

Appellate Body

**UNITED STATES - MEASURE AFFECTING IMPORTS OF
WOVEN WOOL SHIRTS AND BLOUSES FROM INDIA**

AB-1997-1

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

*United States - Measure Affecting Imports of
Woven Wool Shirts and Blouses from India*

India, Appellant

United States, Appellee

AB-1997-1

Present:

Beeby, Presiding Member

Bacchus, Member

Matsushita, Member

I. Introduction

India appeals from certain issues of law and legal interpretations in the Panel Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R (the "Panel Report"). That Panel was established on 17 April 1996 to consider a complaint by India against the United States relating to a transitional safeguard restraint imposed on imports of woven wool shirts and blouses (category 440) from India.

The measure was imposed by the United States on 14 July 1995 after bilateral consultations with India in April and June 1995 did not result in a mutually-agreed solution. The restraint was effective as from 18 April 1995 for one year and was later extended through 17 April 1997. The United States took this transitional safeguard action pursuant to Article 6 of the *Agreement on Textiles and Clothing* (the "ATC"). As required by Article 6.10 of the ATC, the United States referred the matter to the Textiles Monitoring Body (the "TMB"), which concluded - and confirmed upon review - that the transitional safeguard action in this case was imposed in accordance with the requirements of the ATC. The TMB found that "actual threat of serious damage had been demonstrated" and that "this actual threat could be attributed to the sharp and substantial increase in imports from India".¹ At India's request, the Dispute Settlement Body (the "DSB") established a panel (the "Panel") to examine the legality of the United States' transitional safeguard measure.

¹G/TMB/R/3, confirmed in G/TMB/R/6.

After the release of the interim report of the Panel, the United States announced that it would withdraw the transitional safeguard measure, effective as of 22 November 1996, “due to a steady decline in imports of woven wool shirts and blouses from India and the adjustment of the industry”. Nevertheless, India requested that the Panel continue its work and produce a comprehensive report on the dispute. The Panel Report in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* was circulated to the Members of the World Trade Organization (the "WTO") on 6 January 1997. The Panel Report contains the following conclusions and recommendations:

8.1 We conclude that the US restraint applied as of 18 April 1995 on imports of woven wool shirts and blouses, category 440, from India and its extensions violated the provisions of Articles 2 and 6 of the ATC. Since Article 3.8 of the DSU provides that “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment”, we conclude that the said US measure nullified and impaired the benefits of India under the WTO Agreement, in particular under the ATC. The Panel recommends that the Dispute Settlement Body make such a ruling.

On 24 February 1997, India notified the DSB² of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a notice of appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "Working Procedures"). Pursuant to Rule 21 of the *Working Procedures*, India filed an appellant's submission on 6 March 1997. At the request of the United States, pursuant to Rule 16(2) of the *Working Procedures*, the Appellate Body extended the time for the United States to file its appellee's submission to 24 March 1997. On that date, the United States filed its submission pursuant to Rule 22 of the *Working Procedures*.

The oral hearing provided for in Rule 27 of the *Working Procedures* was held on 7 April 1997. The participants presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

²WT/DS33/3, 24 February 1997.

II. Arguments of the Participants

A. *India*

India agrees with the overall conclusions of the Panel Report, but alleges that the Panel erred in law when making its findings on the burden of proof, on the TMB and on the issue of judicial economy.

1. Burden of Proof

India notes that the Panel made statements on the burden of proof in its findings in paragraph 7.12 of the Panel Report as well as in its comments on the interim review in paragraph 6.7 of the Panel Report. India argues that both statements are incorrect, and furthermore, are contradictory. India asserts that the specific interim review comments at issue are part of the findings to be reviewed by the Appellate Body.

India asserts that the fact that India had initiated dispute settlement proceedings did not impose upon India the obligation to establish that the United States had violated Article 6 of the *ATC*, as the Panel stated in paragraph 7.12, nor the obligation to present a *prima facie* case to that effect, as the Panel stated in paragraph 6.7. According to India, the issue of the burden of proof is an issue of substantive law and must be answered solely on the basis of the substantive law of the WTO in the light of the customary rules of interpretation of public international law. India maintains that the question of whether it is up to a particular Member to demonstrate an inconsistency with the *Marrakesh Agreement Establishing the World Trade Organization*³ (the "*WTO Agreement*") does not depend on whether the Member is a complaining or a respondent party in the proceedings in which the inconsistency is at issue, but rather on the nature of the provision invoked. In India's view, the rules on the burden of proof determine which party in the dispute must make a legal claim and supply the evidence; the function of the rules is to ensure that a dispute can be settled even if the legal claims and factual information before the panel are incomplete. As India reads it, according to the Panel's comments on the interim review, both parties bear a burden of proof of different degrees.

