements. However, it states that if a Member believes it is not being afforded market access in conformance with article 7, para. 1 of the ATC, it can bring the matter before the relevant WTO body.<sup>36</sup> For countries that are found to have failed to improve market access, the accelerated quota growth rates called for in stages two and three may be denied.<sup>37</sup>

While the ATC provides for the eventual removal of all quotas, it also calls for countries to abide by quotas in the interim period. The ATC states that circumvention of quotas by "transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents" frustrates the implementation of the ATC.<sup>38</sup> Members are to establish the necessary legal provisions and administrative procedures to address circumvention and are to consult

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<sup>30</sup> *Id.* art. 2, para. 1. The ATC requires all quantitative restrictions included in pre-existing bilateral agreements to be disclosed to the WTO. *Id.*

<sup>31</sup> *Id.* art. 2, para. 4.

<sup>32</sup> Only WTO signatories benefit. Therefore, China and Taiwan – the two largest textile and apparel suppliers to the United States – will not necessarily have quotas increased. POTENTIAL IMPACT, *supra* note 22, at IV-6. However, China may join the WTO in the near term. *See WTO Nominates*, *supra* note 14.

<sup>33</sup> ATC, *supra* note 4, art. 9.

<sup>34</sup> *Id.* art. 7, para. 1. A bound rate of duty is a legally negotiated rate which obligates the country to pay compensation or face possible retaliation if the ceiling rate is exceeded. POTENTIAL IMPACT, *supra* note 22, at IV-7 n.11.

<sup>35</sup> Many developing countries maintain market access barriers, including the prohibition of imports of textiles and apparel, by relying on the GATT balance of payments exceptions. Articles XII and XVIII of the GATT allow import restrictions to compensate for a serious decline in monetary reserves, to achieve a reasonable rate of increase in reserves, and for purposes of development in unusual circumstances, in contravention of normal GATT principles. POTENTIAL IMPACT, *supra* note 22, at IV-7. These exceptions could presumably allow developing countries to maintain restriction on textile imports despite ATC art. 7.

<sup>36</sup> ATC, *supra* note 4, art. 7, para. 3.

<sup>37</sup> *Id.* art. 8, para. 12.

<sup>38</sup> *Id.* art. 5, para. 1.

with the Member(s) concerned when circumvention is suspected.<sup>39</sup> If investigation reveals sufficient evidence of circumvention, a Member may take action including the introduction of restraints with respect to the circumventing Member's products.<sup>40</sup> Either party may refer the matter to the TMB for review and recommendations.<sup>41</sup>

As discussed in detail in part III of this comment, the ATC allows Members to apply a transitional safeguard – a temporary quota – if a product that is not already under any form of quota restraint is imported from a Member country (or countries) in such increased quantities as to cause “serious damage” or “actual threat thereof” to a domestic industry.<sup>42</sup> The TMB has the authority and responsibility to review applications of the transitional safeguard provision.<sup>43</sup>

### B. Potentially Dramatic Impact of the ATC on the Textile and Apparel Industries

The textile and apparel industries and their workers are notable among the industry sectors expected to bear the costs of economic adjustment resulting from the Uruguay Round Agreements (URA).<sup>44</sup> The Industry Sector Advisory Committee (ISAC) for the textile and apparel sector indicated that the ATC will result in increased imports and a corresponding 50% to 60% decline in U.S. textile and apparel production.<sup>45</sup> According to the United States International Trade Commission (USITC), an increase in textile imports of 5% to 15% is expected to overshadow a 1% to 5% increase in exports, resulting in a decline in U.S. textile production and employment.<sup>46</sup> An increase of

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<sup>39</sup> *Id.* art. 5, para. 2-3. If circumvention is alleged Members are to cooperate fully, “consistent with their domestic laws and procedures,” in investigating the matter. *Id.* art. 5, para. 3.

<sup>40</sup> *Id.* art. 5, para. 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* art. 6, para. 2.

<sup>43</sup> *Id.* art. 8, para. 1.

<sup>44</sup> *Implementation Issues Concerning the World Trade Org.: Hearings Before the Subcomm. on Int'l Trade of the House Ways and Means Comm.*, 104th Cong., 2d Sess. (1996)(prepared statement of JayEtta Z. Hecker, Associate Director International Relations and Trade Issues National Security and International Affairs Division)(hereinafter Hecker Statement), available in 1996 WL 5509707.

Liberalization of textile trade will likely benefit exporting nations, U.S. consumers, and U.S. exporters of other products. However, these gains will likely come at a high price to the U.S. textile and apparel industries. The purpose of this section is to indicate what the price will be in order to give perspective on the importance and contentiousness of the “serious damage” case decisions by the TMB.

<sup>45</sup> POTENTIAL IMPACT, *supra* note 22, at IV-7.

<sup>46</sup> The USITC model projects a “negligible” decline in textile employment and production, but this model inexplicably does not factor in the significant effect that the ATC is expected to have on the U.S. apparel industry, which constitutes 37% of the fiber produced domestically. *See*

over 15% of apparel imports is expected to significantly exceed growth in exports leading to modest reductions in production and employment.<sup>47</sup> The U.S. consumer is expected to benefit by a small amount from lower prices and greater product diversity.<sup>48</sup>

### 1. *The Apparel Industry*

Between 1964 and 1994, 50% of the world's apparel production capacity moved from developed to developing countries.<sup>49</sup> Between 1984 and 1994, apparel imports into the United States grew by 90% to approximately 43% of the U.S. market despite significant tariff and quota restrictions.<sup>50</sup> Developing countries, mainly in Asia, supply 90% of U.S. apparel imports.<sup>51</sup> The URA will stimulate further investment in apparel production in low wage countries and, thus, imports from developing nations.<sup>52</sup> In a joint submission, four apparel manufacturer associations stated that the URA would accelerate import penetration and threatened to eliminate 33% to 75% of the domestic apparel production.<sup>53</sup> The USITC estimated only "modest" job loss in the apparel sector.<sup>54</sup>

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*id.* at IV-10. The USITC estimates that because of the impact of the U.S. apparel market, the U.S. textile industry will experience a small decline in employment and production. *Id.* at IV-12.

<sup>47</sup> *Id.* The textile and apparel sector will benefit from the URA's increased protection of trade-related intellectual property rights which should curtail pirating of garment designs, labels, and trademarks. *Id.* U.S. textile and apparel firms should likely see increases in exports which could be increased if countries which have essentially banned apparel imports through tariffs or quotas allow even limited access. However, India is the only developing country with essentially closed markets that has a significant enough middle class and disposable income level to provide a meaningful market for U.S. apparel. *Id.*

<sup>48</sup> *Id.* Wholesalers and retailers support the phase-out of the MFA. The National Retail Federation noted that the URA would reduce the costs of clothing, widen the selection of apparel products, increase competitiveness of manufacturing industries that use textile inputs, and eliminate the welfare costs of the MFA quotas. *Id.* Some estimate the costs per consumer of U.S. protection of the textile and apparel industries to be as high as \$238. JACKSON, *supra* note 6, at 183.

<sup>49</sup> POTENTIAL IMPACT, *supra* note 22, at IV-14.

<sup>50</sup> *Id.* The United States had quotas on apparel imports from 41 developing countries, which supplied about 70% of apparel imports in 1993. *Id.* at IV-5.

<sup>51</sup> *Id.* at IV-14.

<sup>52</sup> *Id.* at IV-15.

<sup>53</sup> *Id.* at IV-7. The ISAC indicated that larger U.S. apparel manufacturers may also use factories abroad in order to compete with the low wage imported competition. *Id.* The ISAC also expressed concern that agreements on anti-dumping and subsidies and countervailing measures could have a detrimental impact on the U.S. textile and apparel industries due to the de minimus margins established therein. Many textile and apparel products are highly price sensitive, and the industry group noted that the 2-3% de minimus standards allowed in the URA could give foreign producers which dumped goods or were subsidized within the de minimus range an advantage over U.S. producers. *Id.* at IV-7.

<sup>54</sup> *Id.* at IV-12.

In the 18 months since the signing of the ATC, apparel jobs have declined by 10.7%.<sup>55</sup> While this figure suggests that the ATC has been significantly detrimental to the domestic industry, increased automation, a soft retail market, and other business factors may also have affected the decline.

## 2. *The Textile Industry*

The U.S. textile industry is expected to fare better than the apparel industry under the URA.<sup>56</sup> The U.S. textile industry is one of the world's largest and most efficient producers of textile mill products. United States textile manufacturers have high levels of productivity which they achieved through significant investment in new technology.<sup>57</sup> The U.S. mills excel in areas where quality, innovation, marketing, and service are competitive factors.<sup>58</sup> But the textile industry is dependent on the U.S. apparel industry as one of its largest customers. Largely because of this dependence, the textile industry is expected to experience a small decline in production and employment.<sup>59</sup>

In the first 18 months since the United States signed the WTO agreement, employment in the textile industry has declined by 4.6%, marking the first significant decline in textile employment since 1990.<sup>60</sup> As with the apparel industry, it is difficult to isolate the effect that the ATC had on this decline.

According to the American Textile Manufacturers Institute (ATMI), the national association for the U.S. textile industry, the negative effect of the ATC on the textile industry is exacerbated by the fact that the ATC will result in rapid import increases during the phase-out, without forcing truly open worldwide markets.<sup>61</sup> Accord-

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<sup>55</sup> Compare U.S. Department of Labor, Bureau of Labor Statistics, 43 EMPLOYMENT AND EARNINGS, Jan. 1996, at 50 with Employment Situation, *supra* note 2 (apparel employment declined from approximately 960,000 at the end of 1994 to 847,000 in June of 1996).

<sup>56</sup> POTENTIAL IMPACT, *supra* note 22, at IV-12, IV-14.

<sup>57</sup> *Id.* at IV-10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at IV-12. The greatest area of direct competition in textiles is in broadwoven cotton fabrics from India, Pakistan, and China. These nations each have government programs that keep their raw cotton prices below world market prices. U.S. mills also face higher health, safety, and labor costs than those in Asia. *Id.* at 15, 16.

<sup>60</sup> See *supra* note 55 (textile employment declined from approximately 673,000 at year end 1994 to 642,000 in June of 1996).

<sup>61</sup> POTENTIAL IMPACT, *supra* note 22, at IV-7. Ron Sorini, chief textile negotiator for the Bush administration and negotiator of the majority of the ATC, stated that a major shortcoming of the ATC is its failure to obtain specific market access requirements. Interview with Ron Sorini, Senior Vice President, International Development and Government Relations, Fruit of

ing to the ATMI, the United States would be able to compete in markets for high quality products if worldwide markets were open.<sup>62</sup>

The anticipated decline of the U.S. textile and apparel industries helps to explain why, as discussed in Section III of this Comment, the United States has been the primary user of the ATC's Transitional Safeguard provision.<sup>63</sup>

### III. THE TRANSITIONAL SAFEGUARD PROVISION AND CASES TO DATE

#### A. The Transitional Safeguard and Dispute Settlement Procedures

##### 1. *Transitional Safeguard Definition and Application*

Article six of the ATC provides a "transitional safeguard"<sup>64</sup> which allows a country to take action to protect its textile and apparel industries if there is "serious damage" or the "actual threat thereof" due to increased imports.<sup>65</sup> The provision is to be used "as sparingly

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the Loom, Inc., in Chicago, Ill. (Jan. 12, 1996). Instead the ATC has only a general statement that countries should improve market access. See ATC, *supra* note 4, art. 7.

<sup>62</sup> POTENTIAL IMPACT, *supra* note 22, at IV-7. Of the major textile and apparel suppliers that are GATT members, India, Pakistan, Thailand, Indonesia, Egypt, the Philippines, and Turkey are frequently cited for maintaining restrictive barriers. *Id.* at IV-12. Many markets that had been closed to U.S. exports, including India and Pakistan, are gradually opening as a result of URA market access agreements. Jennifer Hillman, *The GATT, the WTO and the Uruguay Round Agreements: Trade Activities Involving Textiles and Clothing*, 722 PLI/COMM. 879 (1995).

<sup>63</sup> See *infra* notes 109, 110 and accompanying text.

<sup>64</sup> ATC, *supra* note 4, art. 6, para. 1.

<sup>65</sup> *Id.* The safeguard provision in the ATC differs from the GATT 1994 provision in many respects. The ATC calls for transitional quotas to be applied on a Member-by-Member basis, *id.* art. 7, para. 4, whereas GATT 1994 safeguards are generally to be applied to products being imported irrespective of the source, with deviations permitted under certain conditions. Agreement on Safeguards, April 15, 1994, art. 2, para. 2, art. 5, para. 2, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 315 (GATT Secretariat ed. 1994)(hereinafter Agreement on Safeguards).

Also, the ATC allows a safeguard to be placed on unfairly traded goods without requiring compensation to the restricted party, which would be due under normal GATT 1994 rules. *World Trade Org. Meeting in Singapore: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 2d Sess. (1996)(Testimony of Julia K. Hughes, Chairman, U.S. Association of Importers of Textiles and Apparel)(hereinafter WTO Meeting in Singapore), available in 1996 WL 10830709. Unfairly traded goods are those tainted by dumping, government subsidies, or sellers' evasion of legitimate regulations regarding the environment, fair competition, intellectual property protection, etc. JACKSON, *supra* note 6, at 151. Additionally, the TMB has primary responsibility of supervising transitional safeguard measures, ATC, *supra* note 4, art. 8, para. 1, whereas disputes over GATT 1994 safeguards are reviewed in the first instance according to the Dispute Settlement Understanding. Agreement on Safeguards, *supra*, art. 14.

