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**THE BURDEN OF PROOF IN WTO LAW  
AND PRACTICE**

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*Al ricordo di Ugo,  
che mi ha insegnato l'amicizia, la dignità  
e che si può dire quasi tutto anche senza parlare.*



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## GENERAL INTRODUCTION

The burden of proof is a crucial concept in determining the outcome of a dispute, and the decision of a party to pursue litigation. It has been defined as the legal response to ignorance, meaning that it compensates for the many uncertainties of litigation, allowing the judicial system to reach determinate outcomes in the absence of relevant information<sup>1</sup>. Hence, the concept of burden of proof is a mechanism by which an adjudicatory body allocates the duty to prove facts and determines the outcome where evidence is evenly divided<sup>2</sup>.

Therefore, it is essential that the parties to a dispute can be aware in advance about the allocation of the burden of proof with respect to the issue of the case. Indeed, the identification of the burden and the standard of proof are vital elements in determining both the outcome of a dispute, and the responsibilities of disputants in preparing and presenting their cases<sup>3</sup>. This is because decision making in a legal system works by presumption, assumption, induction and deduction.

The interest for this topic originated from an initial analysis of panels and Appellate Body reports and the consequent verification of the remarkable relevance of the burden of proof in the reasoning of the World Trade Organisation adjudicating bodies.

Guided by intellectual curiosity, the study of legal literature led to come across with a fragmented doctrine on the burden of proof in WTO law and practice. Even though eminent scholars examined the issue in the light of specific provisions of WTO law, it proved to be impossible to find a comprehensive analysis of the burden of proof throughout the WTO covered agreements. Therefore, it seemed worth to contribute in recollecting all this sparse and fragmented information. This exercise suddenly developed into a research and, by furthering the

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<sup>1</sup> Gaskins, *Burden of Proof in Modern Discourse*, Yale University Press, New Haven – London, 1992, p. 4-5.

<sup>2</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 30.

<sup>3</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 536.

investigation on the burden of proof, the degree of interest as well as the entity of doubts continuously grew.

Yet, approaching the research coming from a non-legal background, requested additional efforts, as the study of the burden of proof in domestic jurisdictions turned out to be essential in view of the examination of such a complex procedural notion at the international level.

The purpose of this thesis is to provide an overview on the state of the art of the issue. Such an overview is based on the reconstruction of the wide though fragmented doctrine, and on the analysis of the most significant cases which have directly addressed the topic as well as those that have considerable implications for it.

The WTO Agreements, including the Dispute Settlement Understanding, do not contain any specific rule concerning the allocation of the burden of proof. The WTO, like other international organisations, has not developed any substantial body of rules dealing with methods of proof, fact finding and admissibility and weight of evidence. Nor would one expect trade negotiators to devote significant amounts of time debating notions such as burden, onus and standard of proof or discussing about the proper role of inferences, presumptions and the like<sup>4</sup>.

This notwithstanding, the Appellate Body has recognised that the concept of burden of proof is implicit in the WTO dispute settlement system. Furthermore, panels and Appellate Body have addressed the matter since their earliest jurisprudence. Therefore, it becomes crucial to understand whether the adjudicating bodies' discretion on the allocation of the burden of proof creates a significant degree of confusion from the point of view of the parties and whether the lack of clear direction on this subject could possibly influence Members States' use of the dispute settlement system.

Hence, in the WTO context, the question raised by Joost Pauwelyn in 1998 of "Who bears the burden?" has yet to be answered definitively.

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<sup>4</sup> *Ibidem*, p. 530.

The first chapter of the thesis aims at providing an overview of the notion of burden of proof in domestic and international jurisdictions. In particular, it was deemed worth to highlight the terminological and substantial differences regarding burden of proof in common and civil law legal systems. This is not intended to be an academic exercise, though, but rather an indispensable phase in the study of burden of proof, in name of two main reasons. First, the notion of burden of proof at the international level is borrowed from the one developed in the more advanced and sophisticated domestic legal system. Second, international organisations, as well as international adjudicating bodies, are the result of the encountering, tension and compromise between Members coming from diverse legal traditions. This aspect is reflected in the way international adjudicating bodies function and it is essential for understanding the peculiar features of international procedure. The inclusion of domestic procedural principles, such as the burden of proof in international jurisdiction, is carried out through the use of general principles of law. While the function of general principles in international law has been far more extended, in the context of the present study their role is taken into consideration as far as the gap-filling in procedural matters is concerned. Hence, general principles bridge procedural rules developed at domestic level to the procedure of international tribunals. The brief overview of international jurisdiction concerning the allocation of the burden of proof attempts to provide for a term of comparison to the analysis of the burden of proof in WTO law and practice.

The second chapter offers an examination of some relevant characteristics of the WTO dispute settlement system. The first sections of this chapter are dedicated to the description of the types of complaints admissible before the Dispute Settlement Body, to the alternative means of dispute settlement provided in the Dispute Settlement Understanding, and to the functioning of panels and Appellate Body proceedings. The remaining sections focus on relevant aspects of the functioning of the dispute settlement system for the analysis of the burden of proof, i.e. panel's fact-finding power, *stare decisis* doctrine and general principles.

The third chapter aims to analyze the general rules on the allocation of the burden of proof developed by panels and Appellate Body jurisprudence. It starts with a background of the allocation of the burden of proof before the inception of the WTO and continues with an overview of the jurisprudence of adopted and non-adopted GATT 1947 panels. The subsequent section is focused on the general rules on burden of proof and demonstrates that those applied by WTO adjudicating bodies generally followed the practice developed in the context of the GATT, as well as the one of other international courts and tribunals. However, the relevance of the notion of *prima facie* in the WTO jurisprudence seems to be unprecedented in international procedure, being therefore a peculiarity of the dispute settlement system. As the notion of burden of proof is connected with issues of fact and the burden of proof requires the presentation of evidence to be discharged, it was considered appropriate to examine the types of evidence admissible before the WTO adjudicating bodies and the *quantum* of proof required for discharging the burden of proof.

The fourth chapter constitutes an analysis of the rules on burden of proof developed by panels and especially Appellate Body jurisprudence in all the WTO covered agreement. The objective pursued is to give an overview of the existing (few) explicit rules on burden of proof contained in the agreements, as well as those developed in the extended case-law of WTO adjudicating bodies. An analysis of specific issues in the case-law on burden of proof could have made easier to compare the analogies and dissimilarities between provisions in different agreements, as well as their objectives, and could have avoided the examination of some agreements whose provisions did not resulted peculiar or relevant in the economy of the whole study. However, this chapter was an attempt to circumvent a discretionary and potentially biased selection of some core provisions of the WTO, in order to craft as much as possible a comprehensive analysis of the issue. A final section is dedicated to drafting some conclusive remarks and personal interpretations about panels and the Appellate Body jurisprudence on the burden of proof and its consequences (or rather causes), not only on the framework of the dispute settlement system in itself, but predominantly in the WTO as a whole.

## 1. BURDEN OF PROOF IN MUNICIPAL AND INTERNATIONAL LEGAL SYSTEMS: AN OVERVIEW

The notion of burden of proof can be defined as the obligation of each of the parties to a dispute to prove its claims to the satisfaction of, and in accordance with the rules acceptable to the tribunal or court<sup>5</sup>. It corresponds to the question of which party is responsible for providing proof of an asserted fact and it can be referred to as a legal response to ignorance<sup>6</sup>.

While the evidentiary burden can be allocated in different ways, there is a large degree of commonality between domestic legal systems and between those systems and international law principles. As a general rule, a person who desires an adjudicatory body to take some action must prove the case to the tribunal's satisfaction. *Actori incumbit probatio* is the principle indicating that the party putting forward a claim must establish the facts and law in support of a decision in its favour.

This principle is widely accepted in civil and common law systems and is also applied by international courts and tribunals as a general principle of law<sup>7</sup>. However, some substantial peculiarities can be recognised in the determination and application of procedural rules on burden of proof in these different contexts. The objective of this chapter will be to give an overview of burden of proof in common and civil law systems, in an attempt to underline the most significant differences between the two systems in this regard. Then, the inclusion of burden of proof among general principles of law will be examined. In conclusion, the allocation of the burden of proof, as applied by international courts and tribunals,

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<sup>5</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 30.

<sup>6</sup> Pfitzer and Sabune, *Burden-Shifting in WTO Dispute Settlement: The Prima Facie Doctrine*, *Bridges*, 12(2), March 2008, p. 18.

<sup>7</sup> See e.g., Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987; Ferrari Bravo, *La Prova nel Processo Internazionale*, Casa Editrice Jovene, Napoli, 1958; Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, Kluwer Law International, The Hague – London – Boston, 1998.

will be briefly discussed, with specific attention to the International Court of Justice and the European Court of Justice.

### **1.1. Burden of proof in common and civil law jurisdictions**

There are a number of broad differences between legal families when it comes to evidence and fact finding. These differences relate to control over the presentation of evidence, admissibility, duties to provide evidence, permissible witnesses, role of experts, judicial notice of facts, standards of proof, and methods and formal proof. Indeed, the processes by which truth is determined in a legal system are not absolute. By setting the rules on evidence and burden of proof, legal systems choose between conflicting values. These include: the pursuit of the correct outcome, the need to reduce time and costs, the need to compare probative and prejudicial aspects of potential evidence and even libertarian issues as to the obligation to provide information of use to an adversary. As a result, any system will display certain compromises and biases<sup>8</sup>. Because there is no absolute methodology for determining truth and no consensus as to the way these trade-offs should be determined, it would be particularly difficult to reach a consensus on the way evidentiary matters ought to be considered by an international adjudicatory body.

Rules of evidence and the operation of the burden of proof are extremely important in the common law adversarial system. In this system, each party controls the proceedings as to his own side of the process; deciding on how best to present his case and it is for the judge, using a detailed body of procedural rules, to ensure that each side has an opportunity to present his case fairly. On the basis of the evidence presented by him, he decides which side is the most compelling, and, thus, the “winner”. Conversely, in the civil law (mainly inquisitorial)<sup>9</sup>

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<sup>8</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 529-531.

<sup>9</sup> Although the characterisation of civil law procedure as “inquisitorial” may have been historically justified, civil law procedure in modern times is also adversarial in a sense. Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow,

system, the judge is in control of the process. The judge takes an active role in the proceedings, with a duty to investigate the facts, and he will require further evidence to be brought before him if necessary<sup>10</sup>.

Other relevant differences between common law and civil law systems relate to the duty, if any, that parties have in terms of presenting all relevant evidence to the tribunal. In common law systems, generally, parties must refrain from being selective in the presentation of their own case. They also have rights of discovery that largely allow for the identification of all relevant information held by the other party. This includes evidence which is adverse to the parties' interests. The civil law model tends to leave for each party to determine the evidence upon which it seeks to rely, subject to the tribunal's independent fact finding powers. Evidence adverse to interest is generally not required to be provided<sup>11</sup>.

A further difference relates to the type of evidence that may be seen as probative. Common law systems exclude certain forms of evidence where its prejudicial value is thought to outweigh its probative value. For example, common law systems exclude hearsay evidence, where one party seeks to give direct evidence about statements of a third party. Civil law systems do not have rules proscribing such evidence<sup>12</sup>.

Another element of distinction is the approach towards the use of experts. Expertise can be provided in two ways: in the form of an expert opinion provided by a third party as a measure ordered by the court. This procedure is very rare in common law countries; if the parties wish expert evidence to be brought before the court, they will do so by means of their own expert witness. The judge has the task to decide which expert to accept. In civil law tradition, the use of third party experts is also controversial; the "neutral expert" infringes upon the role of parties

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Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 560.

<sup>10</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 2000, p. 265.

<sup>11</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 531-532.

<sup>12</sup> *Ibidem*, p. 532.

in bringing information before the court and usurps the judge's freedom in determining the evidence before him.<sup>13</sup>

Coming to more specific aspects of the burden of proof in the two systems, it should preliminarily be noted that burden of proof needs also to be distinguished from other elements of the adjudicatory process. The concept only has significance with questions of fact: it does not apply to legal interpretation. The adjudicator must seek to interpret legal rules in the most appropriate manner, notwithstanding the specific arguments presented by the disputants. Moreover, a differentiation is required between the two interpretations of the burden: legal and evidential. Indeed, the determination of who bears the burden of proof is often confused with the process of presenting evidence that is necessary in order to decide whether or not the burden of proof has been discharged. Even though there is a close relation between the two principles (as the party bearing the burden of proof usually carries the burden of presentation of pleading and evidence) they have very different implications. The confusion is caused by the different meanings that the concept of burden of proof has in different legal systems.

In common law countries, "burden of proof" is an ambiguous term, since it is used by the courts to refer to two different meanings. Its primary sense relates to substantive law and refers to the "duty of a party to persuade the trier of fact by the end of the case of the truth of certain propositions"<sup>14</sup>. This burden is also referred to as the "persuasive burden", "the burden of the pleadings" and "the risk of non-persuasion"<sup>15</sup>. The legal or persuasive burden is the burden borne by the party who will lose the case unless he persuades the tribunal of the reconstruction of facts. That is the reason why it is acceptably termed also the "burden of persuasion"<sup>16</sup>. In other words, in the event the evidence submitted by the parties is

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<sup>13</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other Int'l Courts and Tribunals*, Cameron May, London, 265-288, pp. 265-266.

<sup>14</sup> Heydon, *Cases and Materials on Evidence*, Butterworth, London, 1975, p. 13.

<sup>15</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 24.

<sup>16</sup> Cross, *Evidence*, Butterworth & Co Ltd, London – Dublin – Edinburgh, 1958, p. 63.

incomplete or in equipoise, the party bearing the burden loses and the benefit of doubt plays in favour of the opposing party<sup>17</sup>.

The second sense of the “burden of proof” is related to a particular procedure of common law rules of evidence, known as a ruling by the judge on submission of “no case” or “on insufficient evidence”. While the effect of the first burden is known at the end of the trial, the second burden concerns an early stage of the procedures and the production of sufficient evidence to justify the judge to allow the hearing to continue. The burden of proof in this second meaning is also referred to as “evidential burden”, “burden of adducing evidence”, the “duty of passing the judge” or the “burden of evidence”<sup>18</sup>. In sum, the evidential burden is the burden of producing sufficient evidence to justify a finding in favour of the party who bears it.

This burden corresponds to the duty resting on the proponent of a claim in order to adduce enough evidence to convince the court there is a case to answer<sup>19</sup>. However, the *prima facie* case does not usually require much evidence and it is not enough for the fact to be proven as a matter of law<sup>20</sup>. Accordingly, discharging the evidential burden (i.e. the burden of proof in its second meaning) does not necessarily mean that the legal burden of proof (in its primary meaning) is also discharged<sup>21</sup>.

This double meaning of burden of proof in common law systems is derived from the two-tiered structure of the common law trial court, with the judge as decider on the points of law and the jury as the trier of facts. In the first stage, the judge can prevent the intervention of the jury when the burden of production of evidence is not met (i.e. *prima facie* case). The burden of persuasion becomes relevant in the second phase, when the burden of production is satisfied and the

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<sup>17</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 229.

<sup>18</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 24-25.

<sup>19</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 229.

<sup>20</sup> *Ibidem*.

<sup>21</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 25.

jury is asked to determine the substantive outcome of the case and to decide in favour of either party<sup>22</sup>.

As to the allocation of the burden of proof in common law countries, normally a party bearing the legal burden in relation to a particular fact at the commencement of the proceedings also bears an evidential burden in relation to the same fact<sup>23</sup>. Accordingly, there is apparently no overriding principle governing the allocation of the burden of proof in common law countries, but rather specific rules for specific cases set out in statutes or precedent.

As far as the notion of a “shift” in the burden of proof is concerned, it is generally acknowledged that it tends to create confusion when applied. First, it is not equally applicable to the “evidential” burden and to the “legal” one. On the one hand, when referring to the “evidential” burden, the shift occurs either when the proponent of an issue discharges the “evidential” burden that rests on him by adducing evidence that is *prima facie* (provisional shift) or when the proponent of an issue discharges the “evidential” burden which rests upon him by adducing evidence which is presumptive (absolute shifting). On the other hand, while commentators recognise that there may be a shift in the “evidential” burden, the prevailing view is that the notion of “shifting” referring to the legal burden should be rejected<sup>24</sup>.

In civil law countries, the concept of “burden of proof” only refers to the duty of parties to prove their allegations and corresponds to the primary meaning of burden of proof in common law systems, i.e. the burden of persuasion. Consequently, there is no distinction between adjudication of fact and law and the concept of “duty of passing the judge” does not exist<sup>25</sup>. This also relates to the fact that in civil law systems there is no division of word between the judge and the

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<sup>22</sup> Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds.), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 553-5.58.

<sup>23</sup> Cross, *Evidence*, Butterworth & Co Ltd, London – Dublin – Edinburgh, 1958, p. 68.

<sup>24</sup> Yanovich, *The Appellate Body’s Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and Other International Tribunals*, WTO OMC Memorandum, 6<sup>th</sup> November 2002, p. 6.

<sup>25</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 26 and Pauwelyn, “Evidence, proof and persuasion in WTO dispute settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 229., p. 230.

juries, as both functions are played by the court. Therefore, the concept of burden of proof concerns only the function of the court<sup>26</sup>.

In relation to the “shifting” of the burden of proof in civil countries, the concept itself is not commonly used in civil law jurisdictions. Here, there is a usual and well-established order in legal pleadings. Such order, which sees proceedings initiated by the filing of the complaint by the claimant followed by the respondent’s response, must not be confused with the notion of shift in the “evidential” burden. It is a rather a sort of “natural” shift that should not be confused with the conception accepted within common law jurisdictions<sup>27</sup>.

Consequently, rules on what is and is not admissible as evidence and the discharge of the burden of proof do not have the same importance in the two systems. A continental lawyer’s approach to issue of evidence or proof is therefore less rule-bound than that of a common lawyer. To the extent that there are significant differences between legal families, any international adjudicator faced with a broad discretion and a lack of specific policy guidance must treat rules on evidence and the burden of proof warily to ensure that the employment of the discretion does not display significant bias<sup>28</sup>.

However, despite the substantial differences between common law and civil law systems regarding burden of proof, some common aspects should also be emphasised. In particular, the burden of proof in its real sense, i.e. the legal burden, as a fundamental substantive obligation, does not shift and remains on the party that bears it throughout the proceeding. The burden of proof is discharged by means of presentation of pleadings and evidence, but the satisfaction of the burden of evidence does not necessarily discharge the burden of proof. Similarly, the duty of presenting evidence on specific allegations does not rest solely on the party bearing the burden of proof, as both parties have the duty to co-operate<sup>29</sup>.

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<sup>26</sup> Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 554-555.

<sup>27</sup> Yanovich, “The Appellate Body’s Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and Other International Tribunals”, WTO OMC Memorandum, 6<sup>th</sup> November 2002, 10.

<sup>28</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 532.

<sup>29</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 233.

The burden of presentation of pleading and evidence is a procedural matter and could shift from the proponent to the opposing party during the procedure, while the burden of proof is a principle of international procedure, which is based on substantive law and it does not shift, i.e. it remains on the party that bears it throughout the proceeding<sup>30</sup>.

Moreover, in both common law and civil law jurisdictions the scope of burden of proof is limited to issues of fact, as, in principle, it is the duty of the court to know and apply the law<sup>31</sup>. It needs to be stressed that in international law the scope of the burden of proof does not encompass the duty to prove the existence of the law as well. It is a duty of the adjudicator to ascertain the facts and apply the relevant law, in accordance with the adage *jura novit curia*. However, it is also true, that on some occasions issues of law are hardly separable from issues of fact. Yet, it is rare for the parties to deem it necessary to provide legal opinion from eminent jurists and scholars, in support of their respective position in a pending litigation. In practice, the parties usually find it necessary to discuss the law they believe to be applicable in the case. And the tribunal, without imposing the burden of proof on any particular party, while taking note of the position of each party, decides on the law at its own discretion<sup>32</sup>.

## **1.2. Burden of proof as a general principle of international law**

The third source of international law identified in Article 38(1) of the Statute of the International Court of Justice is constituted by “general principles of law recognized by civilized nations”. Though, like customary international law, the scope of general principles of law is also contested. Cheng notes how “some writers consider that the expression refers primarily to general principles of

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<sup>30</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 35-37. The author also affirms that international courts and tribunals that have used the term burden of proof where they referred to the duty of presentation of pleadings and evidence have caused doubts and confusion. *Ibidem*, p. 35-37.

<sup>31</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 230.

<sup>32</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 48-49.

international law and only subsidiarily to principles obtaining in the municipal law [...]”, while others contend that “this provision can refer only to principles obtaining in municipal law.”<sup>33</sup>

International courts can be seen as having recognized general principles of law in the following categories: a) standards that are common to all or a majority of the various systems of municipal law (e.g. the procedural principle of equality of the parties); b) standards applicable to international legal relations (e.g. principles concerning the sovereign immunity of states); c) standards applicable to legal relations, domestic and international, generally (e.g. good faith).

The principles included in the first category are mainly a result of the inductive and descriptive work of the judges throughout the single municipal legal systems. As with the first category, the third category includes a set of principles that can be found through inductive reasoning, because they are present in all legal systems. Still, being “inherent” and “unalterable”, they can also be identified through a deductive normative reasoning<sup>34</sup>. The second category is more controversial, since none of the standards included correspond to legal principle within municipal legal systems. Nevertheless, they can still be considered as general principles since they have been widely recognized by “civilised” nations as principles on which to rely for the purpose of resolving international legal issues.

Both the first and third category of general principles may include procedural rules that, as widely accepted in domestic jurisdictions, can be applied in international proceedings. While international tribunals are entirely free to estimate the value of statements made by the parties, their activity in this regard is, nevertheless, governed by a large number of general principles of law recognised by States in *foro domestico*<sup>35</sup>. As international law does not have a

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<sup>33</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987, p. 2-3. See also Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996; Sandifer, *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, 1975; Cross, *Evidence*, Butterworth & Co Ltd, London – Dublin – Edinburgh, 1958.

<sup>34</sup> Mitchell, “The Legal Basis for Using Principles in WTO Disputes”, *Journal of International Economic Law* 10(4), 795-835, pp. 801-802.

<sup>35</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987, p. 303.

complex set of procedural rules as comprehensive as those developed and applied in municipal systems, international law needs to mutuate some procedural norms from domestic law, either in civil law or common law jurisdictions, through the application of general principles of international law.

An example of general principles recognised in municipal law and consistently applied by international tribunals is the rule on the allocation of the burden of proof. In the past, there was some debate about whether there was a general principle of law governing the allocation of the burden of proof<sup>36</sup>. This debate stemmed from an often-criticised decision of the Mexico – USA General Claims Commission in the Parker Case, which stated:

“As an international tribunal the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure”<sup>37</sup>.

Scholars commenting on this decision emphasised that the Commission appears to be referring to the burden of proof in the sense of evidential burden, thus did not intend to reject the existence of a general principle of law on the burden of proof used in the sense of the legal burden<sup>38</sup>. In fact, a number of general principles of law relate to the procedural conduct of litigation rather than to substantive norms. Notwithstanding the important differences in the term burden of proof in civil law and common law systems, both systems apply the principle reflected in the Latin maxim *actori incumbit probatio*, and such principle has been accepted and applied also by international tribunals. Therefore, this rule is so well-founded in municipal law that it could be considered to be a generally accepted principle of municipal

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<sup>36</sup> *Ibidem*, p. 326-335; Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 72-75. See also Yanovich, *The Appellate Body’s Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and Other International Tribunals*, WTO OMC Memorandum, 6<sup>th</sup> November 2002, p. 10.

<sup>37</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987, p. 327, footnote 45, quoting *Parker Case* (1926), First Mexico – USA General Claims Commission, p. 39.

<sup>38</sup> What the Commission actually meant by burden of proof was the burden of presentation of pleadings and evidence, which would impose the technical rules of evidence of either the United States or Mexico on the Commission, and not the burden of proof in its real sense. Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 37-38.

law which, in accordance with Article 38 of the Statute of the International Court of Justice, is a source of international law<sup>39</sup>.

The essence of the rule is that the party who asserts a fact, whether claimant or respondent, is responsible for providing proof, i.e. evidence and legal arguments, thereof<sup>40</sup>. The rule implies that the burden of proof, as a point of departure, is on the *actor*, i.e. the party who alleges the fact, not necessarily the party who institutes the proceeding. Accordingly, each claim or fact needs to be proven by the party submitting it and the defending party bears the burden to prove the exceptions or affirmative defence it invokes<sup>41</sup>.

The second general rule of the burden of proof concerns the duty of parties in international proceedings to co-operate in order to place the facts of the disputed issues before an international tribunal. This rule derives from the idea of peaceful settlement of disputes. The necessity of collaboration of parties has been relied upon in order to justify the flexible application of the rule *actori incumbit probatio* and, as a supplement to the first rule, which emphasises the respondent's role, is a principle of international procedure<sup>42</sup>. Indeed, the rules on burden of proof need to be balanced against the obligation on parties to collaborate in presenting evidence to international tribunals and against the tribunals' own authority in matters of evidence<sup>43</sup>. This also responds to a peculiarity of international proceedings that, as involving sovereign States as parties to a dispute, cannot based their decisions solely on the technical aspects of the rules of evidence. The proper balance is described by Kazazi as follows: "an international tribunal should exercise its undisputed authority in matters of evidence to lead the proceedings in a way that while the claimant is not relieved from its primary duty of proving its claims and neither of the parties is placed under the impression that

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<sup>39</sup> *Ibidem*, p. 220-222.

<sup>40</sup> *Ibidem*, p. 116-117.

<sup>41</sup> Pauwelyn, "Evidence, Proof and Persuasion in WTO Dispute Settlement", *Journal of International Economic Law*, 1(2), 1998, p. 229 and 232.

<sup>42</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 223. The general principle expressed by the Latin maxim *actori incumbit probatio*, has been clearly reaffirmed in the case *US – Shirts* by the Appellate Body which noted that the burden of proof is on the party asserting a particular claim or defence (Appellate Body report, p. 14).

<sup>43</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 117.

it is proving the position of the other party, the co-operation of parties is ensured”<sup>44</sup>.

In spite of the freedom of States and international tribunals to apply the rules of procedure, the principles and general characteristics of the rules of procedure and evidence selected and applied in different judicial and arbitral tribunals are not very different from one another. Since they are based on general principles and considerations, these rules are more or less the same. The rules of procedure adopted for or by international tribunals are usually general rules acceptable to different legal systems, without the details and complications of any given municipal law<sup>45</sup>. Indeed, if there is a lack of guidance in the international procedural rules, one possible response is to look for widely recognised principles in other adjudicatory systems, i.e. to use procedural rules developed and applied in municipal courts through the detour of general principles of international law.

### **1.3. Practice in international courts and tribunals**

Contrary to municipal law, international procedure tends to be free from technical and detailed rules on evidence. International tribunals are not generally provided with detailed and complex rules of evidence, nor is there a supreme power to impose such rules on States as parties to international proceedings. International law has special features that also affect the way evidentiary rules have been developed and applied. International law is basically consensual; therefore international evidentiary law should be similarly derived. The primary form of consent in most areas of international adjudication appears to be the grant of wide discretionary powers of arbitral tribunals rather than agreement on comprehensive rules<sup>46</sup>.

Indeed, a peculiarity in the international tribunals’ approach to procedural matters and the burden of proof is flexibility and freedom in determining, interpreting and

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<sup>44</sup> *Ibidem*, p. 120 and 235.

<sup>45</sup> *Ibidem*, p. 3.

<sup>46</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 532-533.

applying procedural rules. This could be explained by the fact that international tribunals deal with sovereign States and the issues with which they are confronted often go to the very core of State sovereignty. Similar to other aspects of international law, party autonomy is a mayor factor in determining the rules of evidence, including those on the burden of proof.

Therefore, the rules and procedures adopted by international courts and tribunals are usually general rules acceptable to different legal systems, without the details and complications of any given municipal law. As a result, the international procedure to a large extent reflects a consensus on general rules of procedure and evidence.

The flexibility and the generality of the procedure, and the authority and the discretion of international tribunals in determining the value of evidence and the satisfactory standard of proof, are among the criteria that distinguish the international procedure from municipal one<sup>47</sup>. Accordingly, international procedure tends to be free from technical and detailed rules on evidence known in municipal law<sup>48</sup>.

A study of the practice of international tribunals shows that it could easily be concluded that, in spite of a variety of approaches and difference of opinions as to the degree of applicability of the rule on burden of proof under different circumstances, the logical and legal concept of *actori incumbit probatio* has generally been accepted and applied by international tribunals<sup>49</sup>.

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<sup>47</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 367.

<sup>48</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 230.

<sup>49</sup> See also Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996; Sandifer, *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, 1975; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987; Ferrari Bravo, *La Prova nel Processo Internazionale*, Casa Editrice Jovene, Napoli, 1958. A limited exception to the rule *actori incumbit probatio* is constituted by international proceedings in the field of human rights, where the rationale is that priorities and interests may transcend those of the formal parties and even of the individual, whose complaint promotes a common public order based on the protection of human rights. Therefore, a different approach to the burden of proof under human rights law is required, because reference to the approach of *actori incumbit probatio* implies some adversariness which derives from the mutual exclusivity of the interests involved. Therefore, at least in human rights proceedings, not only a power but rather a duty to discover the “real truth” rests on international courts. This applies specifically to those categories of human rights that are regarded as *jus cogens* in international law. The protection of human right should not be considered an individual interest directly opposite to

However, it should be noted that in international procedure the phrase “burden of proof” is used only to refer to the general obligation of the parties to prove their claims and defence<sup>50</sup>. Generally speaking, there is no place in international proceedings for the common law dual concept of the burden of proof, which is related to a particular feature of domestic law<sup>51</sup>.

International tribunals, being naturally more concerned with the practical aspects of the issue, have usually discussed the rules for allocating the burden of proof and the consequences thereof, rather than its nature and scope. Nonetheless, if one has to find *a posteriori* the underlying concept to which international tribunals have applied their rules in this regard, then the outline of the concept of burden of proof could be drawn 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>52</sup>.

### *International Court of Justice*

The International Court of Justice is the most useful model for comparative analysis. As most international courts and tribunals, the International Court of Justice is not provided with detailed procedural rules. The Statute and the Rules of the Court do not resolve all the procedural issues that may arise. Therefore, it is frequently left to the discretion of the Court as to how a particular matter is to be resolved as it arises in a particular case. Generally speaking, the Court takes a broad, liberal and flexible approach to procedural issues<sup>53</sup>.

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that of the state. Special rules of interpretation have developed concerning human rights conventions which are based on their “objective”, non reciprocal, law making character. This is also reflected in the investigatory/inquisitorial process applied by both the European and the Inter-American Court on Human Rights. The Inter-American Commission on Human Rights plays an active role in its proceedings in requesting relevant information and by conducting investigations *proprio motu*. Within the framework of their respective conventions, both Courts are perceived as defenders of the public interest and function as major fact-finding bodies. Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, Kluwer Law International, The Hague – London – Boston, 1998, p. 191-192, 195 and 209-210.

<sup>50</sup> Thus, it corresponds to the first meaning of burden of proof in common law (not to its second meaning) and to the single notion of burden of proof in civil law.

<sup>51</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 31-32.

<sup>52</sup> *Ibidem*, p. 30.

<sup>53</sup> Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 289-301, 2000, p. 289.

Analogously, the Rules and the Statute are silent on the allocation of the burden of proof and the Court is not inclined to treat questions of burden of proof too strictly, as reflected by Judge Lautherpacht:

“There is, in general, a degree of unhelpfulness in the argument concerning the burden of proof. However, some *prima facie* distribution of the burden of proof there must be”<sup>54</sup>.

The International Court of Justice has primarily relied on pleadings and documentary proof<sup>55</sup>. However, in a small number of cases, witnesses and experts have been called before the Court. There have been no limits as to the amount of evidence and admissibility. The International Court of Justice does not rule out any particular forms of evidence *per se*, as evidence may be excluded on discretionary grounds<sup>56</sup>.

The primary form of consent in most areas of international adjudication appears to be the grant of wide discretionary powers to international tribunals rather than agreement on comprehensive rules. Indeed, Article 36(2)(c) of the Statute of the International Court of Justice allows for consent to the Court determining ‘the existence of any fact which, if established, would constitute a breach of an international obligation’. Article 48 allows the Court to make all arrangements connected with the taking of evidence. The Court can call upon parties to produce evidence (although it has no power to compel production of evidence<sup>57</sup>), can commission inquiries or expert opinion<sup>58</sup>, and can limit the production of untimely evidence<sup>59</sup>.

Also, in the context of the International Court of Justice, there is a distinction drawn between the burden of proof in the broad sense of the overall burden of proof in the case, and the burden of proof in the narrow sense of establishing particular propositions. In the overall sense, concerning the case as a whole the burden of proof rests essentially with the applicant. It is the complaining State

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<sup>54</sup> *Certain Norwegian Loan case*, ICJ Reports 1957, p. 39.

<sup>55</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 533.

<sup>56</sup> *Ibidem*.

<sup>57</sup> Article 49, Statute of the ICJ.

<sup>58</sup> Article 50, Statute of the ICJ.

<sup>59</sup> Article 52, Statute of the ICJ. Moreover, witnesses and experts may be heard by the court (Article 43(5), Statute of the ICJ; see also Article 48, Article 51 and Article 52). The court may inspect evidence (Article 43(2), Statute of the ICJ).

which has brought the case and the applicant must make good its case if it is to succeed<sup>60</sup>. In that sense the burden of proof remains with applicant throughout the proceeding. Accordingly, the rule generally applied by the Court with respect to the burden of proof is the basic rule according to which the party who asserts a fact is responsible for providing proof thereof. This rule has consistently been applied by the Court in cases before it<sup>61</sup>.

The International Court of Justice explained how the burden of proof is allocated in proceedings before it in *Military and Paramilitary Activities in and against Nicaragua*, where it stated:

“The Court is bound to observe that any judgement on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts and are regarded by the Court as sound in law. [...] Ultimately [...] it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgement be rejected as unproved”<sup>62</sup>

However, it should also be underlined that the burden of proof is not always with the applicant. In the case concerning *Rights of Nationals of the United States of America in Morocco*, the Court decided that although France was the applicant, in that specific case it was to the respondent, the US, to have the burden of proving its case.<sup>63</sup>

In fact, in the proceedings before the International Court of Justice there is not always a clear distinction between the parties in terms of which is the claimant and which is the respondent. It may be said that the term “actor” in the principle *actori incumbit probatio*, is not to be taken to mean the plaintiff from the

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<sup>60</sup> Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other international Courts and Tribunals*, Cameron May, London, p. 289-301 and. 291-292.

<sup>61</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 85.

<sup>62</sup> International Court of Justice, *Jurisdiction and Admissibility, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. Unites States of America)*, 1984, ICJ Reports, p. 437, para. 101.

<sup>63</sup> *Rights of Nationals of the United States of America in Morocco*, ICJ Reports [1952], p. 176, as cited by Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 289-301, p. 294.

procedural standpoint, but the real claimant in view of the issues involved<sup>64</sup>. In fact, many cases are submitted to the Court by special agreement<sup>65</sup>, i.e. the two State parties to a dispute conclude a treaty in which they agree to submit their dispute to the Court. What tends to happen here is that the Court, looking at the issues before it, identifies the crucial ones and the party which has the role of applicant<sup>66</sup>. An early example of this is the *Corfu Channel* case where, although the case involved a special agreement, the Court concluded that the United Kingdom, which had initially filed an application instituting proceedings, was in fact the plaintiff and accordingly bore the general burden of proof in the case<sup>67</sup>. The parties themselves may make provisions in their special agreement regarding the burden of proof and, actually, they usually do so by a ‘without prejudice’ provision<sup>68</sup>.

Similarly, in cases involving territorial disputes, where there is no distinction between the parties, each would be considered a claimant and each would have the burden of proving that what it claims is true. In the *Minquiers* case the question of the burden proof was raised when, referring to a provision in the *compromis* between the parties submitting the dispute to the Court<sup>69</sup>. The Court, though establishing the order of the written pleadings, expressly stated this to be without any question as to the burden of proof. In establishing this, the Court was probably influenced by the nature of the case itself, i.e. two States claiming sovereignty over the same territory. While in circumstances like the ones expressed by the case above, it rests on the two parties to prove their rights and to the Court to judge on the relative merits. The line taken by the Court in the *Minquiers* case is to be welcome as an indication that the Court, in deciding any

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<sup>64</sup> Cheng, *General Principles of Law as Applied by the International Courts and Tribunals*, Grotius Publications Limited, 1987, p. 303, cited by Yanovich, *The Appellate Body Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and Other International Tribunals*, WTO Memorandum, Geneva, 2002, p. 12.

<sup>65</sup> Article 40, Statute of the ICJ.

<sup>66</sup> Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 289-301, p. 292.

<sup>67</sup> *Corfu Channel case*, ICJ Reports, 1949.

<sup>68</sup> See the Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Palau Ligitan and Palau Sipadan, 31 May 1997.

<sup>69</sup> *Minquiers case*, ICJ Report, 1953.

question on the burden of proof, will look not only to any relevant instruments, such as the *compromis* if there is one, but to the general nature of the case itself and the realities involved<sup>70</sup>.

In conclusion, it is worth to spend, even though merely *en passant*, a few words on the relationship between the burden of proof and the standard of proof. There is nothing in the Statute or the Rules about the standard of proof. The International Court of Justice does not have any preconceived notions about the standard of proof, nor has any strict rule been developed on such matter.<sup>71</sup>

Thus in the *Corfu Channel* case, the Court was concerned with allegations about the laying of a minefield in Albanian waters, and the allegation that it had been laid by a particular State. In concluding that the evidence to support that allegation was insufficient, the Court said:

“A charge of such exceptional gravity against a State would require a high degree of certainty that has not been reached here.”<sup>72</sup>

In another aspect of the same case, the standard applied by the Court was different, “beyond reasonable doubt” instead of “high degree of certainty”. The Court, in admitting that proof may be drawn from inferences of fact, added the proviso “that they leave no room for reasonable doubt”<sup>73</sup>. The Court seems to approach these issues in whatever way appears to it to be dictated by its feeling for (judicial) common sense.<sup>74</sup>

### *European Court of Justice*

The rules of evidence and the burden of proof that apply in the European Court of Justice and the Court of First Instance reflect the particular nature of these courts

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<sup>70</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius Publications Limited, Cambridge, 1986, p. 575-576.

<sup>71</sup> Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 289-301, p. 294.

<sup>72</sup> *Corfu Channel*, ICJ Reports 1949, p. 17.

<sup>73</sup> *Corfu Channel*, ICJ Reports 1949, p. 18.

<sup>74</sup> Watts, *Burden of Proof, and Evidence Before the ICJ*, Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 289-301, pp. 294-295.

in the legal order of the European Union<sup>75</sup>. The specific features of the European Union, which consists of countries of civil and common law, make the rules and procedures of the European Court of Justice consist of elements of both adversarial and inquisitorial traditions, with the well-known consequences that the two systems imply on the rules on the allocation of the burden of proof.<sup>76</sup> Being the European Court of Justice a hybrid common law/civil law system, its proceedings are controlled both by the parties and by the court.

Therefore, the approach to the burden of proof in proceedings before the European courts must be seen bearing in mind that, similarly to other international courts and tribunals, the European Court of Justice is not provided with detailed rules on burden of proof. As a consequence, the rules on burden of proof are normally handled in a pragmatic, flexible and un-technical way, and on a case by case basis. However, some generally accepted procedural rules on burden of proof are applied also in the context of the European Court of Justice<sup>77</sup>. An example of the application of the principle *actori incumbit probatio*, is the case *Pioneer v Commission*, where Advocate General Slynn observed that there is “a principle of law recognised in all Member States that the legal burden of proving the facts essential to an assertion normally lies on the party advancing it”<sup>78</sup>.

