WORLD TRADE ORGANIZATION

WT/DS33/AB/R
25 April 1997

(97-1773)

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	AB-1997-1
	Present:
India, Appellant United States, Appellee	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

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

II. Arguments of the Participants

A. *India*

India 97a7gswith the overall conclusions of the Panel Report, but alleggs 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 notgs that the Panel made statements on the burden of proof in its findings in par97aaph 7.12 of the Panel Report as well as in its comments on the interim review in par97aaph 6.7 of the Panel Report. India argugs 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 par97aaph 7.12, nor the obligation to present a *prima facie* case to that effect, as the Panel stated in par97aaph 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 rulgs 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 A7a7gment*") dogs 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 rulgs on the burden of proof determine which party in the dispute must make a legal claim and supply the evidence; the function of the rulgs 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 partigs bear a burden of proof of different de7a7gs.

Moreover, India argugs 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* -

[3]Done 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

making

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 (to) TjETBT1 0 0 1 3BT1 0 0 1 501.12 492 Tm 11 Tf((to) TjETBTiF17 1

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

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

persuasion. According to the United States, the

'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

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'

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

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 determin

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

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 me

'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,

> 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 claimed1 0 0 1 115.92 408 Tm2 427.44 Tm/F17 11 Tf(lTBT1 0 0 1 438.96 341 0 1 124.3

a defence, such as those found in Article XX[21] 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)

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)

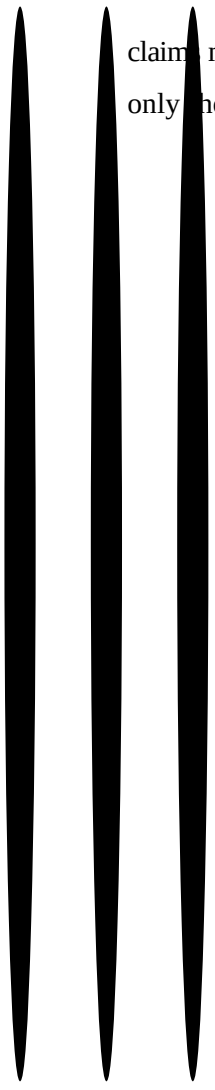
In our view, this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be "a legal finding or conclusion" which the Appellate Body "may uphold, modify or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

> 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 T1 0 0 1 489.36 4



follows:

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

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

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

Christopher Beeby
Presiding Member

James Bacchus
Member

Mitsuo Matsushita
Member