

ICTSD Programme on Dispute Settlement



# Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence



By James Headen Pfitzer and Sheila Sabune



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## ACRONYMS

ATC - Agreement on Textiles and Clothing

DSB - Dispute Settlement Body

DSU - Dispute Settlement Understanding

GATT - General Agreement on Tariffs and Trade

ICJ - International Court of Justice

IMF - International Monetary Fund

IP - Intellectual Property

LDC - Least-developed Country

SPS - Agreement on the Application of Sanitary and Phytosanitary Measures

WTO - World Trade Organization

## FOREWORD

The Dispute Settlement Understanding (DSU), the agreement that governs the WTO dispute settlement mechanism, seeks to ensure an improved prospect of compliance, given its provisions on compensation and retaliation and thus constitutes a central element in providing security and predictability to the multilateral trade system.

Now in its second decade, member states have demonstrated that the structure and enforcement mechanisms provided by the DSU provide a legal recourse unparalleled by many similar intergovernmental bodies. Yet growing use has revealed problems within the institutional framework of the system itself, as well as in the jurisprudence thus far developed.

These shortcomings threaten the continued usefulness of the dispute settlement body, and by implication, the very legitimacy of the multilateral trading system itself. Truly, without effective adjudication under the DSU, a major advantage of multilateral trade coordination is lost as members will invariably seek unilateral recourse in trade disputes.

The burden of proof as currently applied is one such point of concern.

A legal principle not defined by the DSU, its meaning only emerges through amalgamation of Appellate Body decisions. Oft repeated yet inescapably uncertain, the rule has emerged that parties must forward sufficient evidence to make a '*prima facie*' case.

Illusive in both definition and application, this principle can create profound challenges to system participation and overall function. Appellate Body reasoning has been applied capriciously at the panel level, undermining predictability. Contradictions between rulings undermine consistency, and overall system transparency is eroded as how much and what kind of evidence is required to satisfy the burden is unknown, allowing decision makers to seemingly draw arbitrary distinctions amongst evidentiary submissions.

Since the adjudication of trade disputes would remain ambiguous without the transparent and consistent application of the burden of proof, the lack of clarity within the '*prima facie*' principle could be seen to detract from overall system legitimacy while further presenting an additional obstacle to entry for inexperienced members, especially the developing and least developed amongst them, wishing to engage in the dispute settlement system.

This study clarifies the standard through reference to WTO jurisprudence, scholarly analysis, as well as international and domestic legal traditions. Providing both general overview and focused guidance, this paper tracks case-by-case interpretations of the standard at all levels of WTO dispute settlement, providing key language while attempting to reconcile internal contradictions.

After comprehensive analysis, this study advocates modifying the burden of proof to a preponderance of the evidence standard, a principle which the authors argue is better suited to the inherent structural organization of the Dispute Settlement Mechanism.

It is the central conclusion of this paper that such an adoption would provide clarity within the system while easing the entry of new participants to the system - both ultimate goals of the DSU. Providing useful commentary on how this new standard may be implemented, this study cites evidence from recent decisions indicating that a shift to this standard may already be underway within the dispute settlement system.

This study aims to assist both experienced practitioners and newcomers in understanding the current nuances of the dispute settlement system, while also presenting a well-reasoned argument for reform. It is our hope that you find this paper a useful contribution within the field.

This paper is produced under ICTSD's research and dialogue program on Dispute Settlement and Legal Aspects of International Trade which aims to explore realistic strategies to maximize developing countries' capability to engage international dispute settlement systems to defend their trade interest and sustainable development objectives. The authors are James Headen Pfitzer, legal technical officer at the World Health Organization in Geneva, and Sheila Sabune, Trade in Services and Dispute Settlement Programme Officer at ICTSD.



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## EXECUTIVE SUMMARY

The burden of proof in dispute settlement has been referred to as a legal response to ignorance. However, clarification is necessary to establish what constitutes the “*prima facie*” evidence that allows a dispute to go forward under WTO jurisprudence.

While the notion of *prima facie* (often translated as “on the face of it”) is a standard of evidence without a fixed definition, international tribunals have characterised it as evidence that “unexplained or uncontradicted is sufficient to maintain the proposition affirmed”.

Under WTO jurisprudence, a complainant that is unable to meet the *prima facie* standard runs the risk of failure. Lawyers with a background in common law find this fact troubling as WTO panels are not confined to considering only the factual record as presented by parties. (Article 13 of the Dispute Settlement Understanding authorises panels to seek information from anywhere they deem appropriate to supplement evidence provided by the parties. This is also the practice of courts in civil law systems, as well as most international tribunals).

“Burden shifting” refers to the point in legal proceedings when a court has completed its analysis of whether the complainant has presented enough evidence to state a claim and allows the adjudicator to consider the merits of the case, and with it evidence presented by the defendant and, possibly, other parties with an interest in the dispute.

In case law, the WTO Appellate Body has confirmed the original GATT practice regarding the allocation of burden of proof that the complaining party must establish all violations it alleges. The Appellate Body emphasised that the burden of proof would shift only once the panel had conducted an analysis to determine that the complaining party had met the requisite *prima facie* standard.

The Dispute Settlement Understanding does not contain an explicit standard of review of what constitutes *prima facie* evidence and the task of developing the jurisprudence for its implementation has been left to the Appellate Body. However, Appellate Body rulings have not been consistent with respect to exactly what evidence should be considered by a panel in deciding whether a *prima facie* case has indeed been presented and therefore it is not clear how a panel should conduct its *prima facie* analysis. Clarification is necessary.

This paper contemplates the modification of burden of proof shifting in WTO dispute settlement to include a preponderance of the evidence analysis rather than limiting consideration to the *prima facie* standard. Further, this paper considers how procedural aspects unique to dispute settlement under the WTO Dispute Settlement Understanding directly support this shift and in fact make the application of traditional notions of a *prima facie* standard impossible. In doing so, it highlights a specific area in WTO jurisprudence which is currently difficult for all Members to navigate, including those which are developing and least-developed.

Over the last thirty years there has been a steady increase in the number of developing countries participating actively in the international trading system as well as a related improvement in quality associated with that participation.<sup>1</sup> The shift from dispute settlement from the GATT to the WTO has created substantial change which to a certain extent benefits and encourages participation of developing countries. The WTO has developed a neutral environment isolated from political pressures in which Members may engage in the adjudication of trade disputes.<sup>2</sup>

The substantially broadened WTO membership has raised new challenges for nations seeking to actively engage in the WTO. As WTO rules have become more complex and far-reaching, negotiating

Rounds have increasingly required agreement across a wider and more complex set of issues, therefore opening the door to trade disputes of escalating complexity. Adjudication of trade disputes cannot be meaningful without the transparent and consistent application of the burden of proof and developing and least-developed countries (LDCs) should watch with particular attention as the practices relating to the burden of proof are further developed.

## INTRODUCTION

The purpose of this contribution is to explore whether (and how) it is possible to improve the World Trade Organization (WTO) dispute settlement system through the modification of burden of proof shifting in WTO to include a preponderance of the evidence analysis rather than consideration of the *prima facie* standard in order to facilitate coherence and ease of use for all WTO Members.

The power to settle international disputes with an authority that is binding distinguishes the WTO from most other intergovernmental institutions. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) gives the WTO unprecedented power to resolve trade-related conflicts between Members and to assign penalties and compensation to parties involved.

As dispute settlement under the GATT tended to be more negotiation-based, dispute resolution was characterised by the flexibility of procedures, the control of the dispute by the parties and the freedom to accept or reject opinions and proposed settlements.<sup>3</sup> These diplomatic solutions were favoured by those Members who valued flexibility and looked upon international trade disputes as inherently political. Conversely, the WTO dispute settlement system is adjudication-based and strives for legalistic, impartial and objective procedures which lead to heightened predictability and precise definitions of obligations and effective means of implementation.<sup>4</sup>

While the diplomatic method of the GATT tended to be easier and less expensive for developing countries than that of the WTO, the strengthening of the dispute settlement mechanism improved the situation of developing countries by better insulating them from the pressures of power politics.<sup>5</sup> Developing countries commonly find themselves at a disadvantage during political bargaining because they often rely upon developed countries for aid, military assistance or technical transfers and are therefore afraid to “bite the hand that feeds them”. A developing country also has a smaller impact on a developed country’s economy because bilateral trade is more likely to be a greater percentage of the

developing country’s gross domestic product than that of the developed country’s.<sup>6</sup> The development of a neutral dispute settlement system under the WTO has helped to level the playing field by limiting the scope of debate to the legal merits of the case and therefore offers increased judicial protection to a developing country litigant against more powerful developed country adversaries.<sup>7</sup>

The breakdown in the Doha negotiations may be a signal of eroding faith and growing impatience in the multilateral trading system. The impasse between developing countries and developed countries in Doha may be indicative of waning political will among such economies to maintain and expand the WTO and may evidence a potential shift towards bilateralism. How WTO resolves disputes will be monitored closely as the dispute settlement system is the arm of the WTO which ensures compliance with the covered agreements.

In this climate of doubt, not only will final outcomes be scrutinised, but so will technical aspects of the dispute settlement process. The application of the burden of proof and methods of measuring proof are such technical aspects which will gain greater importance because the burden of proof grapples with the balance of power between WTO Member state litigants. Potentially, it can be the keystone which exemplifies equality between Member States and which rebuilds confidence in the system and ultimately holds it together; or alternatively, its biased application may add further impetus to a shift away from multilateral trade in general.

Any discussion on the legitimacy of the WTO and, by extension, the dispute settlement system, cannot be meaningful or effective without a clear understanding and consistent application of the burden of proof. Developing countries and least-developed countries (LDCs) should watch with great interest as WTO jurisprudence expands because they not only have much to lose from the failure of the multilateral trading system, but also a great deal to gain from WTO dispute settlement success.

## DEVELOPMENT OF DISPUTE SETTLEMENT WITHIN WTO

The creation of the DSU is a substantial step in the gradual shift from a diplomatic and power-based approach in the settlement of international disputes to a more legalistic, law-based approach.<sup>8</sup> Dispute settlement procedures are central in the WTO's mechanisms designed to ensure the reduction of tariffs and nontariff barriers to trade as well as the elimination of discriminatory treatment in trade relations. However, it is necessary for the WTO dispute settlement system to achieve and maintain a degree of transparency, predictability and consistency: traits which are prerequisites for any legal system based on the rules of law.<sup>9</sup> While the WTO has made substantial progress in the direction of a legalistic model through the creation of the DSU, this progress may become protracted by uncertainties in its application, particularly in standards of review and burdens of proof applied by panels. This confusion is highlighted when panels conduct analyses to shift the burden of proof between parties to a dispute.

WTO dispute settlement is administered by a Dispute Settlement Body (DSB) which consists of the WTO's General Council. Among its powers, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the WTO agreements. The dispute settlement system aims to resolve disputes by clarifying the rules of the multilateral trading system because the WTO cannot legislate or directly promulgate new rules or regulations without explicit Member consent.