Like the GATT 1994 escape clause, the ATC safeguard provision is very vague. See *infra* notes 205 to 222 and accompanying text.

as possible,"<sup>66</sup> and it is not to be applied if the "particular product" to be restrained is already under restraint<sup>67</sup> or if it has already been integrated into GATT 1994 in accordance with the integration procedure prescribed by the ATC.<sup>68</sup>

"Serious damage" or "actual threat thereof" is to be determined based on the effect of imports on an industry as reflected by relevant economic variables such as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits, and investment.<sup>69</sup> For a transitional safeguard to be invoked, the damage to the industry must be caused by "increased quantities in total imports of that product."<sup>70</sup> Damage due to changes in technology or consumer preference is not actionable under this provision.<sup>71</sup> The Member seeking to apply a safeguard appears to bear the burden of proof regarding the serious damage determination.<sup>72</sup>

Measures invoked under the transitional safeguard are to be applied on a Member-by-Member basis. "Serious damage" must be attributed to individual Members. Attribution is to be based on a "sharp and substantial increase in imports, actual or imminent" from the Member and "the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction."<sup>73</sup> An "imminent increase"

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<sup>66</sup> ATC, *supra* note 4, art. 6, para. 1. In the United States, the Committee For the Implementation of Textile Agreements (CITA), a committee with members from the Departments of Labor, Commerce, Treasury, and State, as well as the Office of the U.S. Trade Representative (USTR), is responsible for making the United States' initial determination of serious damage. Weiler and Senie, *supra* note 12, at 512-14.

A serious damage determination by CITA leads to a notification or "call" on the relevant country, which informs the country that rising imports are damaging the U.S. industry and that the United States intends to put import restraints in place. *WTO Textile Body Recommends That U.S. Resume Talks on Underwear Imports*, 12 Int'l Trade Rep. (BNA) No. 30, at 1268 (July 26, 1995) [hereinafter *WTO Recommends U.S. Resume*].

When a country is called on a particular category, the United States presents a "Statement of Serious Damage" which describes the economic facts underlying the serious damage determination. See, e.g., COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, STATEMENT OF SERIOUS DAMAGE: CATEGORY 352/652 (COTTON AND MANMADE FIBER UNDERWEAR) (1995) [hereinafter *UNDERWEAR SERIOUS DAMAGE*], on file in the United States Commerce Department Trade Reference Room.

<sup>67</sup> ATC, *supra* note 4, art. 6, para. 4.

<sup>68</sup> *Id.* art. 6, para. 1.

<sup>69</sup> *Id.* art. 6, para. 3.

<sup>70</sup> *Id.* art. 6, para. 2.

<sup>71</sup> *Id.*

<sup>72</sup> The ATC says that a safeguard may be applied when "it is demonstrated" that serious damage exists and is "demonstrably" caused by imports. *Id.* art. 6, para. 2.

<sup>73</sup> *Id.* art. 6, para. 4.

must be measurable and based on more than mere allegation, conjecture, or possibility.<sup>74</sup>

Preferences are given to certain categories of Members and products in the application of the transitional safeguard. Least developed nations are to be accorded "significantly more favorable" treatment in the application of the transitional safeguard provision.<sup>75</sup> Similarly, Members whose total volume of exports is small relative to the total volume of exports of other Members and who account for only a small percentage of total imports of that product into a particular importing Member shall be afforded "deferential and more favorable" treatment in the application of safeguards.<sup>76</sup> Additionally, with respect to wool products from developing country Members whose (1) economies are dependent on the wool sector; (2) textile and clothing exports consist almost exclusively of wool products; and (3) exports to the importing Member are relatively small for the importing Member, "special consideration" is to be given to the economic needs of such Members when considering quota levels, growth rates, and flexibility.<sup>77</sup> Finally, "more favorable" treatment is to be accorded to re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent re-importation when this type of trade represents a significant portion of the Member's total textile exports.<sup>78</sup> Safeguards are not to be used at all on exports of "handloom fabrics of the cottage industry . . . or traditional folklore handicraft" products traded in "commercially significant quantities prior to 1982,"<sup>79</sup> and products made of pure silk.<sup>80</sup>

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<sup>74</sup> *Id.* art. 6, n.6. For example, the possibility of an imminent increase in imports based on increased capacity in another country would not be sufficient. *Id.*

Hereinafter, the required quantum of (1) "serious damage" or "actual threat thereof" to a domestic industry, (2) causal connection between the damage to the domestic industry and imports, and (3) attribution to the Member against whose products a safeguard is sought, which is sufficient to support a safeguard shall be referred to collectively as the "Serious Damage" standard.

<sup>75</sup> *Id.* art. 6, para. 6(a). The ATC does not specify what constitutes "significantly more favorable" treatment, nor does it define developing or least developed nations.

Many developing nations are significant textile exporters. *See* Williams, *supra* note 6; *cf.* JACKSON, *supra* note 6.

<sup>76</sup> ATC, *supra* note 4, art. 6, para. 6(b).

<sup>77</sup> *Id.* art. 6, para. 6(c).

<sup>78</sup> *Id.* art. 6, para. 6(d).

<sup>79</sup> *Id.* Annex, List of Products Covered by This Agreement, para. 3. "Commercially significant" is not defined but examples of such items are listed as "bags, sacks, carpetbacking, cordage, luggage, mats, matting and carpets made from fibers such as jute, coir, sisal, abaca, maguey and henequen." *Id.*

<sup>80</sup> *Id.*

Members proposing to take a safeguard action shall provide the relevant facts to the affected Member(s) and the TMB; the safeguard proponent shall seek a consultation with the affected party.<sup>81</sup> If the consultations produce an agreement on a restraint level, then a quota can be fixed at not less than the level of imports over the 12 months ending two months before the notification was issued to the affected Member.<sup>82</sup> If there is no agreement within 60 days of the request for consultations, the initiating Member may apply a restraint.<sup>83</sup> Safeguard measures can be maintained for up to three years without extension, or until the product is integrated into GATT 1994.<sup>84</sup> If the restraint is in place for more than one year, it must increase at an annual rate of at least 6%, unless otherwise justified to the TMB.<sup>85</sup>

Importing Members have significant control over the use of safeguards in that they can choose when to issue a call and can apply a restraint if consultations do not produce an agreement. This power is to be checked, however, by the TMB.

## 2. TMB Review Procedure and Membership Composition

### a. Review Procedure

The TMB is to review all safeguard actions. If Members reach a bilateral agreement, the TMB is to determine whether the agreement is justified by the ATC and is to make appropriate recommendations to the Members concerned.<sup>86</sup> If an agreement is not reached and a safeguard is unilaterally imposed, the TMB is to “promptly conduct an examination of the matter” and “make appropriate recommendations to the Members concerned within 30 days.”<sup>87</sup> It is of note that the burden of proof in a transitional safeguard matter appears to be on

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<sup>81</sup> *Id.* art. 6, para. 7.

<sup>82</sup> *Id.* art. 6, para. 8.

<sup>83</sup> *Id.* art. 6, para. 10. The restraint level is to be no less than the level of imports over the 12 months ending 2 months before the notification was issued. *Id.* art. 6, para. 8.

In “highly unusual or critical circumstances” a safeguard may be applied before consultations with the affected country, subject to prompt consultation with the affected country and review by the TMB. *Id.* art. 6, para. 11.

<sup>84</sup> *Id.* art. 6, para. 12.

<sup>85</sup> *Id.* art. 6, para. 13.

<sup>86</sup> *Id.* art. 6, para. 9. However, the TMB has yet to recommend that any bilateral agreements be overturned. *See infra* note 222 and accompanying text.

<sup>87</sup> ATC, *supra* note 4, art. 6, para. 10. Also, either member can refer the matter to the TMB prior to the expiration of the sixty day consultation period or the imposition of a safeguard. *Id.*



the Member seeking to invoke a safeguard,<sup>88</sup> and the TMB's standard of review appears to be *de novo*.<sup>89</sup>

After reviewing a matter, which review must include an invitation to the Members concerned to participate, the TMB issues observations or recommendations<sup>90</sup> which Members are to "endeavor to accept in full."<sup>91</sup> If a Member does not accept the recommendations, the Member is to provide the TMB with its reasons within one month of receiving the recommendations. Following consideration of the reasons given, the TMB is to issue further recommendations. If the matter remains unresolved, either party may refer the matter to the Dispute Settlement Body (DSB) and invoke Article XXIII of GATT 1994 and the Dispute Settlement Understanding.<sup>92</sup>

#### b. Membership

The TMB consists of ten members "appointed by Members designated by the [WTO's] Council For Trade In Goods" and a Chairman.<sup>93</sup> Membership on the TMB is to be "balanced and broadly representative of the [WTO] Members" and is to rotate "at appropriate intervals."<sup>94</sup> Each member of the TMB serves in an "*ad personam* basis."<sup>95</sup> The TMB is to "develop its own working procedures,"<sup>96</sup> and

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<sup>88</sup> See *supra* note 72. Because the TMB is to "conduct an examination," ATC, *supra* note 4, art. 6, paras. 10, 11, the party seeking to apply the safeguard may not formally have the burden of proof before the TMB. However, as a functional matter, the party seeking to apply the safeguard will likely have to produce "factual data," *Id.* art. 6, paras. 9, 10, sufficient to support its case.

<sup>89</sup> *Id.*, art. 6, para. 10. The TMB is to conduct an "investigation of the matter, including the determination of serious damage." *Id.* The language suggests that the TMB shall make its own determinations without regard for the parties' factual findings or conclusions regarding serious damage.

<sup>90</sup> *Id.* art. 8, para. 5-7.

<sup>91</sup> *Id.* art. 8, para. 9.

<sup>92</sup> *Id.* art. 8, para. 10. Article XXIII of GATT 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes provide for a dispute settlement by a three member *ad hoc* panel with the possibility of appeal to a standing seven person appellate body. If a Member fails to abide by the DSB's recommendations, the DSB can authorize Members to suspend the application of concessions or other obligations to the reluctant Member. The Member may then withdraw from GATT. See GATT 1994, *supra* note 5, art. XXIII; Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1226 (1994) (hereinafter Dispute Settlement Understanding). See also Porges, *supra* note 5, at 4-5.

<sup>93</sup> ATC, *supra* note 4, art. 8, para. 1.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Thus, TMB members are to serve in an individual, theoretically politically neutral capacity rather than as a representative of their governments.

<sup>96</sup> *Id.* art. 8, para. 2.

reach decisions by consensus.<sup>97</sup> A TMB consensus does not require the consent of a representative appointed by a country that is a party to a controversy before the TMB.<sup>98</sup>

The composition of the TMB was arguably the most prominent early problem faced by the WTO.<sup>99</sup> The ATC's statement that the TMB members should be "balanced and broadly representative" obviously lacks specificity. Importing countries, primarily led by the European Union,<sup>100</sup> argued that the ten TMB seats should be evenly split between members selected by importing and exporting countries, as had been the case with the Textile Surveillance Body<sup>101</sup> which administered the MFA.<sup>102</sup> Exporting countries asked for a majority (six) of seats<sup>103</sup> based on the relatively large number of exporting countries.<sup>104</sup> Importing countries argued that the TMB composition should reflect the size of import markets, not the number of countries involved.<sup>105</sup> Developing countries threatened to hold up all WTO committee chairperson appointments – which would have prevented the WTO from operating effectively – until the dispute was settled.<sup>106</sup>

The dispute has been resolved by an agreement which, for the first three years, gives exporting nations five seats, importing nations four seats, and creates one "swing" seat to be held by the two groups alternately.<sup>107</sup> Additionally, the outgoing chairman of GATT, Andras

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<sup>97</sup> See *id.* The ATC does not specifically state how decisions should be reached. See *id.* However, it states 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.* at art. 8, para. 2. The traditional GATT method of decision making has been predominately by consensus. See IMPLEMENTING BILL, *supra* note 5, at 662. The TMB reportedly makes decisions by consensus. See WTO Recommends U.S. Resume, *supra* note 66.

<sup>98</sup> ATC, *supra* note 4, art. 8, para. 2.

<sup>99</sup> Sheel Kohl, *Starting Date for Trade Body Agreed*, SOUTH CHINA MORNING POST, Dec. 9, 1994, Business Section, at 14; see Frances Williams, *Textiles Compromise Puts WTO Back on Course*, FIN. TIMES, Feb. 1, 1995, World Trade News Section, at 4.

<sup>100</sup> See Williams, *supra* note 99.

<sup>101</sup> GATT Textile Board Chairman Calls for More Cooperation With WTO Monitoring, 11 INT'L TRADE REP. (BNA) 1898 (Dec. 7, 1994).

<sup>102</sup> Irene Ngoo, *Last-minute Accord Reached in Textile Row*, THE STRAITS TIMES (Singapore), Feb. 2, 1995, at 4.

<sup>103</sup> *Id.*

<sup>104</sup> John Zarocostas, *Nations Fail to Agree on Makeup of TMB*, DAILY NEWS RECORD, Dec. 22, 1994, at 12.

<sup>105</sup> *Id.*

<sup>106</sup> Williams, *supra* note 99.

<sup>107</sup> WTO Nominates, *supra* note 14. The exporting nations which will name a TMB member consist of:

1. One member of the Association of Southeast Asian Nations (with one member rotating with the five other nations);
2. Hong Kong and South Korea to alternate with each other;

Szepesi of Hungary, is to serve as the Chairman of the TMB.<sup>108</sup> The controversy that surrounded TMB membership indicates that the WTO Members recognize both the importance of the body and the potential for politically based decision-making by its members.

## B. TMB Transitional Safeguard Cases to Date

The United States has been the only country to invoke the ATC safeguard clause.<sup>109</sup> The United States issued 25 calls on WTO Members during the first 20 months of the ATC.<sup>110</sup> Several unresolved cases were referred to the TMB for review; many others were with-

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3. Pakistan and China to alternate with each other (if China does not become a WTO member, it will be replaced with another country);

4. India to alternate with one member of a group consisting of Egypt, Morocco, and Tunisia; and,

5. Latin American and Caribbean nations to decide among themselves how they will rotate a seat among themselves (this could eventually be expanded to include a second delegate).