Moreover, India argues that the Panel's finding on the distribution of the burden of proof is inconsistent with the finding on the same issue by the concurrent WTO panel in *United States -*

³Done at Marrakesh, Morocco, 15 April 1994.

Restrictions on Imports of Cotton and Man-made Fibre Underwear.⁴ India points to that panel's statement that the principle that the party invoking the exception carries the burden of proof is well-established in the GATT 1947 practice.⁵ Thus, India argues that in making its finding on burden of proof in this case, the Panel failed to take into account the customary practice of the CONTRACTING PARTIES under the GATT 1947. India maintains that the *ATC* is an exception to the GATT 1994 because it authorizes the temporary maintenance of measures inconsistent with Articles XI and XIII of the GATT 1994. India argues that within that temporary and exceptional regime deviating from basic GATT principles, Article 6 of the *ATC* establishes an exception from the general principles of trade in textiles and clothing that are set out in Article 2.4 of the *ATC* by authorizing the introduction of new and discriminatory quantitative restraints within the framework of what Article 6.1 of the *ATC* describes as "a specific transitional safeguard mechanism" that "should be applied as sparingly as possible". India concludes that the principles applied to the exceptions in the GATT 1994, therefore, apply with even greater force to Article 6 of the *ATC*. In India's view, the Panel's finding on burden of proof changes the operation of the substantive requirements under Article 6 of the *ATC*, upsetting the negotiated balance of interests between importing and exporting Members under the *ATC*.

2. The TMB

India asserts that the Panel's finding in paragraph 7.20 of the Panel Report that the TMB, when examining a transitional safeguard measure in accordance with Article 6.10 of the *ATC*, "is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we understand, may relate to subsequent events"⁶, was requested neither by India nor by the United States. India contends that this finding attributes to the TMB discretionary powers that neither of the parties to the dispute suggested the TMB had.

India argues that the *ATC* and the *DSU* accord exporting Members three important procedural rights: (i) the right to hold consultations on the proposed transitional safeguard action on the basis of specific and factual information; (ii) the right to a review of a transitional safeguard action by the TMB; and (iii) the right to refer the matter to the DSB for examination by a panel. In India's view, the Panel's finding denies Members the benefit of the first two of these three rights.

⁴Adopted 25 February 1997, WT/DS24/R, para. 7.16.

⁵India cites seven GATT 1947 panel reports to demonstrate that there has been a consistently applied and well-established practice that the party invoking an exception bears the burden of proof.

⁶Panel Report, para. 7.20.

India submits that the Panel bases its finding on the erroneous notion that the *ATC* and the *DSU* establish a "two-track process" for the review of transitional safeguard actions, and that therefore the matter on which the TMB makes a recommendation and the matter submitted to the DSB can be different. In India's view, the *ATC* and the *DSU* establish a two-stage procedure under which the same measure is first submitted to the TMB and, if its recommendations are not acceptable, to the DSB. India stresses that the TMB review is a substitute for consultations normally held before the request for the establishment of a panel, and India argues that information that was not available at the time when the safeguard determination was made is not information that is "relevant" in the TMB's review of that determination under Article 6.10 of the *ATC*.

India further asserts that the task of the TMB is to deal with disputes arising from measures actually taken and to carry out those functions that are specifically assigned to it by the *ATC*. According to India, the expression of views on transitional safeguard actions that have not yet been taken is not part of this task. India maintains that by attributing to the TMB this additional competence, even when the Members did not agree to seek views on that matter, the Panel attributed to the TMB the authority to conciliate without the consent of the Members concerned, which is not consistent with the *DSU*.

Finally, India asserts that a comparison of the provisions of the *ATC* on the TMB and the provisions of the Multi-Fibre Arrangement (the "MFA") on the Textiles Surveillance Body (the "TSB"), reveals that the TMB, in contrast to the TSB under the MFA, has a well-defined, limited function of a legal nature.

In response to the argument by the United States that the Panel's statement on the role of the TMB is merely *obiter dicta* on which the Appellate Body need not rule, India argues that Articles 17.6, 17.12 and 17.13 of the *DSU* do not distinguish between *dicta* and findings. According to India, the right to appellate review would be seriously impaired if panels could express legal opinions on any point other than the issues involved in the case before them and Members of the WTO could not seek an appellate review of those opinions.