The primary goal of WTO dispute settlement is to ensure national compliance with multilateral trade rules. Consistent with this endeavour, the DSB encourages Members to make their best possible effort to bring domestic legislation into compliance with the panel ruling within a reasonable period of time. This reasonable period of time is established by the parties at the conclusion of the dispute.

When a WTO Member believes that another Member has taken an action that impairs benefits accruing to it, both directly or indirectly, under the Uruguay Round Agreements, it may request consultations to resolve the conflict through informal negotiations. The consultations procedure is a mandatory first step to the WTO dispute settlement process and is codified and further developed by the DSU. The DSU requires written requests for consultations clearly stating reasons for the request, the legal basis for the complaint and an explanation of the measures in question (DSU 1994). Consultations aim at assisting disputing Members to reach a mutually-agreed solution; however, consultations must be conducted in good faith before resorting to further action available to Members under the DSU.<sup>10</sup> Additionally, the consultation process provides potential parties to a dispute the opportunity to discuss and exchange relevant information and opinions, all of which are intended to enable the panel process to flow as smoothly as possible.

The DSU requires a Member to respond to a request for consultations within ten days, and the Member is further required to engage in consultations within thirty days. In the event that consultations after 60 days from the receipt of the request fail to yield outcomes that are mutually agreeable, Members may request the establishment of a panel to resolve the dispute. The consultation process is conducted without prejudice to the rights of any Member in relation to the panel process and DSU Article 4.6 explains that confidential information received during the consultation process cannot be used in the panel procedure as evidence against the other parties.

Panels generally consist of three individuals with expertise in international trade law and policy. These panellists hear and consider the evidence and then provide the DSB with a report which recommends a course of action within six months. The DSB either adopts the report or decides by consensus not to accept it. Alternatively, if one of the parties involved

decides to appeal the decision, the report will not be considered for adoption until the completion of the appeal by the WTO Appellate Body. An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership.

The WTO Secretariat manages a list from which panel members are selected. The DSU contains detailed rules on the composition of panels and clarifies necessary steps and the role of the WTO Director General should parties fail to agree on the panel's composition. Under the GATT dispute settlement system, only government officials served on panels; however, today the WTO allows well-qualified non-government individuals to serve on a panel and DSU Article 8.1 forbids a potential panel member from serving on a panel if he or she is a citizen of a Member-state party to the dispute, or a citizen of a third party, unless the parties agree otherwise.<sup>11</sup>

When the attempt to create an international trade organisation in the late 1940s failed, the successfully-negotiated trade agreement, the GATT, was left without a well-defined institutional structure. Only a few clauses with regard to dispute settlement were contained in the original GATT, most of which centered around Article XXIII. The article states that a Member country may request consultations with another Member country should it consider that the other Member country's trade measure may lead to the nullification or impairment of its own expected benefit. Despite the rather skeletal framework of Article XXIII, dispute settlement in the early stages of the GATT worked rather well, partially due to its small and homogenous membership. Since its inception in 1947, the

GATT evolved into a comprehensive framework of international trade laws as it exists today under the WTO. In 1995, the WTO was established following the completion of the Uruguay Round negotiations and the new dispute settlement procedures under the WTO altered several features of the previous GATT mechanism.

As stipulated in DSU Article 11, a WTO panel is required to 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 covered agreements. Thus, like any tribunal of first instance, WTO panels make findings of fact, applicable law, and, applying such law to the facts, violations of law.

The WTO panel process consists of two sets of submissions, two sets of rebuttals, two oral hearings, with accompanying questions and answers throughout, before the panel makes its interim report to the parties.<sup>12</sup> Thus, all evidence in the case is submitted and evaluated before any interim findings of fact, applicable law, or WTO violations are made by the panel. Therefore, the panel process as structured under the DSU is not designed to suggest the application of a *prima facie* standard under which a panel would decide whether the complainant has made a *prima facie* case; and, if so, then allow the respondent to attempt to rebut the finding; and, if so, then allow the respondent to present any defence it may have. Although the Appellate Body, in its jurisprudence, has devoted substantial time addressing the procedural ramifications of conducting analysis under a *prima facie* standard, the WTO panel process was structured so as to inevitably support what would more closely resemble the application of a preponderance of the evidence approach.

## STANDARDS OF REVIEW WITHIN WTO DISPUTE SETTLEMENT

The determination of the appropriate burden of proof and the standard of review specify the rules under which a decision-maker proceeds in the face of uncertainty.<sup>13</sup> Standards of review and the question of applying the proper such standard come into play under the WTO in two

ways. Firstly, they arise at the panel level, specifically when a panel is required to review a domestic administrative determination and decide if such a domestic ruling is in compliance with WTO rules and obligations.<sup>14</sup> Put differently, the question addresses "the degree

to which, in a GATT (and now WTO) dispute settlement procedure, an international body should ‘second guess’ a decision of a national government agency concerning economic regulations that are allegedly inconsistent with an international rule”<sup>15</sup>

The second context in which standard of review arises in WTO dispute settlement is when the Appellate Body reviews decisions of a

## THE BURDEN OF PROOF

The burden of proof in dispute settlement has been referred to as “the law’s response to ignorance”<sup>17</sup> It “compensates for the many uncertainties of litigation, allowing the judicial system to reach determinate outcomes in the absence of relevant information”<sup>18</sup> In international law the generally-accepted rules relating to the burden of proof are relatively straightforward. Simply stated, “[e]ach party ... has to prove its claims and contentions”<sup>19</sup> The main source of confusion relating to the burden of proof lies in the terminology used to express these rules as well as in the distinction between burden of proof and the presentation and evaluation of evidence.<sup>20</sup> Additionally, differences in the way the burden of proof and the *prima facie* standard are defined in both common law and civil law jurisdictions can further contribute to this confusion.

Issues related to the burden of proof were less significant during the application of the original GATT dispute settlement system. This is most likely because disputing parties often presented panels with already agreed-upon facts.<sup>21</sup> Under the old GATT, the burden of proof was actually considered “more of an intellectual concept than a practical one” because panels directly questioned both parties, giving neither the benefit of the doubt.<sup>22</sup> The evolution of the burden of proof in the GATT relates substantially to “nullification and impairment”. Originally, under GATT Article XXIII, a breach of obligation alone was not enough to bring an action.<sup>23</sup> Proof of “nullification or impairment” was required of

panel. In this situation, the issue becomes how much deference, if any, should the Appellate Body give to panel findings and interpretations of law, as opposed to facts.<sup>16</sup> Standards of review and the determination of which standard of review to apply to a certain case are substantially different from the application of and determination of burdens of proof and standards of proof, further explained below.

the complaining party which was described as the “negotiation oriented approach”.<sup>24</sup> Gradually, GATT panels eliminated this confusing approach and held that any violation of GATT would be considered “*prima facie* nullification or impairment”<sup>25</sup>

As explained by Appellate Body member, David Unterhalter, the burden of proof in WTO dispute settlement “answers two questions that are central to most forms of adversarial litigation that rests upon the proof of facts. First, which party must satisfy the decision-maker on a particular issue once all the evidence has been adduced? Second, what standard of proof must be met to satisfy the decision-maker on that issue”<sup>26</sup> The WTO DSU incorporated at least two rules relevant to the burden of proof from the old GATT system. First, the complaining party is required to prove all violations alleged by it. Second, a respondent who invokes general exceptions under GATT Article XX is obliged to prove that the necessary requirements for the exceptions are satisfied.<sup>27</sup>

In the WTO panel process, the question of who bears the burden of proof is quite essential because, unlike during the time of the GATT, the disputing parties to a WTO case often contest numerous facts and evidence in the panel proceedings.<sup>28</sup> The allocation of the burden of proof has a substantial impact on the substantive rights and obligations of the parties and may directly determine the outcome of the case.



The determination of the correct burden of proof can be closely linked to the concept of presumption. Presumptions, in basic pretext, require or at times allow the trier of fact upon the proof of *X* to proceed on the basis that *Y* is true.<sup>29</sup> Where the presumption is irrefutable, then *Y* follows as a rule of law and will not be undermined by the presentation of additional evidence. Alternatively, where the presumption is refutable, then the truth of *Y* remains open to further determination on the basis that there is additional evidence to eventually disprove *Y*.<sup>30</sup>

## THE PRIMA FACIE STANDARD

*Prima facie* is a standard of proof without a finite definition; however, it has been defined in general by international tribunals as evidence “which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed”<sup>33</sup> The Latin term *prima facie*, or “at first appearance”, means “the evidence sufficient to render reasonable conclusion in favour of the allegation he asserts”<sup>34</sup> This definition, nevertheless, only emphasises the importance of the subjective element inherent in issues relating to the standard of proof and begs the question: what is the evidence which, unexplained or uncontradicted, is sufficient to maintain a claim?<sup>35</sup>

Historically, use of a *prima facie* standard was utilised by GATT panels in the context of deciding whether a certain act or measure by a GATT contracting party constituted nullification or impairment in the sense of GATT Article XXIII.<sup>36</sup> As GATT jurisprudence evolved, a finding by a panel of a GATT violation constituted *prima facie* nullification or impairment of GATT concessions. Such a finding was rebuttable by the responding party. If not successfully rebutted however, the initial *prima facie* finding of nullification and impairment became final along with all the legal consequences that followed under GATT Article XXIII.<sup>37</sup>

The WTO introduced a more structured and formal system for resolving disputes than that of the GATT. The WTO system arose out

Presumptions may directly affect the burden of proof in that a presumption, by creating a commitment to proceed in a particular fashion, may determine which party is burdened with the obligation to present proof for a particular issue.<sup>31</sup> Just as a presumption favours one party to the dispute and shifts the burden of proof, the successful refutation of that presumption by an opposing party may be sufficient to persuade the trier of fact that what has been initially presumed is not the case.<sup>32</sup> There is a shift in the burden of proof, but only in the sense that the opposing party is now at risk and should it fail to produce sufficient evidence, it will lose the case.

of dissatisfaction with aspects of the GATT procedures although it is important to note that dispute settlement under the WTO system has not divorced itself from the former rules in the GATT Agreement. GATT Articles XXII and XXIII remain central to dispute settlement under the WTO today.<sup>38</sup>

The typical standard of proof applied by WTO panels has been presented in *Indonesia - Autos* namely that it is for the complainant to establish a *prima facie* case of inconsistency with the provision before the burden of showing consistency with that provision is shifted to the defendant. The Appellate Body in *EC - Hormones* states with respect to the meaning of a *prima facie* case “that it is well to remember that a *prima facie* case is one which in the absence of effective refutation by the defending party requires the panel, as a matter of law, to rule in favour of the complaining party”<sup>39</sup> However, the question remains: in order to discharge the burden of proof, what degree of evidence is required?