Importing nations which will nominate a TMB representative include:

1. the United States;
2. the European Union;
3. Canada; and
4. Japan.

The "swing seat" is to be occupied by Norway, Turkey, the Czech Republic, Hungary, Poland, Romania, or Slovakia. Norway will represent these countries in the first year, Turkey in the second year. After two years the countries will decide among themselves which country chooses the delegate to represent them. *Id.*

Notably, during the first year of TMB meetings, China, a non-WTO member but a major textile exporter and a potential WTO Member in the future, was allowed to attend TMB meetings. *WTO Nominates, supra* note 14.

<sup>108</sup> The selection of Mr. Szepesi was part of the compromise reached to resolve the TMB composition issue. Williams, *supra* note 99.

<sup>109</sup> See Hecker Statement, *supra* note 44 ("the United States is the only WTO member country thus far to impose a new quota under the agreement's safeguard procedures"). Turkey has also imposed textile and apparel import restrictions, but this appears to have been based on an interpretation of European Union rules and not a serious damage determination. See *U.S. Says No to India's Request for WTO Panel in Dispute Over Indian Woolens*, DAILY NEWS REC. (Mar. 28, 1996), at 5 [hereinafter *U.S. Says No*].

<sup>110</sup> A word search (using the search terms "serious damage" & "CITA") of Westlaw and LEXIS Federal Register databases on November 6, 1996, indicated that for the period from January 1, 1995, to August 31, 1996, the United States issued 30 calls on textile and apparel items. Of these, 21 were issued against products from countries which were WTO members when the call was initiated. Another 4 (two calls on El Salvadoran products and one each on products from Columbia and Guatemala) were directed at items from countries which became WTO members before August 31, 1996. One country called (Bulgaria) became a WTO Member after August 31, 1996. The final four calls were issued against products from non-WTO Members and were authorized under Section 204 of the Agriculture Act of 1956, as amended.

Thus, 25 U.S. textile and apparel calls affected WTO Members during the first 20 months of the ATC.

drawn or settled.<sup>111</sup> While the TMB is to review settlement agreements of WTO Members, the TMB has not disturbed any bilateral settlements.<sup>112</sup>

In six of the cases decided by the TMB, the TMB attempted to resolve the conflict by application of the "serious damage" standard. The results were mixed. The TMB decided in favor of the exporting country in two cases, in favor of the United States in one case, and reached no decision in three cases.<sup>113</sup>

The following subsections summarize the cases that the TMB has attempted to decide based on application of the "serious damage" standard. Each subsection encompasses: (1) a listing of the countries *initially* called by the United States and a statement of which countries' cases settled before reaching a TMB hearing, (2) the basis of the United States' determination of damage to the U.S. industry from imported goods, (3) the basis of attribution of damage to total imports and imports from the countries *whose cases went before the TMB*, and (4) the TMB's decision and the status of the dispute as of August 31, 1996.<sup>114</sup>

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<sup>111</sup> See *World Trade Organization: Hearing Before the House Ways and Means Comm.*[sic], 104th Cong., 2d Sess. (1996) (statement of Terence P. Stewart, Managing Partner, Stewart and Stewart)(hereinafter Stewart Statement), available in 1996 WL 7137141. Stewart stated that 10 cases had been referred to the TMB. *Id.* Another source stated that the TMB reviewed 9 cases during this period. Hecker Statement, *supra* note 44. The author has found no indication of a TMB review of a U.S. *call* since the period covered by these statements.

<sup>112</sup> See *infra* note 222 and accompanying text.

<sup>113</sup> The author has found six cases that the TMB attempted to decide by reference to the Serious Damage standard. These cases are shown in Table II, *infra* Section III. Note that in a seventh case the TMB ruled in favor of Hong Kong, but the TMB made its decision based on its determination that the product in question was already under restraint. *WTO Rules for Hong Kong in Wool Dispute With the U.S.*, REUTERS, Sept. 29, 1995, available in LEXIS, News Library, REUFIN File. Because this case with Hong Kong was not decided based on a determination of serious damage or its causes, it is not considered to have involved the Serious Damage standard for the purposes of this Comment.

<sup>114</sup> The economic facts of the following cases are derived from the respective "Statement of Serious Damage" issued by the United States for each case. These economic figures are summarized in Table II, which follows Section III, *infra*. The actual facts as presented by the United States to the TMB during the TMB's formal review may have differed from those found in the "Statement of Serious Damage" due to the lapse in time between the calls and the TMB hearings. The USTR refuses to make available the information contained in the U.S. presentation(s) to the TMB. See *infra* notes 266 to 268 and accompanying text.

Despite the potential discrepancies between the information presented herein and that on which the TMB based its decisions, the information found in each "Statement of Serious Damage" should provide a reasonable picture of the United States' case, given that the time elapsed between the calls and the TMB hearings was limited. Economic conditions could have changed in this time period; but given the USTR and TMB's refusal to provide information, what is presented is all that is publicly available.

1. *Underwear*

The United States called five WTO countries on underwear exports: the Dominican Republic, Costa Rica, Honduras, Thailand, and Turkey.<sup>115</sup> Bilateral agreements were reached with the Dominican Republic<sup>116</sup> and Turkey.<sup>117</sup> The safeguard action against Thailand was withdrawn.<sup>118</sup> The TMB formally reviewed the unilateral quotas imposed against Costa Rica and Honduras.<sup>119</sup>

According to the United States, "serious damage" to the U.S. domestic underwear industry was evidenced by a decline in production of 3.8% in 1993 and 3.5% in the first nine months of 1994.<sup>120</sup> Domestic producers' share of the domestic market declined from 73% in 1992 to 65% in 1994.<sup>121</sup> In that same two-year period, domestic employment declined by 2,321 jobs, or approximately 5% of category jobs.<sup>122</sup>

The effect of underwear imports on the domestic industry was evidenced by a 48.7% increase in total underwear imports into the United States between calendar year 1992 and 1994.<sup>123</sup> Imported goods as a percentage of total domestic production were 54% in the year ended September 1994, up from 37% in 1992.<sup>124</sup>

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The TMB decisions as reported herein are based on newspaper reports and have been verbally verified by U.S. trade officials. The TMB does not release its decisions to the public. The USTR refused to release the TMB decisions, but a representative stated that the decisions included no explanation of the TMB's reasoning, and read an opinion to the author. The author read one TMB decision in the office of a trade official which confirmed that they provide no insight into the TMB's reasoning. See *infra* notes 266 to 268 and accompanying text.

<sup>115</sup> UNDERWEAR SERIOUS DAMAGE, *supra* note 66 (the countries called and all of the economic facts that follow regarding this category are from this source).

<sup>116</sup> CITA Announces New Limits on Underwear And Nightwear, 12 INT'L TRADE REP. (BNA) 1103 (June 28, 1995).

<sup>117</sup> Unilateral quotas were initially imposed on goods from Turkey and Thailand. The TMB was to review these actions, but just before the scheduled hearing the United States and Turkey reached an agreement and the United States rescinded the quota on goods from Thailand. Jim Ostroff and John Zarocostas, *Importers, U.S. Makers Accept TMB Quota Underwear Ruling. (World Trade Organization's Textile Monitoring Body Rules That US Quota On Caribbean Imports Is Without Basis)*, DAILY NEWS REC., July 25, 1995, at 4.

<sup>118</sup> *Id.*

<sup>119</sup> WTO Recommends U.S. Resume, *supra* note 66, at 1268. These are considered to be two cases for purposes of discussing the number of TMB decisions. Because the cases involved the same Statement of Serious Damage and the TMB decided them at the same time, hereinafter the two cases are collectively referred to as "Underwear."

<sup>120</sup> See UNDERWEAR SERIOUS DAMAGE, *supra* note 66, at 10.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.* at 9.

<sup>124</sup> *Id.* at 10.

Costa Rica accounted for 15% of total underwear exports to the United States in 1994 and experienced a 61% increase in exports to the United States between 1992 and 1994.<sup>125</sup> Costa Rican underwear entered the United States at a landed duty-paid value 69% below the average price of U.S. producers in 1994.<sup>126</sup> Honduras represented 6.7% of U.S. imports in 1994, and saw a 182% increase in exports between 1992 and 1994.<sup>127</sup> In 1994, Honduran underwear entered the United States at a value equal to 62% of the average U.S. producer's price.<sup>128</sup>

The TMB found that Costa Rican and Honduran underwear was not causing serious damage to the U.S. industry; however, the TMB could not reach a consensus on whether the imports constituted a threat of serious damage.<sup>129</sup> Consequently, the TMB recommended that the countries and the United States resume consultations regarding the issue.<sup>130</sup> As the TMB did not recommend rescission of the safeguard, the quota remained in place during additional consulta-

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<sup>125</sup> *Id.* at 7.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* It is of note that the United States was willing to give the countries called practically unlimited Guaranteed Access Level (GAL) quotas under the 807(a) program. Under 807(a), fabric that is made and cut in the United States is then assembled (sewn) offshore. Only the value added in assembly off shore is subject to tariffs when the finished product is reimported to the United States. Prior to the calls, much of the underwear imported from the Caribbean nations was being produced under the 807 program, which applies to fabric that is cut (but not necessarily made) in the United States and then assembled offshore. Tariffs under 807 also apply only to the value added portion of the good when reimported. The American Apparel Manufacturers Association expressed disapproval for the call because nearly all of the underwear imported from the Caribbean was made by their members, primarily from U.S. made fabric. However, the American Textile Manufacturers Institute supported the call because the 807(a) program would *require* that the imported underwear contain U.S. made fabric. Jim Ostroff, *Makers Hit U.S. Plan for CBI Underwear Quota*, WOMEN'S WEAR DAILY, Apr. 10, 1995, at 12.

The United States' goal may be sanctioned by the ATC, which states that "more favorable treatment shall be accorded to reimports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation . . . when these products are imported from a Member for which this type of trade represents a significant proportion of its total exports of textiles and clothing." ATC, *supra* note 4, art. 6, para. 6(d).

<sup>129</sup> *WTO Recommends U.S. Resume*, *supra* note 66.

Within five months of the TMB's inability to reach a decision on the threat of serious damage in this case, Fruit of the Loom, one of the United States' largest makers of underwear announced that it would close 13 U.S. plants, eliminate 5,000 jobs, and would experience a significant net loss for the year. THE CHICAGO SUN TIMES, Dec. 21, 1995, Financial Section, at 56. (Other factors in addition to increased imports also contributed to the net loss). Fruit of the Loom has shifted production capacity offshore in order to compete with lower priced imports. See Charles Peters, *Truth was Stranger Than Fiction in America in 1995 - As Usual*, CHARLESTON GAZETTE AND DAILY MAIL, Sunday Edition, Dec. 24, 1995, at C2.

<sup>130</sup> *WTO Recommends U.S. Resume*, *supra* note 66.

tions.<sup>131</sup> The dispute with Honduras was eventually settled in an agreement that also involved nightwear and women's and girls' wool coats.<sup>132</sup>

Despite consultations advised by the TMB, the United States and Costa Rica failed to reach an agreement. Upon examination of reports from the two countries, the TMB affirmed its earlier findings.<sup>133</sup> Costa Rica requested additional consultations under Article XXIII of GATT 1994 and Article 4 of the WTO Dispute Settlement Understanding (DSU).<sup>134</sup> No agreement was reached, and on Feb. 22, 1996, Costa Rica requested panel review under the DSU.<sup>135</sup> In November of 1996, as this Comment was going to press, the DSB panel found that the United States had not demonstrated serious damage, apparently based largely on the fact that the United States had reached large quota levels agreements with the other countries called in this category.<sup>136</sup>

## 2. *Nightwear*

The United States called four countries – Costa Rica, El Salvador, Honduras, and Jamaica – on “Cotton and Manmade Fiber Pajamas & Other Nightwear” imports.<sup>137</sup> Bilateral agreements were reached with Jamaica and El Salvador.<sup>138</sup> Unilateral limits were im-

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<sup>131</sup> Williams, *supra* note 6.

<sup>132</sup> U.S., *Honduras Settle Underwear Quota Issue*, DAILY NEWS RECORD, Sept. 19, 1995, at 8. The settlement contained a quota that allowed for significant growth in underwear imports and gave a practically unlimited GAL quota for items assembled in Honduras from U.S.-made and U.S.-cut fabric under the 807(a) program. *Id.* (See Ostroff, *supra* note 128, for an explanation of 807(a)).

<sup>133</sup> Notices, WTO Dispute Settlement Proceedings Concerning U.S. Restrictions on Cotton and Manmade Fiber Underwear from Costa Rica, 61 Fed. Reg. 12,129 (Office of the U.S. Trade Representative 1996).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Helene Cooper, *WTO Says U.S. Quotas on Underwear Imported From Costa Rica are Unfair*, WALL SR. J., Nov. 11, 1996, at B8. *al, Id.* The United States has not yet indicated whether it will remove the quotas, appeal the decision, or not abide by the decision. *See id.*

<sup>137</sup> COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, STATEMENT OF SERIOUS DAMAGE: CATEGORY 351/651 UPDATED TO INCLUDE COSTA RICA (COTTON AND MANMADE FIBER PAJAMAS AND OTHER NIGHTWEAR), (June 1995) (the countries called and all of the economic facts that follow regarding this category are from this source) [hereinafter NIGHTWEAR SERIOUS DAMAGE], on file in the U.S. Commerce Department Trade Reference Room. The figures provided herein are from the June Statement of Serious Damage rather than an earlier Statement from March 1995 because the June Statement was closer in time to the TMB decision and therefore should better reflect the data before the TMB.