3. Judicial Economy

India points out that the Panel did not make findings on two of the four issues India submitted to the Panel for examination: namely, whether the United States' failure to specify in its request for consultations whether the proposed transitional safeguard action related to serious damage or the actual threat of serious damage was consistent with Article 6 of the *ATC*; and whether the retroactive

application by the United States of its transitional safeguard action was consistent with Article 2 of the *ATC*.

India argues that, within the framework of the *ATC*, the determination, the request for consultations on a proposed transitional safeguard action and the actual application of the transitional safeguard action must be regarded as distinct measures that can be contested separately. India states that it contested these measures separately not for the purpose of making the panel address theoretical issues, but rather out of a practical concern relating to the implementation of the Panel's recommendations by the United States. India argues that by defining the three factually and legally distinct measures as a single, "contested measure", the Panel denied India the right to an objective assessment of the request for consultations and the application of the transitional safeguard action in accordance with Article 11 of the *DSU*.⁷ India insists that it is not arguing that panels have to address in all instances all legal claims made by the parties. India acknowledges that there are many instances in which a finding on one matter resolves the dispute on another matter. In the present case, however, India maintains that the Panel's findings did not resolve the dispute on the two matters referred to above.

India asserts that the Panel failed to distinguish the contested "measure" from the matter to be examined. India explains that any dispute brought by a WTO Member under Article XXIII:1(a) of the GATT 1994 concerns an act or omission of another Member, that is a "measure". India notes that the dispute settlement procedures of the WTO begin with consultations on a specific measure and end with a recommendation on that measure. However, India maintains that the matter the panel must examine in accordance with Articles 6, 7 and 11 of the *DSU* is not the measure by itself, but rather the legal claims which the parties to the dispute make in connection with the measure. India concludes that the function assigned to a panel under Article 11 of the *DSU* is, thus, to examine all legal claims made relating to all measures at issue. India concludes that by defining its task solely in terms of the measure to be brought into conformity with the *ATC*, the Panel curtailed India's right to an objective assessment of all the legal claims it had made in its request for a panel. India also observes that while a panel must examine all claims made by the parties to the dispute and cannot go beyond these claims, it need not examine all arguments of the parties and can develop its own arguments.

India asserts that the panels established under the GATT 1947 did not apply the concept of judicial economy as suggested by the Panel in the Panel Report. India contends that those previous panels did not systematically end their legal analysis as soon as they had found the contested measure

⁷India also asserts that the question of what constitutes the "measure" that may be maintained in accordance with Article 6.12 of the *ATC* for a period of up to three years and the question of what constitutes "the specific measures at issue" within the meaning of Article 6 of the *DSU* are obviously completely different issues.

to be inconsistent with the GATT 1947, but instead determined the scope of their examination in the light of the objectives and legal interests of the parties to the dispute. India argues that had the Panel in this case been guided by the customary practice of the CONTRACTING PARTIES to the GATT 1947, it would have determined the scope of its examination in the light of India's expressed legal interest in findings on which the Panel failed to rule. Because the Panel in this case was not guided by this customary practice, India argues that matters that could be resolved in one proceeding will have to be resolved instead in multiple proceedings if future panels apply this Panel's concept of judicial economy.

Therefore, India submits that the Panel's application of the notion of judicial economy undermines the objectives of the *DSU*, which are described in Article 3.2 of the *DSU* and in India's view, include both dispute resolution as well as dispute prevention. India maintains that these objectives can only be achieved if panels resolve both the dispute over the particular contested measure and the issues of interpretation arising from all legal claims made in connection with that measure.

B. *United States*

With respect to each of the three issues raised in this appeal, the United States argues that the Panel acted correctly. The United States asks the Appellate Body to affirm the Panel Report.

1. Burden of Proof

The United States argues that the Panel properly addressed the issue of burden of proof in paragraphs 6.7 and 7.12 of the Panel Report. Unlike India, the United States does not see any contradiction between the Panel's statements in paragraphs 6.7 and 7.12 of the Panel Report, and considers paragraph 6.7 to be the final interpretative word on this issue by the Panel. As the United States sees it, the Panel found, consistently with the *DSU*, that both India and the United States had differing burdens to present factual and legal arguments: first, as the complaining party, India had the initial burden of establishing "a *prima facie* case of violation of the ATC, namely, that the restrictions imposed by the United States did not respect the provisions of Article 2.4 and 6 of the ATC"; then, after India had established a *prima facie* case, the United States had the burden "to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC".