Similarly, as other international courts and tribunals, the European Court of Justice applies the rule that it is for a party asserting a particular fact to provide proofs thereof, as confirmed by Advocate General Tesauro:

“In general, the Community judicial process has always been governed, as far as the onus of proof is concerned, by the principle that it is incumbent on the party who relies on particular facts to identify and produce evidence

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<sup>75</sup> On the European Court of Justice see e.g., De Búrca and Weiler, *The European Court of Justice*, Oxford University Press, 2001; Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994; Plender, “Procedure in the European Courts”, *Receuil des Cours*, 267, 1997, Brealey, “The Burden of Proof Before the European Court”, *European Law Review*, 10, 1985.

<sup>76</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 265.

<sup>77</sup> Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 421. A number of authors refer in relation to this assumption to the Case *Commission vs. Netherlands* (1989).

<sup>78</sup> Joined cases 110-103/80 [1983] ECR 1825, p. 1930, cited in Yanovich, *The Appellate Body Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and other International Tribunals*, WTO Memorandum, Geneva, 2002, p. 14.

such as to convince the court of the existence of those facts”<sup>79</sup>.

It should be noted that in this excerpt the expression “burden of proof” (or “onus of proof”) is used referring to the concept of evidential burden, i.e. a party asserting a fact must adduce the necessary evidence to prove that fact, rather than the legal burden of proving one’s case overall<sup>80</sup>. While the legal burden only has place in contentious proceedings<sup>81</sup>, the evidential burden, by contrast, exists wherever a fact is raised, as in all proceedings there is a burden on a party to satisfy the court that the factual assertions it makes are true. This is reflected in the Rules of the European Court of Justice and the Court of First Instance on what must be contained in written pleadings<sup>82</sup>. In competition cases, while the legal burden lies with applicant in providing that a decision taken by the Commission is wrong in law, the primary evidential burden lies with the Commission in proving the facts on which it based its decision. The evidential burden, therefore, shifts back and forth between the parties<sup>83</sup>. In fact, while the onus is on the Commission to prove that an undertaking has breached Article 81 or 82 of the Treaty, or that a

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<sup>79</sup> Advocate General Tesouro, Case C-362/95 *P Blackspur DIY v. Council and Commission* [1997] ECR I 4775, para. 26.

<sup>80</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 266.

<sup>81</sup> As the legal burden of proof only has place in contentious proceedings, it is not therefore relevant to preliminary ruling procedures before the European Court of Justice. Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 421. So, for example, in actions by the Commission against a Member State under Article 226 of the Treaty on the basis of the Member State’s failure to carry out its obligations to properly implement Community law, the onus is on the Commission to prove that failure. E.g., Case 141/87 *Commission v Italy* [1989] ECR 943, especially Advocate General Jacobs, paras. 55-60.

<sup>82</sup> See European Court of Justice Rules: Article 38(1)(e), Article 40(1)(d); and Court of First Instance Rules: Article 44(1)(e), Article 46(1)(d).

<sup>83</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 267. The burden of adducing evidence may shift in the course of proceedings. Shifting of the burden of proof is not provided in theory (“The Court is not shifting the legal burden of proof but merely asking a party to adduce evidence”, Brealey, “The Burden of Proof Before the European Court”, *European Law Review*, 10, 1985, p. 259), but it happened (see case 12/74 *Commission vs Germany*) that it has been accepted. The explanation for this seems to lie in the distinction between propositions advanced to show that the opposing party did not discharge the burden lying on him to prove his case and pleas raised to rebut the case made out. The Court has exceptionally shifted the legal burden, in sum, “when a fact is peculiarly within the knowledge of a party”. *Ibidem*, p. 160.

Member State continues to retain a monopoly contrary to Article 86, the legal burden in court is on the applicant to show that the decision is wrong in law, where an action is brought by either an undertaking or a Member State for annulment of the decision in question<sup>84</sup>. Where a party is seeking to establish the Community's liability for damages, "it is first and foremost for [that] party to adduce conclusive proof as to the existence or extent of the damage he alleges and to establish the causal link between that damage and the conduct complained of on the part of the Community institutions"<sup>85</sup>.

In cases 117/76 and 16/77 *Firma Albert Ruckdeschel & Co and Diamalt AG v Hauptzollamt Hamburg-St Annen*<sup>86</sup>, the European Court of Justice asked the Council and the Commission to supply evidence to support certain assertions made by them. Adequate proof was not forthcoming and Advocate General Capotorti said: "in the circumstances the conclusion must be drawn that there is no evidence of the facts to which the institutions attached importance". This tends to suggest that, in references for a preliminary ruling, each party who submits written or oral observations to the Court must discharge a burden lying on him to satisfy it that the assertions of fact he makes are true. Since the preliminary ruling procedure is in theory non-contentious, there should be no legal burden of proof<sup>87</sup>. However, in contentious proceedings, even though only one party bears the risk if an issue of fact is not proved, both parties lie under an equal duty to the Court to produce evidence relating to the issues of fact in the case<sup>88</sup>. Indeed, the concept of burden of proof before the European Court of Justice is also mitigated by the duty

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<sup>84</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 265-288, p. 267. See also e.g., Case C-7/95 *P John Deere Ltd. v Commission* [1998] ECR I 3175, Case C- T-11/89 *Shell International v Commission* [1992] ECR II 757, Case C-242/95 *GT Link v De Danske Statsbaner* [1997] ECR I 4449.

<sup>85</sup> Case 26/74 *Roquette Freres v Commission* [1976] ECR 677, paras. 22-23.

<sup>86</sup> [1977] ECR 1753 at 1784.

<sup>87</sup> Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 421.

<sup>88</sup> In consequence, where the evidence produced to the Court is inconclusive as to the existence or non-existence of a fact in issue, the Court is entitled to find that the legal burden of proof has not been discharged to that extent, but it does not do so on the basis that the party bearing the legal burden has failed to produce sufficient evidence to support his case. See e.g., Case 23/81 *Commission v Royale Belge* [1983] ECR 2685, paras. 22-25. Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 422.

of cooperation of the parties to a dispute. As Advocate General Langrange remarked, in the context of a claim for damages:

“[...] the onus of proof lies with the injured party. However, the defendant must not remain inactive. It is incumbent to him to produce to the Court all the evidence which can be used to dispute the relevance of the evidence put forward by the party opposing him. Even when the defendant is an administrative body it must, at least within certain limits, produce the documents or the information which it alone possesses in its capacity as a public authority. Briefly, therefore, although the parties oppose each other, they are required, and indeed precisely because they are opponents, to collaborate with a view to enabling the Court to decide, with all the facts at its disposal, whether the damage is sufficiently proved”.<sup>89</sup>

In fact, the procedural rules of the European Court of Justice are modelled on the rules of the International Court of Justice. However, similarly to the International Court of Justice, the European Court of Justice is not sympathetic to narrow procedural arguments<sup>90</sup>. This was confirmed by Advocate General Gand who once said:

“I do not think that it is right to apply with undue strictness the concept “burden of proof” [...]. In the final analysis, a reasonable degree of certainty must be attained on examining the documents produced by each of the parties and the reply made to them by the opposing party, subject to the Court’s power, if it considers that the matter is insufficiently clear [...].”<sup>91</sup>

The remarks of the Advocate General Gand evince a natural unwillingness that cases should be decided on the basis of the burden of proof and implicitly indicates that the alternative and preferable option is cooperation between the parties and the Court on the production of all relevant evidence, the parties by producing evidence in their possession and the Court by exercising its power to order a measure of enquiry<sup>92</sup>. Thus, while one party may bear the legal burden of

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<sup>89</sup> Cases 29, 31, 36, 39-47, 50 and 51/63 *Laminoirs, Hauts Forneaux, Forges Fonderies et Usines de la Providence SA v High Authority* [1965] ECR 9111 at 943-944.

<sup>90</sup> See Watt, *Burden of Proof, and Evidence Before the ICJ*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 289-301.

<sup>91</sup> Case 8/65 *Acciaierie e Ferrerie Pugliesi SpA v High Authority* [1966] ECR 1 at 12.

<sup>92</sup> Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 422.

proof, both parties may lie under a duty to adduce evidence relevant to an issue of fact connected with it.

A number of cases show a marked aversion to a formalistic approach to deciding a case based on where the evidential burden of proof lies and whether it has been adequately discharged<sup>93</sup>. In proceedings before the Court, which are semi-inquisitorial in nature, the parties have an obligation to adduce the evidence they can in support of their claims, and where the Court considers it necessary, it will request further information or the production of documents<sup>94</sup>. If a party refuses to produce requested information in support of its claims, the Court will give no weight to the allegation, and the claim is likely to be dismissed because the evidential burden has not been discharged<sup>95</sup>.

Therefore, the production of sufficient evidence to decide an issue of fact is, in the final analysis, a matter for the Court to decide. It follows that judgement cannot, in general, be given against a party on the basis that he has failed to produce sufficient evidence<sup>96</sup>.

Although it can be taken to be the rule that the Court must be convinced of the existence of a fact, there is very little authority on what is necessary to convince it or, in other words, on what is the standard of proof required<sup>97</sup>. The Court, in fact, does not yet seem to have relied on a specific formula to express the standard of proof required to convince it and there is no rule stating what standard of proof is required before the European Court of Justice<sup>98</sup>. The absence of a formula does

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<sup>93</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 267.

<sup>94</sup> *Ibidem*, p. 267-268.

<sup>95</sup> E.g., Case 19/77 *Miller International Schallplatten v Commission* [1978] ECR 131. The principle that the party asserting a particular fact must prove it thus applies throughout, but the case may not immediately be lost if sufficient evidence is not immediately available to discharge the evidential burden of proof. This approach is particularly justifiable in view of the fact that discovery proceedings are not available in proceedings before the European Court of Justice. MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other Int'l Courts and Tribunals*, Cameron May, London, p. 268.

<sup>96</sup> Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 423.

<sup>97</sup> *Ibidem*, p.429.

<sup>98</sup> MacLennan, *Evidence, Standard and Burden of Proof and the Use of Experts in Procedure Before the Luxembourg Courts*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures:*

not mean in itself that the Court does not have a standard of proof: it might rather be that the degree of proof was internally stated in each case, but without seeing the necessity to publishing it externally. Even though discussions about the correct standard applying to a particular situation take place in the judges' deliberations, this does not find itself reflected in any detail in written judgements<sup>99</sup>.

In some cases, the common law requirement in civil cases of “proof on the balance of probabilities” seems to be applied; in other cases, the criminal standard of “proof beyond the reasonable doubt” is thought to be appropriate. The standard of proof in civil tradition Member States is difficult to generalise upon, but it seems often to be the level of proof required to exclude reasonable doubt<sup>100</sup>. At the same time, it seems that in every case the Court has followed the standards which belong to the legal tradition in which every judge was trained.<sup>101</sup>

In conclusion, the most important aspect to be underlined with respect to the European Court of Justice and the burden of proof is then the Court's wide powers of intervention on evidential issues, either on its own motion or upon request, by asking written and oral questions, demanding the production of documents or requesting the attendance of witnesses<sup>102</sup>.

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*Issues & Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, p. 268.

<sup>99</sup> *Ibidem*.

<sup>100</sup> *Ibidem*.

<sup>101</sup> Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London – Dublin – Edinburgh, 1994, p. 431.

<sup>102</sup> Brealey, “The Burden of Proof Before the European Court”, *European Law Review*, 10, 1985, p. 258, cited by Yanovich, *The Appellate Body Treatment of the “Burden of Proof” in the Light of the Rules on the Subject Applied by Municipal Courts and Other International Tribunals*, WTO Memorandum, Geneva, 2002, p. 15.

## 2. BURDEN OF PROOF RELATED ASPECTS OF THE WTO DISPUTE SETTLEMENT SYSTEM

The WTO dispute settlement system is based on the idea that the rights and obligations of Member States under the WTO agreements are to be preserved and safeguarded. This principle, as enshrined in DSU Article 3.2, implies that the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system<sup>103</sup>. Moreover, the DSU stresses that the prompt settlement of disputes is essential to the good functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members<sup>104</sup>.

The WTO system has moved away from its more power-oriented diplomatic approach to trade relations, and embraced rule-oriented approaches and impartial dispute settlement<sup>105</sup>. Panel and Appellate Body reports are in essence automatically binding, subject to a negative vote by the parties in the DSB, as established in Articles 6.1, 16.4, 17.14 of the DSU<sup>106</sup>. By automatic adoption, the

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<sup>103</sup> Article 3.2 of the DSU: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

<sup>104</sup> Article 3.3 of the DSU: “The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”.

<sup>105</sup> Petersman, *The GATT/WTO Dispute Settlement System*, London, 1997, p. 64.

<sup>106</sup> Article 6.1 of the DSU: “If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel” (footnote omitted); Article 16.4 of the DSU: “Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report” (footnote omitted); Article 17.14 of the DSU: “An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report” (footnote omitted).

parties “have substituted legal legitimacy for political legitimacy in the dispute settlement process”<sup>107</sup>. The global acceptance of a compulsory dispute settlement system as part of the WTO Agreements lends credence to developments in international trade law and generally elevates the importance of public international law. Confidence in the DSB is probably the WTO’s most significant success and the creation of the Appellate Body has contributed to a further sophistication of international trade law<sup>108</sup>.

There is still a significant role for diplomacy and non-legal arguments in the dispute settlement system. Panels are established on an *ad-hoc* basis by the DSB, which is a political body comprising representatives of all WTO Members. Furthermore, panels and the Appellate Body merely issue recommendations, which the DSB must adopt in order to render them legally binding. Nevertheless, none of these features significantly weakens the characterisation of the WTO adjudicating bodies as judicial<sup>109</sup> or affect its more juridical and rule-oriented approach<sup>110</sup>.

As it has been incisively said, “the Appellate Body is a court in all but name”<sup>111</sup> and “although the euphemism ‘quasi-judicial’ is sometimes used to describe the WTO dispute settlement process, in practice and in substance, it is a judicial process”<sup>112</sup>.

The view that the WTO Dispute Settlement is *de facto* a judicial system is also supported by the growing complexity and sophistication of its procedures, whose rules on the allocation of the burden of proof are one of many examples.

This chapter aims to provide some preliminary information on the functioning and procedures of the dispute settlement system, in view of the analysis of the burden of proof that will follow.

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<sup>107</sup> Chua, “The Precedential Effect of WTO Panel and Appellate Body Reports”, *Leiden Journal of International Law*, 11(1), 1998, p. 46.

<sup>108</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 250-251.

<sup>109</sup> Mitchell, “The Legal Basis for Using Principles in WTO Disputes”, *Journal of International Economic Law* 19(4), 2007, p. 829.

<sup>110</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 249.

<sup>111</sup> Weiler, “The Rule of Lawyers and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, *Journal of World Trade*, 35(2), 2001, p. 201.

<sup>112</sup> McRae, “What is the Future of WTO Dispute Settlement?”, *Journal of International Economic Law*, 7, 2004, p. 8.

The first three sections of this chapter, on types of complaints, on alternative means of dispute settlement, and on the phases of the dispute settlement process, simply aim to define the context in which the WTO dispute settlement procedure has developed and what type of jurisprudence will be examined in the fourth chapter.

The fourth section concerns the doctrine of *stare decisis* on the dispute settlement system, whose role is essential in the framework of the WTO rules on burden of proof. Indeed, as emphasised in the introduction, the WTO covered agreements do not contain any specific provisions on the allocation of the burden of proof. Hence, the existing rules on burden of proof have been developed since the early jurisprudence of the panel and especially Appellate Body. This early jurisprudence has been widely referred to in subsequent panels and Appellate Body reports, which has led to both a clarification and strengthening of the way in which the WTO approaches the burden of proof. This occurred despite panel and Appellate Body reports approved by the DSB not having binding precedent value.

Section five deals with the fact-finding power exercised by panels. This represents an inquisitorial element of the dispute settlement system that is mainly adversarial in nature. This implies substantial consequences on burden of proof, as the authority of the panel to seek information can risk softening a party's burden to establish a *prima facie* case of inconsistency or to discharge its burden of proof.

In conclusion, section six examines the role of general principles of international law in the WTO dispute settlement system. The burden of proof, together with other procedural and interpretative rules widely applied in international and municipal courts, has been introduced into the WTO via general principles of international law.

## **2.1. Types of complaints**

As it is often observed, the WTO dispute settlement system does not contain a clear-cut core provision on jurisdiction, as in the case of Article 36 of the ICJ

Statute<sup>113</sup>. However, GATT Article XXIII (that has been the only comprehensive legal basis of disputes settlement under GATT 1947) and the DSU contain most elements that are relevant in this regard.

By reference to the “contracting parties” and to “this Agreement”, Article XXIII can be considered as determining what is otherwise called jurisdiction *ratione personae* (only Members of the WTO can bring a matter to the dispute settlement system) and *ratione materiae* (the scope of jurisdiction is limited to claims which relate to provisions of the WTO)<sup>114</sup>.

The DSU is primarily concerned with the settlement of disputes that involve an infringement of an obligation assumed under one or more of the WTO agreements. Such an infringement is considered a *prima facie* nullification or impairment of trade benefits accruing to other WTO Members<sup>115</sup>. Indeed, normally, the mere causation of an international damage to another party does not, in and of itself, engage the international responsibility of the actor (*damne sine injuria*)<sup>116</sup>. Following the GATT practice, however, the DSU provides for dispute

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<sup>113</sup> Article 36 of the Statute of the International Court of Justice: “1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time. 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court. 5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court”.

<sup>114</sup> It should be added that this limitation on the scope of WTO dispute settlement concerns the nature of complaints and has to be clearly distinguished from the question of the applicable law. While the complaint has to be based on a WTO provision or – as far as Article XXIII is concerned on GATT 1994 rules – the dispute settlement institutions are very competent to take into consideration and to apply other provisions of international law. Wolfrum, Stoll and Kaiser (eds), *WTO – Institutions and Dispute Settlement*, Max Planck Commentaries on World Trade Law, Koninklijke Brill NV, Leiden, 2006, p. 202.

<sup>115</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 121.

<sup>116</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 84.

settlement concerning complaints where there is a nullification and impairment of benefits without an infringement of WTO obligations.

Article XXIII.1 of the GATT contains a set of conditions that can be considered as determining what constitutes an admissible complaints. Article XXIII.1 (lit. a-c) defines three admissible types of complaints. These include the obvious case of a violation of obligations by another party (lit. a: violation complaint); but also and rather specifically the application of measures by another Member, irrespective of the question whether such measures conflict with the provisions of the agreement (lit. b: non-violation complaint); and the “existence of any other situation” (lit. c: situation complaint).

Article 26.1 of the DSU, in accordance with GATT Article XXIII.1(b), authorises a complaint against a measure taken by a Member even if such a measure does not conflict with any WTO agreement, where the complaining Member considers that any benefit under the covered agreements is being nullified or impaired or the attainment of any objective of the agreement is being impeded as a result of the application of the measure<sup>117</sup>. This procedure is available, where not specifically excluded by the relevant covered agreement, in order to secure the removal of trade barriers that impede market access even if there is no violation of the agreement. In non-violation complaints the burden of proof is on the complainant, who must provide for a “detailed justification” of the complaint. This involves (1)

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<sup>117</sup> Article 26.1 of the DSU: “Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following: (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement; (b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment; (c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute; (d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute”.

defining the “benefit” being nullified or impaired or the objective being impeded; (2) defining the “measure” responsible; and (3) showing a causal relationship between the measure and the nullification or impairment or impeding of objectives<sup>118</sup>.

It should be emphasised that WTO law does not envisage strict liability, which would aggravate the burden of proof of the State to prove that it took all necessary measures it was capable of taking under the circumstance to avoid liability. In such cases it is for the claimant to demonstrate the grounds and reason for its invocation, which requires detailed submissions<sup>119</sup>. In *Japan - Film*, the panel examined the issue of which party bears the burden of proof in a claim involving non-violation under Article 26.1 of the DSU. The panel stated:

“In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a detailed justification to back up its allegations.” and “Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that 'precisely how much and precisely what kind of evidence will be required to establish ... a presumption [that what is claimed is true] will necessarily vary from ... provision to provision', we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption.”<sup>120</sup>

In contrast with the concept of legal interest inherent in most other systems of international or national jurisdiction, the term “nullification or impairment of benefits” is not defined from a legal perspective. Indeed, benefits do not refer to legal interests, but rather to the real world trade conditions, which result from certain rules of the GATT 1994 and the concessions made under it. While the

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<sup>118</sup> See e.g., Hsu, “Non-Violation Complaints - World Trade Organization Issues and Recent Free Trade Agreements”, *Journal of World Trade*, 39(2), 2005, p. 205-237; Von Bogdandy, “The Non-Violation Procedure of Article XXIII.2: Its Operational Rationale”, 26(4), *Journal of World Trade*, 1992, p. 95.

<sup>119</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 84-85.

<sup>120</sup> Panel Report, *Japan - Film* paras. 10.30 and 10.32.

concept of benefits is not defined in purely legal terms, it would also be a mistake to adopt a purely economic approach. In particular, it would be wrong to assume that benefits relate directly to real trade flows<sup>121</sup>.

Where the elements of a non-violation complaint are proven, however, there is no obligation to withdraw the challenged measure. The panel or the Appellate Body must recommend the Member concerned to make a “mutually satisfactory adjustment”<sup>122</sup>. Article 26.1(c) provides for non-binding arbitration “upon the request of either party”. Arbitrators may determine the level of benefits impaired or suggest ways of resolving the dispute. Compensation may be part of a “mutually satisfactory adjustment as final settlement of the dispute”<sup>123</sup>. This procedure, although technically not binding, places pressure on the parties to reach an agreement to resolve the dispute<sup>124</sup>.

The Appellate Body clarified that the remedy in Article XXIII:1(b) “should be approached with caution and should remain an exceptional remedy”.<sup>125</sup> In fact, in *Japan-Film* the panel held that:

“Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members

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<sup>121</sup> It has been an established practice for a long time to relate the term “benefit” to potential trade rather than actual trade, and to consider it to concern the competitive relation of trade rather than real trade figures. Wolfrum, Stoll and Kaiser (eds), *WTO – Institutions and Dispute Settlement*, Max Planck Commentaries on World Trade Law, Koninklijke Brill NV, Leiden, 2006, p. 201-203. See also, Panel Report on *Japan - Film*, para. 10.62, where the panel cited GATT panel Reports on *Australia - Ammonium Sulphate*; *Germany - Sardines*; *Uruguay - Recourse to Article XXIII*; *EC - Citrus*; *EEC - Canned Fruit*; *Japan - Semi-Conductors*; *EEC - Oilseeds I*; *US - Sugar Waiver* and panel Report on *EC - Asbestos*, para. 8.285.

<sup>122</sup> Article 26.1(b) of the DSU.

<sup>123</sup> Article 26.1(d) of the DSU.

<sup>124</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 122.

<sup>125</sup> Appellate Body Report, *EC - Asbestos*, para. 186.

negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.”<sup>126</sup>

In accordance with GATT Article XXIII.1(c), Article 26.2 of the DSU also authorises complaints by Members that consider that any benefit under a covered agreement is being nullified or impaired or the attainment of any objective of the agreement is being impeded by the existence of “any situation” other than those covered by the violation and non-violation complaint procedures<sup>127</sup>. The utility of the situation complaint procedure is that it allows more nebulous conditions or situations to be addressed. However, its actual effectiveness is very limited. This is because both the elements of such complaints are rather vague and the best outcome will be that the findings of the panel will be circulated to Members. The panel report may be appealed to the Appellate Body. The adoption of the panel report, as well as surveillance and implementation of recommendations and rulings is subject to pre-WTO rules that allow for blocking and delay of panel rulings<sup>128</sup>. In fact, no WTO jurisprudence, neither in GATT nor in WTO history, has addressed situations complaints.

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<sup>126</sup> Panel Report, *Japan - Film*, para. 10.36.

<sup>127</sup> Article 26.2 of the DSU: “Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply: (a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph; (b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph”.

<sup>128</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 123.

## 2.2. Alternative means of dispute settlement

The DSU encourages parties to resolve their disputes amicably using alternative instruments to dispute settlement. Indeed, the parties to a dispute can also agree to request good offices, conciliation and mediation as voluntary procedures for the settlement of any given dispute. Such methods may be utilised by WTO Members before or during any phase of the DSU proceedings when the parties mutually agree to do so<sup>129</sup>.

Under Article 5 of the DSU provides that:

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Good offices consist primarily of providing logistical support to the parties. It is hoped that the authority of the institution providing such offices can facilitate the resolution of the parties' conflict. Conciliation additionally involves the direct

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<sup>129</sup> Article 5.3 of the DSU.

participation of a third person in the discussion and negotiations between the parties. In a mediation process, the mediator not only participates in, and contributes to, the discussions and negotiations, but may also propose a solution. The parties are not obliged to accept this proposal.

On 13 July 2001, the WTO Director-General<sup>130</sup> addressed a communication to the Members expressing his views that “Members should be afforded every opportunity to settle their disputes through negotiations whenever possible”. In this communication, the WTO Director-General noted that Article 5 of the DSU, which provides for the use of good offices, conciliation, and mediation, has not been used since the inception of the WTO and reminded Members that he was ready and willing to assist them acting in his *ex officio* capacity as it is envisaged under the terms of Article 5.6<sup>131</sup>.

The DSU also provides for arbitration upon agreement of the parties. Article 25 of the DSU establishes that:

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

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<sup>130</sup> The WTO Director-General issuing this communication was Mr Mike Moore.

<sup>131</sup> WT/DSB/25. On 10 October 2002, the WTO Director-General Supachai Panitchpakdi issued a communication informing the Members that on 4 September 2002, the Philippines, Thailand and the European Communities had jointly requested mediation by himself or by a mediator appointed by him with their agreement. The purpose of the mediation was “to examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in ACP states. In the event that the mediator concludes that undue impairment has in fact occurred, the mediator could consider means by which this situation may be addressed.” Although the requesting Members considered that the matter at issue was not a “dispute” within the terms of the DSU, they agreed that the mediator could be guided by procedures similar to those envisaged for mediation under Article 5 of the DSU, as described in a communication by the Director-General on Article 5 of the DSU. WT/GC/66 and WT/GC/66/Add.1.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

In *US - Section 110(5) Copyright Act (Article 25.3)*, the first time since the inception of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU, the Arbitrators observed that such recourse is not subject to multilateral control and that, accordingly, “it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system”<sup>132</sup>:

“The Arbitrators note that this is the first time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU. Whereas the DSB establishes panels or refers matters to other arbitration bodies, Article 25 provides for a different procedure. The parties to this dispute only had to *notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system”<sup>133</sup>.(footnotes omitted)

In *US - Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators were called upon to determine the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)B of the US Copyright Act. The Arbitrators considered that it was for them to determine whether they had jurisdiction to consider this issue; they concluded that they did have jurisdiction because, as recalled also by the Appellate Body in *United States - Anti-Dumping Act of 1916*<sup>134</sup>, “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative” and the same principle applies also to arbitration bodies<sup>135</sup>.

As far as the allocation of the burden of proof is concerned, the Arbitrators followed the rules applicable in Article 22.6 arbitrations as stipulated in the

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<sup>132</sup> Award of the Arbitrators on *US - Section 110(5) Copyright Act (Article 25.3)*, para. 2.1.

<sup>133</sup> Award of the Arbitrators on *US - Section 110(5) Copyright Act (Article 25.3)*, para. 2.1.

<sup>134</sup> Appellate Body Report, *United States - Anti-Dumping Act of 1916*, para. 54, footnote 30.

<sup>135</sup> Award of the Arbitrators on *US - Section 110(5) Copyright Act (Article 25.3)*, para. 2.1.

agreed procedures submitted by the parties<sup>136</sup>. Therefore, it was for the United States, the respondent in the original panel proceedings, to provide a *prima facie* case that the methodology and estimates proposed by the EC did not accurately reflect the EC benefits being nullified or impaired:

“The Arbitrators carefully examined the claims, arguments and evidence submitted by the parties in light of the rules on burden of proof applicable in the context of arbitrations under Article 22.6 of the DSU, as instructed by the parties. The Arbitrators were mindful of the fact that, in arbitration proceedings under Article 22.6, a party contests the level of countermeasures which the other intends to take under paragraphs 2, 3 and 4 of Article 22. It is therefore understandable that the burden be on the party that contests the level of countermeasures to make a *prima facie* demonstration that the methodology and the calculations submitted by the party intending to apply countermeasures are inconsistent with the requirements of Article 22 of the DSU. For instance, in the *European Communities - Hormones* cases, the initial burden was on the European Communities. The present case, however, was referred to the Arbitrators by both parties "by mutual agreement". It is arguable whether or not there is a complainant and a defendant. This said, we note that the agreed procedures submitted by the parties expressly instruct us to follow the allocation of the burden of proof applied in arbitrations under Article 22.6. We also note that the parties agreed that the European Communities would submit a methodology paper ahead of the first written submissions, as in proceedings under Article 22.6. As a result, the Arbitrators decided to allocate the burden of proof accordingly, as in an Article 22.6 case”<sup>137</sup>.  
(footnotes omitted)

Arbitration has been recognised as a useful and important alternate forum for resolving disputes, as it traditionally possesses the benefits of being quick, efficient and economical. Therefore, one could expect WTO Members to turn to arbitration often to resolve their disagreements<sup>138</sup>. Moreover, in international commercial arbitration the parties agree to respect the arbitral award whatever the

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<sup>136</sup> Award of the Arbitrators on *US - Section 110(5) Copyright Act (Article 25.3)*, para. 4.4. See also Spamann, “The Myth of ‘Rebalancing’ Retaliation in WTO Dispute Settlement Practice”, *Journal of International Economic Law*, 9(1), 2006.

<sup>137</sup> Award of the Arbitrators on *US - Section 110(5) Copyright Act (Article 25.3)*, para. 4.4.

<sup>138</sup> Malkawi, “Arbitration and the World Trade Organization. The Forgotten Provision of Article 25 of the Dispute Settlement Understanding”, *Journal of International Arbitration* 24(2), 2007, p. 182.

outcome. While there is no such requirement in Article 25 of the DSU, the parties would certainly be expected to comply with the decision.

Despite arbitration's popularity and benefits in resolving disputes, WTO Members involved in disputes rely primarily on adjudication before WTO panels. One substantial reason for this could be related to the textual limitations imposed by Article 25<sup>139</sup>.

Moreover, arbitration and the alternative means of dispute settlement are only available if both sides concur, which is perhaps the reason why these procedures have not been used. Another explanation may be that it is not in the interest of the stronger party in a bilateral dispute to agree to procedures that could put the other side on a more equal footing<sup>140</sup>. In addition, respondents may prefer to litigate rather than mediate WTO disputes for internal political reasons so that they can tell their domestic constituencies protected by the disputed trade measure that they have done everything possible to defend it, but that they are now in a position where they must comply with the legal ruling. Finally, there is no defined procedure for these alternatives, which means the parties define what procedure will be followed on an *ad hoc* basis<sup>141</sup>.

Thus, the procedures under Article 5 (Good Offices, Conciliation and Mediation) and Article 25 (Arbitration) could, in principle, be used with the *consent* of both parties.

Another option for the settlement of disputes within the WTO framework is to invoke the accelerated procedures of the Decision of 5 April 1966<sup>142</sup> which are aimed at assuring the prompt settlements of complaints raised by a developing country against a developed country party. The Decision of 5 April 1966

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<sup>139</sup> Moreover, the current text of the DSU is in fact the result of extensive debates between those countries that argued for diplomatic means to settle disputes and those who favoured legal approach. Countries generally prefer the establishment of a WTO panel to settle disputes because of the mutual trust that countries have in the WTO rule of law. *Ibidem*, p. 183.

<sup>140</sup> *Ibidem*, p. 186-187. The possibility of raising the price for the other side by not yielding without a full scale legal battle could induce the weaker party into a settlement on favourable terms or even discourage the case from being submitted in the first place. Nordström and Shaffer, *Access to Justice in the World Trade Organization. The Case for a Small Claims Procedure. A Primary Analysis*, ICTSD - Dispute Settlement and Legal Aspects of International Trade, Issue Paper No. 2, June 2007, p. 14.

<sup>141</sup> *Ibidem*.

<sup>142</sup> BISD 14S/18.

procedures are incorporated into the WTO via Article 3, Paragraph 12 of the Dispute Settlement Understanding, which provides that:

“Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail”.

The content of the 1966 procedure can be summarised as follows:

1. If a developing country Member brings a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an alternative to the provisions in Articles 4 (Consultations), 5 (Good Offices, Conciliation and Mediation), 6 (Establishment of Panels) and 12 (Panel Procedures) of the DSU, the accelerated procedures of the Decision of 5 April 1966.
2. The Director-General may use his good offices, and conduct consultations at the request of the developing country in view of facilitating the finding of a solution to the dispute, where the consultations between the parties have failed.
3. If these consultations conducted by the Director-General do not bring about a mutually satisfactory solution within two months, the Director-General submits, at the request of one of the parties, a report on his action. The DSB then establishes the panel with the approval of the parties.
4. The panel must take due account of all circumstances and considerations relating to the application of the challenged measures, and their impact on the trade and economic development of the affected Members.

5. The panel should submit its findings within 60 days from the date the matter was referred to it. Where the panel considers this time-frame insufficient it may extend it with the agreement of the complaining party.

The option is only available to developing countries in their claims against developed countries and do not require mutual consent<sup>143</sup>.

While the DSU calls for consultations and provides for voluntary good offices, conciliation, mediation and arbitration<sup>144</sup>, in practice nothing of substance is carried out. The system may benefit from implementing compulsory forms of alternative dispute resolution to supplement the rigour of its litigation<sup>145</sup>.

### **2.3. The dispute settlement process**

This paragraph will examine the phases of the initiation and conclusion of a WTO process. The objective is to provide for an overview of the diverse types of disputes established under the DSU, in order to introduce some essential background information for the analysis of WTO case-law that will be conducted in the following chapters.

In this vein, the panel and the appeal process will be addressed, as well as Article 21.5 compliance procedure and Article 22.6 arbitration. For the purposes of this dissertation, only the first two types of disputes (panel and appeal) will be taken into consideration. Nevertheless, for a matter of completeness, it was deemed appropriate to include also Articles 21.5 and 22.6 procedures in this phase of the analysis and to briefly address their respective rules concerning burden of proof.

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<sup>143</sup> While consent is not required in this case, the accelerated timeframe was applied only once by the panel during the GATT era and has yet to be applied under the WTO. Indeed, shorter timeframes may simply not be a viable option unless the demands on the parties are reduced correspondingly, especially for poor developing countries that are not repeat players and thus have significantly less experience with WTO law and jurisprudence. The problem in this case is that developing countries with less internal legal capacity find it difficult to meet even the regular panel timetables, and the time and cost of a potential appeal and implementation and compliance proceedings could dwarf the gains from reducing the time period for the initial panel proceeding. Speeding up the panel process is not a useful option unless the overall demands on the parties are reduced. *Ibidem*, p. 15.

<sup>144</sup> DSU Articles 4, 5 and 25.

<sup>145</sup> Kouris, "The WTO's Dispute Settlement Procedures. Are They Up to the Task After Ten Years?", *The Journal of World Investment and Trade*, 7(2), April 2006, p. 249.

### *The Panel Process*

A panel's function is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements<sup>146</sup>. Accordingly, a panel should make an objective assessment of the matter before it, considering the facts of the case as well as the applicability of, and conformity with, the relevant covered agreements<sup>147</sup>.

The first step for a Member willing to initiate the dispute settlement process is to make a request of consultation with the other Member or Members. The Member to which the request is made shall reply to the request within 10 days and shall enter into consultations within a period of no more than 30 days, with a view to reaching a mutually satisfactory solution. If the Member does not respond or does not enter into consultations, then the complaining Member may proceed directly to request the establishment of a panel<sup>148</sup>. If consultations fail to settle the dispute

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<sup>146</sup> Article 11 of the DSU: "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". The Working Procedures for panels are set out in Appendix 3 of the DSU.

<sup>147</sup> Cameron and Orava, "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 (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the practice of other International courts and tribunals*, Cameron May, London, 2000, p. 200.

<sup>148</sup> Article 4.3 of the DSU: "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" (footnote omitted).

within 60 days (20 days in cases of urgency<sup>149</sup>), the complaining party must request the establishment of a panel<sup>150</sup>.

Panels are composed of three (exceptionally five) qualified governmental and non-governmental individuals chosen from the list maintained by the Secretariat. The parties have 20 days to agree on the panellists but if they fail to do so, panellists are appointed by the Director-General<sup>151</sup>. The panel operates on a

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<sup>149</sup> Article 4.8 of the DSU: "In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel".

<sup>150</sup> Article 4.7 of the DSU: "If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute".

<sup>151</sup> Article 8 of the DSU: "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. 2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. 3. Citizens of Members whose governments<sup>151</sup> are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise. 4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements. 5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel. 6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons. 7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request. 8. Members shall undertake, as a general rule, to permit their officials to serve as panelists. 9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. 10.

timetable that, generally, shall not exceed six months (three in cases of urgency)<sup>152</sup>. The panel process involves written submissions of the parties, third parties, and meetings (oral hearings) with parties and third parties<sup>153</sup>.

The panel, which can seek information and technical advice from any relevant source<sup>154</sup> and request an advisory report from the Expert Review Groups<sup>155</sup>, then submits a draft report to the parties to the dispute<sup>156</sup>. After comments by the parties, the panel prepares an interim report consisting of findings of fact, and conclusions of law. The interim report is circulated to the parties, which can

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When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member. 11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

<sup>152</sup> Article 12.8 of the DSU: "In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months".

<sup>153</sup> Article 12.6 of the DSU: "Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously".

<sup>154</sup> Article 13.1 of the DSU: "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".

<sup>155</sup> Article 13.2 of the DSU: "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". The function of the Expert Review Groups (ERGs) is to make available technical and scientific expertise to panel members. ERGs work under the authority of the panels, which decide their terms of reference and their working procedures. DSU Appendix 4, para. 1. Their final reports are advisory only. DSU Appendix 4, para. 6.

<sup>156</sup> Art 15.1 of the DSU: "Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing".

request a meeting with the panel to discuss the issues<sup>157</sup>. At the conclusion of this interim review process, the panel prepares a final report and transmits it to the DSB<sup>158</sup>. Within 60 days after the submission of the report, the DSB must adopt it unless there is a consensus against adoption<sup>159</sup>. However, if a party has notified its decision to appeal, the DSB may not consider the report until after the completion of the appeal<sup>160</sup>.

The DSU establishes that in its proceedings panels shall follow the relevant provisions of the DSU, as well as the Working Procedures for Panel, in Appendix 3 of the DSU. In brief, the Working Procedures provide that panels should meet in closed sessions, set the timing for the transmission of written submissions and for the call of substantive meetings as well as for panel work as a whole, and emphasise the importance of confidentiality and transparency in the panel process<sup>161</sup>.

### *The Appeal Process*

The DSU furthers the role of legal adjudication in international trade law by creating a permanent appellate tribunal.

Either side (but not third parties<sup>162</sup>) can appeal a panel's ruling to a seven members standing Appellate Body established for this purpose<sup>163</sup>. Sometimes both sides do so.

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<sup>157</sup> Art 15.2 of the DSU: "Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members".

<sup>158</sup> Art. 15.3 of the DSU: "The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12".

<sup>159</sup> Article 16.4 of the DSU: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting<sup>159</sup> unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report".

<sup>160</sup> Article 16.4 of the DSU.

<sup>161</sup> DSU, Appendix 3 on Working Procedures.

<sup>162</sup> Article 17.4 of the DSU: "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

Appellate procedures – that is, procedures that allow a higher body to review a first-instance decision – are widespread at domestic level. Conversely, such procedures are uncommon in international adjudication and, more specifically, in inter-States dispute settlement systems. For example, no appeal is available against decisions of the International Court of Justice or of the International Tribunal for the Law of the Sea<sup>164</sup>. However, the negotiators of the DSU conferred a broad appeal right to WTO litigants. Indeed, any WTO litigant has the right to file an appeal against a report of a panel, as the function of the Appellate Body is to “hear appeals from panel cases”<sup>165</sup>.