<sup>138</sup> *WTO Recommends U.S. Resume*, *supra* note 66, at 1269; *see also CITA Announces New Limits on Underwear and Nightwear*, 12 INT'L TRADE REP. (BNA) 1103 (June 28, 1995) (the agreement with Jamaica provides a GAL quota for imports from Jamaica of nightwear assembled from U.S.-made and U.S.-cut fabric but limits the amount otherwise imported).

posed on Costa Rica but were later rescinded.<sup>139</sup> Unilateral limits were imposed on Honduras, and the TMB conducted a formal review of the Honduran quota.<sup>140</sup>

The U.S. alleged "serious damage" based on a 14.1% decrease in domestic manufacturers market share and a corresponding 10.7% decrease in U.S. production between 1992 and 1994.<sup>141</sup> During this time period, the United States experienced a loss of 807 jobs in the nightwear industry, or 5.4% of industry jobs.<sup>142</sup> However, U.S. industry production declined by less than one half of one percent and total wages actually increased in 1994.<sup>143</sup>

The link between domestic industry damage and imported products was reflected by a 22% increase in total category imports between 1992 and 1994.<sup>144</sup> Imported products as a percentage of domestic production rose from 80% in 1992 to 110% in the first nine months of 1994.<sup>145</sup> Honduran exports increased by 71% in 1994 and rocketed up 722% between 1992 and 1994.<sup>146</sup> Honduran imports entered the United States at a landed duty paid price 53% less than the average price of domestic goods in 1994.<sup>147</sup> Nevertheless, Honduras accounted for only 1.5% of U.S. nightwear imports in the 12 months ended March 1995.<sup>148</sup>

The TMB found that nightwear imports from Honduras were not causing serious damage to the U.S. industry and that there was not a threat of such damage. The TMB accordingly recommended that the United States rescind the unilateral quotas that it had imposed.<sup>149</sup> The United States initially did not comply with the TMB recommenda-

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<sup>139</sup> The United States rescinded its safeguard on Costa Rican nightwear after the TMB ruled against the United States in the Honduran nightwear case. Both of these U.S. calls were based on the same "Statement of Serious Damage." Jim Ostroff, *U.S. Withdraws Curbs on Costa Rican Cotton, Man-made Nightwear, Pajamas*, DAILY NEWS REC., Nov. 3, 1995, at 8.

<sup>140</sup> *WTO Recommends U.S. Resume*, *supra* note 66. This case is hereinafter referred to as "Nightwear."

<sup>141</sup> NIGHTWEAR SERIOUS DAMAGE, *supra* note 137, at 10 (Table II).

<sup>142</sup> *Id.* at 11.

<sup>143</sup> *Id.* at 10, 11.

<sup>144</sup> *Id.* at 9 (Table I).

<sup>145</sup> *Id.* at 8 (Table II). Approximately 7% growth in the size of the domestic market cushioned the effect of increased imports on the domestic manufacturing industry's production and market share. *See id.*

<sup>146</sup> *Id.* at 6.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *WTO Recommends U.S. Resume*, *supra* note 66.

The U.S. Chief Textile Negotiator, Rita Hayes, noted that a call may be justified when issued, despite a subsequent TMB decision against the United States or a "no decision." Hayes pointed out that in the time between the call and the TMB hearing import levels might have



tion.<sup>150</sup> However, the United States ultimately rescinded the safeguard on Honduran nightwear in an agreement reached that also covered outstanding disputes over underwear and women's and girls' wool coats.<sup>151</sup>

### 3. *Men's Coats*

The United States called two countries – Brazil and India – on this category.<sup>152</sup> The call against Brazil was dropped prior to a TMB hearing.<sup>153</sup> After consultations failed, the United States imposed a unilateral safeguard on India's products in this category, and the TMB reviewed the U.S. action and the serious damage determination.<sup>154</sup>

Alleged serious damage to the U.S. industry was demonstrated by a 4.2% decline in production and a 14.3% decline in market share in this category during the nine month period ending September 1994.<sup>155</sup> Between 1993 and 1994, 275 jobs – 4.8% of total category jobs – were lost. However, the decline in U.S. production was only 1.9% for the twelve month period ending September 1994.

The connection between domestic industry damage and imports was indicated by an increase in total category imports of 40.2% in the year ending January 1995. Imported items as a percentage of domestic production increased from 85% in 1992 to 111% during the nine month period ending September 1994.<sup>156</sup> Imports from India rose by 105% and accounted for 24% of total U.S. imports in the year ending January 1995. In both 1993 and 1994, India was the leading exporter

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been affected by unilateral quotas or the U.S. domestic industry might have increased production. Ostroff, *supra* note 28.

<sup>150</sup> Jim Ostroff, *Caribbean Underwear Row Goes Back to WTO's Court*. (*World Trade Organization on U.S. Underwear Trade With Costa Rica and Honduras*), *WOMEN'S WEAR DAILY*, Aug. 22, 1995, at 20.

<sup>151</sup> See *U.S., Honduras Settle Underwear Quota Issue*, *supra* note 132.

<sup>152</sup> COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, STATEMENT OF SERIOUS DAMAGE: CATEGORY 434 (MEN'S AND BOY'S WOOL COATS OTHER THAN SUIT TYPE) (1995) (the countries called and all of the economic facts that follow regarding this category are from this source) [hereinafter *MEN'S COATS SERIOUS DAMAGE*].

<sup>153</sup> *WTO's Textile Monitoring Body to Review Curbs on Woolen Garments*, 12 *INT'L TRADE REP.* 1382 (Aug. 16, 1995).

<sup>154</sup> *U.S. Gets Mixed Rulings By WTO Group on Restraints on Indian Wool Imports*, 12 *INT'L TRADE REP.* (BNA) 1571 (Sept. 20, 1995) [hereinafter *Mixed Rulings*]. The case is hereinafter referred to as "*Men's Coats*."

<sup>155</sup> The large decline in domestic manufacturers' market share relative to the moderate decline in production is explained by the fact that the total domestic market increased during this time period. See *MEN'S COATS SERIOUS DAMAGE*, *supra* note 152, at 7.

<sup>156</sup> The dramatic growth in imports compared to the modest decline in U.S. domestic production is explained by the fact that the U.S. domestic market grew by 11.1% during the twelve month period ending September 1994. See *id.*

of coats to the United States. In 1994, Indian coats in this category entered the United States at a landed, duty-paid price 70% below the U.S. domestic producers' average price.

The TMB found no serious damage or threat thereof and recommended that the United States rescind its safeguard.<sup>157</sup> The United States has rescinded the quota.<sup>158</sup>

#### 4. *Women's Coats*

The United States called two countries in this category – India and Honduras.<sup>159</sup> A unilateral safeguard was imposed against Honduras before a bilateral accord was reached as part of an agreement that included underwear and nightwear.<sup>160</sup> However, the United States was unable to reach an agreement with India and imposed a unilateral quota against the Indian products. The TMB reviewed the action.<sup>161</sup>

“Serious damage” to the U.S. industry was alleged based on a decline in domestic production of 1.0% during the nine month period ending September 1994 and 1.8% during the twelve month period ending September 1994. U.S. producers' market share declined by 6.8% in the first nine months of 1994 and was down by 4.4% for the twelve month period ending September 1994. Between 1993 and 1994, the United States reported a loss of 363 jobs, which represented 16.2% of the category jobs.<sup>162</sup>

The relationship between damage and imports was reflected by the fact that imports rose by 9% during the year ending January 1995 and captured 59% of the U.S. market. In this period, Indian exports surged by 402% to capture 3.1% of the United States market. In 1994, imports from India entered the United States at a price 79% below the U.S. producers' average price.

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<sup>157</sup> *Mixed Rulings*, *supra* note 154.

<sup>158</sup> Notices, Cancellation of a Limit on Certain Wool Textile Products Produced or Manufactured in India, 60 Fed. Reg. 56,985 (Comm. for the Implementation of Textile Agreements 1996); Paula L. Green, *U.S. Drops Warning on Woolens Exported by India, Hong Kong*, J. COM., Nov. 21, 1995, at A5; *U.S. Says No*, *supra* note 109.

<sup>159</sup> COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, STATEMENT OF SERIOUS DAMAGE: CATEGORY 435 (WOMEN'S AND GIRL'S WOOL COATS) (April 1995) (the countries called and all of the economic facts that follow regarding this category are from this source) [hereinafter *WOMEN'S COATS SERIOUS DAMAGE*].

<sup>160</sup> See *U.S., Honduras Settle Underwear Quota Issue*, *supra* note 132.

<sup>161</sup> *Mixed Rulings*, *supra* note 154. The case is hereinafter referred to as “*Women's Coats*.”

<sup>162</sup> The severe disparity between the mild production decline and the severe employment decline is difficult to reconcile. Perhaps the USTR's figures are wrong. Another potential explanation would be a significant increase in automation in a short time period.

Although the TMB found that there was no serious damage, it could not reach a consensus on whether there was a threat of serious damage.<sup>163</sup> Since the TMB did not recommend rescission of the safeguard, it remained in place.<sup>164</sup> India requested that a WTO trade dispute panel be set up to hear this matter, as well as a dispute regarding woven wool shirts and blouses.<sup>165</sup> In March of 1996, the United States turned down India's request for dispute panels.<sup>166</sup> However, pursuant to the terms of the WTO's dispute settlement procedures, at the DSB's next meeting, which was held in April 1996, the DSB agreed to set up dispute panels.<sup>167</sup> Subsequently, the United States withdrew the safeguard on women's and girl's wool coats,<sup>168</sup> leaving only the dispute over woven wool shirts and blouses (summarized below), a matter in which the TMB unanimously agreed there was a threat of serious damage, to be heard by a dispute panel.<sup>169</sup>

### 5. *Woven Blouses*

The United States called two countries – India and Hong Kong – on imports of this category.<sup>170</sup> No bilateral agreements were reached and the TMB heard cases from both countries. The Hong Kong case was resolved in favor of Hong Kong; the TMB determined that, since the Hong Kong products were subject to a group limit, the United States could not apply a specific limit to the category.<sup>171</sup> The United

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<sup>163</sup> *Mixed Rulings*, *supra* note 154.

<sup>164</sup> See generally Williams, *supra* note 6.

<sup>165</sup> *Indian Complaint Against U.S. to be Taken to WTO Dispute Body*, INT'L TRADE DAILY (BNA), (Jan. 11, 1996) [hereinafter *Indian Complaint*]. The woven wool shirts and blouses case is discussed in section 5, *infra*.

<sup>166</sup> *U.S. Says No*, *supra* note 109.

<sup>167</sup> *Id.*; Robert Evans, *WTO Sets Panels in India-U.S. Textile Disputes*, REUTERS EUR. BUS. REP., April 17, 1996, available in LEXIS, News Library, CURNWS File [hereinafter *WTO Sets Panels*].

<sup>168</sup> Notice, Cancellation of a Limit on Certain Wool Textile Products Produced or Manufactured in India, 61 Fed. Reg. 18,722 (Comm. For the Implementation of Textile Agreements 1996).

<sup>169</sup> See Notice, WTO Dispute Settlement Proceedings Concerning U.S. Restrictions on Woven Wool Shirts and Blouses From India, 61 Fed. Reg. 24,516 (Off. of the U.S. Trade Rep. 1996). [hereinafter *WTO Dispute Settlement Proceedings*].

<sup>170</sup> COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, STATEMENT OF SERIOUS DAMAGE: CATEGORY 440 (WOVEN WOOL SHIRTS AND BLOUSES) (April 1995) (the countries called and all of the economic facts that follow regarding this category are from this source) [hereinafter *WOVEN BLOUSES SERIOUS DAMAGE*].

<sup>171</sup> Sheel Kohl, *Territory Wins Textile Battle in WTO Ruling*, SOUTH CHINA MORNING POST, Sept. 29, 1995, at 14.

The ATC states that a "safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this agreement." ATC, *supra* note 4, art. 6, para. 4. The item in question from Hong Kong was under export

States applied a quota on the Indian goods, and the TMB reviewed the case.<sup>172</sup>

“Serious damage” to the U.S. manufacturing industry was evidenced by a decline of 7.58% during the nine month period ending September 1994 and 12.5% for the 12 month period ending September 1994. During these periods, U.S. manufacturers’ market share declined by 34.4% and 36.1% respectively. In 1994, a total of 2,125 jobs were lost, representing 6.2% of all category jobs.

The causal connection between damage and imports was indicated by a 94% increase in total imported items in the year ending January 1995. Imports held 60.1% of the domestic market in the nine month period ending September 1994. Imports from India expanded by 414% to account for 54% of total imports during the year ending January 1995. In 1994, Indian garments entered the United States at a price 53% below the average U.S. manufacturers’ price.

The TMB determined that a threat of serious damage existed.<sup>173</sup> India asked the TMB to reconsider its decision, and in December of 1995 the TMB affirmed its earlier findings.<sup>174</sup> India sought the establishment of a dispute settlement panel; however, it was blocked by the United States in March 1996. Nonetheless, the DSB, at its meeting the following month, automatically agreed to establish the panel.<sup>175</sup> The panel was still being established in May 1996.<sup>176</sup> The panel is expected to issue a report with its findings and recommendations within six to nine months of the panel’s establishment.<sup>177</sup>

The facts of each case as reported in the “Statement of Serious Damage” reports and outcomes as reported in public media, are shown in the following table:

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controls applied to a basket of 60 items. Kohl, *supra*. This decision does not involve the definition of the Serious Damage standard and so is not discussed further in this Comment.

<sup>172</sup> *Mixed Rulings*, *supra* note 154. The case is hereinafter referred to as “Woven Blouses.”