In response to this concept McGovern explains that “[g]iven that panels have a margin of discretion in the assessment of fact, it might be better to speak of a case that entitles (rather than requires) the panel to reach a conclusion”<sup>40</sup> In his evaluation of the *prima facie* standard as presented by the Appellate Body in *EC - Hormones* with respect to the burden of proof, McGovern queries whether it

is still meaningful to even speak of a *prima facie* case, while observing that in deciding whether such a case has been established, not only is the evidence of the party who is charged to present a *prima facie* case taken under consideration *prima facie*, but also the evidence presented by independent experts along with “at least some responses from the other party”<sup>41</sup>

Traditionally, establishing a *prima facie* case serves the purpose of allowing the case to move forward from the initial phase where the claimant is required to present to the adjudicator evidence supporting the claim, to the point where the responding party is required to rebut the evidence presented by the claimant. Throughout WTO jurisprudence, the Appellate Body attempts to shift the burden of evidence to the responding party only once the complainant has established a *prima facie* case. However, confusion related to when the Appellate Body determines that it is actually appropriate to shift the burden is apparent upon a review of the relevant case law.

## BURDEN OF PROOF IN A COMMON LAW SYSTEM

Burden of proof in common law systems is ambiguous. The primary application of the burden of proof here relates to “the duty to persuade the trier of fact by the end of the case of the truth of certain positions”<sup>44</sup> Such a duty has been called the “burden of persuasion”, which places the benefit of the doubt in favour of the defending party; that is, if the complaining party does not produce sufficient evidence to convince the trier of fact of its position, that complaining party then loses.<sup>45</sup>

In common law, additionally, there is a secondary meaning to burden of proof which contributes to the confusion related to this concept. This burden consists of “producing sufficient evidence to justify the judge in leaving the issue to the jury or, when there is no jury, to allow the hearing to continue”<sup>46</sup> The burden of proof here addresses whether sufficient evidence has been presented by the party bearing the burden of proof to warrant

WTO panels are not confined to the factual record as presented by parties. Lawyers with a background in common law find this troubling because, contrary to what takes place in most common law proceedings, Article 13 of the DSU authorises a panel to seek information “from any individual or body which it deems appropriate”<sup>42</sup> This information may then be used to supplement that provided by the parties. In this respect, WTO panels follow the practice of courts in civil law systems, as do most international tribunals.<sup>43</sup>

It is possible to trace some of the confusion related to the application of the *prima facie* standard to differences between the common law and civil law systems. This is because each system has an innately different approach to the application of burden of proof. Moreover, when taking part in WTO Dispute Settlement, participants bring with them preconceived ideas from their own domestic system relating to the application of burden of proof. This further contributes to the confusion of burden of proof generally and its application within the WTO Dispute Settlement System specifically.

the court granting consideration of the claim. In common law jurisdictions, “[a]fter the plaintiff has closed his case, the defendant may apply for absolution from the instance on the grounds that no reasonable court might find for the plaintiff on his evidence. If the application is successful, the defendant will not be called on to present his case”<sup>47</sup> This interpretation of burden of proof relates to the duty of the complainant to present sufficient evidence to convince the court that there is in fact a case to be tried, that is, to present a *prima facie* case, and is typically referred to as the burden of production.

In common law, the proponent of the case needs only establish a legitimate triable issue of fact which therefore avoids the possibility that the court make a judgment as a matter of law or summary judgment (dismissing the claim). It is necessary to clarify, however, that in common law jurisdictions, the requisite



degree of evidence to establish a *prima facie* case is not automatically sufficient for that disputed fact to be proven as a matter of law, even in the event the opposing party chooses not to respond.<sup>48</sup> There are in effect two levels of proof: one being the *prima facie* level, the meeting of which ensures that the judge considers the merits of the particular claim; and the second, the overall burden to persuade the adjudicator that what is claimed is true.

In common law, the duty to present a *prima facie* case satisfies the burden of production and rests upon the proponent of a cause of action in order to justify that the judge identifies sufficient evidence to support the cause of action and allows the case to move forward.<sup>49</sup>

## BURDEN OF PROOF IN A CIVIL LAW SYSTEM

In civil law jurisdictions there is but one interpretation assigned to the burden of proof which relates directly to the duty of parties to prove allegations they assert.<sup>52</sup> This interpretation correlates to the first interpretation of burden of proof in common law jurisdictions, the duty of persuasion, where the complaining party has the burden to ultimately prove the merits of their case. This is different from the concept of the burden to move the case forward and the requirement for the complaining party to present sufficient evidence to bring the case, or the burden of production.

The functions of a court adjudicating a case in civil law jurisdictions are not divided between judge and jury and therefore the legal concept of “duty of passing the judge” does not exist in civil law.<sup>53</sup> When considering traditional interpretations of the value of presenting a *prima facie* case, that is, the requirement for the complaining party to present sufficient evidence to convince the trier of fact that the case should be considered, there is no traditional *prima facie* concept in civil law. Each party must present their case and it is for the trier of fact to conclude which party prevails. There is no initial hurdle for the complainant to surmount in order to establish that the court should consider the case and no clear

When the proponent has made a *prima facie* case, it is then for the defendant to produce evidence to rebut, and therefore the burden of production has shifted to the defendant upon the presentation of evidence sufficient to meet the *prima facie* standard. The ultimate burden of persuasion works after the burden of production is satisfied and rests on the same party who initially bears the burden of production.<sup>50</sup> Where the burden of persuasion is fixed to the pleadings, it is possible for the burden of production to shift between the parties depending on the respective claims and defences invoked.<sup>51</sup> The burden of production raises a threshold issue to be considered by the judge before proceeding further.

distinction between the burden of production and the burden of persuasion.<sup>54</sup>

In civil law jurisdictions, in contrast to common law jurisdictions, the proceeding usually stretches over a series of hearings and does not involve a jury. Additionally, prior to a hearing, evidence is likely to be submitted simultaneously by both sides and not presented sequentially.<sup>55</sup> In the German trial practice, a civil law jurisdiction, the burden of persuasion is the key aspect to the burden of proof. The concept of the burden of production arises when facts at issue are disputed. The proponent of disputed facts must be prepared to explain to the court what types of evidence it will submit to substantiate its version of the facts, but under German law, as long as the proponent describes what evidence it will provide, both the claimant and respondent will then submit evidence simultaneously.<sup>56</sup> In civil law jurisdictions as explained above, the common law interpretation of the burden of production does not exist.

In the German system, the presentation of a case that satisfies the *prima facie* standard does not shift the burden of proof to the other party. The burden always rests with the same party and it is only tentatively treated as having been satisfied unless the opposing party

presents sufficient evidence to bring the issue in question back to a state of uncertainty.<sup>57</sup> It is important to note however, that civil law jurisdictions do have presumptions and the concept of *prima facie* proof; however, as in Germany, presumptions arise out of statutory provisions and concepts of *prima facie* evidence are used to rebut such presumptions.<sup>58</sup>

According to Herzog and Weser, French law and doctrine, another civil law jurisdiction, does not make a clear distinction between the burden of production, which is the burden of producing sufficient evidence to justify that the court find

in favour of the proponent of the evidence and hear the case, and the burden or persuasion, which is the burden of actually persuading the court to ultimately rule in favour of the proponent of evidence.<sup>59</sup> The *prima facie* concept would be most relevant to the burden of production. Because the court is required to interpret the law and facts, and as no procedural motion is available to test whether enough evidence has been presented for the court to rule,<sup>60</sup> the clear distinction of the *prima facie* analysis for the purpose of moving the case forward, contains no practical significance in jurisdictions which are based in civil law.

## COMMON LAW AND CIVIL LAW TAKEN TOGETHER

In common law, the concept of the burden of production is distinguished from the burden of persuasion.<sup>61</sup> With respect to the general interpretation of the burden of proof, common law and civil law share two main principles; the first being the concept that burden of proof as a fundamental substantive obligation does not shift between parties, but remains with the party that initially bears it throughout the proceedings.<sup>62</sup> However, in both systems, the burden of proof does not always reside with a single party, each party will bear the burden to prove the claims and facts it asserts. As an example, the defending party will bear the burden to prove the exceptions and affirmative defences it invokes.

Secondly, in both common law and civil law jurisdictions, the scope of the burden of proof is limited only to triable issues of fact.<sup>63</sup> The court is assumed to know all applicable law and is in need of no persuasion by the parties. However, in practice, the parties to a dispute will bring forward as many legal causes of action as possible in an effort to support their position. In the event that the court is unclear on issues of law after an examination of all the arguments, the court is obligated to conduct its own legal analysis. Regarding issues of law, parties to a case do not bear a risk of non-persuasion the way they do for factual issues.

## BURDEN OF PROOF WITHIN WTO DISPUTE SETTLEMENT

The WTO is a rules-based system as opposed to a negotiation-conciliation-mediation type of dispute resolution mechanism and very much depends on the presentation of factual proof by the parties.<sup>64</sup> The jurisprudence, however, addresses which parties are required to establish a *prima facie* case, or meet the burden of production.<sup>ii</sup> The strict application of a *prima facie* case instills upon the complaining party the burden of proof and requires that, to satisfy the *prima facie* standard, that party must adduce evidence which discharges the burden such that in the absence of evidence in rebuttal,

the decision-maker must determine the case in its favour.<sup>65</sup>

Although not the traditional method of applying the *prima facie* standard and the burden of production, the Appellate Body through case law, has utilised the concept of a *prima facie* standard to set the duty on the party who must satisfy the decision-maker that it is entitled to succeed in its complaint. The Appellate Body tends not to make a clear distinction between the burden of persuasion and the burden of production, and further seems to focus mainly on the burden to meet the *prima facie* standard,

a concept unique to WTO jurisprudence which diverges from traditional interpretations of the various burdens of proof. Therefore, a complaining party that is unable to present the *prima facie* case runs the risk of failure.

Conversely, a defending party that believes the complaining party has not met the *prima facie* standard and, as a result, decides to forgo presentation of a defence also risks failure. In practice, however, both parties undertake to present cases which not only meet the *prima facie* standard as the burden of proof, but which meet the ultimate standard of proof, or the burden of persuasion, for their particular claims. This tendency for parties to undertake to present cases which meet the burden of persuasion, combined with the fact that procedurally there is no opportunity for the panel to transparently consider and communicate to the parties the outcome of the application of the *prima facie* standard, ultimately leads to the confusion which surrounds the burden of proof issue in WTO dispute settlement.

In WTO proceedings, there is no strict sequence for parties to present evidence. The Working

Procedures for panels in Appendix 3 to the DSU have certain provisions that appear to be similar to procedures in common law jurisdictions. At the first substantive meeting, the complaining party presents its case (paragraph 5) while the second substantive meeting is primarily devoted to “formal rebuttals” (paragraph 7). However, in practice, the second meeting tends to have a mixed character and involves submissions by the parties while both parties are supposed to “submit, prior to that meeting, written rebuttals to the panel”<sup>66</sup> Additionally, as the panel may at any time pose questions to the parties, substantial time during the substantive meetings is devoted to explanations and answers to such questions.<sup>67</sup> Regardless of what the drafters of the DSU envisioned, the current practice of panel substantive meetings does not resemble common law practices in that the complainant and the respondent are allowed to present evidence simultaneously during the meetings, a practice which is more similar to civil law procedures than common law procedures. At this point, a review of WTO jurisprudence related to the *prima facie* standard and burden shifting is necessary.