The Appellate Body stands at the apex of the WTO system, with final powers of review over all questions of law and legal interpretations that arise in specific disputes between Member States. It is not officially an international court, but its quasi-judicial function is in many respects analogous to that of a permanent tribunal<sup>166</sup>. It sits in divisions of three members<sup>167</sup> and its members are appointed for four-year terms and cannot be affiliated with any government<sup>168</sup>. Generally,

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paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body”.

<sup>163</sup> Article 17.1 of the DSU: “A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body”.

<sup>164</sup> It is difficult to explain why the appeal process is less observed in the international than in the domestic arena. An explanation might lie in the decentralization of the international system, in the necessity of ensuring world peace and order through the swift final settlement of international disputes or in the trust conferred on international trial judges. Iynedjian, “Reform the WTO Appeal Process”, *Journal of World Investment and Trade*, 6(5), October 2005, p. 813-814.

<sup>165</sup> DSU Article 17.1: “A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body”. See also Van den Bossche, *Appellate Review in the WTO Dispute Settlement*, in Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May, London, 2000, p. 305-319; and Petersmann, “How to Promote the International Rule of Law. Contributions by the World Trade Organization Appellate Review System”, *Journal of International Economic Law*, 1(2), 1998.

<sup>166</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 66.

<sup>167</sup> Article 17.1 of the DSU.

<sup>168</sup> Article 17.2 of the DSU: “The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term”. Article 17.3 of the DSU: “The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade

the Appellate Body process must be completed within 60 days but should in no case exceed 90 days<sup>169</sup>. The Appellate Body report must be adopted by the DSB and “unconditionally accepted by the parties to the dispute” unless the DSB decides by consensus not to adopt the report<sup>170</sup>.

It should be noted that the mandate of the Appellate Body is restricted in two core respects<sup>171</sup>. A first restriction is that appeals are limited to “issues of law covered in the panel report and legal interpretations developed by the panel”, i.e. the appeals have to be based on points of law and the Appellate Body cannot re-examine existing evidence or examine new issues<sup>172</sup>. A second restriction relates to what the Appellate Body can do in response to an appeal. Indeed Article 17.13 of the DSU provides that the “Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel”.

Therefore, the DSU does not confer to the Appellate Body the power to send a case back to the panel that heard it and wrote the underlying report<sup>173</sup>. This absence of remand power is problematic because the Appellate Body also lacks

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and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest”.

<sup>169</sup> Article 17.5 of the DSU: “As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days”.

<sup>170</sup> Article 17.14 of the DSU: “An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report”.

<sup>171</sup> Pauwelyn, *Appeal Without Remand. A Design Flaw in WTO Dispute Settlement and How to Fix it*, ICTSD - Dispute Settlement and Legal Aspects of International Trade, Issue Paper No. 1, June 2007, p. 1.

<sup>172</sup> DSU Article 17.6.

<sup>173</sup> The Chairman’s Text of 28 March 2003 (TN/DS/9), among the other proposals for reforming the DSU, included, as a major innovation, a provision on remand, in cases where there are insufficient fact-findings in the panel report. The Chairman’s text was not agreed to. Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations*, Cameron May, London, 2006, p. 58-70. On the consequences of the absence of explicit power to remand on the Appellate Body, see e.g., Pauwelyn, *Appeal Without Remand. A Design Flaw in WTO Dispute Settlement and How to Fix it*, ICTSD - Dispute Settlement and Legal Aspects of International Trade, Issue Paper No. 1, June 2007.

fact-finding authority. Indeed, as mentioned before, the Appellate Body may only review a panel's legal analysis; it cannot review or supplement the facts found by the panel<sup>174</sup>.

The question may then arise whether the Appellate Body is empowered to do other things besides uphold, modify or reverse panel findings. It seems clear from the context that the Appellate Body's power is somewhat broader than this<sup>175</sup>. Moreover, the grounds on which the Appellate Body may modify or reverse a panel finding are varied. Obviously, if a panel has incorrectly interpreted a WTO provision, the Appellate Body may reverse or modify the panel's interpretation<sup>176</sup>. In fact, the Appellate Body shows little if any deference toward panel's assessment of legal issues and it does not hesitate to correct a panel's flawed application of WTO provisions to the facts of a case<sup>177</sup>. The Appellate Body is also capable of finding that a panel has committed a legal error, whether under Article 11 or 12.7 of the DSU or otherwise<sup>178</sup>. Although neither these nor any other DSU provision specifically state that the Appellate Body may make such findings, some suggest that this power falls within the Appellate Body's inherent jurisdiction as a judicial tribunal reviewing a lower court's analysis<sup>179</sup>.

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<sup>174</sup> Iynedjian, "Reform the WTO Appeal Process", *Journal of World Investment and Trade*, 6(5), October 2005, p. 817.

<sup>175</sup> Voon, "To Uphold, Modify or Reverse? How the WTO Appellate Body Treats Panel Reports", *Journal of World Investment and Trade* 7(4), August 2006, p. 508.

<sup>176</sup> See, for example, the Appellate Body Report, *EC – Hormones*, para. 253. Voon, "To Uphold, Modify or Reverse? How the WTO Appellate Body Treats Panel Reports", *Journal of World Investment and Trade* 7(4), August 2006, p. 509.

<sup>177</sup> See, for example, the Appellate Body Report, *Chile – Price Band System*, para. 224 and the recent Appellate Body Report, *EC – Hormones II*, para. 581-583.

<sup>178</sup> Article 11 of the DSU: "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" and Article 12.7 of the DSU: "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached".

<sup>179</sup> Voon, "To Uphold, Modify or Reverse? How the WTO Appellate Body Treats Panel Reports", *Journal of World Investment and Trade* 7(4), August 2006, p. 509.

In recent appeals, the Appellate Body seems to be straying further from its original role of upholding, modifying or reversing panel reports. In particular, it is relying increasingly on Article 11 of the DSU to intervene in panels' decision-making<sup>180</sup>, including inherently factual areas, which in principle fall within panels' discretion in accordance with Article 17.6 of the DSU<sup>181</sup>.

*Article 21.5 implementation procedure and Article 22.6 arbitration*

The losing party must inform the DSB of its intentions "in respect of implementation of the recommendations and rulings of the DSB" within 30 days of the date of the adoption of a panel or Appellate Body report<sup>182</sup>. Losing parties have an obligation to comply with the recommendations and rulings of the DSB within "a reasonable period of time, as determined by Article 21.3 of the DSU.

A problem with the implementation of WTO rulings is the lack of guidance over what exactly a losing party must do to comply. The tendency has been for the losing party to take minimal steps and declare itself in full compliance, with the winning party often disagreeing<sup>183</sup>. One solution in these cases is to refer the

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<sup>180</sup> The growing tendency of the Appellate Body to find panel errors under Article 11 of the DSU produces several problems. First, it creates a risk of the Appellate Body monitoring panel decisions too closely, including by reassessing factual matters, which the panel is in a better position to judge. Second, the Appellate Body liberates itself from the need to provide detailed legal reasons to support its decision whether to uphold, modify or reverse panel findings. Effectively, the Appellate Body replaces a panel's decision with its own for unspoken reasons, simply claiming that the panel failed to make an "objective assessment", under Article 11 of the DSU. Third, the Appellate Body renders the panel process excessively difficult, as panels are being forced to comply with the Appellate Body's own notions about fact-finding and evidence-gathering. *Ibidem*, p. 511.

<sup>181</sup> *Ibidem*, p. 510.

<sup>182</sup> Article 21.3 of the DSU: "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be: (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement, (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances".

<sup>183</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 118. See e.g., Fukunaga, "Securing Compliance Through

matter to a compliance panel under Article 21.5 of the DSU<sup>184</sup>, which provides for an expedited compliance procedure:

“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel”<sup>185</sup>.

Another option is contained in Article 22.2 of the DSU, which provides that, if the losing party fails to bring its offending measure into compliance, the winning party may request authorization from the DSB to retaliate by suspending trade concessions<sup>186</sup>. The first option is to seek suspension of concessions or other obligations with respect to the same sector as the goods or services in dispute. Article 22.3 allows for suspension in other sectors where a party is justified in concluding that “it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s)”<sup>187</sup>. Indeed, Article 22.6 states that, if a Member fails to comply with the recommendations and rulings, the DSB can authorise the suspension of concessions or other obligations. However, if the

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the WTO Dispute Settlement System: Implementation of DSB Recommendations”, *Journal of International Economic Law*, 9(2), 2006, p. 383-426.

<sup>184</sup> See e.g., Kearns and Charnovitz, *Adjudicating Compliance in the WTO: a Review of DSU Article 21.5*, in Bronckers and Horlick (eds), *WTO Jurisprudence and Policy: Practitioners’ Perspective*, Cameron May, London, 2004.

<sup>185</sup> Article 21.5 of the DSU.

<sup>186</sup> Article 22.2 of the DSU: “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.

<sup>187</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 579. A WTO Member requesting authorisation to impose countermeasures will submit a list of concessions it wishes to suspend. The *Hormones* arbitration established that it is up to the party challenging that the complainant has respected its obligations to rebut the submission of the Member requesting authorisation. *Hormones* arbitration, paras. 9-11. Mavroidis, “Remedies in the WTO Legal System: Between a Rock and a Hard Place”, *European Journal International Law*, 11(4), 2000, p. 802.

Member concerned objects to the level of suspension proposed, the matter shall be referred to arbitration, carried out, where possible, by the original panel<sup>188</sup>.

It should be noted that the burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension<sup>189</sup>.

A problem also arises because of the lack of coherence between DSU Articles 21.5 and 22.6. In fact, there is the possibility that an Article 21.5 compliance panel and Article 22.6 arbitration could proceed in parallel and come into conflict. The confusion is compounded by the fact that only compliance panels' decisions can be appealed, there being no equivalent appeal route in the case of arbitration<sup>190</sup>.

For the purposes of this dissertation, the allocation of the burden of proof in panel and Appellate Body proceedings under Article 21.5, as well as Article 22.6 arbitration, will not be examined in the following chapters. However, the issue of burden of proof does not lack of relevance even in these contexts. Indeed, in case of implementation of adverse WTO rulings, the burden to demonstrate that its proposed period of time is reasonable for implementation stays on the responding/implementing party<sup>191</sup>. The Appellate Body in *Canada - Aircraft (Article 21.5 - Brazil)* ruled that the examination of "measures taken to comply" is based on the relevant facts proven by the complainant to the Article 21.5 panel

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<sup>188</sup> Article 22.6 of the DSU: "When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration" (footnote omitted).

<sup>189</sup> Decision of arbitrator under Article 22.6 of the DSU in the case *US – Gambling*, para. 2.22.

<sup>190</sup> In current practice at the WTO, arbitration under Article 22 is suspended until the Article 21.5 compliance proceeding has run its course. Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 119. The parties to a dispute can also avoid the sequencing problem through the adoption of an ad hoc procedural agreement (as those reached between US and Malaysia in *US-Shrimps*, between US and Australia in *Australia-Automotive Leather II*, Canada and Brazil in *Brazi-Aircraft* and *Canada-Aircraft*, ect.

<sup>191</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 178.

during the panel proceedings<sup>192</sup>. Similarly, in *Brazil - Aircraft (Article 21.5 - Canada)*, Brazil argued that the Article 21.5 panel erred in placing upon Brazil the burden of proving that its implementation measure complied with the recommendations and rulings of the DSB. Brazil claimed that Canada should have borne the burden of proving that Brazil's measure did not implement the DSB recommendations and rulings<sup>193</sup>.

The responding/implementing party must also meet the burden of establishing in Article 22 proceedings that the opposing party's proposal to suspend a trade concession is not in conformity with the DSU. Finally, the Member challenging the WTO-consistency of the implementation measures taken by the responding/implementing Member has the burden of demonstrating the non-compliance of those measures with the WTO agreements<sup>194</sup>.

#### *Special or additional procedures*

The WTO Dispute Settlement System provides for additional rules and procedures that respond to the nature of certain disputes and agreements. Many multilateral and plurilateral WTO agreements include special dispute settlement rules and procedures. They are listed in Appendix 2 of the DSU on "Special or Additional Rules and Procedures Contained in the Covered Agreements" as follows:

Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21

<sup>192</sup> Appellate Body Report on *Canada - Aircraft (Article 21.5 - Brazil)*, para. 38.

<sup>193</sup> Appellate Body Report on *Brazil - Aircraft (Article 21.5 - Canada)*, para. 66. See Spamann, "The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice", *Journal of International Economic Law*, 9(1), 2006; and Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *European Journal International Law*, 11(4), 2000.

<sup>194</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 178.

Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services Annex on Financial Services	XXII:3, XXIII:3 4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The first of these rules is Article 11.2 of the SPS Agreement, which provides that in case of disputes involving scientific or technical issues, a panel can seek advice from experts or consult the relevant international organisations<sup>195</sup>. The drafters of this agreement recognised the complexity and highly technical character of the disputes that may arise under this agreement. Panels ruling on SPS issues would be put in a difficult position, if left without resort to expert testimony or other means of proof. The rule enshrined in Article 11.2 thus authorises panels to establish an advisory technical group either upon request of a Member to the dispute or on its own initiative. For the same purpose, panels are also empowered to consult relevant international organisations. The rationale behind this additional rule to the DSU is clear: SPS disputes involve scientific questions of which panels normally possess minimal or no understanding. The availability of the option to consult experts to resolve these scientific questions is due to the need of rendering rightful rulings over issues in dispute.

The same rationale is behind the decision to provide for additional dispute settlement procedures in cases arising under the TBT Agreement. Article 14.2 through 14.4 of the TBT Agreement provides that a panel may establish a technical experts group to assist the panel in questions of technical nature<sup>196</sup>. However, the role of the technical experts group under the TBT Agreement is more explicit than that under the SPS Agreement. Indeed, a separate Annex 2 to

<sup>195</sup> Article 11.2 of the SPS Agreement: “In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative”.

<sup>196</sup> Article 14.2 through 14.4 of the TBT Agreement: “14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts. 14.3 Technical expert groups shall be governed by the procedures of Annex 2. 14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member”.

the agreement provides for the rules that shall govern the technical expert groups, as a sort of terms of reference<sup>197</sup>.

As far as the Textiles Agreement is concerned, it should be recalled that this provision was inserted in light of the fact that the textile sector is one of the most competitive and sensitive in international trade. Therefore, WTO Members agreed for a transitional period within which Members could adjust their rules according to the WTO provisions. The Textiles Agreement had a larger portion of additional rules and procedures, which all expired, together with the Agreement, on January 1<sup>st</sup> 2005. The textiles and clothing sector has since been integrated into the GATT 1994 and is therefore subject to its mandatory rules, including the dispute settlement procedures.

In the case of anti-dumping disputes, the determination of a dumping status cannot be left to Members'. This is reflected in the additional and special rules and procedures stipulated under the Anti-Dumping Agreement that are set for the pre-panel dispute settlement, in order to evaluate the quasi judicial investigations

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<sup>197</sup> Annex 2 of the TBT Agreement: "The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14. 1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel. 2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question. 3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group. 4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate. 5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information. 6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel".

to the determination of the existence or non-existence of dumping practices and thereafter the fixation on the anti-dumping duty, if applicable<sup>198</sup>.

The similarity of the Anti-Dumping Agreement to the Subsidies and Countervailing Measures Agreement, essentially representing two sides of the same coin, is reflected in the additional rules and procedures on dispute settlement included in both Agreements. In particular, the SCM Agreement provide for special procedures for remedies against prohibited subsidies<sup>199</sup>, for the assessment

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<sup>198</sup> Article 17.4 through 17.7 of the Anti-Dumping Agreement: “17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body (“DSB”). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB. 17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member. 17.6 In examining the matter referred to in paragraph 5: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. 17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided”.

<sup>199</sup> Article 4.2 through 4.12 of the SCM Agreement: “4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question. 4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution. 4.4 If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body (“DSB”) for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel. 4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts (referred to in this Agreement as the “PGE”) with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification. 4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date

of a serious prejudice in case of actionable subsidies<sup>200</sup>, for remedies against actionable subsidies<sup>201</sup> and for the identification of non-actionable subsidies<sup>202</sup>.

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of the composition and the establishment of the panel's terms of reference. 4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn. 4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. 4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members. 4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request. 4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate. 4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein" (footnotes omitted). See also Article 24.4 of the SCM Agreement: "The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7".

<sup>200</sup> Article 6.6 of the SCM Agreement: "Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved".

<sup>201</sup> Article 7.2 through 7.10 of the SCM Agreement: "7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused to the interests of the Member requesting consultations. 7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution. 7.4 If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established. 7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference. 7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. 7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The

Additional rules are also provided for the parallel invocation of subsidies and countervailing provisions<sup>203</sup> and for granting a special and differential treatment to developing country Members<sup>204</sup>. Finally, Annex V to the SCM Agreement was established in order to set special procedures for developing information concerning serious prejudice<sup>205</sup>. Therefore, the SCM Agreement does not deviate

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appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members. 7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy. 7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request. 7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist” (footnotes omitted).

<sup>202</sup> Article 8.5 of the SCM Agreement: “Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph”.

<sup>203</sup> Footnote 35 of the SCM Agreement: “The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8”.

<sup>204</sup> Article 27.7 of the SCM Agreement states: “The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7”.

<sup>205</sup> Annex V of the SCM Agreement: “1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information. 2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product. This process may include, where

from the general approach advanced in both the DSU and all other dispute settlement additional rules and procedures. The distinctive characteristics can be summarised as providing more strict time limits, providing preferential treatment to developing and least developed countries, and adding a whole separate Annex V on developing evidence.

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appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII. 3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government. 4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties. 5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions. 6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available. 7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process. 8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner. 9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process”.

The Agreement on Custom Valuation provides for a supervising committee, i.e. the Custom Valuation Committee, which shall provide advice and assistance to Member States engaged in consultations and which shall expedite the amicable satisfactory solution for disputing Members<sup>206</sup>. The Technical Committee can have a further role during the panel's fact-finding process itself, upon request of either disputant Member or on a panel's own initiative<sup>207</sup>.

Conversely, the GATS provides for a slightly different approach from that adopted in most other dispute settlement additional rules and procedures attached to the DSU. However, its overall aim is in line with the ultimate objective of the WTO, i.e. to create more predictability, stability, harmonisation and consistency in international trade in services. Indeed, the GATS provide for additional dispute

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<sup>206</sup> Article 19.3 through 19.5 of the Agreement on Custom Valuation: "3. The Technical Committee shall provide, upon request, advice and assistance to Members engaged in consultations. 4. At the request of a party to the dispute, or on its own initiative, a panel established to examine a dispute relating to the provisions of this Agreement may request the Technical Committee to carry out an examination of any questions requiring technical consideration. The panel shall determine the terms of reference of the Technical Committee for the particular dispute and set a time period for receipt of the report of the Technical Committee. The panel shall take into consideration the report of the Technical Committee. In the event that the Technical Committee is unable to reach consensus on a matter referred to it pursuant to this paragraph, the panel should afford the parties to the dispute an opportunity to present their views on the matter to the panel. 5. Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of this information, authorized by the person, body or authority providing the information, shall be provided".

<sup>207</sup> Paragraphs 3, 9 and 21 of Annex II to the SCM Agreement: "3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by Members, the Committee or a panel, in a reasonably short period of time. As provided in paragraph 4 of Article 19, a panel shall set a specific time period for receipt of a report of the Technical Committee and the Technical Committee shall provide its report within that period. [...] 9. The Technical Committee shall meet as necessary but at least two times a year. The date of each meeting shall be fixed by the Technical Committee at its preceding session. The date of the meeting may be varied either at the request of any member of the Technical Committee concurred in by a simple majority of the members of the Technical Committee or, in cases requiring urgent attention, at the request of the Chairman. Notwithstanding the provisions in sentence 1 of this paragraph, the Technical Committee shall meet as necessary to consider matters referred to it by a panel under the provisions of Article 19 of this Agreement. [...] 21. Each member of the Technical Committee shall have one vote. A decision of the Technical Committee shall be taken by a majority comprising at least two thirds of the members present. Regardless of the outcome of the vote on a particular matter, the Technical Committee shall be free to make a full report to the Committee and to the CCC on that matter indicating the different views expressed in the relevant discussions. Notwithstanding the above provisions of this paragraph, on matters referred to it by a panel, the Technical Committee shall take decisions by consensus. Where no agreement is reached in the Technical Committee on the question referred to it by a panel, the Technical Committee shall provide a report detailing the facts of the matter and indicating the views of the members".

settlement procedures for consultation<sup>208</sup> and for dispute settlement and enforcement<sup>209</sup>. The GATS also includes specific annexes on Air Transport Services<sup>210</sup> and on Financial Services<sup>211</sup>, which set additional dispute settlement procedures. Moreover, On 1 March 1995, pursuant to the Ministers' Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services, the Council for Trade in Services adopted the Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services<sup>212</sup>, taking in consideration the specific nature of the obligations and specific commitments of the GATS, and of trade in services<sup>213</sup>. However, On 4

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<sup>208</sup> Article XXII.3 of the GATS: "A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.<sup>208</sup> The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members".

<sup>209</sup> Article XXIII.3 of the GATS: "If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply".

<sup>210</sup> Paragraph 2 of the Annex on Air Transport Services to the GATS: "The Agreement, including its dispute settlement procedures, shall not apply to measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex". Paragraph 4 of the Annex on Air Transport Services: "The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted".

<sup>211</sup> Article 4 of the Annex on Financial Services to the GATS: "Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute".

<sup>212</sup> S/C/M/1.

<sup>213</sup> Decision on Certain Dispute Settlement Procedures for the GATS: "Ministers decide to recommend that the Council for Trade in Services at its first meeting adopt the decision set out below. The Council for Trade in Services, Taking into account the specific nature of the obligations and specific commitments of the Agreement, and of trade in services, with respect to dispute settlement under Articles XXII and XXIII, *Decides* as follows: 1. A roster of panelists shall be established to assist in the selection of panelists. 2. To this end, Members may suggest names of individuals possessing the qualifications referred to in paragraph 3 for inclusion on the roster, and shall provide a curriculum vitae of their qualifications including, if applicable, indication of sector-specific expertise. 3. Panels shall be composed of well-qualified governmental and/or non-governmental individuals who have experience in issues related to the General Agreement on Trade in Services and/or trade in services, including associated regulatory matters. Panelists shall serve in their individual capacities and not as representatives of any government or organisation. 4. Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors which the dispute concerns. 5. The Secretariat shall

October 1995, the Council for Trade in Services decided that, given the comprehensive nature of the indicative list established by the DSB pursuant to Article 8(4) of the DSU, there was no need for the Council to establish a separate roster of serving panellists<sup>214</sup>.

#### **2.4. *Stare decisis* in the dispute settlement system**

Article 3.2 of the DSU establishes that the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system in order to preserve the rights and obligations of WTO Members<sup>215</sup>. To a certain extent, Article 3.2 contains conflicting elements. On the one hand, it indicates that the Members recognise that the dispute settlement system serves “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”. On the other hand, it states that recommendations and rulings of the DSB “cannot add or diminish the rights and obligations provided in the covered agreements”<sup>216</sup>.

This provision does not amount to an unequivocal rejection of the doctrine of *stare decisis*. Indeed, the sentence can be read differently. It can imply a quasi rejection of the doctrine, in the sense that panel and Appellate Body reports, if they were to have precedential effect, would thereafter affect the rights and duties of WTO Members that are not parties to the dispute at hand<sup>217</sup>.

In the *US – Shirts and Blouses* case, it was affirmed that DSU Article 3.2 is not meant to encourage either panels or the Appellate Body to ‘make law’ by

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maintain the roster and shall develop procedures for its administration in consultation with the Chairman of the Council”.

<sup>214</sup> S/C/M/6, paras. 41-42.

<sup>215</sup> Article 3.2 of the DSU: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”.

<sup>216</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 511.

<sup>217</sup> Bhala, “The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)”, *American University International Law Review*, 14, 1999, p. 11.

clarifying existing provisions of the WTO Agreements ‘outside the context of resolving a particular dispute’, i.e. panels need only address the claims necessary in order to resolve a matter at issue in the dispute, and should only consider the claims that are submitted to them<sup>218</sup>. Alternatively, the sentence can be interpreted as a check against judicial activism: it reminds panellists and Appellate Body Members that, in every case, the rights and obligations of one or more Members, who may or may not be a party, cannot be affected, i.e. WTO panels and the Appellate Body are not supposed to legislate; they are supposed to *find* the law, not to *make* it<sup>219</sup>. As a consequence, Article 3.2 states the obvious. What makes it interesting is what is missing rather than what is present<sup>220</sup>.

The WTO dispute settlement has always been viewed as a matter fundamentally between the parties to the dispute. Thus, the rulings and conclusions set out in a panel or Appellate Body report are considered to apply only to the matter at issue and to the parties involved in the particular case<sup>221</sup>.

Indeed, in terms of legal precedent, it is crucial to first note that the WTO (like GATT before it) implicitly denies binding legal force to adopted rulings beyond the particular matter and parties in dispute even if the question is not directly addressed in the WTO Agreements<sup>222</sup>. The common law doctrine of *stare decisis* generally does not apply in international trade law and in international law in general. This fact alone grants considerable discretion to judges to avoid constraints potentially imposed by previous decisions.

The absence of the *stare decisis* doctrine in the WTO legal system is also supported by the fact that Article IX.2 the WTO Agreement has established a special procedure for authoritative interpretations and provides that “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade

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<sup>218</sup> Appellate Body report, *US – Shirts*, p. 19. See also panel report, *Argentina – Textiles and Apparel*, paras. 6.13 and 6.15. Martha, “Capacity to Sue and to Be Sued Under WTO law”, *World Trade Review*, 3(1), 2004, p. 30-31.

<sup>219</sup> Bhala, “The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)”, *American University International Law Review*, 14, 1999, p. 12.

<sup>220</sup> *Ibidem*.

<sup>221</sup> *Ibidem*, p. 8.

<sup>222</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 93.

Agreements”<sup>223</sup>. This special procedure requires a three-fourths majority of WTO Members. Article 3.9 DSU states expressly that “the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretations of provisions of covered agreements through decision-making under the WTO Agreement”. In addition, the WTO provides for the possibility of amending the law and the process of amendment is regulated in detail by Article X of the WTO Agreement<sup>224</sup>.

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<sup>223</sup> Article IX.2 of the Agreement establishing the WTO: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X”.

<sup>224</sup> Article X of the WTO Agreement: “1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply. 2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members: Article IX of this Agreement; Articles I and II of GATT 1994; Article II:1 of GATS; Article 4 of the Agreement on TRIPS. 3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. 4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members. 5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a

The Appellate Body in *Japan- Alcoholic* dispute, the first case in which the precedential value of previously adopted reports was raised formally since the inception of the WTO, found that:

“The fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in [Article IX.2 of the] WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere”<sup>225</sup>.

However, it can also be argued that, in adopting panels and Appellate Body reports, the Members of the DSB (i.e. the General Council serving as DSB) exercise their power to make authoritative interpretation. Thus, instead of viewing Article IX.2 as excluding the development of authoritative interpretations through adoption of panel and Appellate Body reports, one can regard such an adoption as the implicit or indirect exercise of the power to make authoritative interpretations under Article IX.2<sup>226</sup>.

Nevertheless, so far, no serious effort has been undertaken to use these political decision-making mechanisms to direct the future work of panels and the Appellate Body<sup>227</sup> and the obstacles to decision making among WTO Members invite

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Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members. 6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process. 7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference. 8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference. 9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4. 10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

<sup>225</sup> Appellate Body report, *Japan – Alcoholic Beverages*, p. 15.

<sup>226</sup> Chua, “The Precedential Effect of WTO Panel and Appellate Body Reports”, *Leiden Journal of International Law*, 11(1), 1998, p. 54.

<sup>227</sup> Ehlermann, “Tension Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO”, *World Trade Review*, 1(3), 2002, p. 304. The first request for an authoritative interpretation of the Multilateral Trade Agreements was made on 21 January 1999 (WT/GC/W/133). It was related to Articles 3.7, 21.5, 22.2, 22.6, 22.7 and 23 of the DSU.

governments to pursue in litigation what they fail to achieve in political negotiations<sup>228</sup>. Therefore, without recourse to these formal legal instruments (i.e., authoritative interpretation or amendment), the Appellate Body should not be expected to change its interpretation of the DSU. The result can be a kind of stalemate that affects the credibility of both the Appellate Body and of the political bodies of the WTO<sup>229</sup>.

The panel in *Japan- Alcoholic* held that reports adopted by the GATT Council and Dispute Settlement Body are an integral part of GATT 1994 on two grounds. Firstly, adopted reports constituted ‘subsequent practice’ under Article 31.3(b) of the 1969 Vienna Convention on the Law of the Treaties, which states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account when interpreting the treaty<sup>230</sup>. The panel accepted Article 31.3(b) as part of the “customary rules of interpretation of public international law” which it was bound to use, under Article 3.2 of the DSU, in interpreting the GATT<sup>231</sup>. Secondly, adopted reports constituted ‘other decisions of the Contracting Parties to GATT 1947’ under paragraph 1(b)(iv) of Annex 1A incorporating GATT 1994 into the WTO Agreement<sup>232</sup>. These two findings render panel reports as binding on future panels as are the provisions of GATT 1947 themselves.

However, the Appellate Body rejected the panel’s findings on this issue and stated:

“We do not believe that the CONTRACTING PARTIES,  
in deciding to adopt a panel report, intended that their

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Although the General Council was requested to hold a meeting to deal with these interpretation issues no such meeting was ever held (WT/GC/W/143).

<sup>228</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 66.

<sup>229</sup> Ehlermann, “Tension Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO”, *World Trade Review*, 1(3), 2002, p. 305.

<sup>230</sup> Panel report, *Japan- Alcoholic*, paras. 6.7-6.10. A preliminary question should be whether the acts of an organ established by a treaty can constitute subsequent practice of the parties to the treaty. Judge Spender stated that the practice of an organ such as the United Nations General Assembly cannot be equate with the practice of the parties to the Charter under this principle. He based his objection on the fact that in such organs, majority rule prevails and so determines the practice. Separate Opinion of Judge Spender in Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151, p. 192. See also, Chua, “The Precedential Effect of WTO Panel and Appellate Body Reports”, *Leiden Journal of International Law*, 11(1), 1998, p. 59.

<sup>231</sup> Panel report, *Japan- Alcoholic*, paras. 6.7-6.10.

<sup>232</sup> Panel report, *Japan- Alcoholic*, para. 6.10.

decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994”<sup>233</sup>.

It also found that ‘subsequent practice’, within the meaning of Article 31.3(b) of the Vienna Convention, requires a “concordant, common and consistent” sequence of acts or pronouncements sufficient to establish a discernible pattern implying the parties’ agreement regarding its interpretation<sup>234</sup>. Hence, an isolated act, such as the adoption of a panel report, is generally not sufficient to establish subsequent practice. Nevertheless, the Appellate Body - referring to panels under GATT 1947 - stated also that “adopted Panel reports are an important part of the GATT *acquis*”. They are often considered by subsequent panels, they create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to a dispute, even though they are not binding, except with respect to resolving the particular dispute between the parties to that dispute<sup>235</sup>. Similarly, in *India-Patents*, the panel stated that:

“It can thus be concluded that panels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. [...] However, [...] we will take into account the conclusions and reasoning in the Panel and Appellate Body reports...”<sup>236</sup>.

The concern of preserving its reputation for coherence, made the Appellate Body establish a system of *de facto* precedent, setting a clear analytical frameworks, actively encouraging panels to follow its lead, and prominently citing its previous decisions in support of its conclusions<sup>237</sup>. Some argue that the Appellate Body has engaged in judicial law making and that this is a regrettable form of judicial activism that strays from the limits of its institutional mandate. Others consider gap-filling and the clarification of ambiguity to be intrinsic to the interpretative enterprise in which the Appellate Body is engaged<sup>238</sup>.

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<sup>233</sup> Appellate Body report, *Japan – Alcoholic Beverages*, p. 14-15.

<sup>234</sup> Appellate Body report, *Japan – Alcoholic Beverages*, p. 13. See also Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 273-275.

<sup>235</sup> Appellate Body report, *Japan – Alcoholic Beverages*, p. 15.

<sup>236</sup> Panel Report, *India – Patents (complaint by EC)*, para. 7.30.

<sup>237</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 93.

<sup>238</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO

On the one hand, it is correct to state that there is no *stare decisis* doctrine applicable in WTO dispute settlement. The same is true for all fields of public international law where this doctrine is merely viewed as a domestic common law principle. On the other hand, legal systems without a doctrine of *stare decisis* still utilise past cases. This is confirmed by the fact that civil law systems have the notion of *jurisprudence constante*<sup>239</sup>. Even without any clear principle, reasoning in past cases can be influential, even if not binding. As the Appellate Body has noted, Article 59 of the Statute of the International Court of Justice contains an explicit provision denying any doctrine of precedent but this has not inhibited the development by the Court of a body of case law in which considerable reliance on the value of previous decisions is readily discernable<sup>240</sup>.

The influence of past cases is also connected to the notion of *res judicata*, which is adopted by many domestic legal systems, and is also respected in international law. This principle allows an adjudicator to deny jurisdiction when a particular dispute has been previously decided<sup>241</sup>. There is no express notion of *res judicata* applicable in the WTO, although it remains to be seen if it might be applied in an appropriate case as a general principle of international law. Even if such a doctrine does not exist at WTO level, no answer is provided to the important practical question as to how a later panel will view a dispute when a virtually identical issue has been resolved in a particular manner on a previous occasion<sup>242</sup>. Despite the existing legal constraints and the *de jure* absence of *stare decisis* doctrine, reports of panels and especially the Appellate Body are often relied upon in subsequent decisions, and thereby effectively constitute a fairly stable body of

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Publishing, Geneva, 2008, p. 543. See also Steinberg, "Judicial Law Making in the WTO: Discursive, Constitutional, and Political Constraints", *American Journal of International Law*, 98(2), 2004.

<sup>239</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 510.

<sup>240</sup> Appellate Body Report, *Japan – Alcoholic Beverages*, p. 15, footnote 30. Art 59 of the Statute of the International Court of Justice states that "The decision of the Court has no binding force except between the parties and in respect of that particular case". The ICJ provision goes far in denying the existence of *stare decisis* in international law, as it establishes that in subsequent cases involving different parties but involving the same or a similar issue, a prior holding is not binding. Bhala, "The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)", *American University International Law Review*, 14, 1999, p. 6.

<sup>241</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 510.

<sup>242</sup> *Ibidem*, p. 511.

precedent<sup>243</sup>. Despite the fact that neither a *stare decisis* effect, nor any “definitive interpretation” effect of panel or Appellate Body reports exists, the reports adopted by the DSB remain persuasive, and presumably are part of the practice of the parties under the Agreements<sup>244</sup>. Other than the texts of the WTO Agreements themselves, no source of law is as important in WTO dispute settlement as the reported decisions of prior disputes<sup>245</sup>. As a matter of fact, adopted reports have a strong persuasive power and may be viewed as a form of non-binding precedent whose role is comparable to that played by jurisprudence in the contemporary civil law of many countries<sup>246</sup>. The relevance of jurisprudence in the WTO dispute settlement system is also an effect of the bridging of different legal traditions that takes place in an international organisation<sup>247</sup>.

Among the other consequences of such a state of affairs, it should be recalled – with a view to the overall objective of this study – that the Appellate Body has considerable autonomy to behave strategically within the WTO with respect to procedural issues. Rather quietly, the Appellate Body has crafted an activist approach to a number of fundamental procedural issues<sup>248</sup>. In fact, on matters of procedural evidence the DSU is particularly sparse, and the need to develop rules that render dispute settlement effective is uncontroversial<sup>249</sup>. The Appellate Body has two principle sources of authority over procedural rules in the DSU. First, upon creating the Appellate Body, WTO governments formally agreed to delegate responsibility for constructing the court’s working procedures to its newly appointed Members. They exercise this authority with little oversight, and, after consultations, can amend or supplement these procedures at any time if they so

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<sup>243</sup> Bhala, “The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)”, *American University International Law Review*, 14, 1999, p. 9.

<sup>244</sup> *Ibidem*.

<sup>245</sup> Palmetier and Mavroidis, “The WTO Legal System: Sources of Law”, *American Journal of International Law*, 92(3), 1998.

<sup>246</sup> *Ibidem*.

<sup>247</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 274-275.

<sup>248</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 66.

<sup>249</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 543.

desire<sup>250</sup>. Second, in the context of specific disputes, the Appellate Body has been presented numerous procedural issues on which the DSU is silent or unclear. When Member States are unable to agree on such questions, which is often the case, the Appellate Body is literally invited to interpret the DSU in ways that serve its institutional interests<sup>251</sup>. One topic, on which the Appellate Body has developed a significant body of case law, is the burden of proof.

A recent discussion among the WTO Members at a DSB meeting focused on the role of precedent in WTO dispute settlement. This discussion occurred in the context of the *US - Stainless Steel (Mexico)* dispute, where the Appellate Body made some statements that seemed to indicate a fairly strong view of the role of Appellate Body precedent. In fact, the Appellate Body criticized the panel for conducting its own objective assessment of a legal issue and refusing to follow the Appellate Body's past interpretations of provisions of WTO agreements. The Appellate Body stated that it was "deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues"<sup>252</sup>. In the discussion that followed the circulation of the report, the US stated that "[p]erhaps unlike some other institutions, the WTO did not rely on adjudication to advance its objectives. However, this Appellate Body Report's approach, including its references to a 'coherent and predictable body of jurisprudence', would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members"<sup>253</sup>. Moreover, recalling the Appellate Body in *Japan – Alcoholic*, the US clarifies that they "would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel. To take account of an adopted report, of course, did not mean to

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<sup>250</sup> The Appellate Body must consult with the WTO Director General and DSB Chairman. It has already amended its procedures few times.

<sup>251</sup> McCall Smith, "WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings", *World Trade Review*, 2(1), 2003, p. 67.

<sup>252</sup> Appellate Body report, *US - Stainless Steel (Mexico)*, para. 162.

<sup>253</sup> WT/DSB/M/250, para. 53, p. 11.

follow it without hesitation. To the contrary, to take account of such a report meant to examine it, to consider it, and to engage with its reasoning<sup>254</sup>.

## 2.5. Panels' fact finding power

The Appellate Body has repeatedly affirmed that all WTO Members are required to cooperate in the production of information requested by panels, and by the complaining Members during the consultations and thereafter. In many cases, Members exchange factual information and documents during consultations. In other cases, Members provide factual information in response to questions posed by panels or other Members. Unfortunately, however, Members occasionally do not provide the information requested by either panels or complaining Members<sup>255</sup>.

There are basically two options a panel has when a Member fails to provide requested information within its exclusive control.

First, the panel may draw adverse inferences, i.e., determine that the information, if provided, would have been adverse to the interests of the Member withholding it<sup>256</sup>. The Appellate Body held in *Canada–Aircraft* that panels have the legal authority and discretion to draw negative inferences from the refusal of any WTO member to disclose requested information<sup>257</sup>. This case, therefore, established the

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<sup>254</sup> WT/DSB/M/250, para. 54, p. 11. The position expressed by US amounts to a rebuttal of the arguments expressed by Bhala, “The Precedent Setters: De Facto *Stare Decisis* in WTO Adjudication (Part Two of a Trilogy)”, *Journal of Transnational Law and Policy*, 9(1), 1999; and Pauwelyn, “The Limits of Litigation: ‘Americanization’ and Negotiation in the Settlement of WTO Disputes”, *Duke Law School Legal Studies*, Research Paper No. 54, September 2004, who assert that the precedential effect of panels’ and Appellate Body’s reports is the result of the Americanisation of the WTO dispute settlement.