<sup>173</sup> *Id.* This source notes that the TMB did not make a decision on “future action.” The meaning of this is unclear. Perhaps the TMB reserves the right to say that a safeguard is inappropriate even if there is a threat of serious damage. However, the ATC states that a Member may take a safeguard action if there is a threat of serious damage. ATC, *supra* note 4, art. 6, para. 2.

<sup>174</sup> *Indian Protest of U.S. Safeguards Rejected by Textile Monitoring Body*, INT’L TRADE DAILY (BNA) (Nov. 28, 1995), available in WESTLAW, BNA-BTD database [hereinafter *Indian Protest*]; WTO Dispute Settlement Proceedings, *supra* note 169.

<sup>175</sup> *U.S. Says No*, *supra* note 109; *WTO Sets Panels*, *supra* note 167.

<sup>176</sup> WTO Dispute Settlement Proceedings, *supra* note 169, at 24,517.

<sup>177</sup> *Id.* In addition to arguing that the safeguard is not warranted, India has requested that the panel determine that the United States should have been forced to choose at the outset whether it would claim the existence of serious damage or rather claim a threat of serious damage.

TABLE II: TMB SERIOUS DAMAGE CASE SUMMARIES, SELECTED DATA

Product Category	Cotton & Manmade Fiber Underwear 352/652	Cotton & Manmade Fiber Pajamas & Other Nightwear 351/651	Men's & Boys' Wool Coats Other Than Suit Type 434	Women's and Girls' Wool Coats 435	Woven Wool Shirts and Blouses 440
WTO Countries Called (a)	Costa Rica, Dominican Republic, Honduras, Thailand, Turkey	Costa Rica, El Salvador, Honduras, Jamaica	Brazil, India	Honduras, India	Hong Kong, India
<b>Serious Damage/Threat Determination:</b>					
U.S. Production Decline	Sept. 1994; 9 mos. (b) 6.4% Sept. 1994; 12 mos. (c) 3.8%	0.4% (f) 10.3%	4.2% 1.9%	1.0% 1.8%	7.6% 12.5%
Domestic Manufacturer's Market Share Decline	Sept. 1994; 9 mos. (b) 5.8%	10.6%	14.3%	6.8%	34.4%
Employment: Jobs Lost	Sept. 1994; 12 mos. (e) 1993 6.8% 1993 vs. 1992 11.0% (d) 1993 to 1994 323 1992 to 1993 578 1992 to 1994 2,221	2.9% (d) 11.5% 14.1% 229 578 807	11.1% 11.1% (h)	4.3% 8.9% (h) 363	36.1% 24.5% (h) 2,125
% of Category Jobs Lost	0.7% 1993 to 1994 4.3% 1992 to 1994 5.0% 1993 to 1994 1.2%	1.6% 3.8% 5.4% 1.5%	4.8%	16.2%	6.2%
% Decline in Man Hrs. Worked	4.3% 1992 to 1993 5.5% 1992 to 1994 1993 to 1994 1992 to 1993 1992 to 1994	4.3% 5.7% (\$2) (gain) \$3.6 \$1.6 2%	5.7%	17.9%	5.8%
Total Annual Wages Decline (in millions)			\$2.6	\$4.3	\$11.9
Workers in Category as a % of Total Apparel Workers	6%		Less than 1%	Less than 1%	Less than 1%
Annual Domestic Shipments	\$3.2 billion	\$1 billion	\$400 million	\$250 million	
Causal Connection Between Damage and Total Imports from All Countries	1995 21.8% 1994 22.1% 1993 (d) 15.9% 1994/1992 (e) 48.6% 54% 9 mos. ended 9/94 12 mos. ended 9/94	4.8% (i) 5.3% 22.0%	40.2% (i) 41.8%	9.0% (i) 8.3%	94.0% (i) 95.8%
Import Penetration—Ratio of Imports to Domestic Production	54% 47% 1993 37% 1992	110% (k)	111% 109%	142% 130%	151% 157% 88%

Attribution to Member(s) Whose Case Was Decided by the TMB: Country Involved in Case Before TMB Category Product	Period	Costa Rica 352/652 Underwear	Honduras 352/652 Underwear	Honduras 351/651 Nightwear	India 434 Men's Coats	India 435 Women's Coats	India 440 Woven Blouses
Imports as a % of U.S. Category Imports	1994 1995 1994 (f) 1992-1994 (e)	14.8% 22% 61%	6.7% 10.8% 18.2%	1.5% (l) 71% 72.2%	24% (m) 105% (j)	3.1% (m) 40.2% (i)	54% (m) 41.4% (i)
Imports as a % of U.S. Category Production	1994	8.8% 69%	4% 62%	1.6% 53%	30% (n) 70%	4.1% (n) 79%	100% (n) 75%
Landed Duty Paid Value % Below U.S. Producers Average Price							
Result of Consultations Prior to TMB Decision		Quota (o) imposed	Quota (o) imposed	Quota (o) imposed	Quota (p) imposed	Quota imposed (p)	Quota imposed (p)
TMB Opinion: TMB Determination		No serious (o) damage; no consensus on threat	No serious (o) damage; no consensus on threat	No serious (o) damage or threat	No serious (p) damage or threat	No serious (p) damage; no consensus on threat	A threat of (p) serious damage exists
TMB Recommendation		Resume (o) consultations	Resume (o) consultations	Drop (o) safeguard	Rescind (p) safeguard	No (g) recommendation noted	No (p) recommendation

(e) Countries called and all economic data contained in this table are from the respective Statements of Serious Damage, *supra* notes 66, 137, 152, 159, 170.

(f) 9 months ended Sept. 1994 vs. the nine months ended September 1993.

(g) Year ended Sept. 1994 vs. year ended Sept. 1993.

(h) 1993 vs. 1992.

(i) 1994 vs. 1992.

(j) 1994 vs. 1993.

(k) Year ended Sept. 1994 vs. 1992.

(l) 9 months ended Sept. 1994 vs. 1993.

(m) Year ended March 1995 vs. year ended March 1994.

(n) Year ended Jan. 1995 vs. year ended Jan. 1994.

(o) Year ended Dec. 1994.

(p) Year ended March 1995.

(q) Imports for the year ended Jan. 1995 vs. domestic production for the year ended Sept. 1994.

(r) *WTO Recommends U.S. Resume*, *supra* note 66.

(s) *Mixed Ruling*, *supra* note 154.

(t) *U.S. Says No*, *supra* note 109.

(u) *U.S. Says No*, *supra* note 109.

#### IV. ANALYSIS OF CASES

##### A. Significance of the Early Decisions

The early decisions of the TMB are critical to its success.<sup>178</sup> The ATC does not define the "serious damage" standard. Therefore, it falls to the TMB's decisions to give shape to the standard through common law accretion. The TMB's early decisions are extremely important to this process. They begin developing the "serious damage" standard and establishing the credibility and effectiveness, or lack thereof, of the TMB.

Even though the TMB does not publish reasoned opinions, the facts<sup>179</sup> and the holdings of each case develop a TMB common law. While the language of the ATC makes it difficult to precisely define the standard,<sup>180</sup> the TMB decisions should begin to create a range for what constitutes serious damage or the actual threat thereof.<sup>181</sup> The location of the serious damage "zone" will not only resolve individual cases before the TMB, but perhaps more importantly will affect ongoing safeguard negotiations,<sup>182</sup> future safeguard negotiations, and future use of calls.<sup>183</sup> The TMB's definition of the standard will

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<sup>178</sup> See Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L E. CON. L. 555, 599 (1996).

<sup>179</sup> The TMB does not make formal fact findings, see *supra* note 115, which, as discussed *infra* in section IV. B., limits the current process' ability to define the "serious damage" standard. Nevertheless, the individual TMB members' perceptions of the facts combined with the holdings in each case create hazy precedents.

<sup>180</sup> Regarding the use of the stated factors to determine serious damage, the ATC states that none of these factors "either alone or combined with other factors, can necessarily give decisive guidance." ATC, *supra* note 4, art. 6, para. 3.

<sup>181</sup> While the ATC does not discuss *stare decisis*, it is generally accepted in international law that past decisions are used as precedents. Cf. JACKSON, *supra* note 6, at 89. For example, when the TMB determined that the United States could not impose a transitional safeguard quota on Hong Kong goods which were already subject to a group limit, a "senior trade official from a major developing nation, speaking on condition of anonymity, said that the TMB ruling 'had set a precedent for the future' by which it would be impossible to bring before the TMB cases that are already under restraint under a group limit." *TMB Rules Against U.S. Calls on Hong Kong Shirts, Blouses*, DAILY NEWS REC., Sept. 29, 1995, at 3.

<sup>182</sup> For example, the United States settled the safeguard dispute with Costa Rica over nightwear under pressure of a TMB review. Jim Ostroff, *supra* note 139. The United States had lost the *Nightwear* case with Honduras based on the same statement of serious damage. The United States was also reportedly concerned that a TMB decision against the United States might jeopardize existing bilateral agreements with Jamaica and El Salvador on nightwear. *Id.*

<sup>183</sup> Following its disappointing showings before the TMB, the United States practically quit invoking safeguards. Williams, *supra* note 6. The only U.S. call on WTO Members that the author has found since the TMB decisions in September 1995 was issued against El Salvador in April 1996. See Notices, Request for Public Comments on Bilateral Textile Consultations with the Government of El Salvador on Cotton and Man-Made Fiber Textile Products Produced or Manufactured in El Salvador, 61 Fed. Reg. 16,762 (Comm. for the Implementation of Textile

significantly affect the power of importing countries to use a quota call to facilitate bilateral agreements on quotas or the unilateral imposition of quotas. The bargaining power that parties to quota negotiations have will largely be determined by the likelihood that the TMB would support each party's position.<sup>184</sup>

The early decisions of the TMB indicate the TMB's degree of political neutrality and credibility. As one trade official noted before the TMB's Underwear hearings, "The impartiality of the TMB is a must, if we are to keep the phaseout of the MultiFiber Arrangement from turning into a north-south confrontation."<sup>185</sup>

If the TMB does not prove to be an effective, impartial dispute resolution mechanism, then the exporting countries could find their textile industries at the mercy of CITA, which one U.S. importer association employee called "a rogue agency that is not in sync with the stated U.S. foreign and economic policies."<sup>186</sup> Exporters would be left to suffer the consequences of potentially excessive U.S. protection or to the risks of attempting to circumvent U.S. quotas by re-routing and transshipping goods<sup>187</sup> in contravention of the ATC.<sup>188</sup> Conversely, a

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Agreements 1996). The United States and El Salvador reached an agreement without going before the TMB. Notices, Announcing Settlement on Import Limits and Guaranteed Access Levels and Adjusting an Import Limit for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in El Salvador, 61 Fed. Reg. 43,396 (Comm. for the Implementation of Textile Agreements 1996).

<sup>184</sup> See, e.g., Ostroff, *supra* note 28 (an unnamed import industry official remarked, "When it became clear the TMB would actually review the justification for the calls, CITA was forced to negotiate incredibly large underwear quotas with the Caribbean countries and Turkey, and withdraw the Thailand call, rather than risk a massive defeat in Geneva").

<sup>185</sup> John Zarocostas, *Global Board Hears Case on Underwear Quotas*, WOMEN'S WEAR DAILY, July 14, 1995, at 11.

<sup>186</sup> Jim Ostroff, *U.S. Targets Wool Coats Imports From Russia*, WOMEN'S WEAR DAILY, Sept. 27, 1995. Comment of Laura Jones, executive director, U.S. Association of Importers of Textiles and Apparel. Jones' comment was in response to a call on Russian products which are not subject to the ATC because Russia is not a WTO member, and the comment that CITA is out of sync with U.S. policy was specifically referring to U.S. policy toward former communist countries. Nevertheless, Jones' comment reflects the view that CITA zealously defends the domestic textile and apparel industries and can act with wide discretion, which could significantly impair exporters generally.

<sup>187</sup> For example, China, while not a WTO member, is estimated to illegally export \$2 billion annually to the United States. POTENTIAL IMPACT, *supra* note 22, at 11 n.10; see also Jim Ostroff, *Hong Kong Seeks to Bar Customs Jump Teams*, WOMEN'S WEAR DAILY, July 31, 1996, at 10. It would be naive to think that this option would not be considered by WTO members. Some level of U.S. exclusion of a country's goods would make it worth the risk for the country to attempt to bypass ATC rules.

<sup>188</sup> ATC, *supra* note 4, art. 5, para. 1. This paragraph says that Member nations should establish the necessary legal provisions and procedures to ensure that circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents does not occur.



biased TMB could also produce inadequate transitional protection for U.S. industries and cause excessive disruption in the lives of U.S. employees and investors.<sup>189</sup> The United States might resort to refusing to implement TMB recommendations, as it threatened to do following *Nightwear*.<sup>190</sup> The United States could also find other ways to penalize a nation for exporting excessively, such as instituting quota calls on other categories in order to harass the country or using non-quota import barriers such as quality standards as a pretext for limiting imports, both of which would contravene ATC rules but might be difficult to combat.<sup>191</sup>

In the event they are dissatisfied, both importing and exporting countries can appeal TMB decisions to the DSB.<sup>192</sup> Without a credible and effective TMB, Member nations could frequently find themselves appealing TMB decisions to the WTO's Dispute Settlement Body,<sup>193</sup> which would impede the TMB's ability to define "serious damage." Indeed, some frustrated exporting nations have asked that textile disputes by-pass the TMB and proceed directly to the DSB.<sup>194</sup>

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<sup>189</sup> See, e.g., Jim Ostroff, *El Salvador, U.S. Resume Talks on Underwear Quotas, Import Quotas*, WOMEN'S WEAR DAILY, June 6, 1995, at 15 (during negotiations with countries called on underwear imports, prior to the TMB hearing, one trade analyst stated that the United States did not want to undergo TMB review because a majority of the TMB representatives, including those from India and Pakistan, were outright hostile to U.S. textile policy).