## WTO Case, US – Shirts and Blouses

The WTO Panel in *US - Shirts and Blouses* determined “it was for India to submit a *prima facie* case of violation of the ATC ... [i]t was then for the United States to convince the panel that, at the time of its determination, it had respected the requirements of the ATC.”<sup>68</sup> India appealed the Panel’s holding; however, the Appellate Body upheld the Panel’s decision with respect to the shifting of the burden of proof and the application of the *prima facie* standard. *US - Shirts and Blouses* marked the first instance where the *prima facie* standard was articulated and applied by the Appellate Body:

“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. 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.

In the context of the GATT 1994 and the WTO Agreements, 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.”<sup>69</sup>

By concurring with the *US - Shirts and Blouses* Panel, the Appellate Body created a new standard advocating the shifting of the burden of proof once the *prima facie* standard has been met, therefore confirming the original GATT practice in relation to the allocation of burden

of proof, specifically: 1. it is for the complaining party to establish the violation it alleges; 2. it is for the party who asserts a fact to prove it; and 3. it is the party who invokes an exception or an affirmative defence who must prove that the conditions contained therein are met.

## WTO Case, India – Patent

In *India - Patent*, the Panel applied the Appellate Body's *prima facie* standard to burden shifting as established in *US - Shirts and Blouses* and the Appellate Body confirmed the Panel's holding:

“The panel has [applied the burden of proof correctly] in this case ... the United States put forward evidence and arguments that India's ‘administrative instructions’ pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward

rebuttal evidence and arguments. India misinterprets what the panel said about ‘reasonable doubts.’ The panel did not require the United States merely to raise ‘reasonable doubts’ before the burden shifted to India. Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the panel concluded that it had ‘reasonable doubts’ that the ‘administrative instructions’ would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court.”<sup>70</sup>

## WTO Case, EC – Hormones

In addressing issues relating to the *prima facie* standard and burden of proof shifting under the SPS Agreement, the Panel in *EC - Hormones*, in line with the above cases, held:

“We consider that, as is the case in most legal proceedings, the initial burden of proof rests on the complaining party in the sense that it bears the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement. It is, indeed, for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim ... Once such a *prima facie* case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party”<sup>iii</sup>

case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*, which the Panel invokes and which embodies a rule applicable in any adversarial proceeding.”<sup>71</sup>

The Appellate Body confirmed the panel's findings and offered a degree of clarification:

“The initial burden lies on the complaining party, which must establish a *prima facie*

Up to this point the Appellate Body has maintained consistency and seems to be establishing a *prima facie* standard related to burden shifting as first articulated by it in *US - Shirts and Blouses*. In *EC - Hormones* the Appellate Body clarifies that this standard is to be applied to all WTO adversarial proceedings. Furthermore, the Appellate Body continues to explain: “It is also well to remember that [a] *prima facie* case is one which, in the absence of effective refutation by the defending party,



requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case”<sup>72</sup>

It is important to note that while the Appellate Body in *EC - Hormones* applied the *prima facie* standard to burden shifting, it advanced this application a step further by proscribing that the burden of proof may shift only once the panel has conducted analysis to determine that the requisite *prima facie* standard has been achieved by the obliged party. The Appellate Body explained:

“In accordance with our ruling in *US - Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the SPS Agreement addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5. Only after such a *prima facie* determination has been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party’s claim.”<sup>73</sup>

The Appellate Body’s holding in *EC - Hormones* therefore serves a dual purpose: first, to clarify its intention regarding the application of the *prima facie* standard to burden shifting in all cases, and second, to clarify that a *prima facie* case must be established before a responding party is required to rebut.

According to the Appellate Body, it follows that whether the defending party is able to refute evidence presented by the claimant should have no effect on the initial determination of whether the complainant was able to satisfy the standard of proof, i.e. establishing a *prima facie* case. A failure by the defendant to adequately refute the *prima facie* case presented by the claimant will mean that the complaining party

has successfully discharged its burden of proof or satisfied its burden of persuasion, but should have no effect on the initial determination of whether the complainant established a *prima facie* case in the first place. Otherwise, benefits from conducting the *prima facie* analysis seem to be of little consequence.

At this point it is important to recall that although the Appellate Body in *EC - Hormones* explains that, procedurally under the Working Procedures in DSU Appendix 3, a *prima facie* case must first be established before the responding party is required to rebut because all arguments must be submitted at once, the respondent does not have time to begin preparation and presentation of rebuttal arguments once the panel informs the parties of the outcome of the *prima facie* standard analysis. All submissions are made prior to the panel releasing its preliminary report.

The *prima facie* analysis is therefore a purely internal analysis and this distinction that a *prima facie* case must first be established before the responding party is required to rebut, adds an additional layer of confusion to the burden-shifting analysis. Parties are required to address the *prima facie* analysis as a sub-section of their submissions along with the presentation of their entire case. This fact alone directly undermines the necessity and value-added from conducting the *prima facie* analysis.

When considering the above formulations, it is justifiable to ask: what burden shifts between the parties? A *prima facie* case based on the common law interpretation would mean merely that an inference in favour of the claimant is permissible, but not mandatory, and that the complainant has met a minimum required threshold of proof necessary to bring the case before the tribunal. However, under traditional common law, presenting a *prima facie* case would neither shift the burden of production nor the ultimate burden of persuasion as it seems to in WTO jurisprudence.<sup>74</sup>

## WHAT EVIDENCE SHOULD BE CONSIDERED IN DETERMINING WHETHER THE PRIMA FACIE STANDARD HAS BEEN ATTAINED?

The DSU was not drafted to contain an explicit standard of review. The Appellate Body has explained, however, “that the issue of failure to apply an appropriate standard of review ... resolves itself into the issue of whether or not the panel ... made an objective assessment of the matter before it, including an objective assessment of the facts”<sup>75</sup> While panels must employ DSU Article 11 which addresses the function of the panel, they have not developed the jurisprudence of its legal content. This task has been left to the Appellate Body as it decides claims where panels have failed to make an objective assessment of the relevant issues, as required by Article 11.<sup>76</sup> There are those who consider regrettable the Appellate Body’s engagement in judicial law-making and that this translates into a form of judicial activism that strays from the boundaries of its institutional mandate. Others argue gap-filling and the clarification of ambiguity to be an intrinsic requirement to the Appellate Body’s interpretative role.<sup>77</sup>

Repeatedly, the Appellate Body has indicated that the burden of proof shifts to the other party once a *prima facie* case has been established by the complainant. The substantial investigative authority given to panels under DSU Article 13 cannot be used by a panel to rule in favour of a complaining party that has not first established a *prima*

*facie* case of WTO inconsistency based upon specific legal claims asserted by it.<sup>78</sup>

Regarding the elements necessary to meet the *prima facie* standard, the Appellate Body in *US - Gambling* explained “[t]he evidence and arguments underlying a *prima facie* case ... must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision”<sup>79</sup> However, the Appellate Body has not maintained consistency with respect to exactly what evidence should be considered by the panel in deciding whether a *prima facie* case has indeed been presented. Because the *prima facie* burden-shifting analysis is conducted internally by the panel after all evidence is submitted, panels have been known to consider outside information submitted by experts as well as arguments presented by opposing and third parties to the dispute.

The fact that panels consider information in addition to that provided by the complaining party seems to cut against traditional notions of a *prima facie* analysis for the purposes of the burden of production and the Appellate Body’s determination in *EC - Hormones* that the burden of proof may shift only once the panel has conducted an analysis to determine that the requisite *prima facie* standard has been achieved by the complaining party

## THE PANEL CONSIDERING OUTSIDE INFORMATION WHEN CONDUCTING THE PRIMA FACIE ANALYSIS

As established in DSU Article 13, “Right to Seek Information”, a panel is entitled to seek outside information and guidance from experts and any other relevant source. However, as interpreted by the Appellate Body, the purpose of this mandate is only to help the

panel to understand and evaluate the evidence submitted and the arguments asserted by the parties and this is not a mandate for the panel to make a case on behalf of a complaining party. Below is an analysis of the relevant case law.

## WTO Cases, Japan – Agriculture and Canada – Aircraft

In February 1999 the Appellate Body in *Japan - Measures Affecting Agriculture Products* cited *EC - Hormones* to establish the *prima facie* standard and burden shifting. The Appellate Body then continued to explain that it is an abuse of authority for a panel to investigate under its own initiative and then to nevertheless rule in favour of a complaining party which fails to meet the *prima facie* standard. The Appellate Body thus indirectly imposed limitations upon evidence which the panel may consider during the application of the *prima facie* standard and the burden-shifting analysis. The Appellate Body explained:

“[P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses ... but not to make the case for a complaining party.”<sup>80</sup>

The Appellate Body continued:

“The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency.”<sup>81</sup>

In *Japan - Agriculture*, the Appellate Body seems to be following the *EC - Hormones* interpretation of the *prima facie* analysis and burden shifting with respect to requiring a panel to begin the analysis of each legal provision by examining whether the complaining party has presented evidence and sufficient legal argumentation to reach the *prima facie* threshold, or put another way, whether the complaining party has met its burden of production. This is consistent because outside information that is not presented by the complaining party should not be considered by the panel when applying the *prima facie* standard to the shifting of the burden of proof. This is

also consistent with traditionally-accepted interpretations of a *prima facie* standard and the burden of production and makes a clear difference between the burden of production and the ultimate burden of persuasion.

In a later opinion, however, the Appellate Body directly reversed itself with respect to restraints upon a panel regarding evidence it considers during the application of the *prima facie* standard to burden shifting. In August 1999, the Appellate Body in *Canada - Measures Affecting The Export of Civilian Aircrafts* determined that a panel is free to request and consider information from parties or anyone else, and specifically the panel is under no obligation to wait until the complaining party presents a *prima facie* case before it is able to conduct its own investigation. Furthermore, the Appellate Body explained that outside information requested at the prerogative of the panel may indeed be necessary for the panel to determine whether the complaining party has presented a *prima facie* case:

“[A] panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence.”<sup>82</sup>

Additionally, in paragraph 194 of the *Canada - Aircraft* report, the Appellate Body declared itself consistent with its holding in *Japan - Agriculture*. However, this is not clearly apparent because the Appellate Body in *Canada - Aircraft* seems to have contradicted its statements in *Japan - Agriculture* with respect to a panel’s ability to freely conduct

an independent investigation during the application of the *prima facie* standard for the purposes of the burden of production. Moreover, it would seem that the Appellate Body in *Canada - Aircraft* has diverged from its initial interpretation of the *prima facie* standard as applied to burden shifting, namely that it is for the complaining party alone to carry the initial burden of proof (recall that this interpretation was advanced by the Appellate Body in *EC - Hormones* and upheld by it in *Japan - Agriculture*).

If a panel is free to seek outside information to assist it in the analysis of whether the *prima facie* standard has been met by the complaining party, the value and necessity for a panel to consider whether a party has initially met the *prima facie* standard becomes less apparent. Additionally, allowing the panel to consider outside information cuts against traditional definitions of a *prima facie* standard as related to the burden of production. The Appellate Body thus seems to be creating its own novel version of a *prima facie* standard.