<sup>255</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 188.

<sup>256</sup> While the Appellate Body has clearly ruled that adverse inference are the ultimate remedy a panel can take against a Member refusing to cooperate, panels properly have been reluctant to draw such inferences explicitly. Instead, they have gone to great lengths to provide the non-cooperating Member with numerous opportunities to produce the evidence. *Ibidem*, p. 188-189.

<sup>257</sup> Appellate Body report, *Canada – Aircraft*, para. 205. This decision encourages disputing governments to cooperate in the process of discovery at the panel stage, improving the factual record on which the Appellate Body must rely in reviewing issues of law. If governments fail to produce requested information, that refusal can provide a basis for panels to reach adverse conclusions that weaken their case.

principle that an adverse inference may be drawn from non-cooperation of a party if the lack of cooperation is without any reasonable justification<sup>258</sup>. After this ruling, the Appellate Body confirmed that panels and the Appellate Body may draw an adverse inference from non cooperation on the part of a party to a dispute under certain circumstances<sup>259</sup>. The broad discretion given to panels by the Appellate Body to draw negative inferences, which is at best only indirectly supported by Article 13 of the DSU, has the potential to improve the quality and quantity of factual information produced during panel proceedings<sup>260</sup>.

Second, the other option open to a panel when Members have refused to produce requested information is to make its fact-finding based on the information available<sup>261</sup>.

Indeed, Article 11 of the DSU states that:

“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.*” (emphasis added)

More specifically, Article 13.1 provides that:

“*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*

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<sup>258</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 124.

<sup>259</sup> Appellate Body report, *US – Safeguard on Wheat Gluten*, para. 172; Panel report, *US – Subsidies on Upland Cotton*; Panel report, *Korea – Commercial Vessels*.

<sup>260</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 92.

<sup>261</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 188.

*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”. (emphasis added)

In *Canada – Aircraft*, the Appellate Body affirmed that panels have a broad right to request information from WTO Members. The ruling clarified that panels have the discretion to unconditionally seek information from any relevant source. The Appellate Body also held that Member governments, in turn, have a clear duty to comply with such requests<sup>262</sup>. In order to reach this conclusion, the Appellate Body had to examine DSU Article 13 in significant detail, especially its provision that governments “should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate”. In interpreting the word ‘should’, the Appellate Body decided to emphasise its meaning “in a normative, rather than merely exhortative, sense”, which enabled it to find that governments had an obligation to respond promptly and fully to all panel requests<sup>263</sup>.

The obligation of Members to respond to a panel’s request is also supported by the duty of collaboration. Because cooperation between the parties is seen as an important element in the peaceful settlement of disputes between nation States, there is an obligation to provide the Tribunal with relevant documents which are

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<sup>262</sup> Appellate Body report, *Canada – Aircraft*, Section VII. In support of this finding, the Appellate Body cited its similar holding in *Argentina – Textiles and Apparel, EC – Hormones, US – Shrimps*. Appellate Body report, *Canada – Aircraft*, para. 184.

<sup>263</sup> Appellate Body report, *Canada – Aircraft*, para. 187: “We note that Article 13.1 of the DSU provides that ‘A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.’ Although the word ‘should’ is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used ‘to express a duty [or] obligation’. The word ‘should’ has, for instance, previously been interpreted by us as expressing a ‘duty’ of panels in the context of Article 11 of the DSU.”<sup>263</sup> Similarly, we are of the view that the word ‘should’ in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to ‘respond promptly and fully’ to requests made by panels for information under Article 13.1 of the DSU.” (footnotes omitted) Critics to this decision allege that the Appellate Body deliberately misread ‘should’ to mean ‘shall’, the stronger verb that appears elsewhere in Article 13. Behboodi, “‘Should’ means ‘Shall’. A Critical Analysis of the Obligation to Submit Information Under Article 13.1 of the DSU in the *Canada – Aircraft* case”, *Journal of International Economic Law*, 3(4), 2000, p. 563-592; McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 92.

in party's sole possession<sup>264</sup>. This is consistent with ICJ practice. In the *Barcelona Traction* case, Judge Bustamante, in a separate opinion, stated:

“Accordingly, it does not seem to me to be unlikely that if the Court, in the exercise of its powers, were *proprio motu* to ask the Parties to furnish it with any relevant document or piece of information - a suitable questionnaire would be drawn up for this purpose-it might be found possible to throw light on one or more of the questions raised above. I naturally accept that in each case the onus of proof is placed on one of the parties, but it is also true that the overriding interests of justice give the Court the faculty of taking such steps as are possible to induce the parties to clarify what is not sufficiently clear”<sup>265</sup>.

Because of Article 13, panels have some investigative function as well as adjudicatory powers. Accordingly, in *Thailand – Anti-Dumping Duties* the Appellate Body noted that “panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them”<sup>266</sup>. There are no limits on the panel's right to seek information. In particular, a panel can seek information from a responding party even before a complainant has established a *prima facie* case, although it should be careful not to establish the case on behalf of the claimant<sup>267</sup>. In fact, while Article 13 does not set out any principle or direction on key questions such as the admissibility of evidence, burden of proof, evidentiary presumptions and the like<sup>268</sup>, the Appellate Body in *Japan – Agricultural Products* was faced with the tension between the principle of the burden of proof and the right of panels to seek information under Article 13 of the DSU. Specifically, the question was raised as to whether a panel could make a finding based on opinion or advice given by experts on a particular issue, when no

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<sup>264</sup> Panel Report, *Argentina – Textiles and Apparel*, para. 6.40. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 559.

<sup>265</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports, 1964 p. 2 at 80, separate opinion, Judge Bustamante.

<sup>266</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties*, para. 135.

<sup>267</sup> In *Canada-Aircraft*, the Appellate Body dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was “bereft of any textual or logical basis”. Appellate Body report, *Canada-Aircraft*, para. 185. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 546.

<sup>268</sup> *Ibidem*, p. 545.

party had presented a claim or arguments related to that issue<sup>269</sup>. The Appellate Body found that the authority of panels to seek information cannot be used to rule in favour of a party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it<sup>270</sup>. Analogously, the burden of proof, as a general principle of law, is based on the principle of impartiality of the adjudicating body and prohibits the international judge or court from taking a stand in favour or against either of the parties or proving the parties' allegations on their behalf<sup>271</sup>. Indeed, the responsibility to produce the evidence rests upon the parties to the dispute. The responsibility of the adjudicator is limited to an estimation of the values of the various elements of evidence<sup>272</sup>.

Parties in a WTO dispute are only able to encourage the panel to seek production of evidence or to seek to elicit it through specific questions to the opposing party<sup>273</sup>. In *US – Lamb*, the complainant, in its first written submission, asked the panel to request the respondent to produce certain information. Rather than make a specific ruling on the disclosure of confidential information, the panel called for certain specific questions to be answered by the respondent. The panel considered

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<sup>269</sup> Steger and Lester, *WTO Dispute Settlement: Emerging Practice and Procedure in Decisions of the Appellate Body*, in Rutledge, Mac Vay and Weisberger (eds), *Due Process in WTO Dispute Settlement*, Cameron May, London, 2001.

<sup>270</sup> Appellate Body report, *Japan – Agricultural Products*, para. 129: “Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels 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, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party”.

<sup>271</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 27.

<sup>272</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 82.

<sup>273</sup> Panel Report, *US – Hot Rolles Lead*, para. 6.4. Parties will generally provide written questions to each other at the same time as the Panel provides questions. They are invariably answered. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 559. At times parties have a right to get further information from Members, not through the dispute settlement process itself, but through other parts of the covered agreements. For example, Article 25.8 of the SCM Agreement provides for requests for information in relation to alleged subsidies. Where there is such a request, Article 25.9 of the SCM Agreement requires sufficient information to be provided to allow an assessment of compliance or otherwise of the measures. Article 12 of the Safeguards Agreement requires notification in order to provide transparency and information which could in turn lead to review by the Committee on Safeguards, request for additional information and/or eventual bilateral consultations. A party may also be able to obtain evidence by utilising a foreign country's domestic transparency mechanism such as freedom of information legislation. *Ibidem*, p. 560.

that the responses were sufficient to allow for its determination and hence the claimant's request for information was moot<sup>274</sup>.

The Appellate Body has placed tremendous emphasis on thorough fact finding by panels as a way of improving the quality of the factual records on which its legal decisions are based<sup>275</sup>. The mandate of the Appellate Body under the DSU is to review questions of law, not findings of fact, which are exclusively within the domain of panels<sup>276</sup>. It should be noted, however, that the line between issues of law and fact can be easily blurred<sup>277</sup>.

In conclusion, it is inappropriate to speak of panel's fact-finding function. The panel merely assists in resolving disputes between parties that usually have differences of view on factual matters. Thus, panels must determine which is the better view of the facts based on the evidence provided. It is not part of a panel's function to make definitive determinations on particular factual issues<sup>278</sup>. As a result, panels are "hostages" of the evidence brought before them, which they can accept or reject, but cannot supplement with their own evidence<sup>279</sup>.

## 2.6. General principles in the WTO dispute settlement system

The DSU outlines the procedures for bringing a dispute in front of a WTO panel or Appellate Body and accords certain rights to the parties to the dispute. However, similarly to any other judicial system<sup>280</sup>, the rules cannot anticipate

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<sup>274</sup> Panel Report, *US – Lamb*, para. 5.65. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 559.

<sup>275</sup> McCall Smith, "WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings", *World Trade Review*, 2(1), 2003, p. 91.

<sup>276</sup> DSU Articles 11, 12.7, 17.6 and 17.13.

<sup>277</sup> McCall Smith, "WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings", *World Trade Review*, 2(1), 2003, p. 91.

<sup>278</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 544.

<sup>279</sup> Wolfrum, Stoll and Kaiser (eds), *WTO – Institutions and Dispute Settlement*, Max Planck Commentaries on World Trade Law, Koninklijke Brill NV, Leiden, 2006, p. 388.

<sup>280</sup> The DSB, and especially the Appellate Body, has many characteristics of administrative tribunals and other more established international tribunals, and some of a domestic court. The caseload of the DSB is more typical of many superior courts. The resemblance to administrative tribunals is marked by the expertise which panel members have in determining matters within a specific discipline. Indeed, decisions are not only taken by panel members, that are often trade diplomats, but also by the independent adjudicators in the Appellate Body. Cameron and Gray,

every procedural or practical situation. Panels themselves are required to fill in the interpretative gaps in the rules so that parties to the dispute can fully understand the proper procedure<sup>281</sup>.

This objective is pursued by the application of general principles of international law, i.e. principles that are applied universally in legal systems around the world and relate to procedural norms rather than substantive ones. While there is an ongoing debate on the exact content of general principles, some are more readily accepted and will find their way into adjudicatory reasoning<sup>282</sup>.

General principles accepted by the International Court of Justice include the right to consider circumstantial evidence<sup>283</sup>, *res judicata*<sup>284</sup>, estoppel<sup>285</sup>, *pacta sunt servanda*, good faith<sup>286</sup> and equity<sup>287</sup>. Indeed, the ICJ Statute identifies in Article 38.1(c) the general principles of law recognised by civilised nations as a third source of international law<sup>288</sup>. Cheng, in the introduction to his study on general principles of international law, stated that:

*“Some writers consider that the expression refers primarily to general principles of international law and only subsidiarily to principles obtaining in the municipal law of the various states. Others hold that it would have been redundant for the Statute to require the Court to apply general principles of international law, and that, therefore, this provision can refer only to principles obtaining in municipal law” (footnotes omitted)*<sup>289</sup>.

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“Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 252.

<sup>281</sup> *Ibidem*, p. 287. See also Lennard, “Navigating by the Stars: Interpreting the WTO Agreements”, *Journal of International Economic Law*, 5(1), 2002.

<sup>282</sup> Hu, “The Role of International Law in the Development of WTO Law”, *Journal of International Economic Law*, 7(1), 2004.

<sup>283</sup> *Corfu Channel* case, ICJ Reports 1949, p. 4 at 18.

<sup>284</sup> *Administrative Tribunal* case, ICJ Reports 1954, p. 47 at 53.

<sup>285</sup> *Case concerning the Temple of Preah Vibear (Cambodia v Thailand)*, ICJ Reports 1962, p. 6 at 23, 31 and 32.

<sup>286</sup> *Nuclear Tests* cases, ICJ Reports 1974, p. 253 at 267.

<sup>287</sup> *Diversion of Water from the Meuse* case, PCIJ Reports, Series A / B No 70 (1937) pp. 76; *Continental Shelf* case (*Tunisia/Libya*), ICJ Reports 1982, p. 18 at 60.

<sup>288</sup> Statute of the ICJ, Art 38.1(c): “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”.

<sup>289</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Grotius Publications, 1987, p. 2-3.

Many of the above mentioned principles are already incorporated expressly or implicitly into the DSU and other provisions<sup>290</sup>. However, even though this is not the case, it is legitimate for WTO adjudicating bodies to use principles in the exercise of inherent jurisdiction in WTO disputes, subject to two conditions: 1) the use of the principle must be necessary for the maintenance and the exercise of the panels and Appellate Body subject matter jurisdictions and judicial functions; 2) the principles must be used to resolve procedural matters and not as a source of substantive rights and obligations. Thus, panels and the Appellate Body, as judicial bodies, must determine the appropriate rules of evidence based on general principles of international procedural law<sup>291</sup>.

Generally speaking, panels and the Appellate Body use these principles in two ways: either in an interpretative manner, to understand the meaning of a particular WTO rule; or, in a non-interpretative manner, as an independent substantive rule or a rule of procedure or evidence<sup>292</sup>.

Probably the most fundamental issue for the application of general principles is how to interpret WTO Agreements. Article 3.2 of the DSU states that WTO Agreements have to be interpreted in accordance with the customary rules of interpretation of public international law. This implies a tacit acceptance of the application of the Vienna Convention on the Law of the Treaties, whose Articles 31 and 32 are generally taken as an expression of customary rules on the interpretation of treaties.

Article 3.2 of the DSU provides that the dispute settlement system of the WTO “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.

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<sup>290</sup> See Mavroidis, “No Outsourcing of Law? WTO Law as Practiced by WTO Courts”, *American Journal of International Law*, July 2008.

<sup>291</sup> Mitchell, “The Legal Basis for Using Principles in WTO Disputes”, *Journal of International Economic Law* 19(4), 2007, p. 833.

<sup>292</sup> *Ibidem*, p. 796. However, it should be considered that the Dispute Settlement Understanding does not expressly deal with the question whether the principles of international law should be seen as incorporated into WTO norms. In fact, there is no treaty document purporting to set out general principles and there is no consensus on the content of principles that emanate from customary law. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 495.

Therefore, it only incorporates customary rules of interpretation<sup>293</sup>. Nevertheless, Article 31.3(c) of the Vienna Convention allows for general principles of international law to be incorporated through the interpretative process, as supported by the various authoritative scholars affirming that the WTO is not a self-contained regime<sup>294</sup>. Indeed, the rules of treaty interpretation under international law are not limited to what is expressed in the Vienna Convention and, as an aid to interpreting WTO provisions, principles from outside the WTO may assist dispute settlement in enhancing security and predictability in international trade, as envisaged by Article 3.2 of the DSU<sup>295</sup>.

For example, the principle of effectiveness, expressed by the Latin adage *ut res magis valeat quam pereat*, is a fundamental tenet of treaty interpretation<sup>296</sup>. Indeed, the Appellate Body in *US-Gasoline* held that:

“One of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”<sup>297</sup>.

The effectiveness principle was applied by the Appellate Body in *Japan – Alcoholic*, that clarified that “[a] fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*)”<sup>298</sup>.

When addressing the interpretation of GATT Article III, the Appellate Body stated that:

“Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first

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<sup>293</sup> See Lennard, “Navigating by the Stars: Interpreting the WTO Agreements”, *Journal of International Economic Law*, 5(1), 2002.

<sup>294</sup> See e.g., Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?”, *The American Journal of International Law*, 95(3), 2001.

<sup>295</sup> Mitchell, “The Legal Basis for Using Principles in WTO Disputes”, *Journal of International Economic Law* 19(4), 2007, p. 799.

<sup>296</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 256.

<sup>297</sup> Appellate Body report, *US-Gasoline*, Section IV, p. 23.

<sup>298</sup> Appellate Body report, *Japan – Alcoholic*, Section D, p. 12.

sentence and the second sentence of Article III:2 in different ways”<sup>299</sup>.

Another tool of interpretation is the principles *in dubio mitius*, widely recognised as a supplementary means of interpretation<sup>300</sup>. If a term is ambiguous, the meaning to be preferred is the one that is less onerous on a party assuming an obligation, least interferes with territorial and personal supremacy, or imposes fewer general restrictions<sup>301</sup>. In applying the principle, the Appellate Body in *EC – Hormones* stated that:

“The Panel’s interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations”<sup>302</sup> (emphasis original).

Certain principles that could be described as general principles of law or principles of customary international law could also play a role beyond interpretation, either in the exercise of the inherent jurisdiction of WTO adjudicating bodies, i.e. the court’s or tribunal’s intrinsic powers, derived from its nature as a judicial body; or, as claims falling within the subject matter jurisdiction of WTO panels and the Appellate Body<sup>303</sup>. Indeed, if WTO panels and the Appellate Body are judicial, this means that they have inherent jurisdiction, like all other international judicial tribunals, as inherent jurisdiction flows from

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<sup>299</sup> Appellate Body report, *Japan – Alcoholic*, Section G, p. 19.

<sup>300</sup> The Permanent Court of Justice identified the principle as meaning that “if the wording of a treaty provisions is not clear, in choosing between several admissible interpretations, the one which involves minimum of obligations for the parties should be adopted. See *Frontiers between Turkey and Iraq*, (1925), Series B, No. 12, p. 25. Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 258.

<sup>301</sup> Appellate Body report, *EC – Hormones*, footnote 154, which also cites the following relevant case law: *Nuclear Tests Case (Australia v. France)*, (1974), I.C.J. Reports, p. 267 (International Court of Justice); *Access of Polish War Vessels to the Port of Danzig* (1931) PCIJ Rep., Series A/B, No.43, p. 142 (Permanent Court of International Justice); *USA-France Air Transport Services Arbitration* (1963), 38 International Law Reports 243 (Arbitral Tribunal); *De Pascale Claim* (1961), 40 International Law Reports 250 (Italian - United States Conciliation Commission).

<sup>302</sup> Appellate Body report, *EC – Hormones*, para. 165.

<sup>303</sup> Mitchell, “The Legal Basis for Using Principles in WTO Disputes”, *Journal of International Economic Law* 19(4), 2007, p. 821.

the nature of the judicial function and does not depend on specific provisions in the instrument establishing the court or tribunal<sup>304</sup>.

Accordingly, WTO case law covers not only matters of interpretation and the function of the DSB, but also includes aspects of customary international law, as well as general legal principles. In some cases involving questions of practice and procedure not expressly provided for in the WTO DSU, the Appellate Body has sought guidance from the practice of other international legal systems and tribunals<sup>305</sup>. This guidance is essentially drawn from general principles of law and principles of customary international law.

Issues such as the burden of proof and judicial economy, as well as procedural fairness, have entered the discourse, enabling the members of panels and the Appellate Body to develop a body of law, rather than simply act as *ad hoc* arbitrators<sup>306</sup>.

Panels and the Appellate Body also apply procedural rules that are widely recognised in municipal and international legal systems. In *India—Patents* (US), the Appellate Body drew on principles to resolve an evidentiary issue and stated that “an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations”<sup>307</sup>. It therefore held that the panel could examine Indian law for the purposes of determining whether India had met its obligations under the TRIPS Agreement.

In *Canada—Aircraft*, the Appellate Body drew on “the general practice and usage of international tribunals” to find that panels examining claims of prohibited export subsidies could draw adverse inferences from a Member’s refusal to provide information. It considered this authority “an ordinary aspect of the task of

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<sup>304</sup> *Ibidem*, p. 829. As the ICJ stated in the *Nuclear Tests Case*: “inherent jurisdiction [...] derives from the mere existence of the Court as a judicial organ established by the consent of States, and it is conferred upon it in order that its basic judicial functions may be safeguarded”. *Nuclear Tests (Australia v France) (Merits)* [1974] ICJ Rep 253, 259-260.

<sup>305</sup> Steger, “Jurisdiction of the WTO”, *American Society of International Law Proceedings*, 98, 2004, p. 146.

<sup>306</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 252.

<sup>307</sup> Appellate Body report, *India—Patents*, para. 65.

all panels to determine the relevant facts of any dispute involving any covered agreement”<sup>308</sup>.

Panels and the Appellate Body have also often applied the principle of judicial economy, a recognised principle of the judicial and administrative process whereby an adjudicating body is authorised to deal only with issues necessary to dispose of the dispute in question, while leaving out other issues raised by the parties. Despite the fact that panels and the Appellate Body are free to apply judicial economy, Article 17.12 of the DSU provides that the Appellate Body shall address each of the issues raised during the appellate proceeding<sup>309</sup>. The principle of judicial economy can also be defined as the attempt to settle as many issues as possible in a single proceeding. The principle, when taken in this second sense, is widely applied by panels and the Appellate Body and is also codified in Article 9.1 of the DSU, which provides that:

“Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible”<sup>310</sup>.

Moreover, similarly to *locus standi* rules developed by national and international courts and tribunals, it was necessary for the panel to determine third party rights given that they are afforded the opportunity to be involved in a dispute because their presumed general interest for freer international trade may be affected<sup>311</sup>. This was the case in the famous *EC – Bananas* dispute, due to the participation of ACP countries as third parties.

Another important principle applied by panels and the Appellate Body is that of abuse of right, which prohibits action that, while not contrary to the letter of the law of the agreement, deviates from their general purposes and frustrates legitimate expectations relating to the exercise of the corresponding obligations<sup>312</sup>.

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<sup>308</sup> Appellate Body report, *Canada—Aircraft*, para 202.

<sup>309</sup> Article 17.12 of the DSU. Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 127-128.

<sup>310</sup> Article 9.1 of the DSU.

<sup>311</sup> Cameron and Gray, “Principles of International Law in the WTO Dispute Settlement Body”, *International and Comparative Law Quarterly*, 50(2), 2001, p. 288.

<sup>312</sup> *Ibidem*, p. 294.

The doctrine of abuse of right is rooted in the principles of good faith and equity<sup>313</sup>.

In conclusion, a further example is constituted by evidentiary rules such as the burden of proof that the Appellate Body discussed in the context of international law in the case *US – Shirts* and which has become a milestone for the allocation of the burden of proof in WTO practice. Hence, in *US—Shirts*, the Appellate Body found no rules on burden of proof in the DSU, and therefore it used general principles of law under its inherent jurisdiction to supply them. The Appellate Body adopted the rule that “the party who asserts a fact, whether claimant or the respondent, is responsible for providing proof thereof”, stating that “various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule”. It also found that the “burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence”. The Appellate Body added that, if a complainant “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”, describing this as “a generally-accepted canon of evidence in civil law, common and, in fact, most jurisdictions”<sup>314</sup>. The analysis of this important procedural principle, widely applied in international and municipal courts, is the overall objective of this study and will be examined in detail in the following chapters.

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<sup>313</sup> See, e.g. Zeitler, “‘Good faith’ in the WTO Jurisprudence”, *Journal of International Economic Law*, 8(3), 2005.

<sup>314</sup> Appellate Body report, *US – Shirts and Blouses*, p. 14.

### 3. CHARACTERISTICS OF BURDEN OF PROOF IN GATT/WTO DISPUTE SETTLEMENT

Generally, the concept of burden of proof has the function of answering a fundamental question in any judicial or quasi-judicial system: who should “lose” the dispute if the facts remain unclear? In whose favour should a panel decide if, based on the available evidence, it cannot establish the facts necessary to determine whether or not the respondent has violated a certain provision of the covered agreements? What level of proof suffices for a panel to establish a fact? In this sense, the burden of proof provides a rule of practical reasoning when a definitive decision on an issue must be made under conditions of uncertainty.<sup>315</sup>

Indeed, the rules on the burden of proof not only play a significant role in controversial cases where the evidence is unclear; they also enable panels and the Appellate Body to avoid the judicial pitfall of *non liquet*<sup>316</sup>.

The objective of this chapter is to examine some theoretical and practical aspects of burden of proof in WTO dispute settlement. Such analysis is essential before proceeding to the sectoral review of panels and Appellate Body jurisprudence under the different WTO covered agreements.

The first part is dedicated to the reports of panels under GATT 1947, before the institution of the WTO, and the consequent sophistication and “judicialisation” of the dispute settlement procedure.

The second part attempts to (critically) illustrate the general rules on the allocation of the burden of proof applied by panels and Appellate Body, while the third part deals with the related issue of the *prima facie* case for inconsistency.

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<sup>315</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 544.

<sup>316</sup> The concept on *non liquet* is defined as a situation where a judicial body will simply and explicitly decide no to decide an issue of case. Even if it not clear whether a *non liquet* is totally inappropriate or forbidden in the WTO context, it is generally considered that a judicial body should not be permitted that liberty. Jackson, *Sovereignty, the WTO and Changing Fundamental of International Law*, Cambridge University Press, 2006, p. 172. See also Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, Kluwer Law International, The Hague – London – Boston, 1998, p. 157-160; Kim, “Burden of proof and the *Prima Facie* case: the Evolving History and its Applications in the WTO Jurisprudence”, *Richmond Journal of Global Law and Business*, 6(3), Spring/Summer 2007, p. 245.

The fourth part focuses on an issue that is closely connected to the burden of proof, i.e. the evidence that can be presented before the WTO adjudicating bodies by a party to a dispute in order to discharge its burden of proof. It examines the types of evidence admitted and the rules concerning their admissibility.

The fifth and last parts describe the standard of proof required for a party to discharge its burden of proof or to make a *prima facie* case of inconsistency.

### 3.1. Burden of proof in GATT 1947 panels

Issues of evidence and fact finding were rarely complex in early GATT disputes. Many of the disputes were about relatively simple and clear breaches of international obligations. The measure at issue was usually a legislative provision and a copy of the measure was often the only evidence needed<sup>317</sup>.

No GATT panel report has been found which explicitly endorses the rule on the allocation of the burden of proof as a general proposition. Still, two rules related to burden of proof seem to emerge from the panel practice prior to the establishment of the WTO.

The first rule, as expressed in the Latin adage *actori incumbit probatio*, establishes that it is for the complaining party to prove the GATT violation it alleges. Various holdings in the panel reports suggest that this principle is implicit when claims are examined<sup>318</sup>. Indeed, it is clear that the *actori incumbit probatio* rule must be deemed to be observed whenever the respondent party pleads no contest or even admits that the measures complained of are not consistent with the respondent's obligations. In both types of cases panels have ruled in favour of the claimant<sup>319</sup>.

However, no panel report explicitly allocated this burden to the complaining party. The reason why this rule was never explicitly articulated is most probably

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<sup>317</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 530.

<sup>318</sup> Martha, "Presumption and Burden of Proof in the World Trade Law", *Journal of International Arbitration*, 14(1), 1997, p. 82.

<sup>319</sup> See for admission, GATT panel report, *Increase of Import Duties on Products included in Schedule XXV (Greece)*, (1952), and for no-contest, *GATT panel report, French Import Restrictions*, (1962).

the fact that in GATT 1947 panel practice the parties used to present a set of facts they agreed upon (i.e. the so-called “cluster of undisputed facts”)<sup>320</sup>.

Nevertheless, the rule that it is for the complaining party to prove the violation it alleges, can be implicitly deduced from many panel reports. For example, as early as in 1954 the panel on *Treatment by Germany of Imports of Sardines* concluded as follows:

“The examination of the evidence submitted led the panel to the conclusion that no sufficient evidence has been presented to show that the German Government had failed to carry out its obligations under Article I.1 and Article XIII.1”<sup>321</sup>.

Similarly, in the report *Canada, Administration of the Foreign Investment Review Act*, the panel held that:

“Article III:5. The Panel then considered the United States contention that purchase undertakings which obliged the investor to purchase in Canada a specified amount or proportion of his requirements were also contrary to Article III:5. The Panel noted that these cases had been characterized by both parties as purchase undertakings (paragraph 2.5) and had also been presented as such by the United States (paragraphs 3.1(a) and 3.12). In this regard the Panel noted that in paragraph 5 of Article III the conditions of purchase are not at issue but rather the existence of internal quantitative regulations relating to the mixture, processing or use of products (irrespective of whether these are purchased or obtained by other means). On the basis of the presentations made, the Panel (which was unable to go into a detailed examination of individual cases where purchase undertakings referred to percentages or specific amounts) therefore did not find sufficient grounds to consider the undertakings in question in the light of Article III:5, but came to the conclusion that they fell under the purchase requirements that had been found inconsistent with Article III:4”<sup>322</sup>.

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<sup>320</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 253, footnote n. 24.

<sup>321</sup> GATT panel report, *Treatment by Germany of Imports of Sardines*, (1952), para. 15.

<sup>322</sup> GATT panel report *Canada, Administration of the Foreign Investment Review Act*, (1984), para. 5.13.

Many other GATT panel reports confirm the implicit application of the rule that it is for the party bringing a claim to prove it, even if no straightforward statement in this regard can be found in the pre-WTO panels' case-law<sup>323</sup>.

As second rule, the practice of GATT panels has been to interpret GATT Article XX narrowly, and to place the burden of proof on the party invoking the exceptions, and not to examine Article XX exceptions unless invoked, according to the Latin adage *quicumque exceptionem invocat, eiusdem probare debet*<sup>324</sup>. It should be noted that the application of the rules on burden of proof concerning the invocation of an exception are expressed in a much more direct manner in comparison with the very implicit and somehow vague application of the rule *actori incumbit probatio*.

Since the case on *Canada – Administration of the Foreign Investment Review Act*, panels have consistently held that because Article XX(d) is an exception to general obligations, it is up to the party invoking that exception to demonstrate

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<sup>323</sup> See also report of the Working Party in the *Austrian Subsidy and Ammonium Sulphate*, (1950), para. 11; “Within the terms of reference of the working party, the examination of the relevant provisions of the General Agreement thus led it to the conclusion that no evidence had been presented to show that the Australian Government had failed to carry out its obligations under the Agreement”; GATT panel report *EEC – Measures on Animal Feed Proteins*, (1978), para. 4.21: “Having heard no evidence that either the purchasing obligation, the security deposit or the protein certificate discriminated against imports of ‘like products’ from any contracting party, the Panel concluded that the EEC measures were not inconsistent with the EEC obligations under Article I:1”; GATT panel report *European Communities – Refunds on Exports Sugar, Complaint by Brazil*, (1980), para (e) of the Conclusions: “Therefore, in light of all the circumstances related to the present complaint and especially taking into account the difficulties in establishing clearly the causal relationships between the increase in Community exports, the developments of Brazilian sugar exports and other developments in the world sugar market, the Panel found that on the basis of the evidence available to it in this particular case, it was not able to conclude that the increased share had resulted in the European Communities ‘having more than an equitable share of world export trade in the product’, in terms of Article XVI:3”; GATT panel report *Canada – Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, (1992), para. 5.3: “The Panel noted that, with the exception of the listing and delisting practices in Ontario, the Parties did not agree on the listing and delisting practices actually pursued by the liquor boards. The Panel also noted that the United States had, on 17 July 1991, specifically requested the Panel not to prolong its proceedings. The Panel therefore decided not to schedule another meeting with the parties to permit the United States to submit further evidence on this issue. For these reasons, the Panel had to conclude that, with the exception of the listing and delisting practices in Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the General Agreement”; GATT panel report *USA – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, (1994), para. 82: “In view of the Panel's analysis [...], the Panel considered that the evidence did not support the complainants' claim that the DMA's penalty provisions were separate taxes or charges within the meaning of Article III:2”.

<sup>324</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 88.

that the measure deviating from obligations are necessary to ensure compliance with a law or regulation that itself is not inconsistent with the GATT obligations<sup>325</sup>. There, the panel found that certain purchase undertakings imposed by the Foreign Investment Review Act on foreign investors, were inconsistent with the national treatment clause of GATT Article III.4. However, Canada contended that, in the event that the panel were to consider the purchase undertakings to be inconsistent with Article III:4, these would have fallen within the exception provided for in Article XX(d) of the General Agreement. According to Canada, the Foreign Investment Review Act constitutes “a law which is not inconsistent with the provisions of the General Agreement”, within the meaning of Article XX(d), and the purchase undertakings are “measures necessary to secure compliance” with that law<sup>326</sup>. The panel held that:

“Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act. On the basis of the explanations given by Canada the Panel could not, however, conclude that the purchase undertakings that were found to be inconsistent with Article III:4 are necessary for the effective administration of the Act. The Panel is in particular not convinced that, in order to achieve the aims of the Act, investors submitting applications under the Act had to be bound to purchasing practices having the effect of giving preference to domestic products. It was not clear to the Panel why a detailed review of investment proposals without purchasing requirements would not be sufficient to enable the Canadian government to determine whether the proposed investments were or were likely to be of significant benefit to Canada within the meaning of Section 2 of the Foreign Investment Review Act<sup>327</sup>.”

Even more explicitly, the panel in *USA – Measures Affecting Alcoholic and Malt Beverages* further clarified the specific rule on the allocation of the burden of proof for the party invoking an exception:

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<sup>325</sup> GATT panel report, *Canada – Administration of the Foreign Investment Review Act*, (1984), para. 5.27.

<sup>326</sup> GATT panel report *Canada - Administration of the Foreign Investment Review Act*, (1984), para. 5.19.

<sup>327</sup> GATT panel report *Canada, Administration of the Foreign Investment Review Act*, (1984), para. 5.20. See also GATT panel report, *USA – Section 337 of the Tariff Act of 1930*, (1989), para 5.27.

“The Panel noted that Article XX(d) provides in relevant part: "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: ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ...". The Panel noted that in addition to the requirements of the introductory section of Article XX, sub-paragraph (d) of the Article requires a showing (i) that the laws or regulations with which compliance is being secured are not inconsistent with the General Agreement, and (ii) that the measures in question -- not measures generally -- are necessary to secure compliance with those laws or regulations. The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use" and 5.52: " The Panel was of the view that its considerations with respect to Article XX(d) in relation to the wholesaler requirement apply equally here. It was incumbent upon the United States to demonstrate that particular laws for which compliance is being sought are consistent with the General Agreement and that the inconsistency with Article III:4 of the discriminatory common carrier requirement for imported beer and wine is necessary to secure compliance with those laws. In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. It thus appeared to the Panel that some states have found alternative, and possibly less trade restrictive, and GATT-consistent, ways of enforcing their tax laws. The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states”<sup>328</sup>.

According to the panel report on *United States – Section 337 of the Tariff Act 1930*, the party invoking an exception must prove that all elements found to be

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<sup>328</sup> GATT panel report, *USA – Measures Affecting Alcoholic and Malt Beverages*, (1992), paras. 5.41.

inconsistent with GATT obligations, and not only the system of which they are part, are necessary<sup>329</sup>:

“Bearing in mind the foregoing and that it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are "necessary" within the meaning of that provision<sup>1</sup>, the Panel considered whether the inconsistencies that it had found with Article III:4 can be justified as "necessary" in terms of Article XX(d). The Panel first examined the argument of the United States that the Panel should consider not whether the individual elements of Section 337 are "necessary" but rather whether Section 337 as a system is "necessary" for the enforcement of United States patent laws (paragraphs 3.57-3.58). The Panel did not accept this contention since it would permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. In the view of the Panel, what has to be justified as "necessary" under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favourable treatment of imported products within the meaning of Article III:4, as outlined above (paragraph 5.20), are necessary”.

Moreover, the party must also demonstrate that no reasonable alternative with less impact on the competitive conditions was available. In other words, a party cannot justify as necessary a measure which is inconsistent with a GATT provision in terms of Article XX if an alternative measure which it could reasonably be expected to employ, and which is not consistent with other GATT provisions, was available to it<sup>330</sup>. In cases where a reasonable alternative is not available, the defending party must prove that it used, among those reasonably available, the measures which entails the least degree of inconsistency with other GATT provisions:

“It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other

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<sup>329</sup> GATT panel report, *United States – Section 337 of the Tariff Act 1930*, (1989), para. 5.27.

<sup>330</sup> GATT panel report, *United States – Section 337 of the Tariff Act 1930*, (1989), para. 5.26.

GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so”

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The same approach was taken with GATT Article XI.2(c)(i) which provides a specific exception to the general prohibition of quantitative restrictions<sup>332</sup>.

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<sup>331</sup> GATT panel report, *United States – Section 337 of the Tariff Act 1930*, (1989), para. 5.26.

<sup>332</sup> GATT Article XI.2: “The provisions of paragraph 1 of this Article shall not extend to the following: [...] (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic production of the like product, of a domestic product for which the imported product can be directly substituted [...]”. See GATT panel report, *Japan – Restrictions on Imports of Certain Agricultural Products*, (1988), para. 5.1.3.7: “[...] The Panel noted that in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. The Panel further noted that the CONTRACTING PARTIES recognized in a previous case that a contracting party invoking an exception to the General Agreement had the burden of 1. demonstrating that the requirements of the exception were fulfilled.1 The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c)(i) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. The Panel, therefore, examined whether it would be possible to change the burden of proof in such a way that the provision could be resorted to also in such a situation. The Panel noted that one among the possible ways of achieving this aim would be to consider a demonstration that the size of the quota is equivalent to a certain percentage of the quantities marketed or produced in the importing country as a sufficient proof that the proportionality requirement had been met. The Panel however also noted that the practical consequence of such a change in the burden of proof would be to turn the requirement of Article XI:2(c)(i) to fix the size of the import quotas in relation to the reduction in the quantities marketed or produced into a requirement to determine the size of the quota in relation to the quantities actually marketed or produced. The Panel found that the above or any other change in the burden of proof to make Article XI:2(c)(i) operational in the case of long-term import and/or supply restrictions would have consequences equivalent to those of an amendment of this provision and could therefore seriously affect the balance of tariff concessions negotiated among contracting parties. The Panel noted in this context that Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely affected by the measures taken under it. The Panel considered for these reasons that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement,

Similarly, panels have also explicitly required the defending party to demonstrate the applicability of other provisions it was asserting as a defence. An example can be found in the panel report on *USA – Customs User Fee*. In that occasion, the panel, *inter alia*, examined whether certain custom service operations, for which the USA imposed customs fees, could be considered as ‘services rendered’ within the meaning of Article II.2(c) and VIII.1(a) of GATT. The panel considered these provisions to be exceptions and found as follows:

“The Panel was aware that, in applying this standard, its capacity to make judgments about the nature and functioning of particular government operations would of necessity be limited by the quality of the information presented to it. The Panel was of the view that the government imposing the fee should have the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation had been given, it would then be upon the complainant government to present further information calling into question the adequacy of that explanation”<sup>333</sup>.

In this case, for the first time, the panel applied the presumption technique: the burden of proving that a customs fee corresponds to a ‘service rendered’ rests on the party imposing the fee. However, once that party provides sufficient evidence to raise a presumption of consistency (i.e. a *prima facie* ‘satisfactory

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had been met must remain fully with the contracting party invoking that provision”; GATT panel report, *EEC – Restrictions on Imports of dessert Apples, complaint by Chile*: “[...] The Panel noted that the EEC invoked Article XI:2 to justify its import restrictions on apples. The Panel recalled that a contracting party invoking an exception to the General Agreement bears the burden of proving that it has met all of the conditions of that exception. In the present case, therefore, it was incumbent upon the EEC to demonstrate that the measures applied to imports of apples met each and every one of the conditions under Article XI:2(c)(i) and XI:2(c) last paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1”; and GATT panel report, *Canada – Import Restrictions on Ice Cream and Yoghurt*, (1989), para. 59: “The Panel recalled that it had previously been concluded that a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception. It also noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i). The Panel was aware that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice. However, any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel's mandate” (footnotes omitted).