If this degree of skepticism is warranted, then the protection ostensibly provided by the transitional safeguard may prove to be a false promise to U.S. industries.

<sup>190</sup> See Jim Ostroff, *Caribbean Underwear Row Goes Back to WTO's Court*, *supra* note 150. In July 1995 the TMB recommended that the United States rescind a safeguard on nightwear from Honduras. See *supra* note 150 and accompanying text. The United States refused to comply with this recommendation until September 1995 when the United States reached an agreement with Honduras regarding underwear, nightwear, and women's and girls' wool coats. See *U.S., Honduras Settle Underwear Quota Issue*, *supra* note 132. Perhaps the United States was using the nightwear issue as leverage in the negotiations over the other items.

<sup>191</sup> Quota calls used to harass countries would violate the principle that transitional safeguards are to be used "as sparingly as possible," ATC, *supra* note 4, art. 6 para. 1, and only when there is "serious damage" or "actual threat thereof." *Id.* art. 6, para. 2. The use of non quota mechanisms as a pretext for limiting imports would violate ATC art. 7, para. 1. The injured Member could bring a complaint before the relevant WTO body. *Id.* art. 7, para. 2-3. However, proving that the U.S. actions in these areas were motivated by non-legitimate factors would likely involve a showing of intent which would be inherently difficult to prove.

<sup>192</sup> *Id.* art. 8, para. 10.

<sup>193</sup> Costa Rica and India have both sought a DSB hearing in their disputes with the United States. See *supra* notes 134-136, 173-177. However, the U.S. may have "political clout" with the DSB. See Jim Ostroff, *U.S., Honduras Negotiations Break Off: WTO Debate Seen on Underwear Quota. World Trade Organization May Get Involved in Trade Dispute*, WOMEN'S WEAR DAILY, August 15, 1995, at 30.

<sup>194</sup> Eduardo Lachica and Bhushan Bahree, *Pakistan, Textile Exporters Ask WTO Help in Dispute*, THE ASIAN WALL STREET JOURNAL, July 19, 1996, at 4, available in 1996 WL-WSJA 10218501.

Some developed nations have stated that India's decision to appeal to the DSB undermined the credibility of the TMB.<sup>195</sup> This would seemingly occur if the DSB were to reverse the unanimous opinion of the TMB in *Woven Blouses*.<sup>196</sup>

The DSB acts as an appellate body for disputes before the TMB.<sup>197</sup> Therefore, if the TMB desires to have control over the definition of "serious damage," the TMB must reach decisions that are either not appealed or are sound enough to be affirmed on appeal to the DSB.

For the Members involved in a dispute, appealing to the DSB involves time and costs. The DSB forms a three-person, ad hoc panel to hear WTO disputes and has a seven-person standing body which hears appeals from the panels.<sup>198</sup> The DSB panel could take nine to 12 months to give a decision.<sup>199</sup>

A losing party has 60 days to appeal a panel decision, and the DSB's Appellate Body then has 60 to 90 days to issue an opinion.<sup>200</sup> The DSB has 30 days in which to accept or reject an Appellate Body decision.<sup>201</sup> The implementation period of a decision can then go to arbitration, and arbitrators have a guideline that implementation is not to exceed 15 months from the DSB's adoption of a panel or Appellate Body decision.<sup>202</sup>

Given the time involved in a DSB appeal and the fact that a country can appeal to the DSB only after the TMB has provided a recommendation and a reconsideration,<sup>203</sup> the DSB provides an inefficient resolution method relative to the TMB.<sup>204</sup> "Serious damage" could be done to the economy of a party to the dispute in the time

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<sup>195</sup> *WTO Sets Panels*, *supra* note 167.

<sup>196</sup> The United States has rescinded the safeguard at issue in *Women's Coats*, one of the two safeguards that India has appealed to the DSB. See *supra* notes 164-171 and accompanying text. The TMB had not reached a consensus in *Women's Coats*, and so it would have seemingly been easier for the DSB to decide the case in favor of India. Now India is in the difficult position of appealing only a case in which the TMB unanimously decided in favor of the United States and, thus, asking the DSB to directly conflict with the TMB.

<sup>197</sup> See *supra* note 92 and accompanying text.

<sup>198</sup> Dispute Settlement Understanding, *supra* note 92.

<sup>199</sup> *Id.* art. 12, at 1233-34.

<sup>200</sup> *Id.* art. 17, at 1236-37.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* art. 21, at 1238-39.

<sup>203</sup> ATC, *supra* note 4, art. 8, para. 10.

<sup>204</sup> When a matter is brought to the TMB, the TMB is to "promptly conduct an investigation of the matter" and "make appropriate recommendations to the Members concerned within 30 days." *Id.* art. 6, para. 10. If a Member notifies the TMB that it does not intend to comply with the TMB's recommendations, the TMB shall issue further recommendations "forthwith." *Id.* art. 8, para. 10.

that it takes the DSB to issue an opinion. The speed and seemingly lower legal fees associated with TMB review make it potentially superior to the DSB as a dispute settlement body.

### B. A Vague Agreement

The GATT safeguard provision has historically been plagued by flexible legal terms.<sup>205</sup> There has been little GATT jurisprudence to define the escape clause.<sup>206</sup> The text of the ATC does little to resolve the traditional safeguard ambiguities. In the absence of a clear definition, a diverse international body with conflicting political interests such as the TMB has naturally had difficulty agreeing whether the "serious damage" standard has been demonstrated by particular case facts.

The ATC does not define "serious damage" or "threat thereof," the requisite level of causal connection between imports and damage, or the degree of attribution required for Members' products to receive a safeguard. The ATC merely states that serious damage is to be determined based on economic variables, but cautions that none of the factors, alone or in combination, can give "decisive guidance."<sup>207</sup> The ATC states that damage must be caused by imports but does not articulate the degree of causal connection required.<sup>208</sup> The ATC also says that safeguards are to be applied on a Member-by-Member basis; serious damage or an actual threat thereof must be attributed to a specific Member in order to impose a safeguard on the Member's products.<sup>209</sup> However, the ATC fails to define the degree of causal connection required for attribution. It merely lists four factors from which attribution can be inferred, but again with the caveat that "none of these factors, either alone or combined with other factors, can necessarily

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<sup>205</sup> An example of the delay involved in having to resort to the DSB is provided by the *Underwear* case in which case quotas have remained in place for approximately 16 months while Costa Rica appealed to the TMB and then the DSB. Compare *CITA Announces New Limits on Underwear and Nightwear*, *supra* note 116, with *Cooper*, *supra* note 136.

JACKSON, *supra* note 6, at 158-65. Safeguards are arguably included in trade agreements to get an agreement completed, *id.* at 150-51, despite the fact that they lack predictability. *Id.* at 165.

<sup>206</sup> *Id.* at 156 n.27, 163.

<sup>207</sup> ATC, *supra* note 4, art. 6, para. 3. The agreement lists ten potentially relevant economic variables: "output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment."

<sup>208</sup> *Id.* art. 6, para. 2.

<sup>209</sup> *Id.* art. 6, para. 4. The four factors are "sharp and substantial increase in imports, actual or imminent, . . . the level of imports as compared with imports from other countries, market share, and import and domestic prices at a comparable stage of commercial transaction." *Id.* (fn. omitted).

give decisive guidance.”<sup>210</sup> Thus, the ATC provides no rule of decision for determining “serious damage.”

The confusion that would reasonably be expected to result from the ATC’s indecisive language has in fact manifested itself in the early TMB decisions, which have created an incoherent body of law.<sup>211</sup> Both the United States and exporting nations have had difficulty discerning neutral economic principles underlying the TMB decisions applying the “serious damage” standard.<sup>212</sup> Thus far, the United States, through CITA, has disagreed with the TMB’s assessment of what constitutes “serious damage” in each of the six cases brought before the TMB.<sup>213</sup> Likewise, the TMB has struggled in reaching consensus among its own members. In three of the cases, 50% of those decided to date, the TMB has been unable to reach a consensus regarding whether an actual threat of serious damage exists.<sup>214</sup> The TMB has, however, reached a consensus that no serious damage to industry existed in all six cases.<sup>215</sup>

An effective trade system requires two features: norm formulation and dispute settlement.<sup>216</sup> The TMB acts as a dispute settlement body when it applies the “serious damage” norm.<sup>217</sup> However, the text of the ATC is so vague that it does not dictate a meaningful norm. There is debate regarding whether international trade law – GATT – can or should provide truly meaningful norms.<sup>218</sup> Some argue that GATT provides a forum for “conciliation and negotiation” aimed at preserving a balance of concessions and obligations based on power.<sup>219</sup> However, the trend is toward a “rule-oriented” approach to international law which favors the development of substantive inter-

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<sup>210</sup> *Id.*

<sup>211</sup> See Stewart Statement, *supra* note 111; see *infra* notes 236 to 245 and accompanying text.

<sup>212</sup> See, e.g., *id.*; Frances Williams, *News: World Trade: Poorer nations Plan Attack on Trade Barriers*, FIN. TIMES, July 25, 1996, World Trade News Section, at 5.

<sup>213</sup> See Table II, *supra* Section III. The TMB has yet to agree with the United States that there was “serious damage” caused to an industry. The TMB did find a threat of serious damage in one case, *Woven Blouses*. *Id.*

<sup>214</sup> It is of note that in those three cases – the two *Underwear* cases and *Women’s Coats* – the TMB’s failure to reach a consensus has allowed the United States’ unilaterally imposed safeguards to remain in place while the countries resume consultations; thus, the no-decisions have arguably functioned as a near victory for U.S. restraints on international textile trade. See Williams, *supra* note 6.

<sup>215</sup> See Table II *supra* Section III. .

<sup>216</sup> JACKSON, *supra* note 6, at 88.

<sup>217</sup> See ATC, *supra* note 4, art. 6, para. 10.

<sup>218</sup> JACKSON, *supra* note 6, at 83-113.

<sup>219</sup> *Id.*

national legal rules.<sup>220</sup> The ATC represents a clear step toward a rule-oriented approach because it includes automatic review by the TMB of any agreements reached following a call.<sup>221</sup> However, the ambiguity of the ATC and the TMB's associated difficulty in reaching decisions has kept the TMB from performing the automatic review of settlement agreements.<sup>222</sup> If the ATC's promise of a more "rule-oriented" approach to trade is to be realized, the TMB must develop a more precise meaning of "serious damage," as recommended in section V of this Comment.

### C. Political Influences

In the absence of a well defined standard, the TMB members, as well as the officials of the countries involved in the dispute, have significant leeway in making determinations. Inevitably, given a choice of defensible positions, decision-makers, despite their duty to serve in an *ad personam* capacity,<sup>223</sup> are influenced by the policy interests of their home countries.<sup>224</sup> The Member nations subscribed to this belief when they nearly prevented the first WTO General Council meeting from taking place due to conflict over which nations would appoint individuals to serve on the TMB.<sup>225</sup>

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<sup>220</sup> *Id.* at 98. Most developing nations and many industrial nations, including the United States, appear to favor a rule-oriented approach. Only the European Union opposes such an approach. *See id.*

<sup>221</sup> ATC, *supra* note 4, art. 6, para. 9. A "conciliation and negotiation" approach would, by contrast, favor non-involvement by an international body once the parties had negotiated a settlement. *Cf.* JACKSON, *supra* note 6, at 83-98.

<sup>222</sup> *See* WTO Meeting in Singapore, *supra* note 65. The author has found no evidence of TMB review of an agreement reached by Members. *See, e.g.,* Jim Ostroff, *U.S., Guatemala Agree on First Skirt Quotas*, WOMEN'S WEAR DAILY, November 3, 1995.

The TMB automatic review provision was arguably intended to make it unnecessary to formally challenge an agreement to ensure that the ATC safeguard provision is not abused. WTO Meeting in Singapore, *supra* note 65. This would seemingly aid developing nations which might fear some form of retaliation for challenging an industrial nation.

The DSB panel opinion in *Underwear, Cooper*, *supra* note 136, may begin the process of giving much needed definition to the standard. However, given that the Serious Damage determination depends on numerous economic factors, ATC, *supra* note 4, art 6, para. 2-4, many cases are needed to define the standard.

<sup>223</sup> *See* ATC, *supra* note 4, art. 8, para. 1.

<sup>224</sup> Lachica and Bahree, *supra* note 194 (exporters accuse importing country TMB members of being "shamefacedly biased"); Jim Ostroff, *supra* note 189 (a majority of TMB members, including those from India and Pakistan, are "outright hostile" to U.S. textile policy).

Even individuals who consciously attempt to adjudicate in an unbiased manner would seemingly be biased by their experiences in their home country which inform their opinion of what hardships are created by international trade and restraints thereof and, thus, affect their assessment of Serious Damage.

<sup>225</sup> *See* Kohl, *supra* note 99, at 14.