The United States argues that the Panel did not assign any burden of proof, in the sense of burden of persuasion, to either India or the United States. The United States contends that India distorts the findings of the Panel when it claims that the Panel held that India had the ultimate burden of

persuasion. According to the United States, the Panel merely required India to meet the burden of going forward with the evidence. The United States argues that it is clear from the ordinary meaning of Articles 3.8, 6.2 and paragraph 5 of the working procedures for panels in Appendix 3 of the *DSU* that India had the obligation to initiate and commence the legal and factual issues, not only at the stage of a request for a panel, but also at the first substantive meeting of the parties. In other words, India had to make a *prima facie* demonstration that the United States' measure violated provisions of the *ATC*. The United States stresses that, in fact, India did so successfully in the present case.

The United States argues that India incorrectly asserts that there is a "consistently applied" and "well-established" GATT practice that the party invoking an exception carries the burden of proof of justifying the use of the exception. According to the United States, the panel reports cited by India in its appellant's submission do not reflect GATT practice justifying India's arguments that: (1) everything other than India's "core rules" are exceptions; (2) all "exceptions" are required to be construed narrowly; and (3) the complaining party has no burden to demonstrate that a so-called "exception" was improperly invoked. The United States maintains that the reports cited are either distinguishable, irrelevant, or contradicted by other reports, and that only in a few special situations involving the general exceptions of the GATT 1994 and other isolated exceptions of the GATT 1994 have panels consistently assigned the ultimate burden of persuasion to a particular party.

According to the United States, in disputes involving the vast majority of GATT provisions, it is well-established practice that the complaining party has the burden of making a *prima facie* case. Furthermore, the United States argues that India's legal taxonomy is overly simplistic in that it treats all so-called "exceptions" identically and fails to consider the reasons why such so-called "exceptions" exist. The United States argues that India also ignores the fact that, in addition to "obligations", WTO Member also have "rights", and that many, if not most, of what would be considered "exceptions" under India's taxonomy are more properly viewed as "rights". The United States argues that India's approach results in a "crude" method of treaty interpretation that is at odds with what the Appellate Body said in *United States - Standards for Reformulated and Conventional Gasoline*, in the sense that India's treatment of so-called "exceptions" is not case-by-case, but instead is a simplistic, "one-size-fits-all" mechanical approach to treaty interpretation.⁸

⁸Referring to the Appellate Body Report in *United States - Standards for Reformulated and Conventional Gasoline*, AB-1996-1, adopted 20 May 1996, WT/DS2/9, p. 19, the United States argues that India's approach ignores the "object and purpose" of provisions, it provides for no "scrutiny of the factual and legal context in a given dispute" and it disregards "the words actually used by WTO Members themselves to express their intent and purpose".

Finally, the United States argues that India's theory, if accepted, would alter significantly the rights and obligations of WTO Members with respect to a multitude of provisions of the GATT 1994 and other WTO agreements.⁹

Assuming *arguendo* that India correctly asserts that there is a "consistently applied" and "well-established" GATT practice that the party invoking an exception carries the burden of proof, the United States argues that Article 6 of the *ATC* is not such an exception. The non-exceptional nature of Article 6 is reflected in Article 2.4 of the *ATC*, which states two very general rules, namely, that textile restrictions existing before the *ATC* came into force would be grandfathered, and that new restrictions may be introduced only in accordance with the provisions of the *ATC* and other relevant provisions of the GATT 1994. The United States contends that the term "except" used in Article 2.4 of the *ATC* is in this context a synonym for "only", "provided that", or "unless" and cannot be read as an indication that Article 6 of the *ATC* is an exception. The United States adds as well that the text, context and object of Article 6 of the *ATC* support the conclusion that Article 6 is not a provision that compels a shifting of the burden of proof. The United States argues that for importing countries, Article 6 constituted a critical *quid pro quo* for the acceptance of the *ATC*'s phase-out of pre-existing quotas and integration of textiles and clothing trade into the multilateral trading system. The United States asserts that as an integral *ATC* provision, the transitional safeguard mechanism is on an equal footing with the other provisions of the *ATC*, such as the integration schedule of Article 2. Therefore, the United States concludes, the phrase "should be applied as sparingly as possible" in Article 6.1 of the *ATC* does not provide support for the notion that Article 6 is an exceptional provision; rather, that phrase merely reminds Members not to abuse their right to use temporary, transitional safeguard measures.¹⁰ The United States asserts that the treatment of Article 6 of the *ATC* as an exception would upset the carefully negotiated balance of rights and obligations of Article 6.¹¹

2. The TMB

The United States argues that the Panel's discussion of the TMB was mere *obiter dicta* which had no effect on the outcome of the case, and that it is difficult to see how India's procedural rights

⁹The United States asserted that under India's theory, all of the WTO provisions providing special and differential treatment for developing countries would be labelled as exceptions and that, therefore, the burden of persuasion would be on the developing country seeking to rely on one of these provisions.