<sup>333</sup> GATT Panel report, *USA – Customs User Fee*, (1988), para 98. See also GATT panel report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, (1988), para. 4.34, concerning Article XXIV.12 of GATT 1947 and *USA – Measures Affecting Alcoholic and Malt Beverages*, (1992), para. 5.44 concerning the Protocol of Provisional Application.

explanation’), it will be up to the other party to rebut that presumption (to ‘present further information calling into question the adequacy of that explanation’)<sup>334</sup>.

GATT panel reports also applied the concept of *prima facie* in other cases, when arguing that where a measure is found to be in conflict with a GATT provision, the action would constitute, *prima facie*, a nullification and impairment<sup>335</sup>. This was confirmed in the *EEC – minimum import prices case*<sup>336</sup>, and was later included in Paragraph 5 of the 1979 Agreed Description:

“In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. A *prima facie* case of nullification or impairment would *ipso facto* require consideration of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties and, in such cases, it is up to the contracting party against whom the complaint has been brought to rebut the charge” (emphasis original)<sup>337</sup>.

Subsequently, this statement was referred to by panels in the *Imports of leather*<sup>338</sup> case and in *Semi-conductors*<sup>339</sup> case. Accordingly, in the *Oilseeds* case, the United States argued that a violation of the national treatment obligations of Article III constituted a nullification or impairment of a benefit accruing to it within the meaning of Article XXIII, and that it was not necessary, in case of a clear infringement of GATT provisions, for the complaining party to prove such violation<sup>340</sup>.

However, the practice of GATT panels has not been consistent on the matter of presumption of *prima facie* nullification or impairment<sup>341</sup>. For instance, in the *French export subsidy for wheat and flour case*, the panel examined and found

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<sup>334</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 237.

<sup>335</sup> GATT panel report, *French Import Restrictions*, (1962), paras. 4-5.

<sup>336</sup> GATT panel report, *EEC – minimum import prices case*, (1978), para. 4.20.

<sup>337</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 76.

<sup>338</sup> GATT panel report, *Japanese measures on imports of leather*, (1984), para. 46.

<sup>339</sup> GATT panel report, *Japan - Semi-conductors*, (1988), para. 130.

<sup>340</sup> GATT panel report, *EEC – Oilseeds*, (1986), para. 51.

<sup>341</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 77.

subsidies granted by the French government on exports of wheat and wheat flour, inconsistently with GATT Article XVI.3, resulted in France obtaining more than an equitable share of the world export. Still, the panel did not dedicate any consideration to the presumption of a *prima facie* nullification of impairment, but rather undertook to examine, on the basis of statistical data, whether the French subsidy had caused injury to Australia's normal commercial interests, which amounted to an impairment of benefits<sup>342</sup>.

GATT 1947 also ruled on cases in which the allegation was contested. The first question was how to deal with cases where the evidence available is insufficient for upholding the allegation that a breach has occurred. The panel, established to examine a French complaint that a special contribution imposed to Greece on imported products was contrary to Article III, found that the information available was insufficient to enable it to assess whether the contested measure was a violation of Article III of the GATT. Rather than recommending the Contracting Parties to reject France's claim for lack of evidence, the panel recommended that the Contracting Parties invited the parties to submit additional information on the points that were unclear:

“The Panel does not feel that sufficient information is available at the present time as to the nature of the tax system or method of its application to enable a determination to be made as to whether it falls within the terms of Article III, or constitutes additional import charges under Article II. It therefore recommends that the CONTRACTING PARTIES invite the interested contracting parties to submit additional information on these points. In particular, the Panel suggests that the CONTRACTING PARTIES should request additional information regarding the operation of the tax system introduced by the Greek Government on 8 October 1952, its form and its method of application”<sup>343</sup>.

Few days before the adoption of the above mentioned panel report, another report was circulated on the *Treatment by Germany of Imports of Sardines*. The panel ruled negatively on Norway's complaint under Article XXIII.1(a) that Germany's imposition of an import duty on sardines was inconsistent with obligations

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<sup>342</sup> GATT panel report, *French export subsidy for wheat and flour case*, (1958), paras. 14-20 *et seq.*

<sup>343</sup> GATT panel report, *Special Import Taxes by Greece*, (1952), p. 50, para. 9.

undertaken within the framework of the GATT<sup>344</sup>. In that case it was found that the evidence submitted led the panel to conclude that insufficient evidence had been presented to show that Germany had failed to carry out its obligations under Article I.1 and Article XIII.1. This inconsistency could be explained by the fact that, unlike the previous case, in the latter the panel took judicial notice of information available at the GATT Secretariat which enabled it to dispose of the case<sup>345</sup>.

However, inconsistencies in this phase of GATT dispute settlement were also due to the still embryonic judicial approach and the dominant diplomatic nature of the disputes. Even though the tension between the diplomatic and judicial nature of the dispute settlement still exists in current WTO dispute settlement, it was certainly stronger in pre-WTO disputes.

### **3.2. General rules on burden of proof in WTO dispute settlement**

The DSU was undoubtedly one of the most significant achievements of the Marrakech Agreements. However, as soon as it was put into operation, it became immediately clear that there were important gaps in its rules and procedures<sup>346</sup>. As a matter of fact, the DSU is an incomplete agreement and not all the information on the procedures to be followed can be found in it<sup>347</sup>; rather, there is a call for later clarifications in future treaty practice<sup>348</sup>. Accordingly, panels and Appellate Body have applied a series of principles and rules in interpreting the DSU and

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<sup>344</sup> GATT panel report, *Treatment by Germany of Imports of Sardines*, (1952).

<sup>345</sup> Martha, "Presumption and Burden of Proof in the World Trade Law", *Journal of International Arbitration*, 14(1), 1997, p. 83.

<sup>346</sup> Van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 323.

<sup>347</sup> Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 153.

<sup>348</sup> Petersmann, *From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Trade Governance' in WTO*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 99.

completing it<sup>349</sup>. The WTO adjudicating bodies did so, by resorting to general principles of law<sup>350</sup> as well as following the practice of the International Court of Justice and other international fora<sup>351</sup>. Burden of proof and the maxim *actori incumbit probatio*<sup>352</sup> are one of the examples of the effort of panels and Appellate Body in filling the gaps and the vagueness of the DSU procedural functioning, through their jurisprudence and using the general principles of law<sup>353</sup>.

The DSU and the Working Procedures for Appellate Review, though, do not establish rules on the burden of proof<sup>354</sup>. The basic rules on burden of proof that apply in WTO dispute settlement were set forth by the Appellate Body. The Appellate Body has recognized that the concept of burden of proof is implicit in the WTO dispute settlement system. As a preliminary clarification, it should be noted that the object of the proof are facts, not norms, as panels and the Appellate Body (and any other judicial body) are presumed to know the law and will subordinate the facts before them to the appropriate legal benchmark (*jura novit curia*). Of course, parties will be expected to submit legal arguments in support of their claims, but in theory they do not bear any burden of proof in respect of

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<sup>349</sup> Burgeois, *The Umpire Needs Better Rules of the Game*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 236.

<sup>350</sup> The DSU is explicitly committed to general principles for the management of disputes (DSU Article 3.1). The distinction between precise rules of conduct and general principles for the mutual balancing and progressive optimization of rules is essential for the coherence, efficiency and justice of legal systems. The Appellate Body has identified an increasing number of general principles of law in its jurisprudence, and burden of proof, good faith and due process are just the most representative examples. Petersmann, *From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Trade Governance' in WTO*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006 (Sacerdoti, Yanovich, Bohanes eds.), p.100.

<sup>351</sup> Mavroidis, *Development of WTO dispute settlement procedures through case-law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 167.

<sup>352</sup> As opposite to the Latin maxim on the allocation of burden of proof *actori incumbit probatio* that concerns *facts*, matters of *law* are governed in the WTO by the principle *jura novit curia*, that means that WTO adjudicating bodies are presumed to know the law and will subordinate the facts before them to the appropriate legal benchmark. However, in the WTO system there is nothing like an *ex-officio* compliant thus the adjudicating bodies are limited by what has been pleaded before them and can only accept or reject a claim presented by parties. *Ibidem*.

<sup>353</sup> See also *US – Shirts*, Appellate Body report.

<sup>354</sup> An exception is represented by the Agreement on Agriculture Article 10.3, that explicitly address burden of proof. Grando, "Allocating the Burden of Proof in WTO Disputes: a Critical Analysis", *Journal of International Economic Law*, 9(3), 2006, p. 617.

issues of law<sup>355</sup>. It is for panel and Appellate Body to find the law on the basis of the reported facts (*narra mihi factum, dabo tibi ius*).

The question of the allocation of burden of proof has been debated since the institution of the Dispute Settlement Body (the first case was the panel report *US – Gasoline*<sup>356</sup> in 1996) and it has been addressed in almost every WTO dispute<sup>357</sup>. Indeed, the Appellate Body had the fortune - the DSU cannot choose the issue it wants to address, being a reactive rather than active body - to give answers on important procedural questions at an early stage of its existence<sup>358</sup>. In particular, the Appellate Body in *US – Shirts*, the case that most broadly addressed the issue of burden of proof, noted that municipal courts and international tribunals generally allocate the burden of proving a particular fact on the party that is relying on that fact to support its claim or defence. In line with the practice of various international tribunals, the Appellate Body has endorsed the rule that the party who asserts a fact, either the complainant or the respondent, is responsible for providing proof thereof:

“In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. 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,

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<sup>355</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 242.

<sup>356</sup> Appellate Body report, *US – Gasoline*: “The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue”.

<sup>357</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 617.

<sup>358</sup> Ehlermann, *Six Years on the Bench of the World Trade Court*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 511.

who will fail unless it adduces sufficient evidence to rebut the presumption.”<sup>359</sup>.

It should be noted that a footnote to the above reported sentence in the original judgement refers to Kazazi and other legal writers, law dictionaries and manuals. The reported finding of the Appellate Body in *US - Shirts* has frequently been cited in subsequent cases involving burden of proof issues and such a habitual citation conferred it a certain aura of authority and thus established a broadly accepted jurisprudence in this area.

Another milestone of the Appellate Body jurisprudence on burden of proof is represented by the following paragraph on the *EC – Hormones* case:

“The Panel begins its analysis by setting out the general allocation of the burden of proof between the contending parties in any proceedings under the SPS Agreement. The initial burden lies on the complaining party, which must establish a *prima facie* 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 proceedings” (footnote omitted)<sup>360</sup>.

The rule *actori incumbit probatio* is also confirmed by the solution that panels and Appellate Body found when faced the situation that evidence submitted by the complainant and the respondent was in equipoise. The panel in its report in *US – 1916 Act of 1916 (EC)* held that:

If, after having applied the above methodology, we could not reach certainty as to the most appropriate court interpretation, i.e. if the evidence remains in equipoise, we shall follow the interpretation that favours the party against which the claim has been made, considering that the claimant did not convincingly support its claim<sup>361</sup>.

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<sup>359</sup> *US – Shirts*, Appellate Body report, p. 14. Cho, *Of the World Trade Court’s Burden*, paper presented to the Jean Monnet Seminar, NYU Law School, New York, March 22, 2007, p. 6-7.

<sup>360</sup> Appellate Body report, *EC – Hormones*, para. 98.

<sup>361</sup> Panel report, *US – 1916 Act of 1916 (EC)*, para. 6.58.

In the *US - Shirts* report the Appellate Body also established that it is for the party invoking an exception or an affirmative defence to prove that the conditions contained therein are met. In particular, the Appellate Body stated that:

“[GATT] Articles XX and XI.2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it”<sup>362</sup>.

Similarly, the panel report in *India – Automotive* held that India bore the burden of showing that its violation of WTO law (Article XI of GATT 1994) were justified by recourse to the provisions of Article XVIII of the GATT 1994 (balance of payments):

“In this case, India had provided no evidence whatsoever about its balance-of-payments situation. To the extent that India was asserting that its balance-of-payments position provided a legal justification for the measures at issue, it was responsible for providing proof of that assertion. It had done nothing of the sort. Having adduced no evidence of any kind on the point, India obviously had not adduced evidence sufficient to raise a presumption that it had a balance-of-payments problem justifying the measures in question. For that reason alone, any balance-of-payments defense must fail”<sup>363</sup>.

On the basis of the panels and Appellate Body jurisprudence, as exemplified in the above cited excerpts, it is possible to affirm that two core rules on the allocation of the burden of proof are applied in the WTO dispute settlement.

The first rule is that it is for the complaining party to prove the violation it alleges, and it is expressed by the Latin maxim *actori incumbit probatio*. However, there are some relevant aspects of the Appellate Body’s treatment of the burden of proof. The first is that the Appellate Body appears to be using the term “burden of proof” in two different senses. In *US – Shirts*, the Appellate Body first states that “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

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<sup>362</sup> Appellate Body report, *US – Shirts*, p. 16, footnote omitted.

<sup>363</sup> Panel report, *India – Automotive*, para. 4.151.

defence”. In this sentence, the Appellate Body is obviously referring to the burden of proof in the sense of what some Common law commentators call the “legal burden”<sup>364</sup>. However, the Appellate Body next states that: “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”. Here the Appellate Body is not referring to the burden of proof in the sense of the legal burden, but rather to what is known in Common law jurisdictions as the “evidential burden”<sup>365</sup>. Similarly, in *EC – Hormones* the Appellate Body referred to a shift in the burden of proof once a *prima facie* case is made by the complaining party. This is another example of the term “burden of proof” being used in the sense of an evidentiary burden<sup>366</sup>.

Another issue for consideration on the treatment of the burden of proof by the Appellate Body is the notion of a “shift”. In any event, it does not appear that the Appellate Body intended to suggest that *prima facie* evidence results in a shift of the legal burden. The Appellate Body seems to use the phrase “the burden then shifts” intending the term “burden of proof” in the sense of “evidential burden”<sup>367</sup>. Indeed, one of the essential attributes of the burden of proof, interpreted in the sense of legal burden, is that it does not shift in the course of the proceeding; it remains throughout upon the party burdened with the onus in respect with a particular issue<sup>368</sup>. Some have suggested that the “burden-shifting” is better understood in terms of the burden of production of evidence, and not in the sense of the burden of persuasion, because the latter never shifts from one party to the

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<sup>364</sup> DS/AB/24. WTO Memorandum on the Appellate Body’s treatment of the “burden of proof” in light of the rules on the subject applied by municipal courts and other international tribunals, 2002, p. 19.

<sup>365</sup> DS/AB/24. WTO Memorandum on the Appellate Body’s treatment of the “burden of proof” in light of the rules on the subject applied by municipal courts and other international tribunals, 2002, p. 19.

<sup>366</sup> DS/AB/24. WTO Memorandum on the Appellate Body’s treatment of the “burden of proof” in light of the rules on the subject applied by municipal courts and other international tribunals, 2002, p. 19.

<sup>367</sup> The burden-shifting metaphor is frequently used by Common law judges and practitioners but not generally favoured by Evidence scholars. Whether or not the legal burden can shift is an issue in which there is no agreement among Common law scholars. Some scholars submit that certain legal presumptions can be said to “shift” the legal burden. Yet, even they recognise that the use of this metaphor can lead to confusion. See, e.g. Cross, *Evidence*, Butterworth & Co Ltd, London – Dublin – Edinburgh, 1958; Keane, *The Modern Law of Evidence*, 1996.

<sup>368</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 544

other<sup>369</sup>. Therefore, in the WTO context (somehow differently from domestic legal systems and other international fora), burden of proof is understood not only as the burden of production (i.e. which party must submit the evidence), but also the burden of persuasion (how much evidence is needed for a party to be deemed to have met its burden of proof)<sup>370</sup>.

The second rule on burden of proof emerging from panels and Appellate Body jurisprudence provides that the allocation of the burden of proof changes when it comes to invoking an exception, i.e. it is for the party invoking an exception to prove that the criteria set forth by the exception are met, according to the Roman law maxim *quicumque exceptio invocat ejudem probare debet*. Therefore, it is essential to identify the characteristics of a defence that must be proved by the respondent.

The Appellate Body departed from such a “default” rule in two types of cases: those involving international standards and those involving the Generalised System of Preferences (GSP). Admittedly, in both types of cases it was dealing with exceptions: in the first, the Appellate Body decided that, in spite of the deviation from the standard, the complainant still bore the burden of showing that, had the international standard been used, the respondent could still have achieved its regulatory objective<sup>371</sup>. Concerning the GSP scheme, the Appellate Body held that, although GSP is an exception to Article I of GATT 1994, the complainant must still invoke it, without however bearing the burden of showing the inconsistency of the challenged measure with the provisions regulating the

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<sup>369</sup> Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 569.

<sup>370</sup> Wolfrum, Stoll and Kaiser (eds), *WTO – Institutions and Dispute Settlement*, Max Planck Commentaries on World Trade Law, Koninklijke Brill NV, Leiden, 2006, p. 388. The difference between the concepts of burden of persuasion and burden of production, essential for a deep understanding of the burden of proof, is far than clear. In US law, there is a distinction between the burden of proof, which does not change and always rests on the party who sponsors a legal proposition (for the plaintiff, a cause of action, or for the defendant, an affirmative defense) to prove that claim or defense, and the burden of persuasion, which may sometimes shift to the other party to come forward with evidence once the party who bears the burden of proof provides sufficient evidence to make out a prima facie case. The Black's Law Dictionary says burden of persuasion is a party's duty to convince the fact-finder to view the facts in a way that favours that party, while the burden of proof is a party's duty to prove a disputed assertion or charge and includes both the burden of persuasion and the burden of production, intended as the duty to produced enough evidence to have the issue decided by a fact finder.

<sup>371</sup> *Ibidem*, p. 391.

granting of preferences under the GSP<sup>372</sup>. Indeed, on the basis of DSB case law it is possible to identify two categories of exceptions: the first is a provision establishing an exception to a rule, the second is a provision excluding the application of other rules. In the former case the complainant has the burden of proof to establish that the respondent violated a general rule, and the respondent has the burden of demonstrating that it complied with the requirements for invoking an exception to the rule. In the latter, the complainant has the burden of proof that the respondent does not fall under the situation excluding the general rule, while the complainant can establish a violation of the general rule.<sup>373</sup> What emerges dealing with such a complex categorisation is that an exception provision and an excluding provision cannot be easily distinguished, and that maybe the difference is artificially created by WTO adjudicating bodies in the absence of clear indication with this respect in the text of the covered agreements<sup>374</sup>.

A further rule on the allocation of the burden of proof emerging from the DSB jurisprudence is the impossibility for a party of conclusively proving a negative. In *Guatemala – Cement II* the panel held that the way an adjudicator will approach such a situation will partly depend on the ease with which the other party could disprove the claimant's assertion. Given the impossibility of proving a

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<sup>372</sup> *Ibidem*, p. 391-392.

<sup>373</sup> Grando, "Allocating the Burden of Proof in WTO Disputes: a Critical Analysis", *Journal of International Economic Law*, 9(3), 2006, p. 618-619.

<sup>374</sup> However, such a distinction is justified on the basis of a textual interpretation of the provisions at issue and of the positive rules and hierarchical criteria set out by the Appellate Body in *US – Shirts* case. In particular, the positive rule criterion provides that an exception should not be a positive rule, i.e. the exception contains reference to the obligation excepted and sets down the conditions for invoking the exception, while the hierarchical criterion is based on the importance that the drafters placed on a certain provision as a relevant element to determine whether it is an exception. However, Grando argues, none of such criteria has been applied consistently in the subsequent panel and Appellate Body case law. Indeed, the wording of some WTO provisions seems to fall within the meaning of the exception, but not all the provisions having similar characteristics have been considered exceptions. The lack of consistency is not the only weakness of such criteria that in fact lack of substance. Indeed, the hierarchical criterion implies that characterizing a provision as an exception would undermine its importance (that is what the Appellate Body noted in *EC – Tariff preferences*). Panels and Appellate Body are not in the position of to determine the importance that a Member places on a certain provision and relying in the language of the covered agreements is not a method for allocating the burden of proof. In fact it is hard to interpret the intentions of drafters as they did clearly address burden of proof in some rare cases. *Ibidem*, p. 619. In particular, on the basis of the case law, exception provisions include: GATT Articles XI.2(c)(i), XV.9, XX, Enabling Clause, GATS Article XIV, footnote 59 of the Agreement on Subsidies and Countervailing duties (SCM), TRIPs Article 30. While, SCM Article 27.2, Article 13 of the Agreement on Agriculture, SCM Article 5-6, ATC Article 2, TBT Article 2.4 and SPS Article 3.1 represent excluding provisions. *Ibidem*, p. 620-6235.

negative, the mere assertion must itself be evidence on which a panel could consider relying<sup>375</sup>. This was also alluded in *Canada – Patent Protection (Complaint by the EC)*. In this case there was a need to prove that there was no prejudice to the legitimate interests of patent owners or third parties. The panel acknowledged that the party with the burden could not prove a negative and could only effectively respond when an indication was made as to what those interests were claimed to be<sup>376</sup>.

In *Turkey-Rice*, the panel acknowledged that the burden might be different depending on whether the fact to be proven is positive (i.e. something that has happened) or negative (something that has not happened)<sup>377</sup>. Proving the former requires the demonstration of positive evidence and therefore, documents or other type of evidence indicating the existence of the fact have to be provided. Conversely, proving a negative fact may become, in certain circumstances, an insurmountable burden<sup>378</sup>. Such report sets an important precedent since in many WTO disputes, the application of regular burden of proof rule may be highly problematic when the facts are of a negative nature and at least one of two parties may have incentive not to cooperate with providing the relevant information. Hence, the application of the burden of proof must be flexible in accordance with the specific circumstances of the dispute. If the purpose of the system is to

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<sup>375</sup> E.g. Panel Report, *Guatemala – Cement II*, para. 8.196. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 560.

<sup>376</sup> Panel Report, *Canada – Patent Protection (Complaint by the EC)*, para. 7.60. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 560.

<sup>377</sup> Pierola, “Establishing a Negative Fact: Implications for the Panel Report *Turkey – Rice*”, *Global Trade and Customs Journal*, 3(5), 2008, p. 191-192.

<sup>378</sup> *Ibidem*. In this specific case, the panel was initially persuaded by the information provided by the United States that could demonstrate the “systematic” rejection of requests for out-of-quota licences by submitting evidence regarding specific instances where denial of licences had happened. Interestingly, the United States encouraged the Panel to change its final report to clarify that the burden of proof in making a *prima facie* case rests solely on the complainant, not partially on the respondent. The Panel was not fully persuaded. It concluded that the requirement that it make an “objective assessment” under DSU Article 11 requires to consider *all* evidence of the record, whether submitted by the parties or obtained under its broad information-seeking authority (Panel report, *Turkey – Rice*, para. 7.11). The satisfaction of the panel for the complainant’s submission of evidence and legal reasoning, made the burden of proof shift to the defending party. The defendant is charged with the production and submission of exonerative factual evidence and adequate legal reasoning. Consequently Turkey, on its side, did not dispute the veracity of this evidence, but argued that those rejections were individual and not systematic, in perfect accordance with Turkish legislation. Gantz, Fegtly, Rogers, Schropp, Austin, *Turkey – Measures Affecting the Importation of Rice*, draft paper, May 2008, p. 11.

provide a positive solution to the dispute and to clarify disputed facts and laws, it may be reasonable in certain cases to place the burden of proof on the party which is possession of the information, drawing inferences if no cooperation from one side is provided<sup>379</sup>. According to the panel, when, like in the *Turkey-Rice* case, the respondent is unable or unwilling to produce satisfactory rebuttal, the litigation process is not over by default. Rather, the panel has the obligation, under DSU Art. 11 and 13.1, to launch a parallel process, in which it seeks additional information and technical advice from any individual or body within the two litigating countries<sup>380</sup>. The two parties are to be considered both under a duty and obligation to promptly and fully respond to the request of information<sup>381</sup>: consequently, refusal of cooperation is then “one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn”<sup>382</sup>. Indeed, the rules governing the allocation of the burden of proof in WTO proceedings must also be balanced with the duty of Members to provide information.

In *Canada – Aircraft*, the Appellate Body addressed the issue of whether a party has a duty to comply with the request of a panel to provide information. The Appellate Body noted that Article 13.1 of the DSU provides that “A Member should respond promptly and fully to any request by a panel for such information

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<sup>379</sup> Pierola, “Establishing a Negative Fact: Implications for the Panel report *Turkey – Rice*”, *Global Trade and Customs Journal*, 3(5), 2008, p. 191-192.

<sup>380</sup> Gantz, Fegtly, Rogers, Schropp, Austin, *Turkey – Measures Affecting the Importation of Rice*, draft paper, May 2008.

<sup>381</sup> The interim report had stated that evidence provided by both litigating parties should be considered when deciding whether the United States as complainant sufficiently raised its preliminary presumption that Turkey had engaged in the measures at issue, and that a failure by Turkey to rebut the existence of a measure at issue would be followed by a legal examination whether the facts so demonstrated could be qualified as a WTO-inconsistent measure. The United States opined that the burden of bringing a legal and factual prima facie evidence should reside exclusively with the complaining party, and hence demanded a drastic change in the language. As a reason for its request, the United States claimed that it wanted to avoid possible misinterpretations of the rules on burden of proof. Gantz, Fegtly, Rogers, Schropp, Austin, *Turkey – Measures Affecting the Importation of Rice*, draft paper, May 2008.

<sup>382</sup> Panel Report, *Turkey-Rice*, para 7.10. The Appellate Body has recognized the authority of panels to draw inferences from the facts before it, including refusal by a party to provide information requested by a panel. Appellate Body Report, *Canada – Aircraft*, para. 203. The Appellate Body has also said that, where a party refuses to provide information requested by a panel pursuant to Article 13.1 of the DSU, “that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn”. Appellate Body Report, *US – Wheat Gluten*, para. 174. The same view has been confirmed in the Appellate Body report, *India – Wines and Spirit*, para. 194.

as the panel considers necessary and appropriate<sup>383</sup>. The Appellate Body stated that although ‘should’ is often used colloquially to imply an exhortation or to state a preference, it is sometimes used to express a duty or obligation<sup>384</sup>. The Appellate Body was of the view that, in the context of Article 13, the word ‘should’ in Article 13.1 is used in the ‘normative’, rather than a ‘merely exhortative’, sense. Thus, Members are under a duty and an obligation to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU<sup>385</sup>.

### 3.3. *Prima facie* case

The *prima facie* case can be considered as an additional burden (separate from the burden in its appropriate sense) on the proponent party in order to convince the court that there is a case to be answered<sup>386</sup>. However, the concept of *prima facie* does not always have the same meaning in every context.

In common law jurisdictions, the phrase “*prima facie* case” may be used in two senses<sup>387</sup>. In one sense, as the words themselves would imply, it means evidence merely sufficient to meet the claimant’s production burden – that is, evidence that will withstand a direct verdict motion and get the case to the jury<sup>388</sup>. It suggests that when a plaintiff at the trial has failed to make a *prima facie* case by introducing sufficient evidence, the court will dismiss the action without proceeding to the production of evidence by the respondent<sup>389</sup>. By contrast, when the plaintiff has made a *prima facie* case, the judge proceeds to the respondent

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<sup>383</sup> Appellate Body report, *Canada – Aircraft*, para. 187.

<sup>384</sup> Appellate Body report, *Canada – Aircraft*, para. 187.

<sup>385</sup> Appellate Body report, *Canada – Aircraft*, para. 187.

<sup>386</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 235.

<sup>387</sup> As stated by the US Supreme Court in a footnote in *Texas Department of Community Affairs v. Burdine*, 450 US 248, 101, S.Ct. 1089 (1981).

<sup>388</sup> Note that this is the way *prima facie* is understood in Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998.

<sup>389</sup> Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 557.

case and ultimately lets the jury find the facts<sup>390</sup>. This usage is referred to as *prima facie* in the “weak” sense as it is not strong enough as to shift the burden of production to the respondent<sup>391</sup>. A second usage can be called *prima facie* in strong sense. It links *prima facie* with the concept of a “legally mandatory, rebuttable presumption”. In this usage the concept of a presumption has a fairly rigorous meaning and an important procedural effect. It functions in the following way: if the plaintiff establishes certain facts, then a legal rule intervenes to cause another fact to be treated as established unless the respondent rebuts its existence<sup>392</sup>.

Generally speaking, in civil law jurisdictions, the concept of *prima facie* corresponds to the common law’s strong sense as described above<sup>393</sup>. Similarly, a *prima facie*, if not rebutted, can be taken as sufficient to satisfy the objective burden of proof. In this sense, the *prima facie* proof is not literally *prima facie*; it rather amounts to a full burden of proof<sup>394</sup>.

While the notion of *prima facie* 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”<sup>395</sup>. Before international tribunals any quantum of proof lower than *prima facie* evidence may cause a ruling against the proponent or the dismissal of the case through the simple reasoning that the claimant has failed to establish even a *prima facie* case<sup>396</sup>.

Although the issue of *prima facie* is not directly addressed in the DSU<sup>397</sup>, the Appellate Body developed the concept of a *prima facie* case for inconsistency

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<sup>390</sup> *Ibidem*.

<sup>391</sup> Barceló, “Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement”, *Cornell International Law Journal*, 42(1), 2009, (accepted paper), p. 7.

<sup>392</sup> *Ibidem*.

<sup>393</sup> *Ibidem*, p. 9.

<sup>394</sup> Taniguchi, “Understanding the Concept of *Prima Facie* Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, 562, referring to the German concept of *prima facie Beweis*.

<sup>395</sup> Mexican – USA General Claims Commission, *Lillie S. Kling (USA) v. United Mexican States*, 4 RIAA, p. 585.

<sup>396</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 326-327.

<sup>397</sup> It is important to distinguish the issue of burden of proof from Article 3.8 of the DSU, which deal with a *prima facie* presumption of nullification or impairment only after a breach of a WTO

since its early decisions. The burden of establishing a *prima facie* case was expressed for the first time in the panel report *Japan – Alcohol*<sup>398</sup>. Subsequent cases used the term “make a *prima facie* case” to mean “raise a presumption that what is claimed is true”<sup>399</sup>.

Indeed, the *prima facie* case has a close conceptual relationship to the subject of presumption, both in the sense of presumption of law and presumption of fact<sup>400</sup>. Generally, the effect of presumptions is that, where applicable, proof may be dispensed with as regards facts, the truth of which is presumed by the adjudicator, even though he has no judicial knowledge of the facts<sup>401</sup>. The operative effect of legal presumption is to treat fact B as established – as a matter of law, not direct proof, once the claimant shows fact A to exist through direct proof (irrebuttable presumption), unless the respondent introduces evidence to rebut the existence of B (rebuttable presumption)<sup>402</sup>. Presumption is thus a particular type of legal rule. It is a preliminary commitment to proceed in a particular fashion and legal regimes use presumptions for different reasons: to abbreviate chains of reasoning, to give expression to important values, and sometimes simply as a pragmatic way of providing an answer under conditions of uncertainty<sup>403</sup>.

On the basis of this case law the *prima facie* case is an obligation of the complainant to first substantiate the case<sup>404</sup>. This is also confirmed from the

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provision has been established. Oesch, “Standard of Review in WTO Dispute Resolution”, *Journal of International Economic Law*, 6(3), 2003, p. 167.

<sup>398</sup> The statement on *prima facie* case was contained in the US arguments, *Japan – Alcoholic Beverages II*, Panel report, WT/DS58/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996 (as modified by the Appellate Body), para. 4.32.

<sup>399</sup> Panel report, *US – Antidumping measures on stainless steel plate*. Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 168.

<sup>400</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 545.

<sup>401</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 266-273.

<sup>402</sup> Barceló, “Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement”, *Cornell International Law Journal*, 42(1), 2009, (accepted paper), p. 8.

<sup>403</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 545.

<sup>404</sup> The wording ‘substantiating its case’ is used in the US arguments of the panel report *US – Underwear*, para. 5.67.

reading of the famous paragraph of the Appellate Body report in *US – Shirts and Blouses*:

“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*” (emphasis added)<sup>405</sup>.

Thus, the Appellate Body equates a claimant presenting a *prima facie* case with raising a rebuttable presumption in the claimant’s favour<sup>406</sup>. In the event a *prima facie* case for inconsistency were not rebutted, the party carrying the original burden of proof would win the argument and the WTO adjudicating bodies are legitimated to rule in favour of the complaining party.

In *Korea – Taxes alcohol*<sup>407</sup> the Appellate Body found there was “sufficient unrebutted evidence”, meaning that the *prima facie* was not entirely rebutted<sup>408</sup>. Obviously, the meaning of “insufficient unrebutted”, like the concept of *prima facie* case, depends on the quantum of proof that, in the context of the WTO, is established on a case-by-case basis<sup>409</sup>.

The *prima facie* evidence is an inevitable stage for the distribution of the burden of proof without which there will be no case to require the respondent’s answer. In fact, before this stage the opposing party is not bound to respond to the case<sup>410</sup>. Indeed, the burden of proceeding “shifts”, using the Appellate Body’s wording, when a party has established a *prima facie* case for a particular proposition in relation to which it has the burden of proof. *Prima facie* case is that of which is sufficient to establish a fact in the absence of evidence to the contrary.

“Member’s duty to respond promptly and fully to a Panel’s request for information arises only *after* the opposing party to the dispute has established a

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<sup>405</sup> Appellate Body Report, *US – Shirts and Blouses*, p. 14.

<sup>406</sup> Barceló, “Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement”, *Cornell International Law Journal*, 42(1), 2009, (accepted paper), p. 3.

<sup>407</sup> Appellate Body report, *Korea – Taxes on alcoholic beverages*.

<sup>408</sup> Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 170.

<sup>409</sup> *Ibidem*, p. 172.

<sup>410</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 332.

*prima facie* case that its complaint or defence is meritorious. A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case”<sup>411</sup>.

In *EC – Hormones* the Appellate Body made clear that allocation of burden of proof is the same in cases involving interpretations of the SPS Agreement and that the party asserting a fact or a claim must meet the initial burden of establishing that there is a *prima facie* case of violation of the SPS Agreement. Then, the burden shifts to the defending party to rebut the assertion. Nothing in the SPS Agreement creates special rules putting the initial burden of proof on the country implementing the measure<sup>412</sup>. Indeed, the Appellate Body defined this concept in *EC - Hormones* succinctly as follows:

“[...] a *prima facie* case is one which, in 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>413</sup> and “the initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision [...] 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”<sup>414</sup>.

The Appellate Body decisions in *US – Shirts* and in *EC – Hormones* concerning *prima facie*, lead to say two things. First, they say that if the claimant presents enough evidence to get beyond a threshold, articulated as a *prima facie* case this state of the evidence raises a presumption in the claimant’s favour. Second, in the Appellate Body’s wording, this *prima facie* case (or presumption) *shifts* the burden to the respondent<sup>415</sup>.

As the panel clearly stated in *Argentina – Footwear*, the rationale of a *prima facie* case is, as a general requirement, that the claim must appear substantial, i.e. the

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<sup>411</sup> Appellate Body report, *Canada – Aircraft*, para. 192.

<sup>412</sup> Appellate Body report, *EC – Hormones*, paras. 97-109. See also *Brazil – Aircraft*, paras. 134-141, applying the burden of proof in the context of the SCM Agreement.

<sup>413</sup> Appellate Body report, *EC – Hormones*, para. 104.

<sup>414</sup> Appellate Body report, *EC – Hormones*, para. 98.

<sup>415</sup> Barceló, “Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement”, *Cornell International Law Journal*, 42(1), 2009, (accepted paper), p. 3.

complainant should produce evidence of some value as a minimum standard of proof to establish the panel,<sup>416</sup>. Thus, the respondent should not be expected to provide any evidence and its duty of collaboration does not commence until the claimant presents a *prima facie* evidence of violation. In sum, it can be argued that, before a *prima facie*, no case exists<sup>417</sup>. Once the asserting party has established a fact, it is the responsibility of the other party to provide evidence and arguments to rebut the presumption. The panel in *Thailand – H-Beams*<sup>418</sup> requested one party to provide “effective refutation” against the other party’s *prima facie* case<sup>419</sup>. If the claimant does not manage to discharge its *prima facie* case, i.e. it cannot properly establish the factual record before the panel, the panel is unaware of these facts and the burden of proof rests with the complainant to support the claims made<sup>420</sup>.

However, in *Japan – Apples*, the Appellate Body pointed out that:

“[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof.”<sup>421</sup>

Even though the Appellate Body has embraced the presumption technique, it tends sometimes to characterise it as the basic rule on who bears the burden of proof in a WTO dispute settlement, thus creating confusion between the concept

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<sup>416</sup> Appellate Body report, *Argentina – Safeguard measures on imports of footwear*.

<sup>417</sup> Behboodi, “‘Should’ means ‘Shall’. A Critical Analysis of the Obligation to Submit Information Under Article 13.1 of the DSU in the *Canada – Aircraft case*”, *Journal of International Economic Law*, 3(4), 2000, p. 573. See also Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 320-322 and 137-138, that seems to inspire panel’s ruling in *Argentina – Footwear*.

<sup>418</sup> Appellate Body report, *Thailand - Antidumping duties on angles, shapes and sections of iron or not-alloy steel and H-beams from Poland*.

<sup>419</sup> As already stated, the burden of establishing an affirmative defence rests with the party asserting it. Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 168.

<sup>420</sup> Panel report, *Argentina – Measures affecting the export of bovine hides and import of finished leather*. Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 169.

<sup>421</sup> Appellate Body report, *Japan – Apples*, para. 157, referring also to Appellate Body report, *US – Wool Shirts and Blouses*, p.14; Appellate Body report, *EC – Hormones*, para. 98.

of *prima facie* and that of burden of proof.<sup>422</sup> In fact, in several recent cases the presumption technique had been deemed as a singular substantive rule on who bears the burden of proof in a WTO dispute<sup>423</sup>. Instead, the presumption technique should be an optional technique used by the adjudicators in the evaluation of evidence, only once the determination of who bears the burden has been made, and exclusively in the event the evidence submitted is inconclusive. Hence, the rationale of the *prima facie* case argument should refer to a duty to provide non-rebutted presumption of truth (in accordance with the Appellate Body in *US – Shirts*) rather than conclusive evidence<sup>424</sup>.

Yet, the difference between *prima facie* case and discharge of the burden of proof should not be emphasised in practical development of a WTO dispute. It should also be highlighted that panels normally consider all the available evidence submitted by each party and outside sources in the aggregate at the end of the proceedings<sup>425</sup>. In *Korea – Safeguard*<sup>426</sup>, the Appellate Body noted that there is no provision in the DSU that “requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed examining the respondent’s defence and evidence”<sup>427</sup>. Thus the issue of a *prima facie* case will form an integral part of the general evaluation by the panel<sup>428</sup>. This happens because the concept of *prima facie* in WTO law is not concerned with a temporal sequence of proof. In panel proceedings both parties

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<sup>422</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 235.

<sup>423</sup> *Ibidem*, p. 252-253. It should be underlined that the doctrine is divided on this issue as some commentators distinguish between an initial allocation of the burden of proof (global burden of proof) and a shifted one (local burden of proof). Pauwelyn is an exponent of the former group. Cho, *Of the World Trade Court’s Burden*, paper presented to the Jean Monnet Seminar, NYU Law School, New York, March 22, 2007, p. 6.

<sup>424</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 246.

<sup>425</sup> *Ibidem*, p. 255 and Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 562.

<sup>426</sup> *Korea – Definitive safeguard measures on imports of certain dairy products*, Appellate Body report, WT/DS98/AB/R, adopted 12 January 2000.

<sup>427</sup> Appellate Body report, *Korea – Safeguard*, para. 145.