Impartiality is critical to the efficacy of the TMB. The TMB cannot enforce its decisions; it can only make recommendations.<sup>226</sup> While countries generally prefer to abide by their international obligations, trade matters are highly political and are subject to domestic opposition.<sup>227</sup> Adverse decisions by the TMB are more likely to be accepted domestically if the TMB is seen as unbiased.<sup>228</sup> Given the TMB's lack of enforcement powers, domestic acceptance is needed to achieve enforcement.<sup>229</sup>

The TMB decisions to date validate the suspicions of the skeptics, to a degree; however, the decisions also suggest a willingness by TMB members to search for a neutral standard and to make principled decisions. The TMB has at times demonstrated an ability to overcome political differences and reach consensus. In two cases before the TMB that did not involve the "serious damage" standard, the TMB has achieved consensus, deciding one case in favor of the United States and one in favor of Hong Kong.<sup>230</sup>

The TMB members have also overcome political interests to reach unanimous decisions in several "serious damage" cases. Domestic textile producers in industrial nations are generally likely to be harmed by textile imports. A decision against an importing (developed) nation is likely to create a "serious damage" precedent which negatively affects all importing nations' textile and apparel industries.<sup>231</sup> Therefore, the representatives from the industrial nations presumably voted against the interests of their nations' domestic textile producers when they voted in all six cases that serious damage had not yet been done to a domestic industry and in two of the six cases (*Nightwear* and *Men's Suits*) that there was no threat of serious damage.<sup>232</sup> Similarly, the finding that imports in *Woven Blouses* posed a threat of serious damage suggests a willingness by the members ap-

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<sup>226</sup> See *supra* notes 90 to 92.

<sup>227</sup> Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 408-10 (1995). See also Williams, *supra* note 6 (there are strong anti-WTO forces in the U.S. Congress). Textile trade is a very contentious issue that is important to both developing and developed countries. See *id.*; see also *supra* notes 99 to 108 and accompanying text.

<sup>228</sup> See Young, *supra* note 227.

<sup>229</sup> See *id.*

<sup>230</sup> See *TMB Rules for U.S. on Macao Denim Quota*, DAILY NEWS RECORD, June 11, 1996, at 3; *WTO Rules for Hong Kong in Wool Dispute With the U.S.*, REUTERS, Sept. 29, 1995, available in LEXIS, News Library, REUFIN File.

<sup>231</sup> See *supra* notes 179 to 184.

<sup>232</sup> The TMB delegate from Japan reportedly provided data that was critical to disproving CITA's position in one case. See Ostroff, *supra* note 28, at 5. Japan is a developed nation, and so these actions would seem to be contrary to its interest.

pointed by developing nations to look beyond political interests. That TMB members in these cases did not simply vote based on the goals of their countries indicates a willingness of the TMB to search for neutral principles in defining "serious damage."<sup>233</sup>

While a search for neutral principles may be occurring, the determination of the "serious damage" standard is affected by the policy interests of the countries which appoint the TMB members. In the *Underwear* cases, while the TMB unanimously found no serious damage, the TMB split along national economic-stage-of-development lines in attempting to decide whether there was an actual threat of serious damage. The five members appointed by developing nations found that there was no threat of serious damage, while four members appointed by industrial nations found that there was a threat of serious damage.<sup>234</sup> Thus, it appears that while the TMB members take their duty seriously and the TMB has reached consensus on the standard in certain cases, the vagueness of the standard and the inevitable political interest of TMB members combine to produce uncertainty and politically based conflict.<sup>235</sup>

#### D. Distinguishing Cases to Define the Standard

The "serious damage" standard remains undefined. The TMB has failed to reach agreement in fifty percent of its cases. Even in the cases in which the TMB has made a decision, its reasoning is unavailable, which limits the ability to use prior decisions to predict future determinations.<sup>236</sup> However, by examining the available facts and the holding of each case, perhaps the penumbra of the contours of what constitutes "serious damage" can be seen.

The TMB decisions to date have yet to find a case of "serious damage." Thus, the ability to infer from the cases where the serious damage "zone" begins is limited. The most that can be said is that

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<sup>233</sup> See Jim Ostroff and John Zarocostas, *Importers, U.S. Makers Accept TMB Underwear Ruling*, DAILY NEWS REC., July 25, 1995, at 4. Brenda Jacobs, former senior counsel for textiles and trade agreements at the U.S. Department of Commerce, stated that the *Underwear* decision shows the TMB takes the Serious Damage determination seriously and that this will force the United States to reconsider the economic basis on which it has grounded unilateral quotas. *Id.*

<sup>234</sup> See generally *id.* Members from India, Pakistan, South Korea, Indonesia, and Brazil voted that there was no threat of serious damage. Members from Canada, the European Union, Japan, and Norway found a threat of serious damage.

<sup>235</sup> Opinions differ as to whether the TMB favors the policy interests of developed or developing nations. See, e.g., *supra* note 224.

<sup>236</sup> WTO Meeting in Singapore, *supra* note 65 (Cryptic 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 a useful precedent for future decisions.).

serious damage is more severe than the industry damage presented in *Woven Blouses*, where the TMB found an actual *threat* of serious damage.<sup>237</sup> Based on this case, a finding of serious damage will require a dramatic decline in production and market share, accompanied by significant job loss, or some equivalent combination of economic facts.<sup>238</sup> Thus, it appears that serious damage requires severe economic facts.

As to when a threat of serious damage exists, *Woven Blouses* as well as *Underwear* and *Women's Coats* are instructive. In *Woven Blouses* a threat of serious damage was found, but it is not clear whether that case marks the minimum degree of damage necessary to establish a threat, the threshold amount of damage before actual serious damage is recognized, or whether it is more representative of a middle range of threatened serious damage.<sup>239</sup> The economic facts presented by the United States were materially worse in *Woven Blouses* than in *Underwear* and *Women's Coats*, in which cases the TMB was not able to reach a consensus on the threat of serious damage.<sup>240</sup> Thus, for at least some TMB members, the *Woven Blouses* facts appear to be well within the threat of serious damage range and possibly near the actual serious damage zone.

There is significant discord among TMB members, however, as to where the threat of serious damage zone begins. *Underwear* suggests that for some TMB members a moderate decline in U.S. production in consecutive years may indicate a threat of serious damage.<sup>241</sup> *Wo-*

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<sup>237</sup> See *supra* notes 171 to 178. The countries involved in the six Serious Damage cases with the United States are developing countries. See Curtiss & Atkinson, *supra* note 28, at 119 (all WTO members in Central and South America are developing countries); Baj Bhal, *Tragedy, Irony, and Protectionism after BCCI: A Three-Act Play Starring Maharajah Bank*, 48 SMU L. REV. 11, 48 (1994) (India is a developing country). It is of note that least developed nations and certain other categories of countries are to receive more favorable treatment in the application of safeguards, which further limits the value of the vague precedents discussed herein.

<sup>238</sup> See *WOVEN BLOUSES SERIOUS DAMAGE*, *supra* note 170. U.S. production declined 12.5%, market share dropped 36.1%, and 6.2% of category jobs were lost in the most recent twelve month period.

It is also notable that in this case total imports had risen by 95.8% and well exceeded the amount of domestic production for the most recent twelve months. Indian imports rose by 414% and India was the largest exporter of these goods. Thus, the link between domestic industry damage and imports, and attribution of harm to Indian imports in particular was strongly established.

<sup>239</sup> See *supra* notes 171 to 178.

<sup>240</sup> Compare *id.* with *Underwear*, *supra* notes 115 to 136, and *Women's Coats*, *supra* notes 159 to 169.

<sup>241</sup> *UNDERWEAR SERIOUS DAMAGE*, *supra* note 66 (a 3.8% decline in 1993 and a 3.5% decline in the first nine months of 1994). A DSB panel has determined that serious damage was not shown in the *Underwear* case. Cooper, *supra* note 136. However, the DSB panel decision may have been based more on the United States' quotas settlements with other countries called than on the actual economic data on the U.S. industry. See *id.* Thus, the panel opinion, when



*men's Coats* indicates that significant job loss over a two year period may reflect a threat to an industry.<sup>242</sup> However, the inability of the TMB to reach a consensus in these cases indicates that the individual TMB members have differing definitions of the standard.<sup>243</sup>

The line between the threat of serious damage and an absence thereof is both informed and muddled by a comparison between *Men's Coats*, where the TMB found no serious damage or threat thereof, and *Underwear*, where there was no consensus on the threat of serious damage.<sup>244</sup> Because the cases are similar but produced differing outcomes, they indicate that the threat of serious damage begins somewhere in the range indicated by the facts of the two cases. However, the cases are so similar that they are difficult to distinguish; for example, U.S. production declines and job losses were actually slightly worse in the most recent period in *Men's Coats*.<sup>245</sup> A comparison of these cases suggests that there is some measure of arbitrariness in TMB determinations, illustrates that the standard is unacceptably vague, and demonstrates the need for the publication of reasoned opinions by the TMB to explain its decisions.

## V. RECOMMENDATIONS

The TMB is responsible for interpreting and controlling the application of the safeguards.<sup>246</sup> This is a significant duty; TMB decisions impact the large and imperiled U.S. textile and apparel industries<sup>247</sup> as well as those of developing countries.<sup>248</sup> In the face of

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available, may or may not shed meaningful light on the economic facts which constitute serious damage.

<sup>242</sup> WOMEN'S COATS SERIOUS DAMAGE, *supra* note 159. An estimated 16.2% of category jobs were lost over a two year period.

<sup>243</sup> This is a plausible, though not the only, explanation. In the absence of written, reasoned opinions from the TMB it is not clear what the TMB members based their decisions on. Another possible explanation of the disagreement is that the members made different fact findings.

<sup>244</sup> This DSB panel's opinion that there was no threat of serious damage in *Underwear*, depending on the panels reasoning, may bring some clarity to this issue. *See supra* note 241.

While the panel's opinion may well be useful in determining what fails to constitute a threat of serious damage, the number of factors involved in a Serious Damage determination, ATC, *supra* note 4, art. 6, para. 2-4, should make it necessary to decide numerous cases in order to define the Serious Damage standard.

<sup>245</sup> Similarly, compare MEN'S COATS SERIOUS DAMAGE, *supra* note 152, with WOMEN'S COATS SERIOUS DAMAGE, *supra* note 159. The U.S. industry fared worse in terms of production decline and market share loss in *Men's Coats*. The U.S. industry fared worse in terms of job loss in *Women's Coats*. The TMB found no threat of serious damage in *Men's Coats* but could not reach a consensus on the threat of serious damage in *Women's Coats*. It is difficult to determine why the TMB reached differing results in the cases based on the available economic data.

<sup>246</sup> ATC, *supra* note 4, art. 6, para. 10; art. 8.

<sup>247</sup> *See supra* notes 44 to 63 and accompanying text.

the consequent political differences and pressure, and with only a vague standard to guide it,<sup>249</sup> the TMB has not been able to carry out its responsibility under the ATC.<sup>250</sup>

The TMB needs to establish itself as a predictable and impartial decision making body when making "serious damage" determinations. A predictable TMB would facilitate efficient negotiations between Members involved in safeguard disputes. An impartial TMB would provide Member countries the market access and domestic industry protection which the ATC promises. The following recommendations would assist the attainment of these goals.

#### A. Define the Standard Through Published, Reasoned Opinions

In order to create predictability and to reduce the influence of politics on TMB decision making, the TMB should define the "serious damage" standard by providing reasoned opinions for its decisions. The vagueness of the ATC's articulation of the standard,<sup>251</sup> the conflicting policy interest of the countries which appoint TMB members,<sup>252</sup> and the fact that TMB membership will change annually,<sup>253</sup> make precedent essential for the TMB to achieve consistency and continuity.<sup>254</sup>

Reasoned opinions could give definition to the standard and create a predictor of future TMB decisions. The opinions should state the significant facts as the TMB found them, set forth the applicable legal principles, and explain why those facts did or did not indicate serious

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<sup>248</sup> See generally *supra* note 6.

<sup>249</sup> See *supra* notes 205 to 215 and accompanying text.

<sup>250</sup> The TMB has failed to review any safeguard agreements reached by Members, *see supra* note 222, and has failed to reach a decision in three of the six cases it has attempted to decide based on the Serious Damage standard. See *supra* notes 211 to 222 and accompanying text.

The current approach of the TMB may lead to a delegation of the TMB's responsibility for Serious damage determinations to the DSB. This is not desirable because (1) appeal to the DSB is time consuming for the parties involved in the matter, *see supra* notes 198 to 204 and accompanying text, (2) it would likely take many DSB opinions to flesh out a legal definition of Serious Damage and so heavy reliance on the DSB for precedent would render the TMB ineffective until several DSB decisions were issued, which would likely be an extended period of time, and (3) as a formal matter, the ATC assigns responsibility for Serious Damage determinations to the TMB. See *supra* notes 86 to 92.

<sup>251</sup> See *supra* notes 205 to 222 and notes 236 to 245 and accompanying text.

<sup>252</sup> See *supra* notes 223 to 235 and accompanying text.

<sup>253</sup> See *supra* note 107 and accompanying text.

<sup>254</sup> WTO Meeting in Singapore, *supra* note 65.

Because the text of the ATC does not define Serious Damage, the early decisions of the ATC will inherently involve policy choices in establishing the serious damage "zone." However, once early precedents are established, future TMB decisions would begin to have objective guidelines to follow which would be continually refined through case law.

damage or a threat thereof.<sup>255</sup> Because the factors that are to be considered in making the "serious damage" determination are generally quantified, findings of fact combined with reasoned opinions could provide a very useful road map for Members involved in transitional safeguard considerations. Before taking action, Members could compare their economic factors to the factors found to be most persuasive by the TMB in past decisions and, to a reasonable degree, assess how the TMB would decide the matter. Increased certainty would promote more efficient decision-making and lessen the ability of Members to credibly threaten improper safeguard measures or to oppose valid ones in their negotiations.<sup>256</sup>

The TMB faces a unique challenge in selecting a judicial model for its opinions. DSB panels and appellate bodies follow traditional GATT practices of issuing a single opinion by the decision making body without expression of individual views.<sup>257</sup> However, given the size and diversity of the TMB, it may be useful to allow TMB members to express individual opinions. TMB members might be more willing to reach consensus if they are allowed to state the grounds for their agreement in a concurring opinion. In cases in which no consensus is reached, it would be useful to have disagreeing TMB members articulate their positions because this would impose discipline on TMB members,<sup>258</sup> give interested Members insight into the TMB's view of the serious damage "zone,"<sup>259</sup> and provide a foundation for possible review by the DSB. An approximate representative model for this procedure could be the U.S. court system with its custom of decisions for the court, concurrences, and dissents.<sup>260</sup> The drawback

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<sup>255</sup> *Id.*

<sup>256</sup> See, e.g., *supra* note 182.