¹⁰The United States notes that the Appellate Body in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, AB-1996-3, adopted 25 February 1997, WT/DS24/AB/R, p. 15, did not interpret Article 6 of the *ATC* either narrowly or broadly and indicated that the "as sparingly as possible" language could not be examined in isolation.

¹¹The United States notes that the Appellate Body in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, did not "loosen up the carefully negotiated language of Article 6.10, which reflect an equally carefully drawn balance of rights and obligations of Members ...".

under the *ATC* have been denied in any way by this *dicta*. The United States considers that the appropriate manner of "addressing" this Panel's *dicta* on an issue raised by neither of the parties would be for the Appellate Body simply to declare this aspect of the report to be *dicta* and not to offer any additional *dicta* of its own with respect to the role of the TMB.

Furthermore, the United States observes that nothing in the text of the *ATC* supports India's assertion that the information considered by the TMB in its examination of the transitional safeguard action must be limited to the information used by the importing Member in making its determination to take the transitional safeguard action. According to the United States, Article 6.10 of the *ATC*, and in particular the phrase, "any other relevant information", clearly contemplates the consideration of information that is not the same as that used by the importing Member at the time of the determination to take the action. The United States also argues that nothing in the *ATC* supports India's assertion that the TMB, in contrast to the TSB, has a well-defined, limited function of a legal nature.

3. Judicial Economy

The United States argues that the Panel did not err by declining to rule on all claims made by India. According to the United States, nothing in the *DSU* or elsewhere in the *WTO Agreement* requires a panel to rule on every claim raised by a party. The United States argues that the text of Article 11 of the *DSU* does not impose such obligation. The United States cites Article 3.7 of the *DSU* for the proposition that the primary function of the dispute settlement system is to resolve disputes by achieving the withdrawal of WTO-inconsistent measures, not to render interpretations or to generate opinions on any issue. The United States notes that Article IX of the *WTO Agreement* provides a mechanism for obtaining authoritative interpretations, as recognized in Article 3.9 of the *DSU*.¹² The United States does not accept India's argument that WTO dispute settlement has the "twin objective" of "dispute resolution" and "dispute prevention". According to the United States, this argument is at odds with Articles 3.7 and 3.9 of the *DSU*. The United States maintains that "dispute prevention" is, at most, a subsidiary function under the *DSU*, and one which does not translate into a legal requirement that a panel address every claim raised by a party.

With respect to India's argument that there are three "measures", rather than one, at issue in this case¹³, the United States observes that it is clear from Article 6.12 of the *ATC* that the "measure"

¹²The United States refers in this context to the Appellate Body Report in *Japan - Taxes on Alcoholic Beverages*, AB-1996-2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 13-15.

¹³India argues that not only the United States' determination, but also the United States' request for consultations and the backdating of the United States' restraint each constitute a distinct "measure" that can be contested separately.

is in fact the transitional safeguard action, not the procedures leading up to the imposition of the transitional safeguard action. In the opinion of the United States, India's interpretation of "measure" constitutes the sort of arbitrary subdivision of a measure that the Appellate Body criticized in *United States - Standards for Reformulated and Conventional Gasoline*. The United States also argues that India's belated identification of three measures, rather than one measure, is nothing more than a *post hoc* argument presented for the first time in this appeal.

The United States points out that in addition to being consistent with the text of the *DSU*, the Panel's decision to refrain from ruling on certain issues raised by India was consistent with the well-established practice of the GATT 1947 panels, which frequently declined to address claims in situations where the resolution of a claim was unnecessary for the purpose of resolving a dispute. The United States asserts that this practice has been continued under the *DSU* and the *WTO Agreement* by both WTO panels and the Appellate Body.

The United States also suggests that, as an alternative to finding that the Panel did not err when it declined to make findings on certain issues, the Appellate Body, as it did in *Brazil - Measures Affecting Desiccated Coconut*, could simply address the issue by deciding that it is unnecessary to resolve the procedural issue raised by India since it will have absolutely no effect on the previous conclusion by the Panel that the transitional safeguard measure imposed by the United States was inconsistent with the *ATC*.

Finally, the United States observes that the practice of panels and the Appellate Body in refraining from making findings that are unnecessary to the resolution of disputes has been described as being based on concerns of judicial economy. The United States argues that to the extent such concerns were valid under the pre-WTO regime, they are, in view of the number of matters now referred to the DSB, even more valid today. In order to preserve the integrity of the WTO system in general, and the dispute settlement mechanism in particular, the United States argues that both panels and the Appellate Body should focus only on those claims that must be addressed to resolve a dispute.