## THE PANEL CONSIDERING ARGUMENTATION OF OPPOSING PARTIES WHEN CONDUCTING THE PRIMA FACIE ANALYSIS

Under the Working Procedures of DSU Appendix 3, because the panel process requires the parties to present all submissions, rebuttals, questions and answers, as well as to conduct all oral hearings before the panel releases its interim report to the parties, it is possible for the panel to consider the arguments of opposing and third parties while applying the *prima facie* standard to the burden-

shifting analysis. This further undermines the necessity for the panel to apply the *prima facie* standard. If the panel does not constrain itself to the arguments of the complaining party when applying the *prima facie* standard, the utility of considering the *prima facie* standard in the first place is greatly reduced and only serves to heighten possibilities for confusion and contradiction.

## WTO Cases, India – Quantitative Restrictions and EC – Bed Linen

Confusion becomes further evident with the Appellate Body's 1999 opinion in *India - Quantitative Restrictions*. In addressing whether the US reached the *prima facie* standard, the Panel followed the Appellate Body in *Canada - Aircraft* and considered evidence provided by outside experts, in this case the International Monetary Fund (IMF). However, the panel additionally considered rebuttal arguments provided by India in response to initial claims made by the United States. In reviewing the Panel's decision, the Appellate Body explained:

“[T]he Panel did not explicitly find that the United States had made a *prima facie* case before it considered the answers of the IMF and the responses of India to the arguments of the United States. As mentioned above, the Panel stated that it would consider the position of the United States in light of India.”<sup>83</sup>

The Appellate Body continued:

“We do not interpret the above statement as requiring a panel to conclude that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a *prima facie* case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assuming whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States.”<sup>84</sup>

In addition the Appellate Body in the 2003 *EC - Bed Linen* case also held that all submitted evidence should be considered by a panel during the analysis of the *prima facie* standard and burden shifting. The Appellate Body upheld the Panel's decision and explained:



“India asserts that the Panel should have shifted the burden to the European Communities once India had established a *prima facie* case. There is nothing in the Panel’s reasoning, however, to suggest that the Panel premised its ultimate conclusion on whether or not India had presented a *prima facie* case. From our perspective, the Panel assessed and weighed all the evidence before it - which was put forward by both India and the European Communities - and, having done so, ultimately, was persuaded that the European Communities did, in fact, have information before it on all relevant economic factors listed in Article 3.4 of the Anti-Dumping Agreement.”<sup>85</sup>

The Appellate Body in *EC - Bed Linen* seems to be advocating a more liberal approach to a panel’s investigative authority. Moreover it appears to be moving away from its original concept of the *prima facie* burden-shifting

doctrine, something more similar to the burden of production, as supported in *EC - Hormones*, to a more complex type of *prima facie* consideration where all evidence is considered, similar to the ultimate burden of persuasion, as advanced by it in *Canada - Aircraft*. The Appellate Body in *EC - Bed Linen* continued:

“India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties ... It is not “an error, let alone an egregious error”, for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India’s argument that, by failing to shift the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU.”<sup>86</sup>

## THE CONFUSION AND PROBLEMS CREATED

Confusion is apparent in the different methods that the Appellate Body uses to define and apply the *prima facie* standard to the burden of proof-shifting analysis. In *India - Quantitative Restrictions* and *EC - Bed Linen* the Appellate Body seems to advocate that a panel conduct its own analysis considering all evidence presented simultaneously, in line with *Canada - Aircraft*, rather than conducting an analysis of the *prima facie* standard and burden shifting where a panel initially limits itself to the consideration of evidence proffered by the complainant, as was previously advanced by the Appellate Body in *EC - Hormones* and *US - Shirts and Blouses*.

However, the Appellate Body does still find value in the original analysis of the *prima facie* standard and burden shifting as is evidenced by its continued practice of basing its definition of the *prima facie* standard and burden shifting upon the *US - Shirts and Blouses* and *EC - Hormones* standards. It would therefore seem prudent for the Appellate Body to clearly define requirements under the *prima facie* standard which reconcile the above-mentioned diverging case law.

More recently, in the 2003 *Japan - Apples* and the 2006 *US - Zeroing* cases, the Appellate Body again addressed evidence considered by the panel in determining whether the *prima facie* standard had been met by the complaining party. In *Japan - Apples*, the Appellate Body cited and followed its previous holding in *India - Quantitative Restrictions*, reiterating that a panel should conduct its own analysis and consider outside information in determining whether a *prima facie* case had been presented by the complaining party. Again, this interpretation of the *prima facie* standard is inconsistent with traditional interpretations and with the holdings of the Appellate Body in *US - Shirts and Blouses* and *EC - Hormones*. The Appellate Body explains:

“In order to assess whether the United States had established a *prima facie* case, the Panel was entitled to take into account the views of the experts. Indeed, in *India - Quantitative Restrictions*, the Appellate Body indicated that it may be useful for a panel to consider the views of the

experts it consults in order to determine whether a *prima facie* case has been made. Moreover, on several occasions, including disputes involving the evaluation of scientific evidence, the Appellate Body has stated that panels enjoy discretion as the trier of facts;<sup>87</sup> they enjoy “a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence”<sup>88</sup>

In *US - Zeroing*, the Appellate Body further reiterates, in line with *Japan - Apples*, *Canada - Aircraft*, *India - Quantitative Restrictions* and *EC - Bed Linen*, that a panel should conduct its own analysis considering all evidence presented by all parties before deciding whether *prima facie* has been reached:

“[T]he panel rightly conducted its own assessment of the evidence and arguments, rather than simply accepting the assertions of either party.<sup>89</sup> In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States.”<sup>90</sup>

The Appellate Body seems to be thus instructing a panel to bundle all evidence put forward by both parties and outside experts, and then

## WTO Case, US – Gambling

Evidence-bundling by the panel is inconsistent with traditional interpretations of the *prima facie* standard as well as Appellate Body interpretations of the traditional *prima facie* standard as established by it in the *US - Shirts and Blouses* and *EC - Hormones* cases. It would be reasonable to conclude that the Appellate Body is simply moving away from the application of the *prima facie* standard; however, the 2005 *US - Gambling* case indicates that the Appellate Body intends to strictly enforce the requirement that the complaining party present a *prima facie* case. The Appellate Body explains:

“Where the complaining party has established its *prima facie* case, it is then for the responding party to rebut it.

consider whether the *prima facie* standard has been reached by the complaining party, similar to that which would be conducted during the consideration of the ultimate burden of persuasion; rather than first constraining itself to the submissions of the complaining party for the purposes of the *prima facie* standard analysis and burden of proof shifting, which would be more similar to the burden of production.

This method of evidence-bundling by the panel is actually favoured by the procedural structure of the panel process. Because all evidence is submitted by the parties before the panel releases its interim report, it stands to reason that the panel would have a natural tendency to consider all evidence presented when conducting every step of its analysis. To strictly apply to the *prima facie* standard the panel would first be required to exclude evidence not provided by the complaining party, apply the *prima facie* standard, then, regardless of the outcome from the application of the *prima facie* analysis, continue to consider all submitted evidence while weighing the merits of the case and considering the ultimate burden of persuasion. When considering the procedural aspects of the panel process, the strict application of the *prima facie* standard becomes, at best, cumbersome.

A panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case.”<sup>91</sup>

The Appellate Body continues:

“...at a minimum, the evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.”<sup>92</sup>

Considering the above language from *US - Gambling*, it appears that in order for a panel

to determine whether the complaining party has made a *prima facie* case, it is necessary for it to constrain itself to the evidence and argumentation put forward by the complaining party while conducting the initial analysis of the *prima facie* standard and burden shifting. In *US - Gambling*, the Appellate Body has returned

to traditional interpretations of the *prima facie* standard, similar to the burden of production, as originally advanced by it in the *US - Shirts and Blouses* and *EC - Hormones* cases; however, in doing so, the Appellate Body has created inconsistency in the relevant jurisprudence which leads to substantial confusion.

## LATEST DEVELOPMENTS IN WTO CASE LAW, THE CHINA – IP RIGHTS CASE

On 26 January 2009, the *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (or the *China - IP Rights* case for short) was released by the Panel. In *China - IP Rights*, the Panel considers the application of the *prima facie* standard and the complaining party's obligation to present *prima facie* evidence in sufficient amount so that particular claims may be brought.

In this case, China alleged that the United States failed to make a *prima facie* case with respect to its claim that copyright protection in China is contingent upon a review of the material's content. China explained that according to well-established Appellate Body interpretation, the complaining party must both properly assert and prove its claim and that should such proof be absent or deficient, then the responding party has no burden to progress with that particular claim. China explained that the complaining party must present and substantiate its *prima facie* case and that in the absence of evidence other than that which has been comprehensively rebutted, it cannot be held that the complaining party has met its burden.<sup>93</sup>

In considering this issue, the Panel in *China - IP Rights* explained that although the United States provided several exhibits, “the information in the exhibits would not necessarily have been sufficient and, even if it were, it would not be appropriate for the Panel to trawl them for evidence to which the United States did not refer to make the United States' case for it”<sup>94</sup> The Panel continued by citing the precedent established by the Appellate Body in the *US - Gambling* case:

“A *prima facie* case must be based on ‘evidence and legal argument’ put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments”<sup>95</sup>

With this opinion, the Panel has continued in the same line as laid out by the Appellate Body in the *US - Gambling* case: in order for a panel to complete the determination of whether the complaining party has presented a *prima facie* case necessary to take the claim forward, the panel must constrain itself to the evidence presented by the complaining party. In the traditional context, the Panel has returned to the application of the *prima facie* standard as related to the burden of production.

Further, the Panel in *China - IP Rights* seems to take an additional step in restricting evidence which a panel may consider when conducting the *prima facie* analysis in stating that it is not sufficient for the complaining party to merely submit information and exhibits which it considers relevant to its case; however, the complaining party has the further obligation to present clear argumentation as to how and why the submitted evidence and exhibits bolster their claims and contribute to their presentation of a *prima facie* case. Although this concept was referred to by the Appellate Body in the *US - Gambling* case, the Panel in *China - IP Rights* presented this additional aspect with clarity.

## AFFIRMATIVE DEFENCES AND THE SHIFTING OF THE BURDEN OF PROOF

At this point, it is necessary to consider the shifting of the burden of proof in relation to affirmative defences invoked during dispute settlement. One situation where it is possible for the burden of proof to shift from the complaining party to the defending party is when the defending party invokes an exception or an affirmative defence. In this circumstance, the defendant's challenged measure is then subjected to stricter scrutiny to ensure that it is permissible under the cited exception provision.<sup>96</sup>

The affirmative defences are found in Article XX of GATT 1994. Early in WTO jurisprudence, Article XX of GATT was classified as containing limited exceptions from obligations under certain provisions of the GATT and not positive rules establishing additional obligations.<sup>97</sup> With respect to affirmative defences, the Appellate Body in *US - Wool Shirts and Blouses* stated that the contents of GATT Article XX are "in the nature of affirmative defences", and "the burden of establishing such a defence should rest on the party asserting it"<sup>98</sup>

This precedent as established in *US - Wool Shirts and Blouses* has been followed by the Appellate Body and it is firmly established that the party invoking an affirmative defence or exception bears the burden of production and must present a *prima facie* case that the claimed defence is reasonable.<sup>99</sup> Thus, upon invoking an affirmative defence, the burden is shifted to that party to prove that notwithstanding the fact that a violation exists, the violation is permissible under the invoked exception or affirmative defence. Therefore, upon claiming the applicability of an exception or affirmative defence, the exception-claiming party brings upon itself both the burden of production, necessary to support the consideration of the defence, but also the burden of persuasion, the burden of proof necessary for the exception-claiming party to ultimately prove its claim and discharge the case.