<sup>428</sup> Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 168.

present evidence more or less simultaneously<sup>429</sup>. The Appellate Body has found that a panel is not required to make, in each and every instance, a specific finding 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>430</sup>. Moreover, 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<sup>431</sup>. In practice, panels do not make a distinction between evidence potentially establishing a presumption or *prima facie* case and other evidence, although such a distinction would be, by definition, inherent in the concept of a *prima facie* case of inconsistency. Thus, whether or not a *prima facie* case has been made can only be determined once the proceedings are concluded, although the panel is not prevented from indicating at any time before the conclusion of the proceeding that the complainant has successfully made a *prima facie* case and the respondent should properly rebut it.

As mentioned in the previous chapter, in WTO proceedings, differently from common law systems, adjudicating bodies are not confined to the factual records made by parties and, under DSU Article 13, they can seek information. Nevertheless, the panel and the Appellate Body investigative authority cannot be used to rule in favour of a party which did not establish a *prima facie* case of inconsistency based on specific legal claims. Consequently, panels and Appellate Body cannot discharge the burden of proof on behalf of the party to which it has been assigned. In *Japan – Agricultural products* the panel found the alternative less restrictive measure not mentioned by the complainant, but the Appellate Body held that the complainant did not establish a *prima facie* case that the measure cited by the panel was an alternative measure<sup>432</sup>. In fact in that case the Appellate Body was faced with the tension between the principle of *prima facie* and the

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<sup>429</sup> Taniguchi, "Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement", in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 568.

<sup>430</sup> Appellate Body report, *Thailand – H-Beans*, para. 134.

<sup>431</sup> Appellate Body report, *India – Quantitative Restrictions*, para. 142.

<sup>432</sup> Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 169.

right of panels to seek information under Article 13 of the DSU. Specifically, the question was raised as to whether a panel could make a finding based on opinion or advice given by experts on a particular issue, when no party had presented a claim or arguments related to that issue<sup>433</sup>. The Appellate Body found that the authority of panels to seek information cannot be used to rule in favour of a party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it:

“Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels 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, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party”<sup>434</sup>.

As far as what evidence should be considered for making a *prima facie* case of inconsistency, the Appellate Body rulings have been far from consistent. In *Japan – Agricultural Products* the Appellate Body applied the ‘burden-shifting’ approach of *US – Shirts*, and held that it would be an abuse of authority for a panel to investigate under its own initiative, and then proceed to rule in favour of a complaining party that had failed to establish a *prima facie* case. In doing so, the Appellate Body clearly limited the evidence that panels may consider during the *prima facie* analysis to that provided by the complainant<sup>435</sup>. However, only few months later, the Appellate Body reversed itself with respect to the evidence a panel should take into account in its *prima facie* determination. In *Canada – Aircraft*, it ruled that a panel was free to request and consider information from parties or anyone else. In particular, the Appellate Body specified that the panel was under no obligation to wait until the complaining party had presented a *prima*

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<sup>433</sup> Steger and Lester, *WTO Dispute Settlement: Emerging Practice and Procedure in Decisions of the Appellate Body*, in Ruttley, Mac Vay and Weisberger (eds), *Due Process in WTO Dispute Settlement*, Cameron May, London, 2001, p. 127.

<sup>434</sup> Appellate Body report, *Japan – Agricultural Products*, para. 129.

<sup>435</sup> Pfitzer and Sabune, *Burden-Shifting in WTO Dispute Settlement: the Prima Facie Doctrine*, *Bridges*, 12(2), March 2008, p. 18.

*facie* before conducting its own investigation and further explained that outside information might indeed be necessary to determine whether the complaining party had presented a *prima facie* case. The effort of the Appellate Body to clarify the concept of *prima facie* is evident in this excerpt from the same report:

“A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. [...] To the contrary, 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. Furthermore, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. However, no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute. [...]”<sup>436</sup> (emphasis original, footnote omitted).

Despite the Appellate Body stated that “a *prima facie* case is one which, in 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>437</sup>, it is not possible to deem that the Appellate Body intended to consider the *prima facie* case as a decisive case, which will yield a claimant victory as matter of law “unless effectively refuted”<sup>438</sup>. In saying that the claimant has the burden to present a *prima facie* case that raises a presumption of its correctness, the Appellate Body is only trying to capture the claimant’s basic responsibility to

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<sup>436</sup> Appellate Body report, *Canada – Aircraft*, para. 192.

<sup>437</sup> Appellate Body report, *EC – Hormones*, para. 104.

<sup>438</sup> Barceló, “Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement”, *Cornell International Law Journal*, 42(1), 2009, (accepted paper), 14.

present a reasonably plausible case for the complainant. Thus, the *prima facie* case could just be an imprecise way to refer to the duty of the claimant to introduce enough evidence and argument to raise a presumption of correctness<sup>439</sup>.

### 3.4. Types of evidence

Meeting the burden of proof frequently requires the production and use of factual evidence. In every WTO dispute litigating parties must establish the facts sufficient to meet their legal burden of proof or to rebut the other party's attempt to rebut that evidence<sup>440</sup>. The examination of factual evidence is a panel's task, since under Article 11 of the DSU panel is in charge to "make an objective assessment of the matter before it". Conversely, the Appellate Body may only review the legal findings of the panel report that have been duly appealed by the parties and cannot in principle review the facts found by a panel, as set in Articles 17.6 and 17.12 of the DSU<sup>441</sup>.

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<sup>439</sup> It could well be that in *US – Shirts* the Appellate Body borrowed the *prima facie* and presumption concepts from Article 3.8. Article 3.8 provides that if the claimant shows fact A (that the respondent has violated a covered agreement) then this constitutes *prima facie* proof of the existence of fact B (nullification or impairment of benefit). Put another way, showing fact A causes a presumption to arise that fact B exists. The effect of presumption is to put the burden on the respondent to rebut the existence of fact B. The opinion makes clear, however, that the Appellate Body understands that the issue in *US – Shirts* is not the same as the issue to which Article 3.8 is addressed. In Article 3.8 the issue is whether a violation of a covered agreement produces a "nullification or impairment of benefit", whereas in *US – Shirts* the issue is whether there is a violation of a covered agreement in the first place. Nevertheless, the Appellate Body may well have borrowed the concepts and applied them in a context where they do not fit. Under Article 3.8, *prima facie* and presumption concepts make sense. They apply where the claimant establish a WTO violation so that nullification or impairment is presumed to exist unless the respondent can establish the contrary. In *US – Shirts* the first step (the WTO violation) is the issue and the only issue and does not fit the binary fact pattern for which a presumption is appropriate. Barceló, "Burden of Proof, *Prima Facie* Case and Presumption in WTO Dispute Settlement", *Cornell International Law Journal*, 42(1), 2009, (accepted paper), p. 11-14.

<sup>440</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 177.

<sup>441</sup> The panel's finding of fact may be reviewed as set aside by the Appellate Body only to the extent that (i) they result from a fundamentally flawed assessment of the facts and thus do not meet the "objective assessment" standard set forth in DSU Article 11, or (ii) were not made in accordance with applicable evidentiary rules, especially the rules allocating the burden of proof. See Appellate Body report, *EC – Hormones*, para. 133; Appellate Body report, *Japan – Apples*, paras. 217 *et seq.*

The DSU does not contain any rule setting the nature or category of the relevant evidence, nor could it be expected to, given that it is a compromise between countries from different legal systems<sup>442</sup>. The absence of any evidentiary rule in the WTO is also consistent with the absence of any mandatory discovery rule for the collection of evidence before a dispute begins<sup>443</sup>.

From the historical perspective, it should be recalled that many GATT disputes dealt with the consistency of measures of Member government. Such disputes focused on primarily legal arguments based on the undisputed factual text of the measure at issue. However, recent highly fact-intensive cases, as well as the SPS cases, have required panels to make a considerable number of factual findings based on a wide variety of evidence<sup>444</sup>.

In most cases it will be left to the parties to choose the form of evidence on which they seek to rely. It will then be for the panel to determine its relevance and weight; this inevitably implies to make choices. The flexibility of panels to use a wide variety of evidence suggests that they also exercise the responsibility to analyse critically the weight that should be given to different forms of evidence. Indeed, a WTO panel is not a jury and does not need to be protected by rules of evidence<sup>445</sup>.

WTO panels must also make original factual findings. Many WTO panels make factual findings largely based on written documentation submitted by Member governments. This documentation can take many forms, but can be roughly divided between government documents, which can constitute ‘admission’, and non-government documents that have varying degrees of credibility and reliability<sup>446</sup>.

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<sup>442</sup> The emerging trend in private party international commercial arbitration and the likely trend in WTO dispute settlement is for the adjudicator to adopt more of a civil law inquisitorial style. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 585-586.

<sup>443</sup> Annex V of the SCM Agreement relating to adverse effects cases is the sole exception.

<sup>444</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 182.

<sup>445</sup> A review of many WTO panel decisions suggests that panels have been successful at sifting through evidence and properly assigning weight to it. But, as a dispute become more fact-intensive, considerable burdens will fall on both panels and parties to address and consider a variety of evidence with considerably varying degrees of credibility. This will challenge not only panellists but the opposing parties who must respond to such evidence. *Ibidem*, p. 181-183.

<sup>446</sup> *Ibidem*, p. 185.

Factual evidence can be organised into five basic types: 1) government documents; 2) affidavits and witness statements; 3) experts appearing before panels; 4) non-governmental documents and fact witnesses appearing before panels; 5) physical and demonstration evidence<sup>447</sup>.

The type of evidence that can be used in WTO dispute settlement, like other types of international and domestic litigation, is limited only by the resources and imagination of the litigants<sup>448</sup>. Without the right to compel the production of information from the other Member, a party may well have to use whatever evidence is available – including newspapers articles and statements of witnesses to fill the factual gaps. The importance of a factual analysis is accentuated where there is an assertion of a *de facto* restriction on trade<sup>449</sup>. In *Argentina – Bovine Hides*, the panel suggested that where there is an allegation of *de facto* rather than *de jure* restrictions ‘it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.’<sup>450</sup>

The most significant and typical form of evidence in international tribunals is government and non-government documentary evidence. This is to be contrasted with domestic common law systems which primarily rely on oral testimony and argumentations<sup>451</sup>. Among the most important documents are those produced by the complaining and responding governments. These include published government laws, regulations, policy bulletins, government press releases, WTO notifications, adopted interpretation of legislation, official government statistics, official studies and reports or studies commissioned by governments, statements of government officials in the legislative process, judicial decisions, and arguments of government attorneys in litigation submissions<sup>452</sup>. In cases of mandatory legislation leaving no discretion to the executive branch, the submission of the texts of the relevant statutes, laws, regulations or administrative

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<sup>447</sup> *Ibidem*, p. 184-185.

<sup>448</sup> *Ibidem*, p. 184.

<sup>449</sup> Panel Report, *Argentina – Bovine Hides*, para. 11.14.

<sup>450</sup> Panel Report, *Argentina – Bovine Hides*, para. 11.20.

<sup>451</sup> Such systems even require documentary evidence to be introduced by witnesses as part of their oral evidence. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 586.

<sup>452</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 185.

orders constitute sufficient evidence, no matter if the measure is actually being applied<sup>453</sup>. It is important to distinguish this aspect of the evidentiary burden from the separate question of the evidence needed by the domestic administrator before a positive determination could be made<sup>454</sup>. The latter does not shift the burden. It merely identifies what the burden relates to.

A newer but little-used form of evidence is constituted by affidavits and statements of factual witnesses appearing directly before panellists. While there are rules explicitly allowing for expert witnesses, WTO disputes would not normally need to consider the role of general witnesses, although there is nothing to prevent them doing so<sup>455</sup>. If witnesses were to be utilised, it is important to understand their limited role. Non-experts witnesses are used to provide evidence of facts. They are not to provide mere opinions<sup>456</sup>. On this respect, it seems reasonable to argue that the WTO dispute settlement would follow the International Court of Justice decision in the *Nicaragua* case when it held that:

“The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility. Which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight [...]”<sup>457</sup>.

In many cases, public officers from the relevant government agency have made statements to panels which have then been used as a basis for fact-findings by

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<sup>453</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 83. The submission of the text of national measures for the purposes of substantiating a claim of breach of obligation, is consistent with the view that, from the point of view of international law, domestic laws are mere facts: they express the will and constitute the activities of States, in the same way as decisions and other administrative measures. *Case Concerning Certain German Interests in Upper Silesia*, PCIJ, Series A, No. 5, p. 18

<sup>454</sup> Panel Report, *US – Shirts and Blouses*, para. 7.12.

<sup>455</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 587.

<sup>456</sup> *Ibidem*, p. 588

<sup>457</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)*, Judgement, ICJ Reports, 1986, para. 68.

panels<sup>458</sup>. Panels have relied on factual evidence in the form of sworn affidavits or signed statements of witnesses who do not appear before the panel. Affidavits or notarised statements offer very useful tools, which may not be readily available in a document, for presenting information to a panel. The affidavit can be tailored directly to the facts of the case by a person who either works for a particular delegation or is an independent witness. Of course, the credibility of such affidavits is greatly improved if the affidavit is presented before the panel for being questioned by the panel itself and the opposing party<sup>459</sup>.

Expert testimony is an important type of evidence that has played a leading evidentiary role in factually complex cases. To date, this expert evidence has taken two basic forms – the advice and assistance of experts appointed by the panel pursuant to the first sentence of Article 13.2 of the DSU, and second, experts appearing on the delegations of Members who provide their opinions to the panel<sup>460</sup>. Article 13.2 expressly provides that the panel “may consult experts to obtain their opinion on certain aspects of the matter”. A panel may choose to consult experts even if the parties have not made such request. As already noted, the general rule is that a non-expert witness should provide evidence of facts and not opinions. The same is not valid with experts. This notwithstanding, it remains unclear to what extent the opinions of experts can replace evidence, particularly where a claimant’s burden of proof is concerned<sup>461</sup>. The Appellate Body made clear that the evidence obtained by the panel from the experts could not alter the rules on burden of proof<sup>462</sup>.

Panels have relied heavily on experts in every SPS and TBT disputes. The records of these disputes clearly show the leading role that experts have played in assisting panels to sift through the complex facts and in providing panels with

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<sup>458</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 187.

<sup>459</sup> *Ibidem*, p. 185-186.

<sup>460</sup> *Ibidem*, p. 186.

<sup>461</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 589-590.

<sup>462</sup> Appellate Body report, *Japan – Varietals*, para. 129. See also Marceau and Stilwell, “Practical suggestions for amicus curiae briefs before WTO adjudicating bodies”, *Journal of International Economic Law*, 4(1), 2001, p. 158.

their opinions regarding the validity and credibility of scientific evidence at issue in the dispute<sup>463</sup>.

Experts have also been used in non-SPS disputes, such as *US – Shrimps*, *US – Steel Plate*, *Japan – Film*, *US – Exports Restraints* (pursuant to Article 24.3 of the SCM Agreement), *India – Quantitative Restrictions* (expert assistance of the IMF), and *Brazil – Aircraft*.

Another key group of documents are those produced by non-parties, which is though as broad and unlimited as the documents that could potentially be collected. The most important documents of this kind in WTO dispute settlement are, among others: analysis, opinions, or trade studies of intergovernmental organisations (such as the World Bank, the International Monetary Fund and the World Health Organisation), published standards of international organisations, academic studies, reports and articles, industry research reports and statistics, industry statements and testimony, transactional documents (such as original trading documents and contracts), newspapers articles, negotiating history documents and international judicial decisions<sup>464</sup>.

Finally, there is an increasing use of physical demonstration evidence which allows the presentation of complex data by summarising and illustrating it in charts and graphs.

The DSU is also silent concerning the admissibility, production or sufficiency of evidence. This provides great flexibility to both litigating parties and to panels. As the panel on *EC – Bed Linen* (para. 6.34) has stated:

“[...] under Article 13.2 of the DSU, Panels have a general right to seek information "from any relevant source". In this context, we consider that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement. The DSU contains no rule that might restrict the forms of evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:

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<sup>463</sup> See also, Iynedjian, “The Case of Incorporating Scientists and Technicians Into WTO Panels”, *Journal of World Trade*, 42(2), 2008.

<sup>464</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 185.

“The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the "evidence" with a wider scope in international proceedings .... Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case”.<sup>465</sup> It has clearly been held in the WTO that information obtained in consultations may be presented in subsequent panel proceedings.<sup>466</sup> (footnote original)

The absence of any specific WTO rule governing admissibility means that Members submitting evidence are relieved of the burden of proving that the evidence is admissible. Rather, it is the burden of the Member challenging the evidence to demonstrate, for various reasons, why the evidence should not be considered or given any weight by the panel<sup>467</sup>.

The lack of rules regarding admissibility of evidence is consistent with the peculiar diplomatic nature of WTO proceedings. Not less importantly, if witnesses were required to appear before WTO panels, establishing detailed evidentiary rules might well increase the cost of WTO litigation<sup>468</sup>.

Similarly, there are only minimal procedures governing the timing of presentation of evidence to WTO panels. Neither Article 12 of the DSU nor the Working Procedures for panels set out in Appendix 3 of the DSU establish any precise time limits for the presentation of evidence by a party to the dispute.

However, current version of Panel Working Procedures states that all factual evidence shall be submitted to the panel no later than the first substantive meeting, except rebuttal evidence which is permitted upon a showing of good cause or in

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<sup>465</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 180-184.

<sup>466</sup> Panel Report *Korea - Taxes on Alcoholic Beverages*, para. 10.23 (issue not raised on appeal). This is unlike the situation before many international tribunals, which often refuse to admit evidence obtained during settlement negotiations between the parties to a dispute. The circumstances of such settlement negotiations are clearly different from WTO dispute settlement consultations, which are, as the Appellate Body has noted, part of the means by which facts are clarified before a panel proceeding.

<sup>467</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 179.

<sup>468</sup> *Ibidem*, p. 182.

answers to questions<sup>469</sup>. In fact, the Appellate Body has pointed out that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel: a first stage, covering the written submissions to the panel and the first substantive meeting with the parties; and a second stage, covering the rebuttal submissions and the second substantive meeting with the parties, as confirmed by the Appellate Body in *Argentina – Textiles and Apparel*:

“Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute. It is true that the Working Procedures 'do not prohibit' submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel [...] Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties” and “[T]he Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the United States. Argentina also did not submit any countering documents

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<sup>469</sup> DSU, Appendix 2: Working Procedures, points 4 to 7. This has not, however, prevented panels in such cases from requesting and receiving evidence in questions after the filing of the first submission.

or comments in respect of any of the additional documents of the United States”<sup>470</sup>.

However, it has understandably proven very difficult for panels to differentiate what is ‘factual evidence’ and what is ‘rebuttal evidence’ in the typical burden of proof tennis volley<sup>471</sup>.

In *Australia – Salmon*, the Appellate Body noted that

“the Working Procedures in Appendix 3 of the DSU do not establish precise deadlines for the submission of evidence. Under the provisions of Article 12.1 of the DSU, panels are permitted to establish their own working procedures, in addition to those set out in Appendix 3. In this case, the Panel initially set the deadline for the submission of evidence on 7 October 1997, but later decided to admit evidence submitted after this date. We note that Article 12.2 of the DSU provides that “[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.” However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted”<sup>472</sup>.

Indeed, the most important principle related to evidence is a due process requirement found in many panel working procedures that “the other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting”. This working procedure provides panels and the parties with those flexible procedures which allow the maximum amount of factual evidence to be presented, while protecting each party’s due process rights. Given the lack of any effective discovery mechanism prior to the composition of the panel, this flexible approach properly reflects the reality of the ‘give and take’ in WTO dispute settlement<sup>473</sup>.

A leading panel report in *Canada – Aircraft* rejected Canada’s attempt to impose a strict rule excluding evidence after the first submission, reasoning that:

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<sup>470</sup> Appellate Body report, *Argentina – Textiles and Apparel*, para. 79-80.

<sup>471</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 179 and footnote n. 6.

<sup>472</sup> Appellate Body report, *Australia – Salmon*, para. 272.

<sup>473</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 180.

“In our opinion, an absolute rule excluding the submission of evidence by a complaining party after the first substantive meeting would be inappropriate, since there may be circumstances in which a complaining party is required to adduce new evidence in order to address rebuttal arguments made by the respondent. Furthermore, there may be instances, as in the present case, where a party is required to submit new evidence at the request of the panel”<sup>474</sup> (footnotes omitted).

The Appellate Body emphasised this flexibility noting the fact that there are no deadlines in the DSU for the submission of evidence, and that working procedures are intended to be flexible<sup>475</sup>.

However, such flexibility is not applied for all WTO covered agreements. Indeed, there are practical limitations in the type of evidence that can be used in WTO dispute settlement litigations involving the review of an investigating authority’s decisions in trade remedies disputes (anti-dumping, safeguard, and countervailing proceedings, as opposed to all other types of disputes). In fact, in the special case of disputes involving review of trade remedies decisions, there are more stringent rules on the admissibility of new evidence not previously presented before the investigating authorities. The Appellate Body has held that WTO panels are not to engage in *de novo* examinations of the facts before investigating authorities in such cases<sup>476</sup>. However, the Appellate Body has also held in the *US – Wheat Gluten* case that investigating authorities have an obligation to investigate all relevant factors to determine the causal relationship between imports and serious injury to a domestic industry in a safeguard investigation – even if the interested parties did not make arguments or present evidence regarding those issues<sup>477</sup>. This suggests there is some room for the introduction of evidence not in the administrative record if it is used solely for the limited purpose of showing that that the investigating authorities has reasonable access to relevant information

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<sup>474</sup> Panel report, *Canada – Aircraft*, para. 9.73. Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 179.

<sup>475</sup> Appellate Body report, *Australia – Salmon*, para. 272.

<sup>476</sup> Appellate Body report, *US – Cotton Yarn*, paras. 74, 76-79; Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

<sup>477</sup> Appellate Body report, *US – Wheat Gluten*, para. 69.

concerning additional factors, and did not conduct an objective and reasonable examination of the relevant facts<sup>478</sup>.

Even in trade remedies cases, expert testimony can be used<sup>479</sup>. Expert testimony could also be used to assist panels in understanding whether the investigating authorities objectively considered the facts and whether they addressed facts that should have been obvious to them but which were never reported or discussed in the report<sup>480</sup>.

In conclusion, the absence of specific rules concerning the admissibility, production, presentation and types of evidence relies on the rationale that “for obvious diplomatic reasons, international tribunals are especially reluctant to spurn anything proffered by a sovereign”<sup>481</sup>. The presumption that WTO Members act in good faith including, *inter alia*, in the submission of evidence also diminished the requirement for detailed evidentiary rules<sup>482</sup>.

### 3.5. Standard of proof

Standard of proof relates to the amount and the character of evidence that is needed to satisfy the evidentiary burden and to the level of conviction that is required when an adjudicator is faced with conflicting evidence<sup>483</sup>.

The standard of proof is also relevant for determining the degree of proof or conviction which is necessary for the panel to determine a certain claim as a

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<sup>478</sup> See e.g., Ehlermann and Lockhart, “Standard of Review in WTO Law”, *Journal of International Economic Law*, 7(3), (2004), pp. 491-521.

<sup>479</sup> For example, in the *US – Steel Plate* dispute, the panel permitted expert testimony analysing the data to present new calculations of dumping margins using information supplied by India during the investigation by which was not used by US Department of Commerce (USDOC) in its calculation of very high margins of dumping. Panel Report, *US – Steel Plate*, para. 7.10

<sup>480</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 184.

<sup>481</sup> Brower, “The Anatomy of Fact-Finding Before International Tribunals, An Analysis and a Proposal Concerning the Evaluation of Evidence”, in *Fact-Finding by International Tribunals*, Lillich (ed), 1991, p. 148, cited in Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 181.

<sup>482</sup> *Ibidem*, p. 182.

<sup>483</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 538.

*prima facie* claim for inconsistency and for the related question of what evidence is to be formally taken into account for the evaluation of a *prima facie* case. Such related issues are details of the production, the admissibility, and the relevance of evidence<sup>484</sup>.

In common law jurisdictions there are at least two standards of proof. The “beyond reasonable doubt” standard is accepted without question in criminal cases. In civil cases, a variety of standards have been proposed. The “preponderance of evidence” standard is commonly accepted and it is expressed also as “greater weight of the evidence” or “more probable than not”<sup>485</sup>, but other standards have been used in specific kinds of cases<sup>486</sup>. The US Supreme Court held, in 1991, that “because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume this standard is applicable in civil actions between private litigants, unless particularly important individual interests or rights are at stake”<sup>487</sup>. It remains unclear, though, what standard is applicable in exceptional cases. It has been suggested that an intermediate standard such as “clear and convincing evidence” should be preferred to the “beyond reasonable doubt” standard.

In civil law jurisdictions, the standard of proof has been defined by the German Highest Court as “a degree of certainty usable for practical life” or “such a high degree of probability as would quiet, without eliminating, the doubts of a person of reasonable and clear perception of the circumstances of life”<sup>488</sup>. This is a

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<sup>484</sup> Oesch, *Standard of Review in WTO Dispute Resolution*, Oxford University Press, 2003, p. 168.

<sup>485</sup> When there is no jury, the judge as the sole fact finder follows the same rule. Subjectively, judges are said to understand the standard in terms of probability, namely, the preponderance of evidence requires 50% of probability, and clear and convincing evidence 60%. Although a higher standard than the preponderance of evidence sometimes has been used, a lower standard has not been suggested. James, Hazard, and Leubsdorf, *Civil Procedure*, 4<sup>th</sup> edn, Little Brown, 1992, p. 324, as cited by Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 559.

<sup>486</sup> *Ibidem.* ohen, “The Probable and the Provable”, in Murphy (ed), *Evidence, Proof, and Facts*, Oxford University Press, 2003, p. 229-301.

<sup>487</sup> *Grogan v. Garner*, 111 Sup. Ct. 654, 659 (1991), 115 L. Ed. 2nd 755, 764 as quoted in Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 559.

<sup>488</sup> Murray and Sturmer, *German Civil Justice*, Carolina Academic Press, 2004, p. 267, citing relevant judicial precedents, as quoted Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO*

process within the scope of the so-called principle of free evaluation of proof. Under this principle, the judge is bound by the norms of common sense, i.e. laws of experience shared by everyone in society. Within this framework, the judge is free to draw inferences or presumptions from the facts found in the evidence produced by any party. When an inference is strong enough, the judge may reach a tentative conclusion unless the contrary is shown<sup>489</sup>.

Concerning international procedure, Kazazi asserts that “standard of proof is a subjective and discretionary measure subject to human judgement”<sup>490</sup>. In most cases, this is because of the need to evaluate conflicting evidence. Rosenne has suggested that “the probative value of the evidence depends upon the question at issue and is determined by the substantive rules of international law to the application of which the Court will reach its decision”<sup>491</sup>.

In the *Nicaragua* case the International Court of Justice stated that “it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved”<sup>492</sup>.

The Appellate Body has been somewhat agnostic as to the quantum of evidence that suffices to establish a *prima facie* case or to discharge the burden of proof. While WTO jurisprudence has not expressly identified the requisite standard of proof, generally it would be the case that the party with the preponderant evidence would win a claim in relation to any particular issue<sup>493</sup>. Therefore, in complex factual disputes with conflicting evidence, much depends upon the way various item of evidence are evaluated and contrasted. The WTO approach is akin to the civil law model where all evidence is potentially admissible and it is the panel’s discretion to determine what weight to give each item<sup>494</sup>.

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*Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 561.

<sup>489</sup> *Ibidem*.

<sup>490</sup> Kazazi, *Burden of Proof and Related Issues, a Study of Evidence Before International Tribunals*, Kluwer Law International, Den Hague – London – Boston, 1996, p. 377.

<sup>491</sup> Rosenne, *The Law and Practice of the International Court, 1920-2004*, Martinus Nijhoff, The Hague – Boston, 1997, p. 1086.

<sup>492</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)*, Judgement, ICJ Reports, 1986 o. 14 at para. 60.

<sup>493</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 568.

<sup>494</sup> *Ibidem*.

The Appellate Body in the case *US – Shirts* made an important finding also with respect to the standard of proof. In particular, the Appellate Body viewed that the level of evidence required will depend on the issue in dispute and the substantive provisions that are applicable:

“In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision, to provision, and case to case”<sup>495</sup>.

It is not clear what such a variable standard entails, nor how it may be determined on a casuistic basis. Although the standard may be framed abstractly, it must define a metric against which evidence may be measured<sup>496</sup>. This is not simply because the parties to a dispute must know where they stand in relation to the evidence they may be required to adduce, but also because decision-makers must be able to decide when a *prima facie* case has been made out, or whether a party has satisfied the burden of proof at the end of the case<sup>497</sup>. Furthermore, since the burden of proof is foundational to decision-making under conditions of uncertainty, the standard of proof is necessarily a concept cast in probabilistic terms<sup>498</sup>. Indeed, the Appellate Body has incentives to invent or to utilise legal doctrines that maximise its discretion to respond to difficult issues on a case-by-case basis<sup>499</sup>.

Because of its case-by-case approach, panels and the Appellate Body have broad discretion to determine when a presumption is created and when it has or has not been rebutted. In most cases, the consequence of this approach is that the panel or the Appellate Body ‘shifts’ the burden of proof to the party they consider should lose, since making a finding that a party has failed to satisfy its burden of proof easily disposes of the case<sup>500</sup>.

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<sup>495</sup> Appellate Body report, *US – Shirts*, p. 14.

<sup>496</sup> Unterhalter, “The Burden of Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 551.

<sup>497</sup> *Ibidem*, p. 551-552.

<sup>498</sup> *Ibidem*, p. 552.

<sup>499</sup> McCall Smith, “WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings”, *World Trade Review*, 2(1), 2003, p. 79.

<sup>500</sup> Weiss, *Improving WTO Dispute Settlement Procedures. Issues from the practice of Other International Courts and Tribunals*, Cameron May, 2000, p. 232.

Conceptually, the problem with the Appellate Body approach is that there is no legal certainty as to the amount of evidence needed to satisfy the presumption-threshold<sup>501</sup>.

Indeed, it goes against the very essentials of legal predictability not to have a pre-determined standard of proof for a certain class of cases<sup>502</sup>. However, even if panels and Appellate Body have not yet formulated in general terms what the appropriate standard of proof is<sup>503</sup>, they may find different standards of proof for different types of disputes.

In the case *India - Patent*, the Appellate Body made this statement concerning what is not a sufficient standard of proof for making a *prima facie* case of inconsistency:

“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>504</sup>.

Although the Appellate Body rejected the argument that for a *prima facie* case of inconsistency a complainant only needed to raise 'reasonable doubts' the case law indicates that the standard of proof tends to be set relatively low<sup>505</sup>. Accordingly, the likelihood that a party is not in a position to meet the burden of presenting a *prima facie* case of inconsistency is relatively small.

There are indeed cases in which the standard requested for establishing a *prima facie* is very low. For example, a *prima facie* case of a claim that a statutory provision as such violates a covered agreement could be established by simply

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<sup>501</sup> Vermulst, Mavroidis and Waer, “The Functioning of the Appellate Body after Four Years: Towards Rule Integrity”, *Journal of World Trade*, 33(2), 1999, p. 12.

<sup>502</sup> Pauwelyn, “The Use of Experts in WTO Dispute Settlement”, *International and Comparative Law Quarterly*, 51, 2002, p. 360.

<sup>503</sup> Oesch, *Standard of Review in WTO Dispute Resolution*, Oxford University Press, 2003, p. 168.

<sup>504</sup> Appellate Body report, *India - Patent*, para. 74.

<sup>505</sup> Oesch, *Standard of Review in WTO Dispute Resolution*, Oxford University Press, 2003, p. 168.

showing the language of the statute in question<sup>506</sup>. In *US – Carbon Steel* the Appellate Body stated that:

“Thus, a responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case”<sup>507</sup> (footnotes omitted).

The weighting of evidence in the context of the appropriate standard of proof also needs to take into account the nature of international tribunals and the limitations they face in identifying and extracting evidence. In *Argentina – Textiles and Apparel*, the panel considered that presumption and inferences are more likely to be utilised in international adjudication:

“In situations where direct evidence is not available, relying of inferences drawn from relevant facts each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met”<sup>508</sup>.

The panel considered that “presumption is an inference in favour of a particular fact and would also refer to a conclusion reached in the absence of direct evidence”<sup>509</sup>.

The panel in *Argentina – Bovine Hides and Finished Leather* argued that, in the context of Article XI of the GATT 1994, the difference between the quantum of

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<sup>506</sup> Taniguchi, “Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement”, in Janow, Donaldson and Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries*, WTO Publishing, Geneva, 2008, p. 567.

<sup>507</sup> Appellate Body report, *US – Carbon Steel*, para. 157.

<sup>508</sup> Panel report, *Argentina – Textiles and Apparel*, para. 6.39.

<sup>509</sup> Panel report, *Argentina – Textiles and Apparel*, para. 6.38. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 570.

evidence necessary in a domestic court as well as that necessary before a WTO panel “cannot be great”<sup>510</sup>.

“The evidence before us is quite thin. [...] Such evidence would certainly not support a case in a domestic court. While it may be an open question whether the same quantum of evidence is necessary to support such allegations in a WTO dispute under Article XI of the GATT 1994, surely the difference cannot be that great”.

The evidentiary burden in some cases also depends upon the methodology of proof. In *EC – Hormones* the Appellate Body considered that risk assessment neither requires a minimum quantifiable magnitude of risk nor excludes *a priori* factors not susceptible of quantitative analysis by empirical or experimental methods of the physical sciences<sup>511</sup>.

In a practical sense, evidentiary burdens may also be affected by whether the adjudicatory body adopts an ordinary meaning or contextual approach. For example, in *EC – Hormones*, the Appellate Body considered that the risk assessment should be based on both Articles 2.2 and 5.1 of the SPS Agreement<sup>512</sup>.

The evidentiary burden may also be affected by the nature of the measure. For example, if a case merely relates to an assertion that a particular legislative provision itself offends against WTO obligations, a question arises as to whether the claimant’s burden of proof is merely satisfied by tendering the legislative provision and presenting interpretative arguments<sup>513</sup>.

While the discretionary power to weight evidence is inevitable, an unfortunate corollary is the observable tendency of international tribunals in “admitting evidence offered and then declining to reveal what use was made of it in reaching a decision”<sup>514</sup>.

The panel in *Korea – Dairy Products* elaborated on the different purposes of standards of proof and standards of review of facts. It illustratively established that:

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<sup>510</sup> Panel report, *Argentina – Bovine Hides and Finished Leather*, para. 11.52.

<sup>511</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 570.

<sup>512</sup> Appellate Body report, *EC – Hormones*, para. 180-181.

<sup>513</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 570-571.

<sup>514</sup> Sandifer, *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, 1975, p. 28.

“[...] As a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process. As a matter of process before the Panel, the European Communities will submit its arguments and evidence and Korea will respond to rebut the EC claims. At the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions as to whether the EC claims are well-founded”<sup>515</sup>.

It thus becomes clear that the determination of whether the burden of proof has been discharged, in the light of the appropriate standard of proof, is made on the basis of the relevant factual record. Therefore, two stages need to be distinguished. First, the relevant factual elements and assertions are presented by the complainant at the beginning of a panel proceeding. In addition, the evidentiary record is completed with factual information formally submitted to the panel by the responding and third parties as well as sought or accepted from outside sources pursuant to Article 13 of the DSU<sup>516</sup>. At this stage, and before turning to the question whether or not the burden of proof is satisfied, a panel needs to establish and evaluate the facts in order to prepare the relevant cluster of factual evidence for resolving the dispute<sup>517</sup>. Here the issue of standard of review comes into play, and sets forth the intensity with which the panel is called upon to examine the existing factual record. Accordingly, the respondent’s factual findings and conclusions are scrutinized in the appropriate standard of review. Secondly, only after the panel has adequately reviewed the establishment and evaluation of the relevant facts, does it proceed to examine that factual record according to the rules on burden of proof. This is done in order to establish

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<sup>515</sup> Panel report, *Korea – Dairy Products*, para. 7.24.

<sup>516</sup> DSU 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”.

<sup>517</sup> Oesch, “Standard of Review in WTO Dispute Resolution”, *Journal of International Economic Law*, 6(3), 2003, p. 169.

whether the complainant has succeeded in providing its claim to the panel's satisfaction. Accordingly, the standard of proof deemed appropriate in a given case is applied. Eventually, the panel can conclude that either the complainant met its burden of proving the existence of an asserted fact, or that it did not<sup>518</sup>. Therefore, the establishment and evaluation by a panel of the relevant facts is done against the appropriate standard of review. This procedure aims at getting the relevant factual records. The examination by a panel of whether the burden of proof has been discharged is done against the appropriate standard of proof. It determines whether or not the complainant has succeeded in establishing a *prima facie* case of inconsistency<sup>519</sup>.

On the basis of this analysis of the standard of proof in WTO dispute settlement, a potentially confusing aspect for practitioners concerning standard of proof emerges. In *US – Shirts* and in *EC – Hormones* the Appellate Body stated that, once a complaining party provides sufficient evidence to raise a presumption or makes a *prima facie* case, the respondent will “fail” unless it submits rebuttal evidence. The statement could be read as merely illustrating the operation of the “shift” in the evidential burden. However, this statement also could be read as going beyond the burden of proof, and relating to the quantum or degree of evidence required to discharge the burden of proof, i.e. the standard of proof<sup>520</sup>. This would mean that in WTO dispute settlement a claimant would not be required to submit conclusive evidence, but rather sufficient proof to create a presumption that what is claimed is true if not rebutted<sup>521</sup>.

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<sup>518</sup> *Ibidem*, p. 169-170.

<sup>519</sup> *Ibidem*, p. 170.

<sup>520</sup> DS/AB/24. WTO Memorandum on the Appellate Body's treatment of the “burden of proof” in light of the rules on the subject applied by municipal courts and other international tribunals, 2002, p. 20.

<sup>521</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 246.

#### **4. ANALYSIS OF WTO PANELS AND APPELLATE BODY JURISPRUDENCE**

The objective of this chapter is to provide for a comprehensive analysis of panels and, especially, the Appellate Body jurisprudence on the allocation of the burden of proof.

Given the profound differences in the form, the functioning, and the subject matters of WTO covered agreements, it has been considered appropriate to examine the burden of proof agreement by agreement. In some cases, the specific provisions of the covered agreements have been analysed in detail, either because they have been addressed by panels and the Appellate Body, or because, even if not interpreted by WTO jurisprudence, they imply a particular allocation of the burden of proof.

One of the core aspects of the present examination of WTO jurisprudence on the burden of proof is the determination and definition of ‘exception’.

On the basis of the WTO adjudicating bodies’ case-law, it is possible to identify two categories of exceptions: the first one is a provision establishing an exception to a rule; the second is a provision excluding the application of other rules, i.e. a justification to the non-application of the same rules. In the former case the complainant has the burden of proof to establish that the respondent violated a general rule, while the respondent has the burden of demonstrating that it complied with the requirements for invoking an exception to the rule. In the latter, the complainant has the burden of proof that the respondent does not fall under the situation excluding the general rule. Then, it can establish a violation of the general rule. Thus, in the former case the obligation does not apply at all, while in the latter case an obligation must be breached before the measure can be justified. This distinction is noteworthy as it has important procedural consequences with regard to the burden of proof. In the case of an exception, it is up to the claimant, who has to establish his case, to show that a measure is in breach of an obligation that does not fall under an exception. The justification, on the other hand, has to

be invoked and proven by the respondent after the claimant has established a violation of an obligation<sup>522</sup>.

It is also worth to underline that an affirmative defence or exception, as well as an autonomous right, is defined by its relationship to a positive rule establishing obligations, a concept referred to by the Appellate Body when setting out the fundamental principle of the burden of proof for the first time. In drawing a distinction between “affirmative defence” and “positive rules establishing obligations in themselves”, the Appellate Body held that a complaining party bore the burden of proving an inconsistency of the challenged measure with a “positive rule” that established obligation. In contrast, it was the responding party, i.e. the party invoking the affirmative defence to justify the inconsistency, which bore the burden of proving that it satisfied the requirements of that defence<sup>523</sup>.