<sup>257</sup> IMPLEMENTING BILL, *supra* note 5, at 1014.

<sup>258</sup> TMB members would be forced to support their opinions on economically principled bases, or risk having their political motivations exposed. While requiring opinions would not ensure principled decision making, (*i.e.*, opinions could state mere pretexts for the real factors affecting decisions, place undue weight on one side's version of the facts in order to justify a legal result, etc.), the process would impose some discipline and would be a significant improvement over the current process.

<sup>259</sup> This insight could give guidance to Members involved in other safeguard negotiations and those considering safeguard actions.

<sup>260</sup> Because the TMB reaches decisions by consensus, the equivalent of a dissent would occur when the TMB could not reach an opinion and members stated the grounds for their opinions in separate opinions. Under these circumstances, there would essentially be only individual dissents and there would be no opinion of the TMB.

Issuing individual opinions would conflict with the traditional practice of GATT dispute settlement panels. IMPLEMENTING BILL, *supra* note 5, at 1014. As an alternative model, the TMB could possibly utilize its freedom to create its own working procedures, ATC, *supra* note 4, art. 8, para. 2, to create small dispute panels, like the DSB panels, which would then issue reports

of this approach is that it makes conflict within the TMB a matter of public record. However, given that insiders frequently know how TMB members vote even under the current procedures,<sup>261</sup> it seems that issuing written opinions would cause only limited loss of privacy for the TMB. The incremental friction created by this procedure would be significantly outweighed by the improved rigor of the decision making process and the creation of useful precedent.

### B. Openness

The TMB should increase the openness of its proceedings. Increased transparency in the WTO has been has a goal of the Clinton administration and was partially realized in July of 1996 when the WTO decided to begin making most of its documents publicly available immediately.<sup>262</sup> Openness allows Members to "gain a better understanding of how the WTO works and the reasons underlying actions that Members take."<sup>263</sup> To improve the credibility of its decision making processes – and thus the legitimacy of its results – the TMB, like the WTO, should increase the transparency of its operations.<sup>264</sup>

TMB proceedings are currently closed door affairs; the TMB does not even circulate agendas of its meetings.<sup>265</sup> Additionally, the TMB restricts its opinions to Members who are parties to the controversy,<sup>266</sup> and recommends that interested parties request opinions from their domestic government.<sup>267</sup> However, the U.S. Trade Representative's Office and the Department of Commerce Office of Textiles and Apparel refuse to distribute TMB decisions.<sup>268</sup>

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that would be adopted by the TMB unless there was a consensus on the TMB to not adopt the report.

<sup>261</sup> Ostroff and Zarocostas, *supra* note 233.

<sup>262</sup> WTO Meeting in Singapore, *supra* note 65.

<sup>263</sup> *Id.* (quoting the acting U.S. Trade Representative, Ambassador Charlene Barshefsky).

<sup>264</sup> *Id.*

<sup>265</sup> Ostroff and Zarocostas, *supra* note 233; *Hong Kong Urges TMB to Reveal Reasons for Its Recommendations*, DAILY NEWS RECORD, Dec. 22, 1995, at 12.

<sup>266</sup> Telephone interview, TMB Official (anonymity requested), Nov. 15, 1995.

The TMB is to communicate its findings "to the Members directly concerned. All such recommendations or findings shall also be communicated to the Council for Trade in Goods for its information." ATC, *supra* note 4, art. 8. para. 8. This language, however, does not preclude giving information to other parties.

<sup>267</sup> Telephone interview, *supra* note 266.

<sup>268</sup> In various phone interviews, members of these offices stated that the TMB requires that its proceedings and decisions remain confidential.

Nevertheless, the author has read one of the TMB serious damage case recommendations. It included only a general summary of each party's claims (less than one-half page devoted to each side) and the TMB's holding. The decision contained no indication of which aspects of law

The first step toward increased openness is the already discussed issuance of meaningful, written opinions. Additional steps should also be taken. TMB hearings should be open to interested persons, and the final briefs of both parties before the TMB should be made available to the public.<sup>269</sup> This would promote greater understanding of the definition of "serious damage" by all countries and by industry representatives, which would in turn lead to greater predictability in application of the transitional safeguard measure.

Making these documents publicly available would also serve as a check on the influence of politics on decision-making. A TMB member or members who either provided poorly reasoned explanations for their decisions or who choose to provide no reasoning at all would have their political influences revealed to the public. While this would not force members to make impartial decisions, it would certainly create some pressure to do so.

Openness is also needed in order to increase the sense of legitimacy and fairness in TMB decision-making.<sup>270</sup> Openness is a hallmark of a decision-making body which bases its opinions on legitimate factors and reason.<sup>271</sup> The specter of back room meetings producing edicts without supporting reasoning undercuts the credibility of the TMB. The international nature of the TMB decisions, with the natural attendant suspicion that political influences will subvert principle, makes it particularly important that the TMB establish credibility.<sup>272</sup>

The TMB might resist openness because, based on the inability to reach decisions in fifty percent of its cases thus far, it would likely reveal a significant conflict and uncertainty in the TMB's decision-

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or fact the TMB found to be most significant to its decision nor did it otherwise provide the reasoning for the decision. A U.S. agency official made the document available for the author to read in the official's office but would not allow the decision to be copied. The official stated that the document was representative of TMB decisions. The author has spoken with numerous U.S. officials who have confirmed that other TMB decisions contain no meaningful analysis. *See also* WTO Meeting in Singapore, *supra* note 65 (referring to TMB decisions as cryptic two or three sentence decisions). Given the sparseness of the documents, the TMB and the U.S. agency officials make much ado about nothing in refusing to distribute TMB serious damage case decisions.

<sup>269</sup> This would break with traditional GATT practice of keeping all party submissions to a dispute panel confidential. IMPLEMENTING BILL, *supra* note 5, at 1014-15. However, if the TMB and other GATT dispute settlement bodies are to overcome the cynicism about the effectiveness and integrity of international law, *see* Jackson, *supra* note 8, at 23-24, it may be necessary to increase the openness of procedures and, thereby, encourage a more principled decision making process.

<sup>270</sup> Young, *supra* note 227.

<sup>271</sup> *Cf. id.* (institutions that operate outside the public view have difficulty developing credibility).

<sup>272</sup> *Cf. id.*

making process. However, the TMB's failure to reach decisions has already revealed that it is in conflict. Given the international representation on the TMB, the TMB might be particularly sensitive to the possibility of having members from different countries publicly embarrassed. But, TMB members could be urged to show some discretion in their comments and perhaps, as in U.S. Supreme Court decisions, an occasional acrimonious tone should not cause a level of damage that would be expected to impair decision-making.

Scrutiny and outside criticism would be good for the decision-making process. Openness would not force the TMB to cede any portion of its autonomy to outside inquirers; it would, however, cause the TMB to occasionally evaluate its processes and decisions in light of outside observations. While uncomfortable for the TMB members, this would likely be a healthy process that would provide an incentive for TMB members to make neutral, thoughtful decisions and also provide the body with potentially useful criticism.<sup>273</sup>

### C. Presumptions

The large number of economic variables that factor into a "serious damage" determination will make it difficult to define the standard even with the aid of precedent. To remedy this, after hearing enough cases to develop a sense of the "serious damage" standard, the TMB should state in its opinions figures which it finds create a rebuttable presumption of serious damage or threat thereof, causation by imports, and attribution to an individual Member.

The ATC states that serious damage to an industry is to be assessed by examining changes in "output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment decisions." But the health of an industry can essentially be assessed by examining changes in output and profitability. All of the factors listed in the ATC are either largely determined by or reflected by these two variables. Changes in output largely determine changes in employment, profits, and investment.

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<sup>273</sup> Exporting nations have complained about the TMB's "lack of transparency and impartiality." Williams, *supra* note 212. Hong Kong and India, in particular, have criticized the TMB's secrecy. See Williams, *supra* note 6, at 4. Likewise, the United States has called on the WTO to open up its debates and to agree on a code of conduct. *WTO Should Have More Open Debate, Ethical Code of Conduct, Lang Says*, 50 INT'L TRADE DAILY (BNA) 2093 (Dec. 20, 1995), available in LEXIS, ITRADE Library, BNAITD File (hereinafter *Open Debate*).

Thus, while importing and exporting countries may differ strongly on the meaning of Serious Damage in the ATC, it appears that the major parties would agree that the standard can best be defined in an open process which ventilates the issues.

Output largely reflects changes in productivity, utilization of capacity, market share, and exports. Profits affect investment<sup>274</sup> and wages<sup>275</sup> and reflect the impact of imports on domestic prices and changes in inventories.<sup>276</sup> Over an extended period of time, changes in output would either reflect or cause changes in the other factors.

An example of possible factors creating a presumption of serious damage or a threat thereof is as follows:

TABLE III: SERIOUS DAMAGE PRESUMPTION GRID

	Profits (b)(c)			
		<3%	3%-5%	>5%
Changes in Output (a)	Increase	No serious damage or threat	No serious damage or threat	No serious damage or threat
	Decline of less than 3%	Threat of serious damage	No serious damage or threat	No serious damage or threat
	Decline of between 3% and 5%	Serious damage	Threat of serious damage	No serious damage or threat
	Decline of greater than 5%	Serious damage	Threat of serious damage	Threat of serious damage

(a) In most recent twelve month period measured.  
 (b) Defined as operating income (income before interest, taxes, and extraordinary items) as a percentage of sales during the most recent twelve month period measured.  
 (c) These figures could be derived by determining the average operating income for the industry over the previous five years; this average and the average minus 2% could create the bounds for the middle category.

Similarly, a presumption of a causal connection between serious damage or the actual threat thereof should be established by some

<sup>274</sup> This is based on the reasoning that there is positive relationship between historical profits and anticipated future profits, *c.f.* TOM COPELAND, TIM KOLLER, & JACK MURRIN, *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* 120, 156 (stating that a sound understanding of past performance is the basis of developing a forecast for the future and using the most recent historical year as a base for projections of the future), and a rational investor would only be expected to invest in an industry which was expected to provide an acceptable future return on investment. *See* RICHARD A. BREALEY & STEWARD C. MYERS, 47-125 (4th ed. 1991). Note, however, that accounting profits may not always be equal to economic returns. *Id.* at 261-78.

<sup>275</sup> This is based upon the theory that unprofitable firms are less likely to grant wage increases and more likely to seek wage concessions from employees. *c.f.* ROBERT E. HALL & JOHN B. TAYLOR, *MACRO-ECONOMICS: THEORY, PERFORMANCE, AND POLICY* 428 (under *contract theory*, parties to contracts of over one year should seek to include contingencies for higher profits; also noting that firms engaged in wage negotiations may have an incentive to claim to workers that profits are low).

<sup>276</sup> Increasing inventories may be an indication that goods are not selling, and, if so, this fact should be reflected by a decline in profitability.

quantified measure. For example, if for the most recent full year period, the increase in total imports minus the increase in total market size exceeds five percent of the total domestic output for the period, then a causal connection between total imports and serious damage or the threat thereof would exist.

Once serious damage or the threat thereof and the causal connection with total imports has been established, damage must be "attributed" to an individual Member on the basis of a "sharp and substantial increase in imports, actual or imminent" and "the level of imports as compared with imports from other sources, market share, and import and domestic prices."<sup>277</sup> The TMB should again establish some figure which would constitute a presumption of attribution. For example, if a Member's increase in imports represents more than 5% of the increase in total imports then attribution would be presumed. For countries that are to receive "more favorable" treatment, this figure could be raised to 10%.<sup>278</sup>

In describing the factors which determine serious damage or the threat thereof and the factors which determine attribution to an individual Member, the ATC states that none of these factors "either alone or combined with other factors, can necessarily give decisive guidance."<sup>279</sup> It is not clear what it means to "necessarily give decisive guidance," but it seems clear that the ATC prohibits the creation of definitive decision rules. The TMB will likely hear unique and complex cases. Inevitably, many cases will merit and should receive a decision counter to that suggested by a scheme of presumptions. This, however, does not deny the value or the validity of a simplified, quantified scheme of presumptions. The above proposal would not violate the letter or spirit of the ATC. Rather it would merely create rebuttable presumptions that would provide much needed guidance both to the TMB and to Member countries and, thus, facilitate a more predictable and impartial decision-making process.

#### CONCLUSION

The TMB has failed to create a coherent body of law interpreting the "serious damage" standard. Unless the TMB improves its performance, faith in its processes will be diminished, and traders will increasingly find alternate methods of dealing with dispute – including appealing to the DSB or violating international trade law.

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<sup>277</sup> ATC, *supra* note 4, art. 6, para. 4.

<sup>278</sup> *Id.* art. 6, para 6.

<sup>279</sup> *Id.* art. 6, para. 3-4.



The TMB could increase its credibility and develop a more politically neutral "serious damage" standard by making procedural changes. In order to define the standard and to inform interested parties as to the meaning of the standard, the TMB should publish reasoned opinions for its decisions and accept the discipline which such a process would impose. In order to increase the sense of legitimacy in TMB decision-making and to better ventilate the issues, the TMB should open up its procedures. Finally, to give greater precision and neutrality to decisions, the TMB should set forth economic facts which create a rebuttable presumption of "serious damage." These procedural changes should enable the TMB to better define the substantive standard and to more effectively manage the implementation of the ATC.