In *EC-Asbestos*, Canada claimed that the EC violated Articles III:4 and XI:1 of GATT 1994. The EC considered that, even if its measures amounted to a violation of those provisions, they were justified by exceptions in Article XX (b). While confirming that it was up to Canada to present sufficient evidence to meet the burden of production to establish the presumption of inconsistency, the panel explained that the EC could either present sufficient evidence to rebut the presumption of inconsistency, or alternatively it could make use of a "particular method of defence in the affirmative"<sup>100</sup> The panel explained that by choosing the defence, it would then be up to the EC to present evidence sufficient to support its reliance on that defence just as Canada would be required to present evidence with respect to the claims put forward by it.<sup>101</sup>

Account should however be taken of the caveat raised by the Appellate Body in *EC - Hormones* when considering the effect of an exception on the allocation of the burden of proof. The Appellate Body stated: "[t]he general rule in a dispute settlement proceeding requir[es] a complaining party to establish a *prima facie* case of inconsistency with a provision ... before the burden of showing consistency with that provision is taken by the defending party, [and] is not avoided by simply describing the same provision as an exception"<sup>102</sup> It would seem therefore, that the Appellate Body envisions the complaining party to bear the initial burden of production and with it the requirement to present a *prima facie* case before the burden shifts to the defending party to present a defence. Additionally, the Appellate Body seems to be indicating that once the defending party claims the defence of an exception or affirmative defence, that party must meet the burden of production in presenting a *prima facie* case to establish the relevance of the invoked exception, and then must present evidence sufficient to dissuade the burden of persuasion in order for the panel to ultimately rule in the defending party's favour.

When considering the application of affirmative defences or exceptions included in GATT Article XX to the shifting of the burden of proof, it is important to recall that procedurally, all parties submit all evidence and argumentation before the panel issues its interim report. Therefore, parties must anticipate the shifting of the burdens of proof as well as the types of burdens, be it burden of production or burden of persuasion, and present all relevant claims and evidence before they receive any response from the panel.

Set against this procedural backdrop, the necessity for a panel to initially conduct the analysis of whether a party has met the burden of production by satisfying the *prima facie* standard, when the panel is already in possession of all relevant evidence and argumentation, where the burden of persuasion effectively overtakes the burden of production, makes the consideration of the burden of production and by extension consideration of the *prima facie* standard, of little benefit to the adjudication of the case.

## ATTEMPTS TO RECONCILE WTO JURISPRUDENCE

In considering all available WTO jurisprudence, it continues to remain largely unclear as to how the Appellate Body envisions a panel to conduct the analysis of the *prima facie* standard and its application to burden shifting. Is a panel justified in considering outside evidence and argumentation presented by both parties while conducting the analysis of the *prima facie* standard, as advocated by the Appellate Body in *Zeroing, Apples, Quantitative Restrictions* and *Bed Linen*, effectively treating the *prima facie* analysis as the analysis of the ultimate burden of persuasion? Or is a panel required to consider only evidence proffered by the complainant, as laid out by the Appellate Body in *US - Shirts and Blouses* and *EC - Hormones* and advanced by it in *US - Gambling*, therefore applying the *prima facie* standard consistently with the burden of production? The latter case is the more traditionally-accepted approach to an application of the *prima facie* standard. Clarification is necessary.

Appellate Body member Yasuhei Taniguchi explains that “the point in time at which a *prima facie* case is established is not always clearly discernible and, therefore, not normally mentioned in the panel reports”<sup>103</sup> Taniguchi continues to explain that the “Appellate Body has found that a panel is not required to make a specific finding, in each and every instance, that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that the respondent has effectively rebutted a *prima facie* case”<sup>104</sup> Moreover,

Taniguchi explains that the Appellate Body has held that “a panel is not required to make a finding, either implicitly or explicitly, regarding whether the complainant has established a *prima facie* case before it examines the respondent’s arguments and evidence ... and it is clear that whether a *prima facie* case has been made is normally determined when the proceedings are concluded, although the panel is not prevented from indicating at any time before the conclusion of the proceedings that, in the panel’s view, the complainant has successfully made a *prima facie* case and the respondent should properly rebut”<sup>105</sup>

In following this line of reasoning, it would seem reasonable for a panel to conduct a non-transparent determination of whether the *prima facie* standard has been met when considering whether the complaining party has presented sufficient evidence; however, non-transparent determinations have negative effects and further contribute to diverging WTO jurisprudence because the panel is not required to clearly explain how it arrived at its conclusions regarding the *prima facie* standard. Hypothetically the panel may opt to adjudicate all the merits of the case first, come to a decision, and then during the drafting of the opinion go back and apply the *prima facie* standard with a predetermined outcome as a technicality. In this situation, no benefit is derived from considering the *prima facie* standard while substantial risk of confusion in the opinion is incurred. Additionally, the



Appellate Body has not objected consistently when panels have overlooked the application of the *prima facie* standard altogether and instead have opted to consider all the evidence presented, or, in other words, resorted to the application of a preponderance of the evidence standard.<sup>106</sup> A traditional preponderance of the evidence standard entails the consideration of all submitted evidence and then renders a decision based upon which of the two parties provides evidence carrying the most weight.<sup>iv</sup>

In practice, although panels regularly adopt the language of the Appellate Body, at times they seem to only superficially consider the *prima facie* standard and burden shifting as described above. McGovern explains that in actuality, panels more often rely on a “weighing up of the evidence” approach, or a preponderance of the evidence standard, as demonstrated in *Zeroing, Apples, Quantitative Restrictions* and *Bed Linen*.<sup>107</sup>

Additionally, some panels have even avoided employing the language of the Appellate Body completely, thus denying that the burden shifts at all.<sup>108</sup> Panels seem to use the preponderance of the evidence approach to bundle all the evidence presented by all parties and then use it to establish whether the proponent has successfully presented a *prima facie* case for

the purpose of shifting the burden of proof.<sup>109</sup> Moreover, panels then use this same evidence bundle to determine whether the proponent has discharged its obligation to satisfy the standard of proof in general, or met the ultimate burden of persuasion. As explained above, this evidence bundling by the panel is inconsistent with traditional interpretations of the *prima facie* standard as associated with the burden of production and undermines the necessity of applying the *prima facie* standard at all. McGovern explains, “if all the evidence has been considered then it is no longer meaningful to speak of a *prima facie* case”.<sup>110</sup>

If a *prima facie* case is merely evidence which, if believed, would place the opposing party at risk of losing the case, then the concept of a *prima facie* case is contingent and does not clarify the fundamental issue concerning the burden of proof: which party carries the ultimate burden of persuasion to satisfy the decision-maker that sufficient proof has been furnished to the standard required. In application, the burden of proof in its true sense does not shift but acts as the ultimate burden of persuasion. It rests upon a party throughout the case and that party must, by the end of the case, satisfy the burden of proof upon the consideration of all the evidence adduced.<sup>111</sup>

## BURDEN OF PROOF IN INTERNATIONAL TRIBUNALS

WTO panels and the Appellate Body frequently cite the decisions of other international tribunals, most often the International Court of Justice (ICJ), in order to bolster support for their own decisions. In *US - Gasoline*, the WTO Appellate Body identified decisions of the ICJ, the European Court of Human Rights, and the Inter-American Court of Human Rights as authorities for its determination that Article 31 of the *Vienna Convention on the Law of Treaties* had attained the status of a rule of customary international law.<sup>112</sup> This practice has continued for the most part without interruption.<sup>113</sup>

International tribunals have the authority to decide for themselves which evidence is admissible and what standards to apply while

assessing the probative value of each item of material evidence submitted.<sup>114</sup> Moreover, international tribunals make the determination as to which party shall bear the burden of proof.<sup>115</sup> The concept of burden of proof in international procedure has been regarded as: “the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with, the rules acceptable to the tribunal”.<sup>116</sup> This perception of burden of proof relates to the burden of persuasion in common law jurisdictions and civil law’s singular notion of burden of proof.

International tribunals will require parties, regardless of which side they represent, to

prove against an agreed standard of proof each claim or fact they submit to the tribunal for consideration. In essence then, the burden of proof does not shift. Additionally, generally in international tribunals, the scope of burden of proof is limited only to issues of triable fact. There is no obligation on the parties to prove to the tribunal matters of law. The international tribunal is presumed to already have sufficient knowledge relating to issues of law in a way that is similar to

national courts in both common law and civil law jurisdictions. For the purpose of deciding whether a particular claim is well founded in law, the principle *jura novit curia* signifies that the court is not solely dependant on the arguments of the parties before it with respect to the applicable law, but can make its own determinations and interpretations.<sup>117</sup> Further, international tribunals have latitude in determining which standard of proof to apply to a particular case.

## STANDARDS OF PROOF IN INTERNATIONAL TRIBUNALS

Before an international tribunal can be prepared to determine whether the burden of proof has been discharged, it is necessary for that tribunal to first make a determination relating to the applicable standard of Proof. The standard of proof is a subjective measure under the discretion of the international tribunal that is subject to human judgment.<sup>118</sup> *Prima facie* evidence, proof beyond a reasonable doubt and preponderance of the evidence are all types of standards used to measure the sufficiency of proof presented for the purposes of determining whether the ultimate burden of persuasion has been met. The US Supreme Court held in 1991 that “because the preponderance-of-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless ‘particularly important individual interests or rights are at stake’.”<sup>119</sup>

Kazazi explains that, “[d]ischarging the burden of evidence does not necessarily imply that the burden of proof has been discharged as well. Satisfying the first will allow the hearing to continue ... that does not mean that the trier of fact may at the end of the hearing find that the proponent has provided sufficient evidence to discharge the overall burden of proof resting

on the proponent.”<sup>120</sup> Following this reasoning, the judgment will not automatically be given in favour of the party which has been successful in merely establishing a *prima facie* case, but instead will go to the party which satisfies the ultimate burden of persuasion.