III. Issues Raised in this Appeal

This appeal raises the following legal issues:

- (a) Whether a party claiming that a transitional safeguard action violates Article 6 of the *ATC* has the burden of demonstrating that there has been an infringement of the obligations assumed under the *ATC*;
- (b) Whether the TMB is limited in its examination of a transitional safeguard action pursuant to Article 6.10 of the *ATC* to the evidence used by the importing Member in making its determination to take such action, or may also consider developments and information subsequent to that determination; and
- (c) Whether, under Article 11 of the *DSU*, a complaining party is entitled to a finding on all of the legal claims it makes to a panel relating to the measure in dispute.

IV. Burden of Proof

On the issue of burden of proof, the Panel concluded the following at paragraph 7.12 of the "Findings" section of the Panel Report:

The parties seem to have addressed two different aspects of what one might call the "burden of proof" issue. We believe that a distinction should be made. First, we consider the question of which party bears the burden of proof before the Panel. Since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put forward factual and legal arguments in order to establish that the US restriction was inconsistent with Article 2 of the *ATC* and that the US determination for a safeguard action was inconsistent with the provisions of Article 6 of the *ATC*. Second, we consider the question of what the importing Member must demonstrate at the time of its determination. Concerning the substantive obligations under Article 6 of the *ATC*, it is clear from the wording of Article 6.2 and 6.3 of the *ATC* that, in its determination of the need for the proposed restraint, the United States had the obligation to demonstrate that it had complied with the relevant conditions of application of Article 6.2 and 6.3 of the *ATC*.

The Panel illuminated this finding at paragraph 6.7 in the "Interim Review" section of the Panel Report:

Concerning India's comment about burden of proof, it was for India to submit a *prima facie* case of violation of the ATC, namely, that the restriction imposed by the United States did not respect the provisions of Articles 2.4 and 6 of the ATC. It was then for the United States to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC.

Although the Panel's finding at paragraph 7.12 and comments on interim review at paragraph 6.7 of the Panel Report are not a model of clarity, we do not believe the Panel erred in law. We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption.

The foundation of dispute settlement under Article XXIII of the GATT 1994 is the assurance to Members of the benefits accruing directly or indirectly to them under the GATT 1994. This was true as well of dispute settlement under the GATT 1947. If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then dispute settlement is available. With respect to complaints of violation of obligations pursuant to Article XXIII:1(a) of the GATT 1994, Article 3.8 of the DSU codifies previous GATT 1947 practice:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

Article 3.8 of the DSU provides that in cases where there is an infringement of the obligations assumed under a covered agreement -- that is, in cases where a violation is established -- there is a presumption of nullification or impairment. Article 3.8 then goes on to explain that "the Member against whom the complaint has been brought" must rebut this presumption. However, the issue in this case is not what happens after a violation is established; the issue in this case is which party must first show that there is, or is not, a violation. More specifically, the issue in this case is which party has

the burden of demonstrating that there has, or has not been, an infringement of the obligations assumed under Article 6 of the *ATC*.¹⁴

In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.¹⁵ Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.¹⁶

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.

A number of GATT 1947 panel reports contain language supporting the proposition that the burden of establishing a violation under Article XXIII:1(a) of the GATT 1947 was on the complaining party. As early as 1952, in *Treatment by Germany of Imports of Sardines*, concerning a complaint by Norway, the panel clearly put the burden of establishing a violation of the GATT 1947 obligations at issue on the complaining party, when it concluded:

The examination of the evidence submitted led the Panel to the conclusion that no sufficient evidence had been presented to show that

¹⁴Article 8.10, last sentence, of the *ATC*, allows a Member to invoke Article XXIII of the GATT 1994.

¹⁵M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 117.