What immediately emerges dealing with such a complex categorisation is that, as the Appellate Body itself admitted, this distinction may not always be evident or readily applicable<sup>524</sup>.

Moreover, there is a frequent incongruence between the ruling of panels and those of the Appellate Body. Although a lack of consistency can be found also in Appellate Body jurisprudence alone, the rulings of the panels have been particularly incoherent with their own case-law and with the case-law clearly established by the Appellate Body<sup>525</sup>. This inconsistency contributes to the

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<sup>522</sup> Diebold, “The Moral and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole”, *Journal of International Economic Law*, 11(1), 2007, p. 54; Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 618-619.

<sup>523</sup> Zhu and Donaldson, *Analysis of Appellate Body Jurisprudence Regarding Burden of Proof When Parties Invoke “Affirmative Defence” or Autonomous Rights*, Paper, Geneva, July, 2007, p. 1-2.

<sup>524</sup> Appellate Body report, *EC-Tariff Preferences*, para. 88.

<sup>525</sup> Some authors wonder whether panellists lack the necessary experience to afford complex and contested procedural issues like assessing evidence or allocating the burden of proof. The lack of experience of panellists is one of the reasons that lead some scholars to propose the creation of a small permanent panel body. Cottier, “The WTO Permanent Panel Body: a Bridge Too Far?”, *Journal of International Economic Law*, 6(1), 2003, p. 193. Such proposal has been also promoted by the EC (TN/DS/W/1). Essentially, the EC proposed that a group of 20 or so individuals would constitute the panel body and would staff all WTO panels. There are a number of advantages to such a proposal. First, there would be significant time savings, as parties often spend many weeks in the panel selection process. Second, a panel body would allow for the standardisation of panel working procedures. Davey, “Reforming WTO Dispute Settlement”, *Illinois Public Law and Legal Theory Research Paper Series*, Research Paper no. 04-01, January 29, 2004, p. 30-31.

persistent ambiguity of several crucial aspects concerning the allocation of the burden of proof.

Even though the allocation of the burden of proof is obviously subject to a certain degree of interpretative discretion due to the silence of the text of the Agreements on this respect, such discretion cannot degenerate into arbitrariness and cannot imply a creative construction by the Appellate Body. If the Appellate Body's institutional responsibility can be considered closer to that of a constitutional court (rather than that of a mundane civil court)<sup>526</sup>, it is also essential to recall that, on the basis of the analysis of *stare decisis* in the previous chapters, there is no space for judicial activism in the WTO system.

Panels and Appellate Body have attempted to fill the gaps in the procedural provisions of the WTO despite “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”<sup>527</sup>, and do not constitute binding interpretations of the covered agreements.

#### **4.1. General Agreement on Tariff and Trade (GATT)**

##### *4.1.1. Article XX as a general exception per antonomasia*

A party acting contrary to any of its obligations may be relieved from the resulting international responsibility if any of the circumstances precluding wrongdoing are present. In addition, any treaty may contain exceptions to the general obligations it imposes on the parties to such treaty, which also should be regarded as circumstances precluding wrongdoing for the purposes of the treaty concerned<sup>528</sup>. Clearly, this attracts the question of the burden of proof, particularly whether and to what extent a dispute settlement body can second-guess the assertion of a party

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<sup>526</sup> Cho, *Of the World Trade Court's Burden*, paper presented to the Jean Monnet Seminar, NYU Law School, New York, March 22, 2007, p. 48.

<sup>527</sup> DSU Article 3.2. Christoforou, “Settlement of Science-Based Trade Disputes in the WTO: a Critical Review of the Developing Case-Law in the Face of Scientific Uncertainty”, *New York University Environmental Law Journal*, 8(3), 2000, p. 622.

<sup>528</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 87.

that the circumstances contemplated by the exception concerned have been fulfilled, as well as the question of how the exception ought to be interpreted<sup>529</sup>.

On the issue of interpretation of exceptions, international law abides by the interpretation technique expressed in the adages *exception est strictissimae applicationis*<sup>530</sup> and *quicumque exception invocat, eiusdem probare debet*<sup>531</sup>.

The jurisprudence of the WTO adjudicating bodies is consistent with the interpretation technique applied in international law. Indeed, GATT Article XX, which is considered the general exception *per antonomasia* under the WTO covered agreements, has been interpreted narrowly, and the burden of proof is upon the party invoking the exception<sup>532</sup>. Typically, general exception provisions, like GATT Article XX and GATS Article XIV, are invoked by the party complained against, and considered by the panel only once it has determined a violation of some other provisions. Thus, the complainant's task will in the first instance be to make a *prima facie* case of violation, while the Member maintaining the measure, as the respondent, will bear the burden of demonstrating that the measure can be justified under an exception provision<sup>533</sup>.

In the report *US – Shirts* the Appellate Body clarified some important procedural issues in relation to the allocation of the burden of proof. In particular, with respect to the exception provisions, the Appellate Body made clear that some provisions are in the nature of affirmative defences and that the burden of establishing such a defence should rest on the party asserting it:

“[...] 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”. And:  
“[...] Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in

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<sup>529</sup> *Ibidem*.

<sup>530</sup> The maxim is intended as pronounced by the Franco-Italian Conciliation Commission. *Ibidem*.

<sup>531</sup> Vermulst, Mavroidis and Waer, “The Functioning of the Appellate Body after Four Years: Towards Rule Integrity”, *Journal of World Trade*, 33(2), 1999, p. 11.

<sup>532</sup> Martha, “Presumption and Burden of Proof in the World Trade Law”, *Journal of International Arbitration*, 14(1), 1997, p. 88.

<sup>533</sup> WTO, “Necessity tests in the WTO”, Note by the Secretariat, S/WPDR/W/27, 2 December 2003, p. 11, para. 42. See also, Diebold, “The Moral and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole”, *Journal of International Economic Law*, 11(1), 2007, p. 59-61.

themselves. They are in the nature of affirmative defences”<sup>534</sup>.

Some detractors of the world trading system argue that the dispute resolution process prioritises trade objectives at the expense of environmental and health ones<sup>535</sup>. The allocation of the burden of proof under Article XX of the GATT partially supports this approach, as it is for the respondent to justify the invocation of the exception provision. After the complaining party has made a *prima facie* case of non-compliance, the responding party that intends to invoke a general exception under GATT Article XX has the burden of proving that all the stringent requirements to fall within the exception are met.

In its early case *US – Gasoline*, the Appellate Body set the requirements to be fulfilled to invoke an exception under Article XX(g), which provides an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”<sup>536</sup>. Such requirements are quite burdensome, as the responding party has to show first, that the measure at issue falls within the scope of one of the subparagraphs, and second, that it complies with the introductory clause or *chapeau*, i.e. it is not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or disguised restriction on international trade<sup>537</sup>. The burden of proving the second element falls on the defending party, even after that party has established that the measure qualifies under one of the subheadings of Article XX<sup>538</sup>. In the Appellate Body’s words:

“[...] the burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests upon the party invoking the exception. That is, of necessity, an heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue”<sup>539</sup>.

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<sup>534</sup> Appellate Body report, *US – Shirts*, p. 14 and 16.

<sup>535</sup> Kelly, “The WTO, the Environment and Health and Safety Standards”, *The World Economy*, 26(2), 2003, p. 135.

<sup>536</sup> GATT Article XX(g).

<sup>537</sup> Appellate Body report, *US-Gasoline*, p. 22. See also Heiskanen, “The Regulatory Philosophy of International Trade Law”, *Journal of World Trade*, 38(1), 2004, p. 21.

<sup>538</sup> WTO, “Necessity tests in the WTO”, Note by the Secretariat, S/WPDR/W/27, 2 December 2003, p. 12, para. 43.

<sup>539</sup> Appellate Body report, *US – Gasoline*, p. 22-23.

Two years later, in the case *Shrimp-Turtles*, the Appellate Body reiterated this two-step analysis in response to a panel decision that had not followed the sequence of the two-tiered Gasoline model. Looking first at the provisional justification of a policy under subparagraph (g) and second at the *chapeau*, the Appellate Body decided that the shrimp prohibition was legitimate under Article XX(g), but that the US had applied the prohibition in an arbitrary, unjustifiable and discriminatory manner<sup>540</sup>.

The reason of this differentiation in discharging the burden under the *chapeau* and any of the individual paragraphs of Article XX is twofold. First, the *chapeau* of Article XX deals with how the measure is applied, while the individual paragraphs impose conditions on the measure as such. Second, the conditions to be met under the *chapeau* of Article XX are negative (i.e. the burden of proof is more difficult to discharge), while those contained in the individual paragraphs are positive<sup>541</sup>.

In the recent *Mexico-Soft Drinks*, the Appellate Body examined subheading (d) of Article XX, which provides for an exception for measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions” of the GATT<sup>542</sup>. The Appellate Body recalled its ruling in *Korea – Beef* that two elements must be shown for a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX<sup>543</sup>. The first element is that the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994, and the second is that the measure must be “necessary” to secure such compliance. The Appellate Body also explained that a Member who

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<sup>540</sup> Appellate Body report, *Shrimp-Turtles*, para. 184. See e.g., Bree, “Article XX: *Quo Vadis?* The Environmental Exception After the *Shrimp-Turtle* Appellate Body Report”, *Dickinson Journal of International Law*, 17(1), 1998, p. 99-134; Wofford, “A Greener Future at the WTO: the Refinement of WTO Jurisprudence on Environmental Exceptions to GATT”, *The Harvard Environmental Law Review*, 24(2), 2000, p. 563-592.

<sup>541</sup> Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement”, *Journal of International Economic Law*, 1(2), 1998, p. 239-240, footnote 38.

<sup>542</sup> GATT Article XX(d).

<sup>543</sup> Appellate Body report *Mexico-Soft Drinks*, para. 67, referring to the Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met<sup>544</sup>.

The Appellate Body did not endorse the panel's reliance on the Appellate Body's interpretation in *US – Gambling* of the term “necessary” to interpret the terms “to secure compliance” in Article XX(d) and stated that “a measure can be said to be designed ‘to secure compliance’ even if the measure cannot be guaranteed to achieve its result with absolute certainty”. It also noted that the “use of coercion” is not a necessary component of a measure designed “to secure compliance”. Rather, it said, “Article XX(d) requires that the design of the measure contributes ‘to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of’ the GATT 1994”<sup>545</sup>.

Article XX provides for another exception that is relevant for environmental protection. Article XX(b) allows WTO Member States to apply “measures that are necessary to protect human, animal and plant life or health”<sup>546</sup>.

In *Brazil-Tyres* the Appellate Body, in developing the “necessity” analysis under Article XX(b) of the GATT<sup>547</sup>, noted that the issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand,

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<sup>544</sup> Appellate Body report *Mexico-Soft Drinks*, para. 67, referring to the Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

<sup>545</sup> Appellate Body report *Mexico-Soft Drinks*, para. 74 and 79. In this specific case the central issue was whether the terms “to secure compliance with laws or regulations” in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement. The Appellate Body agreed with the panel that Article XX(d) is not available to justify WTO-inconsistent measures that seek to secure compliance by another WTO Member with that other Member's international obligations. The Appellate Body noted that “Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated”. As a result, the Appellate Body said, “WTO panels and the Appellate Body would [...] become adjudicators of non-WTO disputes”, which “is not the function of panels and the Appellate Body as intended by the DSU”. Appellate Body report *Mexico-Soft Drinks*, para. 78. See also Alvarez Jimenez, “The WTO AB Report on *Mexico – Soft Drinks*, and the Limits of the WTO Dispute Settlement System”, *Legal Issues of Economic Integration*, 33(3), 2006, p. 319-333.

<sup>546</sup> GATT Article XX(b).

<sup>547</sup> It is worth to note that the case-law indicates that there is a rather strict obligation to apply the least trade restrictive measure that is available to achieve the relevant purpose (i.e. the necessity test). The wording of the provision and case-law indicates that the requirements under subheading (g) are less strict than the necessity requirement. This is the main reason why subheading (g) has been preferred by defending States in recent environmental cases. Fauchald, “Flexibility and Predictability Under the World Trade Organization's Non-Discrimination Clauses”, *Journal of World Trade*, 37(3), 2003, p. 450.

public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life, and stated:

“In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives”<sup>548</sup>.

*EC – Asbestos* was the first case in WTO history in which it was found that a violation fell under the Article XX(b) exception. The panel found that the EC, as the party claiming the exception, bore the burden to justify its invocation. As the ban was chosen in light of scientific uncertainty to avoid the risk of serious and irreversible harm, forcing the EC to bear its burden could stand for a direct violation of the precautionary principle, which gives countries the right to take action even though there is a “lack of full scientific certainty” in order to prevent risks to health and environmental<sup>549</sup>. However, in the way it determined that there

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<sup>548</sup> Appellate Body report, *Brazil-Tyres*, para. 210.

<sup>549</sup> Principles 15 of the Rio Declaration, UNEP, 1992. See e.g., Cheyne, “Gateways for the Precautionary Principle in the WTO”, *Journal of Environmental Law*, 17(2), 2007, p. 155-172; Cordonier Segger and Gehring, “The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute”, *Journal of Environmental Law*, 15(3), 2003, p. 309, p. 296-297; Motaal, “Multilateral Environmental Agreements (MEAs) and WTO Rules”, *Journal of World Trade*, 35(6), 2001, p. 1225. Even if Rio Declaration Principle 15 (precautionary principle) does not explicitly refer to the reversal of the burden of proof, several scholars argue that the precautionary principle has established a “presumption of danger”, i.e. the principle reverse the presumption of “safety until proof of danger”. Motaal, “Is the World Trade Organization Anti-Precaution?”, *Journal of World Trade*, 39(3), 2005, p. 484, p. 489.

was sufficient scientific evidence to conclude that the risk existed, it is possible to affirm that the panel adopted a tacit precautionary approach<sup>550</sup>.

The Appellate Body found that Article XX(b) requires the performance of what has been commonly referred to as a “necessity test”. The Appellate Body affirmed that a measure is “necessary” within the meaning of GATT Article XX(b) only if there are no alternative measure consistent with the GATT, or less inconsistent with it, which a Member could reasonably be expected to employ to achieve its health policy objectives<sup>551</sup>. As indicated in its previous report on *Korea-Beef*, the Appellate Body affirmed that one aspect of the weighing and balancing process comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure contributes to the realization of the end pursued<sup>552</sup>. In addition, the more vital or important the common interests or values pursued, the easier it would be to accept as necessary measures designed to achieve those ends<sup>553</sup>.

The Appellate Body placed the burden of proof on the complainant to demonstrate that health risk is not a legitimate basis for treating asbestos differently than alternative materials, under GATT III.4 (like products)<sup>554</sup>. By considering health risk under Article III.4, the Appellate Body allowed the EC to avoid being prematurely required to justify the measure as an exception under Article XX(b), leaving the burden of proof on the proponent of the potential hazardous exports<sup>555</sup>. *EC – Asbestos* is an example where a panel may have inappropriately made reference to burden of proof. The panel was considering the potential for bringing a non-violation claim in a situation where a Member may have been justified in

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<sup>550</sup> Cordonier Segger and Gehring, “The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute”, *Journal of Environmental Law*, 15(3), 2003, p. 309-310.

<sup>551</sup> Appellate Body report, *EC-Asbestos*, para. 170, referring to the GATT panel report *Thailand-Cigarettes*, para. 75.

<sup>552</sup> Appellate Body report, *EC-Asbestos*, para. 172, referring to the Appellate Body report, *Korea – Beef*, paras. 166-163.

<sup>553</sup> Appellate Body report, *EC-Asbestos*, para. 172, referring to the Appellate Body report, *Korea – Beef*, 162. See, Horn and Weiler, *EC-Asbestos. European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, in Horn and Mavroidis (eds), *The American Institute Reporters’ Studies on WTO Case Law. Legal and Economic Analysis*, Cambridge University Press, 2007, p. 27-53.

<sup>554</sup> Cordonier Segger and Gehring, “The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute”, *Journal of Environmental Law*, 15(3), 2003, p. 314.

<sup>555</sup> *Ibidem*, p. 314-315.

relying on an Article XX exemption on the basis of health grounds. In referring to these exemptions the panel concluded:

“[...] that because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations [...]”<sup>556</sup>.

The Appellate Body considered that where products are physically quite different, “a higher burden is place on complaining Member to establish that, despite the pronounced physical differences, there is a competitive relationship between the products”<sup>557</sup>. It would have been preferable for the panel and the Appellate Body to merely indicate that clear and cogent evidence would be needed to satisfy that burden of proof, as the facts should determine the proper outcome rather than references to any ‘stricter’ burdens of proof<sup>558</sup>.

Interestingly, in 2000 the European Communities tabled a proposal to the WTO Committee on Trade and Environment (CTE) arguing for a reversal in the burden of proof under Article XX in disputes involving multilateral environmental agreements. Under this proposal, a country challenging a measure taken by a trading partner under a multilateral environmental agreement would have to prove that that measure does not meet the conditions of Article XX<sup>559</sup>. Thus the proposal supports the principle that *prima facie* any measure taken under a multilateral environmental agreement would carry a presumption of being in conformity with the WTO agreements. The proposal has been opposed by many WTO Members that do not favour the reversal of the burden of proof as is entailed in the incorporation of the precautionary principle into WTO rules<sup>560</sup>.

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<sup>556</sup> Panel Report, *EC – Asbestos*, para. 8.282. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 572.

<sup>557</sup> Appellate Body Report, *EC – Asbestos*, para. 118. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 572.

<sup>558</sup> *Ibidem*, p. 572.

<sup>559</sup> WT/CTE/W/170, 19 October 2000.

<sup>560</sup> Motaal, “Multilateral Environmental Agreements (MEAs) and WTO Rules”, *Journal of World Trade*, 35(6), 2001, p. 1225. See also Cordonier Segger and Gehring, “The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute”, *Journal of Environmental Law*, 15(3), 2003, p. 296-297. Even if Rio Declaration Principle 15 (precautionary principle) does not explicitly refers to the reversal of the burden of proof, several scholars argue that the precautionary principle has established a “presumption of danger”, i.e. the principle reverse the

#### 4.1.2. *The Enabling Clause: sui generis allocation of burden of proof?*

The participation of developing countries Members to the WTO dispute settlement system is essential for the credibility and legitimacy of the system and for the equal integration of all WTO Members<sup>561</sup>.

The WTO contains special and differential provisions which grant more favourable treatment for developing countries than for other WTO Members<sup>562</sup>. Some of these provisions are also procedural in nature and ensure that a special treatment for developing countries is granted also in the context of the dispute settlement system<sup>563</sup>.

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presumption of “safety until proof of danger”. Mootal, “Is the World Trade Organization Anti-Precaution?”, *Journal of World Trade*, 39(3), 2005, p. 489.

<sup>561</sup> Lacarte-Muro and Gappah, “Developing Countries and the WTO Legal and Dispute Settlement System: a View From the Bench”, *Journal of International Economic Law*, 3(3), 2000, p. 395.

<sup>562</sup> Special and differential treatment provisions are also contained in other WTO covered agreements and their application and violation have been at issue in several disputes. For instance one such example is the special and differential treatment provisions under the SPS Agreement that have been raised in the *EC – Biotech Products* dispute. In particular, Argentina, as the complainant, relied upon the obligations in Article 10.1 of the SPS Agreement providing that Members shall take account of the special and differential treatment of developing country Members when preparing and applying SPS measures. However, the panel took a conservative approach to the interpretation of Article 10.1 and held that it does not prescribe a particular result to be achieved. The panel did not provide a clear guidance regarding how a developing country can adduce *prima facie* evidence under Article 10.1. Panel report, *EC – Biotech*, para. 7.1620. Considering the normal rules on the allocation of the burden of proof applied in WTO disputes, the panel found that the complainant bore the burden of making the *prima facie* case that the respondent failed to take account of the special needs of Argentina under Article 10.1, *EC – Biotech Products*, panel report, para. 7.1622. See Prévost, “Opening Pandora’s Box: The Panel’s Findings in the EC-Biotech Products Dispute”, *Legal Issues of Economic Integration*, 34(1), 2007, p. 93-94.

The case *EC – Bed Linen* concerned the special and differential treatment provision contained in Article 15 of the Anti-Dumping Agreement. The panel held that the second sentence of the provision creates the obligation to consider the possibility of imposing constructive remedies instead of an anti-dumping duty which could affect the essential interest of a developing country Member. Panel report, *EC – Bed linen*, para. 6.233. With regard to the same provision the panel in *US – Steel Plate* affirmed that “Members cannot be expected to comply with an obligation whose parameters are entirely undefined”. Panel report, *US – Steel plate*, para. 7.110.

<sup>563</sup> In the Dispute Settlement Understanding there are several provisions that accord special and differential treatment to developing countries Members with respect to dispute settlement. The first special and differential treatment provision is the general principle contained in the DSU Article 3.12 which provides that the 1966 Decision on Procedures under Article XXIII of the GATT applies as an alternative to certain DSU provisions. In particular, the obligations contained in Article 4 (consultations), Article 5 (good offices, conciliation and mediation), Article 6 (establishment of Panels) and Article 12 (Panels procedures) can be substituted by the corresponding rules and procedures of the 1966 Decision when the complainant is a developing country Member bringing a claim against a developed country Member. In particular, Article 12 of the DSU contains 12 paragraphs, two of which, i.e. 12.10 and 12.11, deal with developing countries indicating procedural guidelines for the panels in cases involving a developing country. In addition, paragraph 2 of Article 21 of the DSU, entitles Surveillance of Implementation of

The Enabling Clause is the most important provision establishing a regime of special and differential treatment for developing countries. In fact it constitutes the legal basis for the General System of Preference (GSP) which enables developed Members to grant a more favourable and non reciprocal treatment for developing countries.

In the 60s and 70s, developing countries attempted to collectively exercise their pressure in international economic relations (through the Group of 77) to promote the creation of the “new international economic order”<sup>564</sup>. In particular, their efforts were addressed to the United Nations Conference on Trade and Development (UNCTAD), that at its First Conference in 1964 established that “developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting or other concessions, require any concessions in return from developing countries”<sup>565</sup>.

Therefore, the GSP constitutes by definition a violation of the Most Favourite Nation principle (MFN) under Article I of the GATT. Accordingly, for the GSP to be able to operate, it was necessary to obtain a special GATT waiver to enable developed countries to concede preferences to developing countries without granting the same preferences to all the other GATT Contracting Parties<sup>566</sup>. A ten-year waiver to Article I, known as “GSP Decision”, was conceded in 1971 upon the request of several developed countries<sup>567</sup>. The waiver’s time limits were removed through the adoption of the Decision of the GATT Contracting Parties entitled “Differential and more favourable treatment, reciprocity and fuller

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Recommendations and Rulings, establishes that “particular attention should be paid to matters affecting the interests of developing country Members with respect to measures that have been subject to dispute settlement”. See also Footer, “Developing country practice in the matter of WTO Dispute Settlement”, *Journal of World Trade*, 35(1), 2001, p. 61; Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 321-325; Gambardella and Rovetta, “Reasonable Period of Time to Comply with WTO Rulings: Need to do More for Developing Countries?”, *Global Trade and Customs Journal*, 3(3), 2008, p. 99-107.

<sup>564</sup> Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 979.

<sup>565</sup> UNCTAD, Final Act of the First United Nations Conference on Trade and Development, Principle 8 of Recommendation A.I.1.

<sup>566</sup> Bartels, “The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program”, *Journal of International Economic Law*, 6(2), 2003, p. 511.

<sup>567</sup> *Ibidem*, p. 511-512.

participation of developing countries” of 28 November 1979, commonly referred to as *Enabling Clause*. At the time of the institution of the WTO in 1995, the Enabling Clause was formally made part of the GATT 1994, including the original agreement as amended along with a list of other related instruments, including all decisions on waivers<sup>568</sup>.

The Enabling Clause is the main WTO instrument regulating GSP programs but, despite its prominence in the world trading system, its legal status is not entirely clear<sup>569</sup>. In fact, the Enabling Clause is not a waiver *strictu sensu*<sup>570</sup>. Nonetheless, it is an instrument forming part of the GATT 1994 structure under paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement<sup>571</sup>.

Under Article 1.1 of the DSU, WTO panels and Appellate Body only have jurisdiction when a claim is brought under the dispute settlement provisions or one or more of the covered agreements<sup>572</sup>. However, the Enabling Clause does not contain any of such provision. Thus panels and Appellate Body do not have direct jurisdiction to hear a claim on the basis of a violation of the Enabling Clause<sup>573</sup>. The claim should rather be based on a violation of GATT Article I that cannot be justified under the exceptions set out in the Enabling Clause<sup>574</sup>.

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<sup>568</sup> Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 979. See also Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 339-341.

<sup>569</sup> Bartels, “The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program”, *Journal of International Economic Law*, 6(2), 2003, p. 514.

<sup>570</sup> The Enabling Clause does not refer to the waiver provision, Article XXV.5 of the GATT, nor is included in the list of waivers set out in the footnote to paragraph 1(b)(iii) of “the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement”. *Ibidem*, p. 514-515.

<sup>571</sup> *Ibidem*, p. 516.

<sup>572</sup> DSU Article 1.1: “The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement”.

<sup>573</sup> Bartels, “The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program”, *Journal of International Economic Law*, 6(2), 2003, p. 516.

<sup>574</sup> *Ibidem*, p. 516.

A clarification is needed concerning whether the Enabling Clause constitutes a limited exception of the MFN under Article I of the GATT 1994, or whether it excludes its application<sup>575</sup>.

*EC – Tariff preferences* is the most important dispute on Enabling Clause and both the panel and the Appellate Body reports broadly referred to the relationship between Article I of the GATT and the Enabling Clause and to the allocation of the burden of proof in this particular context.

The system of preferences conceded preferential treatment to 12 developing countries with serious drug problems and excluded other developing countries Members. India challenged the system of preferences alleging a violation of the MFN under Article I of the GATT<sup>576</sup>.

The panel was called upon to determine the relationship between Article I.1 of the GATT 1994 and the Enabling Clause, and the subsequent implications for the allocation of the burden of proof.

The Appellate Body upheld the panel’s finding that the Enabling Clause is an exception of GATT Article I as it *enables* WTO Members to grant tariff preferences to developing countries<sup>577</sup>. If the Enabling Clause is considered an exception to Article I of the GATT, the general rule should apply that the party making an affirmative defence bears the burden of proving it. Accordingly, the developed country Member granting the preferences would be obliged to defend its scheme under the Enabling Clause<sup>578</sup>.

However, the EC as a respondent relied on the hierarchical criterion, which is based on the importance that the drafters placed on a certain provision, in order to demonstrate that the Enabling Clause does not constitute an exception<sup>579</sup>. Accordingly, the EC argued that the Enabling Clause is the “most concrete, comprehensive and important application of the principle of special and

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<sup>575</sup> Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 986.

<sup>576</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006.

<sup>577</sup> Appellate Body report, *EC – Tariff Preferences*, para. 99.

<sup>578</sup> Bartels, “The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program”, *Journal of International Economic Law*, 6(2), 2003, p. 517.

<sup>579</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 633.

differential treatment”, and it aims “to achieve one of the fundamental objectives of the WTO Agreement”<sup>580</sup>. Thus, requiring the preference-granting country that invokes the Enabling Clause to justify its GSP scheme cannot be reconciled with the intention to encourage such schemes<sup>581</sup>. The Appellate Body recognised that the Enabling Clause has become “an integral part of the GATT 1994” and noted that characterizing the Enabling Clause as an exception does not undermine its importance in the overall framework of the covered agreements<sup>582</sup>.

The rule that was clearly set out in the *US – Shirts* Appellate Body report provides that it is for the party invoking an exception to prove it<sup>583</sup>. Therefore, the interpretation of the Enabling Clause either as an exception to Article I of the GATT or as a provision excluding its application would determine whether the complainant or the respondent had the burden of proof and whether in *EC – Tariff preferences* India’s claim would be dismissed for failing to make a *prima facie* case<sup>584</sup>. If the Enabling Clause is not an exception to Article I, then it can be considered as a self-standing obligation and the complainant would have the burden to demonstrate its violation<sup>585</sup>.

The panel in *EC – Tariff preferences* found that the Enabling Clause is an exception to Article I of the GATT, rather than a self-standing obligations and that “as an exception provision the Enabling Clause applies concurrently with Article I.1 and takes precedence to the extent of a conflict between the two provisions”<sup>586</sup>. Indeed, it does not establish a positive rule (in the formulation provided by the

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<sup>580</sup> Appellate Body report, *EC – Tariff preferences*, paras. 14-15, EC submission.

<sup>581</sup> Appellate Body report, *EC – Tariff preferences*, para. 93.

<sup>582</sup> Appellate Body report, *EC – Tariff Preferences*, para. 95.

<sup>583</sup> In particular, the Appellate Body stated that GATT “Articles XX and XI.2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it”. *US – Shirts*, Appellate Body report, p. 16, footnote omitted.

<sup>584</sup> Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 986.

<sup>585</sup> *Ibidem*.

<sup>586</sup> Panel report, *EC – Tariff Preferences*, para. 7.45. It should be noted that the dissenting panel member found that the Enabling Clause was not an exception but rather a self-standing agreement. Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 986.

Appellate Body in the case *US – Shirts*<sup>587</sup>) as it clearly refers to Article I of the GATT<sup>588</sup>. A positive rule in fact imposes an obligation to do, while the Enabling Clause represents a subsidiary non-obligatory provision that does not alter the obligations of Member States under WTO covered agreements as its adoption only depends on the decision of a Member to take such a measure<sup>589</sup>.

The Appellate Body held that the Enabling Clause is an exception to GATT Article I, thus the burden of proof should be borne by the party invoking it. Therefore, the Appellate Body modified the panel's pronouncement on the allocation of the burden of proof, finding that the burden of proof to justify the general system of preferences under the Enabling Clause was on the respondent, while the complainant had to define the parameters within which the respondent had to make its defence<sup>590</sup>. In developing its reasoning, the Appellate Body recalled that it had previously addressed the allocation of the burden of proof in similar situations, and summarised the relevant jurisprudence as follows:

“We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding

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<sup>587</sup> In *US – Shirts* the Appellate Body stated that GATT “Articles XX and XI.2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it”. Appellate Body report, *US – Shirts*, p. 16, footnote omitted.

<sup>588</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 626. However, it should be noted that the dissenting panel member found that the Enabling Clause was not an exception but rather a self-standing agreement. Shaffer and Apea, “Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights”, *Journal of World Trade*, 39(6), 2005, p. 986.

<sup>589</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 626-631.

<sup>590</sup> Zeitler, “‘Good faith’ in the WTO Jurisprudence”, *Journal of International Economic Law*, 8(3), 2005, p. 731.

party. However, this distinction may not always be evident or readily applicable”<sup>591</sup>. (footnotes omitted).

The Appellate Body then examined the text of the relevant provisions, i.e. GATT Article I.1 and the Enabling Clause. The Appellate Body observed that paragraph 1 of the Enabling Clause provides:

“Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties”<sup>592</sup>. (footnote omitted).

The Appellate Body considered that, though the use of the word “notwithstanding”, which has been defined as “in spite of, without regard to or prevention by”, the Enabling Clause permits Members to provide differential and more favourable treatment to developing countries in spite of the MFN obligation of Article I.1. Thus, paragraph 1 excepts Members from complying with the obligations contained in Article I.1 for the purposes of providing differential and more favourable treatment for developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause<sup>593</sup>. In this way the Appellate Body concluded that the Enabling Clause operates as an exception to Article I.1. In making this finding the Appellate Body rejected the EC’s argument that the Enabling Clause exists “side-by-side and on an equal level” with Article I.1, and “thus applies to the exclusion of that provision”. Instead, the Appellate Body held that the Enabling Clause does not exclude the applicability of Article I.1, but rather it applies concurrently with Article I.1, taking precedence to the extent of the conflict between the two provisions<sup>594</sup>.

Therefore, the Appellate Body considered that the particular circumstances of the case justified a special approach and, considering the special status of the Enabling Clause and its vital role in promoting economic growth and development, the Appellate Body affirmed that it is not a typical exception in the style of GATT Article XX<sup>595</sup>.

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<sup>591</sup> Appellate Body report, *EC – Tariff Preferences*, para. 88.

<sup>592</sup> Enabling Clause, para. 1.

<sup>593</sup> Appellate Body report, *EC – Tariff Preferences*, para. 90.

<sup>594</sup> Appellate Body report, *EC – Tariff Preferences*, para. 103.

<sup>595</sup> Appellate Body report, *EC – Tariff Preferences*, para. 106.

The Appellate Body clarified that it was incumbent to the complaining party to raise the Enabling Clause in making its claim of violation of the MFN principle<sup>596</sup>. Therefore, the respondent must prove that the challenged measure satisfies the conditions of the Enabling Clause and bears the burden of justifying it<sup>597</sup>. While it is responsibility of the complaining party to identify those provisions of the Enabling Clause with which the scheme is allegedly inconsistent. The Appellate Body held that the burden of proof in the context of the Enabling Clause is on the respondent, while the burden of pleading that clause is borne by the complainant. Moreover, it added that it is insufficient for a complaining party, when challenging a measure taken pursuant to the Enabling Clause, to claim a violation of GATT Article I only<sup>598</sup>. Rather, the complainant has the responsibility to identify the relevant provisions of the Enabling Clause in its request for the establishing of a panel and it cannot in good faith ignore the relevant provisions with which the challenged scheme is allegedly inconsistent<sup>599</sup>. The Appellate Body emphasised however that, for due process considerations<sup>600</sup>, the responsibility of the complainant is merely to “*identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency”<sup>601</sup>. The burden of establishing the facts is borne by the respondent invoking the Enabling Clause as a defence and identification does not of course amount to an obligation to respect the standard of review associated with a claim under the Enabling Clause<sup>602</sup>. In other words, although the complaining party was found to bear the burden of raising a defence, this finding did not affect the substantive

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<sup>596</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006.

<sup>597</sup> Appellate Body report, *EC – Tariff Preferences*, para. 106. Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better?*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The Contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006 (, p. 339.

<sup>598</sup> Appellate Body report, *EC – Tariff Preferences*, para. 110.

<sup>599</sup> Appellate Body report, *EC – Tariff Preferences*, para. 113.

<sup>600</sup> Appellate Body report, *EC – Tariff Preferences*, para. 113.

<sup>601</sup> Appellate Body report, *EC – Tariff Preferences*, para. 115.

<sup>602</sup> Appellate Body report, *EC – Tariff Preferences*, paras. 110-115.

allocation to the respondent of the burden of proving that its measure was justified under that defence<sup>603</sup>:

“In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, "notwithstanding" the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an "advantage" to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly". In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. [...]”<sup>604</sup>. (footnotes omitted).

In conclusion, the Appellate Body in *EC – Tariff preferences* established a special allocation of burden of proof in the context of the Enabling Clause characterizing it not as a typical exception in the style of GATT Article XX<sup>605</sup>.

The rationale of allocating the burden of raising the Enabling Clause on the complainant is, in the Appellate Body's view, to encourage the adoption of preferential treatment for developing countries<sup>606</sup>. Indeed, the Appellate Body in

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<sup>603</sup> Zhu and Donaldson, *Analysis of Appellate Body Jurisprudence Regarding Burden of Proof When Parties Invoke "Affirmative Defence" or Autonomous Rights*, Paper, Geneva, July, 2007, p. 8-10.

<sup>604</sup> Appellate Body report, *EC – Tariff Preferences*, paras. 110.

<sup>605</sup> Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better?*, in Sacerdoti, Yanovich, Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 339.

<sup>606</sup> "...the Contracting Parties determined that the MFN obligation failed to secure adequate market access for developing countries so as to stimulate their economic development. Overcoming this required recognition by the multilateral trading system that certain obligations, applied to all Contracting Parties, could impede rather than facilitate the objective of ensuring that

*EC – Tariff preferences* said that “the history and the objective of the Enabling Clause lead us to agree with the EC that Members are encouraged to deviate from Article I in the pursuit of differential and more favourable treatment for developing countries<sup>607</sup> .

Thus, the Enabling Clause seems to imply a heavier burden of proof for the developed complaining party, confirming that the Appellate Body attached a special importance to the Enabling Clause and treated it differently than other exceptions<sup>608</sup> .

The characterization of the Enabling Clause as an exception played a significant role in the allocation of the burden of proof<sup>609</sup> .

It should also be considered that the Member invoking the Enabling Clause as an exception bears the burden of justifying its conduct in terms of the provisions, then it may have to spend considerable time, money and effort while the complaining party merely sits back and watches. Such process can be financially too onerous for economically weak Members, thus potentially discouraging them, even as complainants, to actively participate to the dispute settlement system even<sup>610</sup> .

As an exception provision is commonly aimed at balancing competing values, the way an exception provision is treated (and the connected allocation of burden of proof) directly affects the protection of a frame of values rather than the other. Therefore, one could wonder whether it is appropriate to view liberalized trade as the core rule and the special treatment for developing countries as a permitted exception, or alternatively, whether the development issues should be considered a priority and trade measures as instruments to achieve it. Even though it characterised the Enabling Clause as an exception, the Appellate Body partially

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developing countries secure a share in the growth of world trade. This recognition came through an authorization for GSP schemes in the 1971 Waiver Decision and then in the broader authorization for preferential treatment for developing countries in the Enabling Clause”. Appellate Body report *EC – Tariff preferences*, para. 109. See also Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 654.

<sup>607</sup> Appellate Body report, *EC – Tariff Preferences*, para. 111.

<sup>608</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006.

<sup>609</sup> Dhar and Majumdar, *The India-EC GSP Dispute: The Issues and the Process*, Working draft commissioned by ICTSD, 2006, p. 13.

<sup>610</sup> *Ibidem*, p. 14.

mitigated the burdensome consequences that invoking it would imply, by imposing an obligation on the claimant to identify the allegedly inconsistent provisions under the Enabling Clause.

#### 4.1.3. Regional Trade Agreements and Article XXIV

Despite the potential dangers of regionalism to multilateral trading system, from its inception the GATT, and now the WTO, has allowed Member countries to conclude customs unions and free-trade areas as an exception to the fundamental principle of non-discrimination set out in the most-favoured-nation provision of Article I of the GATT. Hence, the provision enshrined in Article XXIV of the GATT 1994 opens the way for GATT-consistent preferential trade agreements and makes it plain that they can co-exist within the multilateral WTO framework<sup>611</sup>. The specific conditions for satisfying consistency with the multilateral rules are set out in Articles XXIV.5, XXIV.6, XXIV.7 and XXIV.8 of the GATT.

The panel on *Turkey - Textiles*<sup>612</sup> had found that Turkey could not justify a violation of Article XI by invoking Article XXIV:5, because the provision, in the view of the panel, does not apply to specific measures adopted on the occasion of the formation of a new customs union. Rather, the panel found that Article XXIV:5 focuses on the overall effect of a regional agreement. As a result, the panel concluded that there is no legal basis in Article XXIV:5(a) for the justification of individual quantitative restrictions which are otherwise incompatible with WTO law. Although the Appellate Body ultimately upheld that Turkey's measures could not be justified under Article XXIV, it modified the panel's reasoning on Article XXIV:5. The *chapeau* of Article XXIV.5 states that "the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area". The Appellate Body in *Turkey - Textiles* has clarified that the words "shall not prevent" in Article XXIV.5 mean that "the provisions of the GATT 1994 shall not make

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<sup>611</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 554.

<sup>612</sup> Appellate Body report, *Turkey – Textile*, para. 58.

impossible the formation of a customs union”.<sup>613</sup> The Appellate Body also introduced a rule which inverted the previous practice: it was no longer the other party who had to demonstrate the inconsistency of a regional trade agreement with Article XXIV but it was up to the Members of this agreement to prove the necessity of the derogation in the sense described before<sup>614</sup>.