Traditionally, the primary purpose of *prima facie* evidence is to reduce the burden of production and the burden of evidence. Wherever provided, *prima facie* evidence shifts the burden of evidence from the proponent of the burden of proof to the other party. Before this stage, the opposing party is not bound to respond to the case, mere silence may indeed be sufficient. However, in international tribunals, after one party has provided *prima facie* evidence, it will be deemed to have discharged its burden of production and will no longer be required to carry the burden of proof until the other party rebuts the *prima facie* evidence established by the proponent. In some municipal jurisdictions, *prima facie* evidence is accepted as the required standard for satisfying the burden of proof. International tribunals have often accepted claims on the basis of *prima facie* evidence in instances where it remains unrebutted; however, the most common standard of proof applied in international tribunals is the preponderance of the evidence standard.<sup>121</sup>

## WTO DISPUTE SETTLEMENT AND INTERNATIONAL TRIBUNAL DISPUTE SETTLEMENT TOGETHER

The traditional concept of *prima facie* evidence related to the burden of production is not directly applicable to the WTO Dispute Settlement Understanding because procedurally, it is not possible for *prima facie* evidence to shift the burden of production from the complaining party to the point where before this shift the opposing party is not bound to respond to the case. Within WTO dispute settlement, mere silence is never enough because all evidence must be submitted by all parties prior to the point when the panel reaches its conclusions and distributes the preliminary panel report.<sup>122</sup>

When presenting a case before traditional international tribunals, parties spend substantial time before the trier of fact and engage in what can be described as a tennis-like volley before the adjudicator. When addressing preliminary issues, including the determination of a *prima facie* case for the purposes of the burden of production, the adjudicator will often hold several narrowly-focused hearings to consider argumentation from the complainant, then from the defending party, make the relevant determination and then directly inform the parties as to whether and how the case will progress. This exchange regularly occurs prior to the time when the trier of fact considers the merits of the case or the ultimate burden of persuasion. This process can be compared to the preliminary law and motion phase of litigation, commonly found in domestic litigation, which also takes place before the trier of fact considers the actual merits of the case. During law and motions proceedings, the trier of fact considers and hears argumentation on whether and how the court will frame its adjudication of the case being considered.

In WTO dispute settlement, direct interaction between the parties and the panel is severely limited.<sup>123</sup> Parties to the case never have the opportunity to argue a specific and singular issue before the trier of fact, wait for a determination and then adjust their strategy and further argumentation accordingly. The

WTO panel procedure does not contain anything similar to the common law's formal motion practice which tests the sufficiency of the proponent party's evidence at any point in the procedure.<sup>124</sup>

Although typically two rounds of oral arguments take place before the panel, there is little, if any, framework guiding which issues are to be discussed at a particular time.<sup>125</sup> Rather, parties use their limited time for oral presentations before the panel to present and argue the merits of their entire case and devote little time, if any, to the consideration of preliminary issues which include the application of the *prima facie* standard and the burden of production. There is no point in the panel procedure for a panel to issue a specific ruling on the very narrow question of whether the claimant has met its burden of production, that is, whether the claimant has presented a *prima facie* case.<sup>126</sup> The panel is therefore left to conduct the *prima facie* analysis alone, after it has been presented with all evidence, including that directed towards the adjudication of the merits of the case. A danger may exist that the occurrence of a shift in the burden of proof may go unnoticed by the interested party which may be surprised by the final decision of the panel blaming it for not successfully rebutting the *prima facie* case established by the other party.<sup>127</sup> Procedurally-speaking, from a due process perspective, this causes problems because a party against whom a *prima facie* case has been raised is not given adequate notice of the need to effectively refute the claims.<sup>128</sup>

It is because of this procedural anomaly in WTO dispute settlement that the application of the *prima facie* standard to the preliminary shifting of the burden of proof has become such a point of confusion within WTO jurisprudence. Although a very fine point of distinction between international tribunals and the WTO dispute settlement process, this procedural difference is sufficient to materially alter the application of a traditionally-accepted *prima facie* standard



related to the burden of production and give pause to ponder whether the forced application of the *prima facie* standard and preliminary burden shifting within WTO dispute settlement actually yields tangible benefits. Should the Appellate Body find it indeed necessary for panels to apply the *prima facie* standard and preliminarily shift the burden of proof, it will therefore be required to construct its own version of the *prima facie* standard which will be unique to WTO dispute settlement, a process which seems to be currently in progress.

As explained by Appellate Body member, David Unterhalter, the Appellate Body's approach to the application of the *prima facie* standard in WTO dispute settlement tends not to follow the conventional approaches to the *prima facie* standard in either common law or civil law jurisdictions. In fact, "the Appellate Body has utilized the concept of a *prima facie* case to cast the duty on the party who, in order to be successful, must finally satisfy the decision-maker that it is entitled to succeed in its complaint"<sup>129</sup> Unterhalter continues to explain that this interpretation and application of the burden of proof captures the true sense of this concept.

In considering this explanation, it would seem reasonable to infer that the Appellate Body has taken the concept of the *prima facie* standard as related to the burden of production and blended it with the concept of the burden of

persuasion, and created a novel concept related to the application of the burden of proof. Put another way, the Appellate Body seems to be using the term "*prima facie* standard" to apply to both the requirement that the complaining party present a *prima facie* case in order to move the case forward, or to meet the burden of production, and also to apply to the ultimate burden of proof necessary for a party to meet in order to emerge victorious from the case, or the burden of persuasion. This overlap in terminology creates substantial confusion when making the comparison between WTO jurisprudence and that in other international tribunals.

When considering the procedural structure of WTO dispute settlement, in particular the lack of direct interaction between the panel and the parties while the panel is making its determinations, the panel's application of a single burden of proof throughout the adjudication process is necessary and may be an initial step towards the clarification of what evidence is appropriate for the panel to consider during the different phases of analysis. Further, with this explanation, it seems that the Appellate Body is indicating that a panel need not make distinctions between evidence, but consider all the evidence at one time. It is the Appellate Body's tendency to apply concepts with conventional applications in non-conventional ways which directly leads to confusion.

## A PREPONDERANCE OF THE EVIDENCE STANDARD: THE PROPOSED SOLUTION

The difficulties related to the interpretation of the *prima facie* standard seem to have arisen from the fact that the term *prima facie* has been used in conjunction with the concept of burden of proof. The application of a preponderance of the evidence standard in place of the *prima facie* standard would likely reduce complexity during the weighing of evidence because it circumvents uncertainty associated with the determination of what evidence is to be considered at what time and in what order. In

conducting a preponderance of the evidence analysis, all the evidence is bundled and considered at one time clearly for the purposes of determining whether the burden of persuasion has been met. Moreover, as panels have tended to apply a preponderance standard upon their own initiative, the legitimisation of this standard by the Appellate Body would augment coherence in WTO jurisprudence. Further, when considering that all evidence is submitted by the parties before the panel releases its interim

report, a clear mandate by the Appellate Body for panels to apply a preponderance of the evidence standard would seem reasonable and most streamlined.

The above-mentioned opinions of the Appellate Body in the *Zeroing*, *Apples*, *Quantitative Restrictions* and *Bed Linen* cases, which uphold a panel's decision to consider all proffered evidence during the burden-shifting analysis, have actually established precedence by the Appellate Body indicating a potential shift in paradigm to an acceptance of a preponderance of the evidence standard where the bundling of evidence will be used to determine whether the complainant has discharged its obligation to satisfy the required standard of proof as well as the burden of persuasion for each of its claims in the whole dispute.

In stating that the claiming party has the burden of presenting a *prima facie* case which bolsters the presumption of correctness, the Appellate Body seems to be capturing the claimant's innate responsibility to present a case which is well founded and plausible to a reasonable person.<sup>130</sup> This notion is in line with the common law concept of the burden to move the case forward by presenting *prima facie* evidence, or the burden of production.

Because there is no time during the panel's adjudication of the case for the panel to decide formally whether the claimant has met this burden of production, the issue of greater importance becomes the determination of which party meets the burden of persuasion, which during the panel's deliberation stage effectively absorbs the burden of production.<sup>131</sup> In reconciling the Appellate Body's language throughout the vast case law on this subject, it would seem that the Appellate Body intends to use the *prima facie* case requirement, or the burden of production, as the ultimate burden of proof, one that is overwhelming and which

will yield a party victorious as a matter of law, unless effectively refuted.<sup>132</sup>

The application of a preponderance of the evidence standard, would provide a heightened degree of clarity by obliging a panel to consider all proffered evidence at the same time, thus allowing it to reach the same end as the analysis of the *prima facie* standard. If all submitted evidence is weighed by the panel simultaneously, it then stands to reason that final outcomes under a preponderance of the evidence analysis will be as just as those reached by conducting an analysis under the *prima facie* standard, if not more so, because the fact finder will have a clear mandate to consider all available information at one time. Further, the additional layer of complication stemming from the forced grappling of a panel with the preliminary determination of whether the *prima facie* standard has been met will be circumvented, ensuring a more streamlined process.

Burden of proof shifting through the application of a preponderance of the evidence standard rather than a *prima facie* standard will likely reduce the potential for appeals because complicated preliminary analysis lacking a direct link to the consideration of the merits of the case will be eliminated. In *India - Quantitative Restrictions*, India appealed the panel's decision on the assertion that the panel failed to effectively conduct the *prima facie* aspect of the burden-shifting analysis and proceeded to wrongfully consider views of outside experts (in this case the IMF) before it determined whether the *prima facie* standard had been met. Had the panel in *India - Quantitative Restrictions* employed a preponderance of the evidence standard during the burden-shifting analysis, India's cause for appeal would have become irrelevant because the panel would have had a clear mandate to consider all available evidence in determining how to distribute the burden of proof.

## CONCLUSION

The confusion over the use of the *prima facie* standard during the preliminary analysis of burden shifting might have arisen from an erroneous transposition of the *prima facie* concept from dispute settlement under the GATT to the WTO dispute settlement of today. Under the GATT, the *prima facie* standard was applied to cases which considered issues related to nullification or impairment, whereas the early WTO panels attempted to apply the *prima facie* standard to determine whether there was a WTO violation or not. During the GATT, a finding of a GATT violation led to a presumption, *prima facie*, that there was nullification or impairment, which could then be rebutted by the responding party. In other words, the existence of a nullification or impairment could be rebutted, not the finding of a GATT violation, which itself was the result of a bundling of all evidence presented by both sides during an earlier stage of the adjudication process.

As noted above, WTO panel proceedings are not structured so as to allow the simple and strict procedural application of the *prima facie* standard to determining violations of law. The shifting of the burden of proof is central in shaping how ultimately disputes are decided and frames the terms of engagement which may be fundamental to the decisions parties make in determining whether to bring a case. Replacing the *prima facie* standard with the preponderance of the evidence standard would serve to reduce inherent systemic complication and confusion by eliminating concerns related to what evidence the panel should consider at what time and in what order. Further, confusion from the determination of who bears the burden of production under the *prima facie* standard would be circumvented in that a preponderance of the evidence standard clearly instructs the

panel to consider all available evidence and then to rule in favour of the party which meets the ultimate burden of persuasion.

The Appellate Body is able to move the organisation forward in areas in which the negotiation processes have been unable to achieve success. Consistent precedent set by the Appellate Body will do much to strengthen the organisation in general. Thus, suggestions for streamlining the Dispute Settlement System assist in this journey towards establishing a coherent global dispute settlement system. Given the increasing complexity of current disputes before the DSB, the time for such a shift is ripe.

