

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

Notification of an Appeal by India under
paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 24 February 1997, sent by India to the Dispute Settlement Body (DSB), is circulated to Members. The notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

1. Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, India hereby notifies its decision to appeal to the Appellate Body certain findings of the Panel on "*United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*" (WT/DS33/R).

2. India's appeal is limited to the following issues of law covered in the Panel report and legal interpretations developed by the Panel:

a) The third sentence of paragraph 7.12 of the report of the Panel reads as follows:

"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" (emphasis supplied).

In the view of India, this finding is legally incorrect. The transitional safeguard provisions of Article 6 of the ATC are an exception from the general principles on trade in textiles and clothing that are set out in Article 2:4 of the ATC. As the recent report of the Panel on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear from Costa Rica* correctly pointed out, "[it] is a general principle of law, well-established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception" (WT/DS/24/R, paragraph 7.16). The Panel therefore erred in law when it ruled that it was for India to establish before the Panel that the US determination for a safeguard action was inconsistent with the provisions of Article 6 of the ATC.

b) In paragraphs 7.18 to 7.20 of its report, the Panel interprets the procedures of the Textiles Monitoring Body (TMB) and the procedures set out in the DSU as establishing a two-track process. On the basis of this interpretation, the Panel reaches in paragraph

7.21 the conclusion that the TMB, when examining a safeguard measure in accordance with Article 6:10 of the ATC,

"need not limit [itself] to the evidence used by the importing Member in making its determination to impose the measure" and may "consider developments subsequent to the initial determination."

The Panel's interpretation implies that the TMB is permitted to refrain from examining the matter referred to it in accordance with Article 6:10 (namely whether the safeguard action actually applied is consistent with the ATC) by examining a completely different matter (namely whether a safeguard measure would be appropriate taking into account the information available at the time of the TMB examination). Article 8:10 of the ATC requires Members to submit a safeguard action to the review of the TMB before challenging it under the procedures of the DSU. This requirement implies that the matter to be examined by the TMB under the ATC and the panel under the DSU must be the same. In the view of India, the Panel therefore erred in law when it failed to recognize that the ATC and the DSU establish a two-stage process under which a single matter is first examined by the TMB and then, if the exporting Member so requests, by a panel.

- c) India had submitted to the Panel's examination essentially four matters, namely
- whether the United States determination of serious damage met the requirements of Article 6:2 and 3 of the ATC;
 - whether the United States safeguard action could be imposed consistently with Article 6 of the ATC notwithstanding the fact that the TMB had not endorsed the United States determination of serious damage;
 - whether the United States' failure to specify in its request for consultations whether it related to serious damage or the actual threat of serious damage was consistent with Article 6:7 of the ATC; and
 - whether the United States retroactive application of its safeguard action was consistent with Articles 2 and 6 of the ATC.

The Panel presented findings only on the first two of the above matters. At the interim review stage, India stated that the above four matters were factually and legally distinct and that Article 11 of the DSU therefore entitled India to findings on all of them. The Panel reacted in paragraph 6.6 of its report as follows:

"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 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 on respect of this dispute."

This finding of the Panel is inconsistent with the DSU as well as the practice under the GATT 1947 and the Tokyo Round agreements on subsidies and anti-dumping. As the Appellate Body pointed out in its most recent report, "the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference." (WT/DS22/AB/R, page 23). 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 legal claims set out in the Panel's terms-of-reference. India would like to clarify that its appeal is limited to the Panel's findings on India's procedural rights under the DSU. India decided not to request the Appellate Body to rule on the matters on which the panel failed to present findings because the interpretative issues to which these matters give rise have already been clarified in the report of the panel on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear from Costa Rica* and the Appellate Body's review of this report (WT/DS24/AB/R).