¹⁶See M.N. Howard, P. Crane and D.A. Hochberg, *Phipson on Evidence*, 14th ed. (Sweet & Maxwell, 1990), p. 52: "The burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue." See also L. Rutherford and S. Bone (eds.), *Osborne's Concise Law Dictionary*, 8th ed. (Sweet & Maxwell, 1993), p. 266; Earl Jowitt and C. Walsh, *Jowitt's Dictionary of English Law*, 2nd ed. by J. Burke (Sweet & Maxwell, 1977), Vol. 1, p. 263; L.B. Curzon, *A Directory of Law*, 2nd ed. (Macdonald and Evans, 1983), p. 47; Art. 9, Nouveau Code de Procédure Civile; J. Carbonnier, *Droit Civil*, Introduction, 20th ed. (Presses Universitaires de France, 1991), p. 320; J. Chevalier and L. Bach, *Droit Civil*, 12th ed. (Sirey, 1995), Vol. 1, p. 101; R. Guillien and J. Vincent, *Termes juridiques*, 10th ed. (Dalloz, 1995), p. 384; O. Samyn, P. Simonetta and C. Sogno, *Dictionnaire des Termes Juridiques* (Editions de Vecchi, 1986), p. 250; J. González Pérez, *Manual de Derecho Procesal Administrativo*, 2nd ed. (Editorial Civitas, 1992), p. 311; C.M. Bianca, S. Patti and G. Patti, *Lessico di Diritto Civile* (Giuffrè Editore, 1991), p. 550; F. Galgano, *Diritto Privato*, 8th ed. (Casa Editrice Dott. Antonio Milani, 1994), p. 873; and A. Trabucchi, *Istituzioni di Diritto Civile* (Casa Editrice Dott. Antonio Milani, 1991), p. 210.

the German Government had failed to carry out its obligations under Article I:1 and Article XIII:1.¹⁷

In 1978, in *EEC - Measures on Animal Feed Proteins*, concerning a complaint by the United States, the panel made it equally clear that the burden of proof in that case was on the complaining party. In the final paragraph of that panel report, the panel stated:

Having heard no evidence that either the purchasing obligation, the security deposit or the protein certificate discriminated against imports of "like products" from any contracting party, the Panel concluded that the EEC measures were not inconsistent with the EEC obligations under Article I:1.¹⁸

Two recent panel reports under the GATT 1947 which follow this approach are the 1992 report in *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*¹⁹ and the 1994 report in *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*.²⁰ In the first case, the United States claimed that Canada had not fully eliminated the listing and delisting practices that a prior GATT panel report had found to be inconsistent with Article XI of the GATT 1947. The panel concluded, however, that with the exception of the listing and delisting practices of the province of Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the GATT 1947. In the second case, the complainants claimed, *inter alia*, that the penalty provisions of the Domestic Marketing Assessment legislation enacted by the United States were separate taxes or charges within the meaning of Article III:2 of the GATT 1947, and that Section 1106(c) of the 1993 Budget Act of the United States, mandated action inconsistent with Article VIII:1(a) of the GATT 1947. With regard to both claims, the panel concluded that the evidence submitted to it did not support the complainants' claims of inconsistency with the GATT 1947 obligations involved.

India has argued that it is "customary GATT practice" that the party invoking a provision which is identified as an exception must offer proof that the conditions set out in that provision are met. We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking

¹⁷Adopted 31 October 1952, BISD 1S/53, para. 15. See also the report of the Working Party in *The Australian Subsidy on Ammonium Sulphate*, adopted 3 April 1950, BISD Vol. II/188, para. 11.

¹⁸Adopted 14 March 1978, BISD 25S/49, para. 4.21. See also *European Communities - Refunds on Exports of Sugar, Complaint by Brazil*, adopted 10 November 1980, BISD 27S/69, para. (e) of the Conclusions; *Canada, Administration of the Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140, para. 5.13; and *Japan - Tariff on Import of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167, para. 10.

¹⁹Adopted 18 February 1992, BISD 39S/27, paras. 5.2-5.3.

²⁰Adopted 4 October 1994, DS44/R, paras. 82 and 124.

a defence, such as those found in Article XX²¹ or Article XI:2(c)(i)²², to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.²³

We do not believe that these particular previous GATT 1947 panel reports are relevant in this case. This case concerns Article 6 of the *ATC*. The *ATC* is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the *ATC* is an integral part of the transitional arrangement manifested in the *ATC* and should be interpreted accordingly. As the Appellate Body observed in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* with respect to Article 6.10 of the *ATC*, we believe Article 6 is "carefully negotiated language ... which reflects an equally carefully drawn balance of rights and obligations of Members" ²⁴ That balance must be respected.

The transitional safeguard mechanism provided in Article 6 of the *ATC* is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the *ATC*. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument

²¹*Canada - Administration of Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140, para. 5.20; *United States - Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345, para. 5.27; *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, paras. 5.43 and 5.52; and Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, as modified by the Appellate Body Report, AB-1996-1, adopted 20 May 1996, WT/DS2/9, para. 6.20.

²²*Japan - Restrictions on Imports of Certain Agricultural Products*, adopted 22 March 1988, BISD 35S/163, para. 5.1.3.7; *EEC - Restrictions on Imports of Dessert Apples*, Complaint by Chile, adopted 22 June 1989, BISD 36S/93, para. 12:3; and *Canada - Import Restrictions on Ice Cream and Yoghurt*, adopted 5 December 1989, BISD 36S/68, para. 59.