From a public policy perspective, the current analysis of the *prima facie* standard during the preliminary burden-shifting determination needlessly complicates WTO dispute settlement for parties lacking substantial experience litigating in this domain. Case law addressing applications of the *prima facie* standard is extremely nuanced and intricate, making its synthesis and application difficult for all Members attempting to use the WTO dispute settlement system; however, when developing and least-developed Members attempt to pursue claims against larger more experienced Members, inherent imbalances of power are compounded. The weaker and more inexperienced Members will be at a disadvantage as a result of this procedural technicality that has no direct connection to the adjudication of the issues brought before the DSB in the first place. Such an unfortunate side effect could then contribute to undermining developing and least-developed Members' confidence in the WTO dispute settlement system, the very Members the dispute settlement system was conceived to protect.

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- 80 Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R (22 February 1999) para. 129.
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- 100 Panel Report, *US - Shrimp*, para. 8.78 - 8.79.
- 101 Id.
- 102 Appellate Body Report, *EC - Hormones*, para. 104.
- 103 Taniguchi, Yasuhei, at 569.
- 104 Id.
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- 108 Id.
- 109 Cameron, James and Orava, Stephen J., *GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement*, in Weiss, Friedl (Ed) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals* (Cameron May, 2000) p. 229.
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- 114 Pauwelyn 1998 at 230.
- 115 *Id.* at 231.
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- 117 *Judgment on the Merits of 25 July 1974*, ICJ Reports 9 (1974) para. 17.
- 118 Kazazi at 377.
- 119 *Grogan v. Garner*, 111 Sup.Ct. 654, 659 (1991), as quoted in James, Hazard, and Leubsdorf, *Civil Procedure*, at 339.
- 120 Kazazi at 25-26.
- 121 *Id.* at 333.
- 122 Kantchevski, Petko D., p. 135.
- 123 *Id.*
- 124 Barcelo at 23.
- 125 Taniguchi, Yasuhei, at 569.
- 126 Barcelo at 23.
- 127 Taniguchi, Yasuhei, at 571.
- 128 *Id.*
- 129 Unterhalter, David, p. 551.
- 130 Barcelo at 26.
- 131 *Id.*
- 132 *Id.*
- i Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1225 (1994) (hereinafter DSU), Art. 3.1.
- ii For a complete discussion of the WTO see Jackson (1969); Hudec (1990); Jackson (1997); Jackson (1996); Cottier and Oesch (2005); Hoekman and Kostecki (1995); Messerlin (1995); Oesch (2003); see also World Trade Organization Analytical Index and *The Law And Policy Of The WTO*, WTO Dispute Settlement Handbook. [www.wto.org](http://www.wto.org). These provide an excellent history and description of the world trading system and the WTO.
- iii In a footnote to this statement, the panel explicitly referred to the Appellate Body's holding on burden of proof in *US - Shirts and Blouses*.
- iv Kazazi indicates that the most common standard of proof applied in international tribunals is the preponderance of evidence standard.

## ANNEX I: RELEVANT DSU AND GATT PROVISIONS

### DSU

#### Article 4: Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.
2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.
3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.
4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.
5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.
6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

#### Article 8: Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

#### Article 11: Function of Panels

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. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

**Article 13: Right to Seek Information**

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

**Article 17: Appellate Review Standing Appellate Body**

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

**Article 18: Communications with the Panel or Appellate Body**

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body. of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements

**Appendix 3: Working Procedures**

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.
2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.
3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a

dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.
5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.
7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.
8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.
9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.
10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.
11. Any additional procedures specific to the panel.
12. Proposed timetable for panel work:
  - (a) Receipt of first written submissions of the parties:
    - (1) complaining Party: \_\_\_\_\_ 3-6 weeks
    - (2) Party complained against: \_\_\_\_\_ 2-3 weeks
  - (b) Date, time and place of first substantive meeting with the parties; third party session: \_\_\_\_\_ 1-2 weeks
  - (c) Receipt of written rebuttals of the parties: \_\_\_\_\_ 2-3 weeks
  - (d) Date, time and place of second substantive meeting with the parties: \_\_\_\_\_ 1-2 weeks
  - (e) Issuance of descriptive part of the report to the parties: \_\_\_\_\_ 2-4 weeks
  - (f) Receipt of comments by the parties on the descriptive part of the report: \_\_\_\_\_ 2 weeks
  - (g) Issuance of the interim report, including the findings and conclusions, to the parties: \_\_\_\_\_ 2-4 weeks
  - (h) Deadline for party to request review of part(s) of report: \_\_\_\_\_ 1 week
  - (i) Period of review by panel, including possible additional meeting with parties: \_\_\_\_\_ 2 weeks

- (j) Issuance of final report to parties to dispute: \_\_\_\_\_ 2 weeks
- (k) Circulation of the final report to the Members: \_\_\_\_\_ 3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

#### GATT

#### Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with

restrictions on domestic production or consumption;

- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

**Article XXII: Consultation**

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

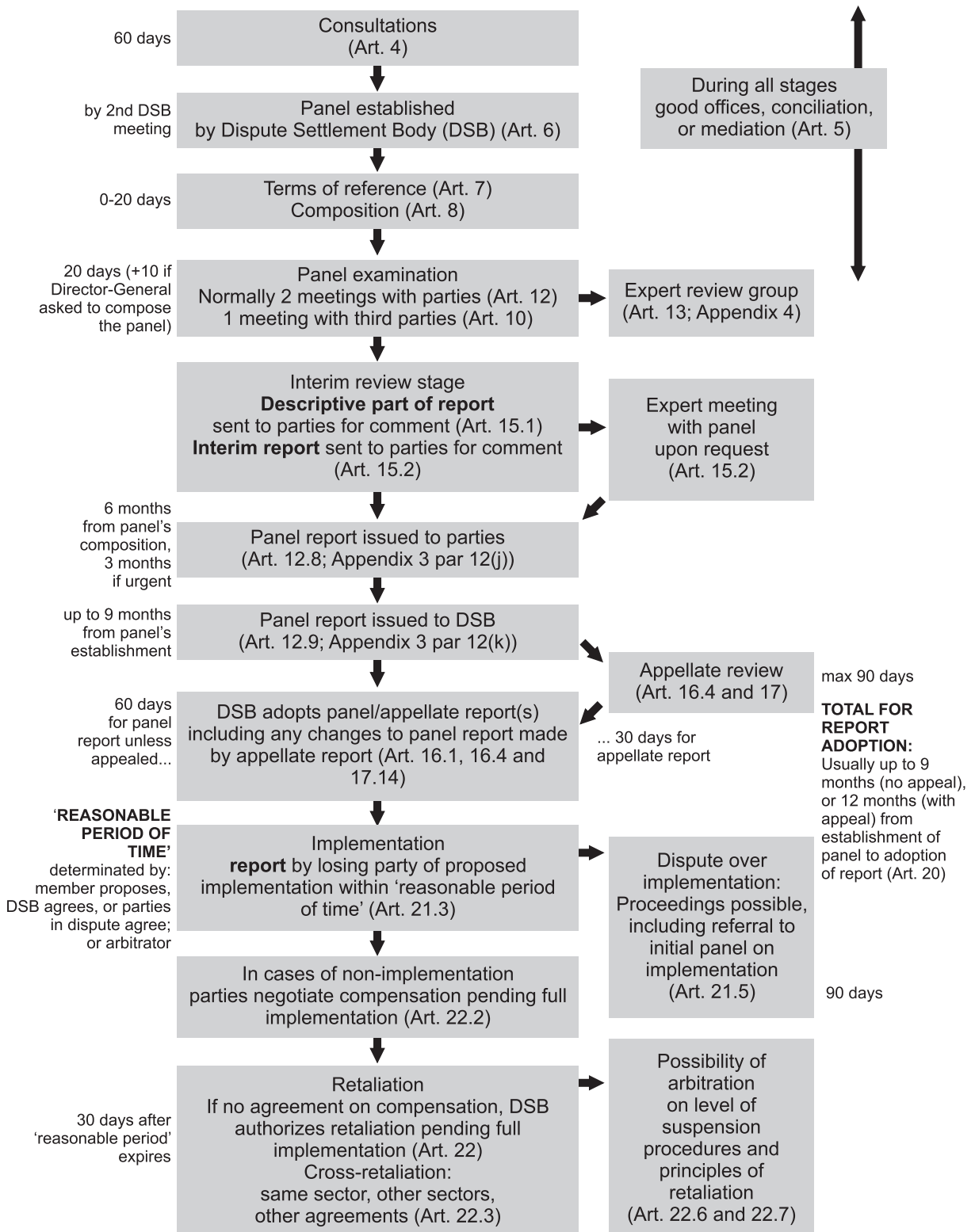
**Article XXIII: Nullification or Impairment**

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
  - (a) the failure of another contracting party to carry out its obligations under this Agreement, or
  - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
  - (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.



## ANNEX II: FLOW CHART OF THE DISPUTE SETTLEMENT PROCESS

Source: [www.wto.org](http://www.wto.org)

## ANNEX III: RELEVANT WTO DISPUTE SETTLEMENT REPORTS AND ARBITRATION AWARDS

Short Title	Full Case Title and Citation
<i>China - IP rights</i>	<i>Panel Report, China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R</i> adopted 26 January 2009
<i>US - Gambling</i>	Appellate Body Report, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R</i> , adopted 20 April 2005
<i>US - Gambling</i>	Panel Report, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R</i> , adopted 20 April 2005, modified by Appellate Body Report, <i>WT/DS285/AB/R</i>
<i>US - Gambling</i>	Award of the Arbitrator, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Arbitration under Article 21.3(c) of the DSU, WT/DS285/13</i> , 19 August 2005
<i>US - Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R</i> and <i>Corr.1</i> , adopted 23 May 1997, <i>DSR 1997:I</i> , 323
<i>US - Wool Shirts and Blouses</i>	Panel Report, <i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R</i> , adopted 23 May 1997, upheld by Appellate Body Report, <i>WT/DS33/AB/R</i> , <i>DSR 1997:I</i> , 343
<i>India - Patents (EC)</i>	Panel Report, <i>India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities, WT/DS79/R</i> , adopted 22 September 1998, <i>DSR 1998:VI</i> , 2661
<i>India - Patents (US)</i>	Appellate Body Report, <i>India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R</i> , adopted 16 January 1998, <i>DSR 1998:I</i> , 9
<i>India - Patents (US)</i>	Panel Report, <i>India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States, WT/DS50/R</i> , adopted 16 January 1998, modified by Appellate Body Report, <i>WT/DS50/AB/R</i> , <i>DSR 1998:I</i> , 41
<i>EC - Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R</i> , adopted 13 February 1998, <i>DSR 1998:I</i> , 135
<i>EC - Hormones (Canada)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WT/DS48/R/CAN</i> , adopted 13 February 1998, modified by Appellate Body Report, <i>WT/DS26/AB/R, WT/DS48/AB/R</i> , <i>DSR 1998:II</i> , 235
<i>EC - Hormones (US)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA</i> , adopted 13 February 1998, modified by Appellate Body Report, <i>WT/DS26/AB/R, WT/DS48/AB/R</i> , <i>DSR 1998:III</i> , 699

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- Identify selected issues critical to the functioning of dispute systems;
- Assess systemic issues relevant to developing country policy-makers and influencers in the WTO;
- Facilitate interaction among negotiators, policy-makers, influencers, civil society and business communities on legal issues arising from the WTO and various preferential trade arrangements.

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