²³Furthermore, there are a few cases that are similar in that the defending party invoked, as a defence, certain provisions and the panel explicitly required the defending party to demonstrate the applicability of the provision it was asserting. See, for example, *United States - Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 98, concerning Article II:2 of the GATT 1947; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para. 4.34, concerning Article XXIV:12 of the GATT 1947; and *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.44, concerning the Protocol of Provisional Application.

²⁴AB-1996-3, adopted 25 February 1997, WT/DS24/AB/R, p. 15.

to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States "violated the provisions of Articles 2 and 6 of the ATC".²⁵

In our view, the Panel did not err on this issue in this case.

V. The TMB

India appealed the following statement relating to Article 6.10 of the *ATC* at paragraph 7.20 of the Panel Report:

During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, *we understand*, may relate to subsequent events. (emphasis added)

In our view, this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse".²⁶

VI. Judicial Economy

With respect to the issue of whether Article 11 of the *DSU* entitles a complaining party to a finding on each of the legal claims it makes to a panel, the Panel stated in paragraph 6.6 of the Panel Report:

Concerning India's argument that Article 11 of the *DSU* entitles India to a finding on each of the issues it raised, we disagree and refer to the consistent GATT panel practice of judicial economy. India is entitled to have the dispute over the contested "measure" resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the

²⁵Panel Report, para. 8.1.

²⁶Within the meaning of Article 17.13 of the *DSU*.

complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute.

The function of panels is expressly defined in Article 11 of the *DSU*, which reads as follows:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and *make such other findings as will assist the DSB* in making the recommendations or in giving the rulings provided for in the covered agreements ... (emphasis added).

Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated.²⁷ In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.²⁸

²⁷See, for example, *EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted 12 July 1983, BISD 30S/129, para. 33; *Canada - Administration of the Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140, para. 5.16; *United States - Imports of Sugar from Nicaragua*, adopted 13 March 1984, BISD 31S/67, paras. 4.5-4.6; *United States - Manufacturing Clause*, adopted 15/16 May 1984, BISD 31S/74, para. 40; *Japan - Measures on Imports of Leather*, adopted 15/16 May 1984, BISD 31S/94, para. 57; *Japan - Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116, para. 122; *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted 22 March 1988, BISD 35S/163, para. 5.4.2; *EEC - Regulations on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132, paras. 5.10, 5.22, and 5.27; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para. 5.6; and *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, para. 6.18.

²⁸See, for example, Panel Report, *Brazil - Measures Affecting Desiccated Coconut*, adopted 20 March 1997, WT/DS22/R, para. 293; and Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, as modified by the Appellate Body Report, AB-1996-1, adopted 20 May 1996, WT/DS2/9, para. 6.43.

Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the *DSU* that requires panels to do so.²⁹

Furthermore, such a requirement is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the *DSU* explicitly states:

The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.

Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the *DSU*. Article 3.4, for example, stipulates:

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO "recognize" that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" (emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.³⁰

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the "exclusive authority" to adopt interpretations of the *WTO*

²⁹See, for example, *EEC - Restrictions on Imports of Dessert Apples*, Complaint by Chile, adopted 22 June 1989, BISD 36S/93, para.12.20, where the panel explicitly stated that given its finding that the EEC measures were in violation of Article XI:1 of the GATT 1947 and were not justified by Article XI:2(c)(i) or (ii) of the GATT 1947, no further examination of the administration of the measures would normally be required. In that case, the panel nonetheless considered it "appropriate" to examine the administration of the EEC measures in respect of Article XIII of the GATT 1947 in view of the questions of great practical interest raised by both parties.

³⁰The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

Agreement and the Multilateral Trade Agreements.³¹ This is explicitly recognized in Article 3.9 of the *DSU*, which provides:

The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

In the light of the above, we believe that the Panel's finding in paragraph 7.20 of the Panel Report is consistent with the *DSU* as well as with practice under the GATT 1947 and the *WTO Agreement*.

VII. Findings and Conclusions

For the reasons set out in this Report, the Appellate Body upholds the legal findings and conclusions of the Panel.

The Appellate Body *recommends* that the Dispute Settlement Body make a ruling consistent with the legal findings and conclusions in the Panel Report and this Report.

³¹*Japan - Taxes on Alcoholic Beverages*, AB-1996-2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

Signed in the original at Geneva this 15th day of April 1997 by:

Christopher Beeby
Presiding Member

James Bacchus
Member

Mitsuo Matsushita
Member