“[I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 ‘shall not prevent’ the formation of a customs union. We read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible ‘defence’ to a finding of inconsistency.

Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent ‘the formation of a customs union’. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed”<sup>615</sup>. (footnote omitted).

Even though the Appellate Body in *Turkey – Textile* referred to Article XXIV as a “defence” and did not clearly affirm that it is an exception to other GATT provisions, this conclusion stems from the report on the basis of several reasons<sup>616</sup>. The Appellate Body stated that “the *chapeau* makes clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with other GATT provisions, and may be invoked as a possible defence to a finding of inconsistency”<sup>617</sup>. Moreover, it is worth to note that a footnote original in the excerpt of the Appellate Body report here cited, recalls

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<sup>613</sup> Appellate Body report, *Turkey – Textile*, para. 45.

<sup>614</sup> Hilpold, “Regional Integration According to Article XXIV GATT – Between Law and Politics”, *Max Planck Yearbook of United Nations Law*, Volume 7, 2003, p. 248. See also Marceau and Reiman, “When and How is a Regional Trade Agreement Compatible With the WTO?”, *Legal Issues of Economic Integration*, 28(3), 2001, p. 312.

<sup>615</sup> Appellate Body report on *Turkey - Textiles*, paras. 45-46.

<sup>616</sup> Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 171-172.

<sup>617</sup> Appellate Body report, *Turkey – Textile*, para. 42.

that legal scholars have long considered Article XXIV to be an exception to claims of violation of GATT provisions<sup>618</sup>. The Appellate Body also referred to an early treatise on GATT law by John Jackson and quoted “[Article XXIV] establishes an exception to GATT obligations for regional arrangements that meet a series of detailed and complex criteria”<sup>619</sup>.

According to the general jurisprudence of WTO panels and the Appellate Body regarding the burden of proof in WTO disputes, the fact that Article XXIV is an exception means that it would be for the Member challenging a regional trade agreement to establish a violation of GATT 1994, and for the responding Member to prove that the inconsistency is justified or removed because the regional trade agreement falls within the exception in Article XXIV.<sup>620</sup>

Indeed, the Appellate Body dealt with the conditions to be satisfied when invoking Article XXIV as a justification for a WTO incompatible measure<sup>621</sup>. The Appellate Body stated first, that the party invoking GATT Article XXIV shall “demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV”<sup>622</sup>; second, that “that party must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue”<sup>623</sup>. Of decisive importance for this case was the third condition, referring to the “necessity” of the measures introduced. The parties to a regional trade agreement should prove the necessity of the derogation in question and bring evidence that otherwise it would be impossible to create the respective formation.

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<sup>618</sup> Mathis, *Regional Trade Agreement in the GATT/WTO*, TMC Asser Press, Den Hague, 2002, p. 211-212 and footnote 72.

<sup>619</sup> Jackson, *World Trade and the Law of GATT*, The Bobbs-Merrill Company, 1969, p. 576. Other scholars mentioned in the footnote 13 to para. 45 of the Appellate Body report *Turkey - Textiles* include: Allen, *The European Common Market and the GATT*, The University Press of Washington, D.C., 1960, p. 2; Dam, “Regional Economic Arrangements and the GATT: The Legacy of Misconception”, *University of Chicago Law Review*, 1963, p. 616; and Huber, “The Practice of GATT in Examining Regional Arrangements under Article XXIV”, *Journal of Common Market Studies*, 1981, p. 281.

<sup>620</sup> Lockhart and Mitchell, *Regional Trade Agreements Under GATT 1994: an Exception and its Limits*, Cameron May, London, 2005, p. 221.

<sup>621</sup> Marceau and Reiman, “When and How is a Regional Trade Agreement Compatible With the WTO?”, *Legal Issues of Economic Integration*, 28(3), 2001, p. 313.

<sup>622</sup> Appellate Body report, *Turkey – Textile*, para. 55.

<sup>623</sup> Appellate Body report, *Turkey – Textile*, para. 55. Marceau and Reiman, “When and How is a Regional Trade Agreement Compatible With the WTO?”, *Legal Issues of Economic Integration*, 28(3), 2001, p. 313-314.

All these conditions must be met to have a benefit of the defence under Article XXIV:

“[...] in a case involving the formation of a customs union, this “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV”<sup>624</sup>.

Hence, the Appellate Body appears to have articulated a necessity test: it put the burden of proof on the defending party to the effect that (i) the regional trade agreement in dispute is a customs union or a free-trade area as defined by Article XXIV, and (ii) the measure at issue is essential for the formation of that agreement<sup>625</sup>.

The panel took a very pragmatic approach and did not specifically address the question whether the regional trade agreement between Turkey and the EC really met the above mentioned requirements, limiting itself to assume that this compatibility was in fact given<sup>626</sup>. As this assumption was not appealed, the Appellate Body could not address it. Nonetheless, the Appellate Body took the occasion to warn the panel that it had to require the parties to prove that the conditions required had been fulfilled<sup>627</sup>.

Concerning the third requisite, i.e. the necessity test under Article XXIV, the Appellate Body agreed with the panel that there existed less trade restrictive alternatives, including the use of rules of origin to distinguish between Turkish and third countries textiles<sup>628</sup>. This would have addressed the problem of trade diversion, and obviated the need to exclude the textiles and clothing sectors from the EC-Turkish customs union. There is indeed a certain amount of flexibility

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<sup>624</sup> Appellate Body report, *Turkey – Textile*, para. 58.

<sup>625</sup> Hafez, “Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs”, *North Dakota Law Review*, 79, p. 14.

<sup>626</sup> Hilpold, “Regional Integration According to Article XXIV GATT – Between Law and Politics”, *Max Planck Yearbook of United Nations Law*, Volume 7, 2003, p. 248.

<sup>627</sup> Appellate Body report, para. 59.

<sup>628</sup> Appellate Body report, para. 62 and panel report, *Turkey – Textile*, para. 9.152.

allowed in the necessity test developed under Article XX jurisprudence. In the *Korea – Beef* case the Appellate Body held that “the reach of the word *necessary* is not limited to that which is *indispensable* or *absolute necessity* or *inevitable*”<sup>629</sup>. If the Article XXIV jurisprudence has introduced a necessity test, then on the basis of *US – Gambling*, one must presume that although Turkey would have made a *prima facie* determination that its textiles import restrictions were necessary, India managed to provide evidence that WTO consistent alternatives were reasonably available and that such alternative would allow Turkey to maintain its desired policy, i.e. to form a customs union with the EC<sup>630</sup>.

Even though the approach relying on the concept of affirmative defence, as determined in the Appellate Body report *US – Shirts*, has been consistently followed, some doubts could arise concerning the nature of Article XXIV exception<sup>631</sup>.

Indeed, while it seems undisputable that Article XXIV is an exception (or a defence) from the MFN principle, it is not entirely clear whether it can be invoked as an exception to other GATT provision. Two opposing views on the relation between regional trade agreement and WTO rules have been proposed<sup>632</sup>. The first is that Article XXIV only derogates from GATT Article I, thus it can be invoked as an exception if a violation of the MFN has been challenged. The second view is that Article XXIV constitutes an exception from any provision of the GATT<sup>633</sup>.

In *Turkey – Textiles* the panel referred the Article XXIV exception directly and exclusively to the MFN obligation according to Article I. However, the Appellate Body’s report differed in the sense that it expanded the applicability of GATT Article XXIV as an exception to GATT obligations beyond the MFN principle. In

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<sup>629</sup> Appellate Body, *Korea – Beef*, para. 161.

<sup>630</sup> Irfan and Marceau, *Is There a Necessity Test Within Article XXIV of the GATT 1994? And if so, is it Applicable to RTA Among Developing Countries, Covered by the Enabling Clause?*, Discussion Paper, 2005, p. 4-5.

<sup>631</sup> Bartels, *WTO Dispute Settlement Practice on Article XXIV of the GATT*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 271. In fact, in contrast with the proliferation of free trade agreements, there is not much judicial activity in this respect that would be able to clarify the implications of the provision at issue. Mavroidis, “If I Don’t Do it, Somebody Else Will (or Won’t)”, *Journal of World Trade*, 40(1), 2006, p. 208.

<sup>632</sup> Mathis, *Regional Trade Agreement in the GATT/WTO*, TMC Asser Press, Den Hague, 2002, p. 229.

<sup>633</sup> *Ibidem*, p. 229-230.

doing so, the Appellate Body argument rested on the *chapeau* of Article XXIV.5 that provides that the provision of the GATT 1994 “shall not prevent” the formation of a customs union. Even though the Appellate Body’s arguments implicitly lead to the conclusion that Article XXIV may be invoked as an exception to WTO-inconsistent measures<sup>634</sup>, it made clear that its finding only referred to Article I:

“[...] we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will *ever* be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified”<sup>635</sup>.

## 4.2. Agreement on Agriculture

The Agreement on Agriculture contains one of the few provisions in WTO Agreement explicitly addressing the issue of the allocation of the burden of proof. As a matter of fact, a special rule of burden of proof is provided for under Article 10.3 of the Agreement on Agriculture, whereby the burden of proof regarding a positive rule is reversed and allocated to the responding party.

Article 10.3 does not impose any substantive obligation regulating the grant of export subsidies under the Agreement on Agriculture. Rather, it provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9, and 10 of the Agreement on Agriculture<sup>636</sup>. Specifically, where a

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<sup>634</sup> Hafez, “Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs”, *North Dakota Law Review*, 79, p. 13.

<sup>635</sup> Appellate Body report, *Turkey – Textile*, para. 62.

<sup>636</sup> Appellate Body report, *Canada — Dairy (Article 21.5 — New Zealand and US II)*, para. 69. “In identifying the nature of the special rule, it is useful to analyze the character of claims brought under these provisions. Pursuant to Article 3 of the *Agreement on Agriculture*, a Member is *entitled* to grant export subsidies within the limits of the reduction commitment specified in its Schedule. Where a Member claims that another Member has acted inconsistently with Article 3.3 by granting export subsidies in excess of a quantity commitment level, there are *two* separate parts to the claim. First, the responding Member must have exported an agricultural product in quantities exceeding its quantity commitment level. If the quantities exported do not reach the quantity commitment level, there can be no violation of that commitment, under Article 3.3. However, merely exporting a product in quantities that exceed the quantity commitment level is not inconsistent with the commitment. The commitment is an undertaking to limit the quantity of exports that may be *subsidized* and not a commitment to restrict the volume or quantity of exports *as such*. The second part of the claim is, therefore, that the responding Member must have granted export subsidies with respect to quantities exceeding the quantity commitment level. There is, in

complainant claims that the respondent has acted inconsistently with Article 3.3 of the Agreement on Agriculture, two elements of the claim must be established. First, the respondent must have exported an agricultural product in quantities exceeding its reduction commitments level. Secondly, the respondent must have granted export subsidies with respect to quantities exceeding the quantity commitment level<sup>637</sup>:

“Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question”.

The provision explicitly alters the general rule on burden of proof with respect to the second element of such a claim, by requiring the respondent, instead of the complainant, to establish that no export subsidy has been granted in respect to any quantity exported in excess of a reduction commitment level<sup>638</sup>.

While under the usual allocation of the burden of proof, according to the rule *actori incumbit probatio*, a responding Member’s measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary, Article 10.3 requires a Member, in defined circumstances, to establish that no export subsidy has been granted. The provision refers to a Member making a “claim” that certain exports are not being subsidized. Although the word “claim” usually refers to an assertion by a complaining Member that a measure is non WTO-consistent, in this provision the word “claim” refers to an assertion by a responding Member that a measure *is* WTO-consistent. The “claim” to which Article 10.3 refers is, therefore, a defensive argument made by the responding Member<sup>639</sup>.

In this context, the verb “establish” is synonymous of the verbs “demonstrate” and “prove”, while the auxiliary verb “must” conveys that the responding Member has

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other words, a *quantitative* aspect and an *export subsidization* aspect to the claim”. Appellate Body report, *Canada — Dairy (Article 21.5 — New Zealand and US II)*, para. 70.

<sup>637</sup> Zhu and Donaldson, *Analysis of Appellate Body Jurisprudence Regarding Burden of Proof When Parties Invoke “Affirmative Defence” or Autonomous Rights*, Paper, Geneva, July, 2007, p. 2, footnote n. 2.

<sup>638</sup> *Ibidem*. See also Appellate Body report, *Canada — Dairy (Article 21.5)*, paras. 70-73; Appellate Body report, *US — Upland Cotton*, para. 616.

<sup>639</sup> Appellate Body report, *Canada — Dairy (Article 21.5 — New Zealand and US II)*, paras. 66-68.

an obligation — or legal burden — to “establish” or “prove” that no export subsidy has been granted”<sup>640</sup>.

In relation to the burden of proof under Article 10.30, the panel on *US - FSC*, in a finding not reviewed by the Appellate Body, stated that:

“In this case, therefore, the European Communities having alleged that the FSC is an export subsidy available with respect to agricultural products, and once the European Communities has established that the United States has exported a quantity of an agricultural product in excess of its reduction commitment level, it is up to the United States to present evidence and argument sufficient to establish that no export subsidy has been granted with respect to the quantity in question. The United States could fulfil this burden by submitting evidence and argument sufficient to establish that the FSC scheme does not represent an export subsidy, that FSC benefits are not granted with respect to a quantity of the product in question in excess of its reduction commitment level, or both”<sup>641</sup>.

The panel on *Canada - Dairy (Article 21.5 - New Zealand and US II)* considered that before the burden of proof could be passed onto Canada under Article 10.3, the complainants would have to establish a *prima facie* case that export subsidies had been granted:

“[...] the Panel is of the view that an operational interpretation of Article 10.3 requires that the Complainants make a *prima facie* showing that the elements of the claimed export subsidies are present. [...] Once the Panel has examined the Complainants claims and arguments, and provided that the Complainants make out a *prima facie* case that certain elements of the Canadian regulation of its dairy industry constitute export subsidies under either Article 9.1(c) or Article 10.1, it will then be for Canada, pursuant to Article 10.3 of the Agreement on Agriculture, since it claims that its exports in excess of its commitment levels are not subsidized, to establish that Canadian exports of cheese and ‘other milk products’ do not benefit from these particular types of export subsidies”<sup>642</sup>.

In *US — Upland Cotton* the Appellate Body clarified that it is not sufficient for the panel to invoke a certain provision (in this case being Article 10.3 of the

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<sup>640</sup> Appellate Body report, *Canada — Dairy (Article 21.5 — New Zealand and US II)*, para. 73.

<sup>641</sup> Panel Report, *US - FSC*, para. 7.136.

<sup>642</sup> Panel Report, *Canada - Dairy (Article 21.5 - New Zealand and US II)*, paras. 5.15-5.19.

Agreement on Agriculture) to assume that the rule on burden of proof enshrined in the same provision has been applied. Indeed, the Appellate Body held that Article 10.3 of the Agreement on Agriculture does not apply to claims brought under the SCM Agreement. Consequently, the panel in the case at issue correctly placed the burden of proof on Brazil (the complainant) and determined that Brazil met its burden of proving that the United States' export credit guarantees are provided at premium rates which are inadequate to cover long-term operating costs and losses. The reference to Article 10.3 does not, by itself, change the fact that the panel ultimately placed the burden of proof on Brazil<sup>643</sup>. The panel's interpretation implies that the burden of proof with regard to the same issue would apply differently under each Agreement. In the case of the Agreement on Agriculture: it would be on the respondent, whereas under the SCM Agreement it would reside on the complainant<sup>644</sup>.

In *US — Upland Cotton* the Appellate Body referred to the application of Article 10.3 to unscheduled products. The Appellate Body criticised panel's approach to the issue, as in its view the only thing a complainant would have to do in order to meet its burden of proof when bringing a claim against an unscheduled product, is to demonstrate that the respondent has exported such product. Once this has been established, the respondent would have to demonstrate that it has not provided an export subsidy. The Appellate Body considered this as an extreme result, since it would mean that any export of an unscheduled product is presumed to be subsidised<sup>645</sup>.

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<sup>643</sup> Appellate Body report, *US — Upland Cotton*, paras. 648. "We agree with the United States that Article 10.3 of the Agreement on Agriculture does not apply to claims brought under the SCM Agreement. However, the panel did not make the error attributed to it by the United States. The panel made the statement relied on by the United States in the context of its assessment of the United States' export credit guarantee program under the Agreement on Agriculture. Although the panel made use of the criteria set out in item (j) of the Illustrative List of Export Subsidies annexed to the SCM Agreement (providing these programs at premium rates inadequate to cover long-term operating costs and losses) it did so as contextual guidance for its analysis under the Agreement on Agriculture, and both the United States and Brazil appear to have agreed with the appropriateness of this approach. Thus, the panel's reference to Article 10.3 did not relate to its assessment of the United States' export credit guarantee programs under the SCM Agreement". *US — Upland Cotton*, para. 647.

<sup>644</sup> Appellate Body report, *US — Upland Cotton*, para. 652.

<sup>645</sup> "In our view, the presumption of subsidization when exported quantities exceed the reduction commitments makes sense in respect of a *scheduled* product because, by including it in its schedule, a WTO Member is reserving for itself the right to apply export subsidies to that product, within the limits in its schedule. In the case of *unscheduled* products, however, such a presumption

In conclusion, according to Article 10.3, if a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it had granted non WTO-consistent export subsidies for the excess quantities, unless it presents adequate evidence to establish the contrary. This reversal of the usual rules obliges the responding Member to bear the consequences of any doubts concerning the evidence of export subsidisation. Accordingly, Article 10.3 acts as an incentive for Members to ensure that they are in a position to demonstrate compliance with their quantity commitments under Article 3.3<sup>646</sup>.

#### **4.3. SPS and TBT: the case of deviation from international standards**

The WTO agreement seeks to promote the use and development of international standards<sup>647</sup>. Under the SPS agreement such standards are deemed to include those emanating from three specified bodies, along with appropriate standards from other relevant international organizations open for membership to all Members, as identified by the SPS Committee (Annex A, SPS agreement)<sup>648</sup>. The TBT agreement remains relatively more vague, as it refers to relevant international standards (Article 2.4 TBT) derived from a recognized body and by virtue of the voluntary nature<sup>649</sup>.

Both agreements aim at creating an incentive in favour of States whose measures conform to international standards and a positive obligation on States to ensure that domestic regulations are based upon them (Articles 3.1 SPS and 2.4 TBT). Accordingly, there is a presumption of conformity with the provisions of the two agreements for the measures that are based on international standards<sup>650</sup>.

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appears inappropriate. Export subsidies for both unscheduled agricultural products and industrial products are completely prohibited under the *Agreement on Agriculture* and under the *SCM Agreement*, respectively". Appellate Body report, *US — Upland Cotton*, para. 652.

<sup>646</sup> Appellate Body report, *Canada — Dairy (Article 21.5 — New Zealand and US II)*, para. 74.

<sup>647</sup> Recital 6 of the SPS Agreement and recital 4 of the TBT Agreement.

<sup>648</sup> Scott, "International Trade and Environmental Governance: Relating Rules and Standards in the EU and the WTO", *European Journal of International Law*, 15(2), 2004, p. 324.

<sup>649</sup> *Ibidem*.

<sup>650</sup> *Ibidem*, p. 324-325.

Even though SPS and TBT Agreements were intended to be an attempt to clarify and establish more specific rules regarding the application of GATT Article XX exception, in fact they go much further. SPS and TBT, as interpreted by the Appellate Body, create an extensive new set of affirmative obligations<sup>651</sup>. In addition, the provisions of Article XX only become relevant after a violation of another GATT provision is found, while SPS and TBT Agreements independently apply requirements of least trade-restrictiveness<sup>652</sup>. GATT Article XX is an affirmative defence, with the burden of proof on the respondent. On the other hand, under the SPS and TBT Agreements, the complainant is required to make an affirmative case.

In the disputes *EC – Hormones* and *EC – Sardines*, the Appellate Body imposed the burden of proof on the complainant to demonstrate that the respondent could have reached its objectives following the existent international standards. If the complainant has honoured its burden, no recourse to a unilateral standard is warranted; otherwise the complainant loses the dispute<sup>653</sup>.

However, in both cases the Appellate Body in its reasoning seems to draw a distinction between complaints based on breaches of harmonization obligations and those alleging a violation of a non-discrimination obligation<sup>654</sup>. In any case it is questionable whether the Appellate Body has chosen the right tool (i.e. the allocation of burden of proof) to deal with the problems related to the new regulatory philosophy of positive harmonization of the WTO, aimed at the establishment of a uniform regulatory framework for trade<sup>655</sup>.

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<sup>651</sup> Shapiro, “The Rules that Swallowed the Exceptions: the WTO SPS Agreement and its Relationship to GATT Articles XX and XXI”, *Arizona Journal of International and Comparative Law*, 24(1), 2007, p. 201.

<sup>652</sup> Marceau and Trachtman, “The Technical Barrier to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade”, *Journal of World Trade*, 36(5), 2002, p. 831.

<sup>653</sup> Mavroidis, *Looking for Mr and Mrs Right: Ten years of the Appellate Body at the WTO*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 355.

<sup>654</sup> Heiskanen, “The Regulatory Philosophy of International Trade Law”, *Journal of World Trade*, 38(1), 2004, p. 23.

<sup>655</sup> *Ibidem*.

#### 4.3.1. SPS Agreement

In *EC – Hormones* the Appellate Body made clear that the rules on the burden of proof do not change in cases involving interpretations of the SPS Agreement. The party asserting a fact or a claim must meet the initial burden of establishing that there is a *prima facie* case of violation of the SPS Agreement. Then, the burden shifts to the defending party to rebut the assertion. Nothing in the SPS Agreement creates special rules putting the initial burden of proof on the country implementing the measure<sup>656</sup>. The Appellate Body defined this concept in *EC - Hormones* succinctly as follows:

“[...] a *prima facie* case is one which, in 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>657</sup>”

*EC - Hormones* is the most relevant case under the SPS Agreement in which the allocation of burden of proof has been addressed. The panel stated that the purpose of the Agreement, recognized in its preamble, is to promote the use of international standards and affirmed that Article 3.3 provides an exception to the general obligation contained in Article 3.1. Article 3.2 specifies that the complaining party has the burden of proof of overcoming a presumption of consistency with the SPS Agreement in the case of a measure based on international standards. Therefore it suggests that when a measure is not based on an international standard, the burden of proof is on the respondent to demonstrate that the measure is justified under the exception of Article 3.3. The *prima facie* case for a breach of SPS Article 3.1 must demonstrate, not only that the contested measure is not based on an international standard, but also that the higher level of protection is not justified on a scientific basis, or that no risk assessment has been conducted under SPS Article 5<sup>658</sup>. Thus, in the panel’s wording, once the

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<sup>656</sup> Appellate Body report, *EC – Hormones*, paras. 97-109. See also Appellate Body report, *Brazil – Aircraft*, paras. 134-141, applying the burden of proof in the context of the SCM Agreement.

<sup>657</sup> Appellate Body report, *EC – Hormones*, para. 104.

<sup>658</sup> Heiskanen, “The Regulatory Philosophy of International Trade Law”, *Journal of World Trade*, 38(1), 2004, p. 25.

complaining party makes a *prima facie*, the burden of proof under Article 3.3 *shifts* to the defending party<sup>659</sup>.

The Appellate Body reversed panel's findings that a "general rule-exception" relationship existed between Articles 3.1 and 3.3 of the SPS Agreement, and that the importing Member, that is, the respondent, accordingly bore the burden of proving that its measure was inconsistent with Article 3.3. The Appellate Body also emphasized that a decision of a Member not to conform a particular measure to an international standard does not authorize imposition of a special and generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*<sup>660</sup>. Furthermore, the Appellate Body clarified that the presumption of consistency with relevant provisions of the SPS Agreement that arises under Article 3.2 SPS in respect of measures that conform to international standards may be well an *incentive* for Members so to conform their SPS measures to such standards<sup>661</sup>. The Appellate Body considered that the panel had misconstrued the relationship between Articles 3.1 and 3.3 SPS, as Article 3.1 simply excludes from its application those situations covered by Article 3.3, and the SPS agreement recognises the autonomous right of a Member to establish an higher level of sanitary protection than would be achieved by a measure based on an international standard<sup>662</sup>. The relationship between Article 3.1 and Article 3.3 is qualitatively different from the relationship between GATT Article I (MFN) or III (national treatment) and Article XX (general exceptions)<sup>663</sup>. While Article XX establishes general exceptions to the non-discrimination obligations under GATT Articles I and III, SPS Article 3.3 only contains an exception to the general harmonization obligation under Article 3.1. The Appellate Body also argued that while the former exception rule provides that the burden of proof is shifted to the respondent, the latter does not<sup>664</sup>:

"The Panel relies on two interpretative points in reaching its above finding. First, the Panel posits the existence of a "general rule - exception" relationship between Article

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<sup>659</sup> Panel report, *EC – Hormones*, paras. 8.86-8.90.

<sup>660</sup> Appellate Body report, *EC – Hormones*, para. 102.

<sup>661</sup> Appellate Body report, *EC – Hormones*, para. 102.

<sup>662</sup> Appellate Body report, *EC – Hormones*, para. 104.

<sup>663</sup> Appellate Body report, *EC – Hormones*, para. 104.

<sup>664</sup> Heiskanen, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, 38(1), 2004, p. 25.

3.1 (the general obligation) and Article 3.3 (an exception) and applies to the *SPS Agreement* what it calls "established practice under GATT 1947 and GATT 1994" to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party. It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below, which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation. 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>665</sup>.

The above Appellate Body's findings suggest that a provision confers "autonomous rights" when it authorises action independently of the relevant positive rule and is explicitly excluded from the application of the positive rule. The complainant bears the burden of proving alleged inconsistency of the

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<sup>665</sup> Appellate Body report, *EC – Hormones*, para. 104.

respondent's measure with an autonomous right, before the respondent must prove the consistency of its measure with the same provision<sup>666</sup>.

Indeed, the Appellate Body stated that there are different types of WTO exceptions to be treated differently and that the fact that some WTO provisions are labelled as exceptions does not mean that Members invoking such provisions always have the burden of proving their applicability<sup>667</sup>. The Appellate Body clarified that:

“Merely characterizing a treaty provision as an exception does not by itself justify a stricter or narrower interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in the context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation”<sup>668</sup>.

However, it should be recalled that some support the view that the SPS Agreement aims at clarifying GATT Article XX(b)<sup>669</sup>. If this is the case, the procedural requirements of Article XX, including rules on burden of proof, would be applicable in SPS cases, and it would have been difficult for the Appellate Body to reverse the panel's decision in *EC - Hormones*<sup>670</sup>.

Furthermore, some commentators argue that it is difficult to reconcile the important decision of the Appellate Body on *EC - Hormones* with the characterization of provisional measures under SPS Article 5.7 as a “qualified exception” from the obligation to maintain SPS measures with sufficient scientific evidence under Article 2.2<sup>671</sup>. Indeed, in the context of Article 5.7 the party imposing a provisional SPS measure has the burden to prove that it meets the requirement settled by the provision<sup>672</sup>. In both Articles 3.1 and 2.2 the treaty

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<sup>666</sup> Zhu and Donaldson, *Analysis of Appellate Body Jurisprudence Regarding Burden of Proof When Parties Invoke “Affirmative Defence” or Autonomous Rights*, Paper, Geneva, July, 2007, p. 3.

<sup>667</sup> Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better?*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 337.

<sup>668</sup> Appellate Body report, *EC - Hormones*, para. 104.

<sup>669</sup> Quick and Bluthner, “Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case”, *Journal of International Economic Law*, 2(4), 1999, p. 629.

<sup>670</sup> *Ibidem*, p. 628, footnote 135.

<sup>671</sup> Appellate Body report, *Japan - Varietals*, 1999, para. 80.

<sup>672</sup> SPS Agreement, Article 5.7: “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from

language is very similar, i.e. “except as...” referring respectively to Articles 3.3 and 5.7<sup>673</sup>.

In the report *EC – Biotech Products*, the panel agreed with the EC that Article 5.7 of the SPS Agreement is an autonomous right, and not merely an exception from the general obligation under Article 2.2 and from the obligation to base a measure on a risk assessment under Article 5.1<sup>674</sup>. This finding has implications for the burden of proof regarding a violation of Article 5.7. It was critical to decide whether Article 5.7 was an affirmative defence. The panel examined whether the relationship between Article 5.1 and 5.7 was a ‘general-exception’ or an ‘exclusion’ and concluded that Article 5.7 is a qualified right, rather than an exception requiring the claimant to establish a *prima facie* case<sup>675</sup>. When addressing whether the complaining parties have met their burden of establishing a *prima facie* case of inconsistency with Article 5.7, the panel stated that the legal issue was to assess whether the measure met the requirements of Article 5.1<sup>676</sup>, rather than the consistency with Article 5.7<sup>677</sup>. The panel interestingly recalled that, according to the Appellate Body's statement in *EC – Tariff Preferences*, in cases where the permissive provision constitutes a right rather than an exception, “the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour”.<sup>678</sup>

“Evaluating the relationship between Article 2.2 and Article 5.7 in the light of the general test provided by the Appellate Body in *EC – Tariff Preferences*, we consider

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sanitary or phytosanitary measures adopted by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measures accordingly within a reasonable period of time”.

<sup>673</sup> Pauwelyn, “The WTO Agreement on Sanitary and Phytosanitary Measures as Applied in the First Three SPS Disputes”, *Journal of International Economic Law*, 2(4), 1999, p. 656-657.

<sup>674</sup> See e.g., Wüger, “Biotech Product WTO Panel Report”, *ASIL Insight*, March 8, 10(5), WTI Project Biotech and international Trade, Working Paper N.1, 2006; Prévost, “Opening Pandora’s Box: The Panel’s Findings in the EC-Biotech Products Dispute”, *Legal Issues of Economic Integration*, 34(1), 2007; Broude, “Genetically Modified Rules: the Awkward Rule-Exception-Right Distinction in *EC-Biotech*”, *World Trade Law*, 6(2), 2007.

<sup>675</sup> Panel report, *EC- Biotech*, para. 7.2976. See also, Kim, “Burden of Proof and the *Prima Facie* case: the Evolving History and its Applications in the WTO Jurisprudence”, *Richmond Journal of Global Law and Business*, 6(3), Spring/Summer 2007.

<sup>676</sup> The burden of proof consists in demonstrating that the challenged measure is inconsistent with at least one of the four requirements set out in Article 5.7. Panel report, *EC- Biotech*, paras. 7.2969 and 7.2976. See also Poli, “The EC’s Implementation of the WTO Ruling in the Biotech Dispute”, *European Law Review*, 32(5), October 2007.

<sup>677</sup> Panel report, *EC- Biotech*, para. 7. 3006.

<sup>678</sup> Appellate Body report, *EC – Tariff Preferences*, para. 88.

that the relationship in question is one where "one provision [namely, Article 5.7] permits, in certain circumstances, behaviour [namely, the provisional adoption of SPS measures in cases where scientific evidence is insufficient on the basis of available pertinent information] that would otherwise be inconsistent with an obligation in another provision [namely, the obligation in Article 2.2 not to maintain SPS measure without sufficient scientific evidence], [where] one of the two provisions [namely, Article 2.2] refers to the other provision, [and] where one of the provisions [namely, Article 2.2, and in particular the clause "except as provided for in paragraph 7 of Article 5"] suggests that the obligation [in Article 2.2 not to maintain SPS measure without sufficient scientific evidence] is not applicable" to measures falling within the scope of Article 5.7.

Thus, we find the general test provided by the Appellate Body in *EC – Tariff Preferences* to be applicable, and application of that test leads us to the conclusion that Article 5.7 should be characterized as a right and not an exception from a general obligation under Article 2.2.<sup>679</sup> In other words, we consider that in the same way that "Article 3.1 of the *SPS Agreement* [...] excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement", Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7. As we will explain further below, characterizing Article 5.7 as a right rather than as an exception has implications for the allocation of the burden of proof<sup>680</sup>. (one footnote omitted, one included).

Moreover, the panel referred to the case *EC – Sardines*, where the Appellate Body observed that

“[i]n *EC – Hormones*, we found that a 'general rule-exception' relationship between Articles 3.1 and 3.3 of the SPS Agreement does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3” (emphasis in original).<sup>681</sup>

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<sup>679</sup> (footnote original) Regarding our use of the term “right”, we note that the Appellate Body's test in *EC – Tariff Preferences* does not provide a term to characterize the permissive provision in the kind of relationship we found to exist between Article 2.2 and Article 5.7. However, as we have noted, the Appellate Body referred to the relationship between Articles 3.1 and 3.3 as an illustration of the relevant kind of relationship. We have also pointed out that in *EC – Hormones*, the Appellate Body referred to the permissive provision, Article 3.3, as an “autonomous right”, noting also that Article 3.3 does not constitute an exception from a general obligation under Article 3.1.

<sup>680</sup> Panel report, *EC – Biotech*, paras. 7.2968-7.2969.

<sup>681</sup> Appellate Body report, *EC – Sardines*, para. 275.

As the references to the Appellate Body jurisprudence demonstrate, the panel in *EC-Biotech* struggles to balance the tension between deferring to the higher tribunal, for the sake of predictability, and exercising its own discretion to reflect the policy objective, for the sake of rebalancing<sup>682</sup>.

The panel then concluded that in cases where a complaining party alleges that an SPS measure is inconsistent with the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence, it is incumbent on the complaining party, and not the responding party, to demonstrate that the challenged SPS measure is inconsistent with at least one of the four requirements set forth in Article 5.7. If such non-compliance is demonstrated, then, and only then, the relevant obligation in Article 2.2 does apply to the challenged SPS measure.<sup>683</sup>

In the recent *EC - Hormones II* the Appellate Body found that the panel failed to correctly determine and apply the burden of proof under the SPS Agreement and in particular Articles 5.1 and 5.7 thereof, as the panel imposed the burden of proof on the EC to prove the consistency of its measure with the SPS Agreement and in particular Articles 5.1 and 5.7. The Appellate Body strongly criticised the panel's choice to rely on a presumption of good faith compliance for purposes of determining the allocation of the burden of proof and finding that the EC established a *prima facie* case. Moreover, the Appellate Body noted the difficulty of following the panel's reasoning concerning which party had the burden of proving which allegation and pointed out that the panel prematurely stated that the US and Canada had succeeded in refuting the EC's allegation of compliance before the panel had addressed the consistency of the measure at issue with the SPS Agreement<sup>684</sup>.

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<sup>682</sup> Kim, "Burden of Proof and the *Prima Facie* case: the Evolving History and its Applications in the WTO Jurisprudence", *Richmond Journal of Global Law and Business*, 6(3), Spring/Summer 2007. See also, Broude, "Genetically Modified Rules: the Awkward Rule-Exception-Right Distinction in *EC-Biotech*", *World Trade Review*, 6(2), 2007, p. 215-231.

<sup>683</sup> Panel report, *EC – Biotech*, paras. 7.2976. This finding is contrary to the finding of the panel in *Japan – Apples*, which held that the burden of proof under Article 5.7 is on the respondent. The Appellate Body in that case noted that this finding was not appealed, which the panel in *EC – Biotech* took as expressing the Appellate Body's reservation with regard to this allocation of the burden of proof. Prévost, "Opening Pandora's Box: The Panel's Findings in the *EC-Biotech Products Dispute*", *Legal Issues of Economic Integration*, 34(1), 2007, p. 84-85 (footnote 81).

<sup>684</sup> Appellate Body report, *EC –Hormones II*, para. 581-583.

#### 4.3.2. TBT Agreement

Article 2.4 of the TBT Agreement imposes an obligation upon the Member States to use relevant international standards as a basis for their technical regulations and standards. This obligation shifted the burden of explanation on the party deviating from relevant international standards (TBT Article 2.5). If the party was not able to discharge its burden by showing that the relevant international standard was inappropriate or ineffective to achieve the legitimate regulatory objectives pursued by the regulation, then it could be found to infringe its obligations under the TBT<sup>685</sup>.

However, the same Article 2.4 of the TBT Agreement establishes that if international standards are ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, Members are allowed not to follow such standards.

In the case *EC – Sardines*, the panel determined, on the basis of the accepted jurisprudence of *US – Shirts*, that the language of Article 2.4 created an exception to the general rule in favour of international standards<sup>686</sup>. In the panel's view, an importing Member that based a challenged technical regulation on a relevant international standard was required to establish that it nevertheless satisfied the conditions set out in the second part of Article 2.4, which the panel considered to be an exception<sup>687</sup>. This placed the burden of proving the exception on the EC as the party claiming it. Thus the complainant (Peru) had the burden of establishing a *prima facie* of proving the existence of a technical regulation and of a relevant international standard, while it was for the respondent (EC) to demonstrate that

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<sup>685</sup> Heiskanen, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, 38(1), 2004, p. 6-9. Note that the Party that is not able to demonstrate that the existing international standards are inappropriate to pursue its objectives, would infringe its obligations under the TBT Agreement even if the contested measure were not discriminatory, i.e. they do not breach the MFN and NT obligations. *Ibidem*, p. 6.

<sup>686</sup> Panel report, *EC - Sardines*, para. 7.50.

<sup>687</sup> Zhu and Donaldson, *Analysis of Appellate Body Jurisprudence Regarding Burden of Proof When Parties Invoke "Affirmative Defence" or Autonomous Rights*, Paper, Geneva, July, 2007, p. 4.

the international standard was an ineffective or inappropriate means to fulfil the legitimate objectives pursued<sup>688</sup>.

In appeal the Appellate Body reversed this finding and found, instead, that given the “strong conceptual similarities” between, on the one hand, Articles 3.1 and 3.3 of the SPS Agreement and, on the other hand, Article 2.4 of the TBT Agreement<sup>689</sup>, the principle articulated by the Appellate Body in *EC – Hormones* should be applied to determine the allocation of the burden of proof under Article 2.4 of the TBT Agreement. Therefore, the Appellate Body adopted the same standard of proof as in *Hormones* to conclude that there is no “general rule-exception relationship” in Article 2.4<sup>690</sup>. The Appellate Body reiterated that some provisions labelled as exceptions are rather qualifications of the main obligation and concluded that TBT Article 2.4 is like SPS Article 3.3 and both agreements permit a WTO Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard<sup>691</sup>, provided that such measures comply with the relevant WTO provisions<sup>692</sup>. The Appellate Body stated:

“We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no "direct bearing" on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the TBT Agreement and, on the other hand, Articles 3.1 and 3.3 of the SPS Agreement, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the SPS Agreement is a requirement that Members base their sanitary or

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<sup>688</sup> Panel report, *EC – Sardines*, para. 7.50-7.52. Mathis, “WTO Panel Report, European Communities – Trade Description of Sardines, WT/DS231/R, 29 May 2002”, *Legal Issues of Economic Integration*, 29(3), 2002, p. 339. The panel justified the inconsistency between its approach to TBTA Article 2.4 and the *Hormones* Appellate Body’s approach to the SPS, arguing that the system of risk assessment under the SPS was a discrete alternative mechanism for national standard setting, not an exception to a general rule in favour of harmonization. Panel report, *EC – Sardines*, para. 7.50, footnote 70. McDonald, “Domestic Regulation, International Standards and Technical Barriers to Trade”, *World Trade Review*, 4(2), 2005, p. 22-23.

<sup>689</sup> Appellate Body report, *EC - Sardines*, para. 274.

<sup>690</sup> Appellate Body report, *EC - Sardines*, para. 275. McDonald, “Domestic Regulation, International Standards and Technical Barriers to Trade”, *World Trade Review*, 4(2), 2005, p. 22-23.

<sup>691</sup> Appellate Body report, *EC - Sardines*, para. 274.

<sup>692</sup> Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better?*, in Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 338.

phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the TBT Agreement is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the SPS Agreement permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the SPS Agreement, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the TBT Agreement, a Member may depart from a relevant international standard when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation.

Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the SPS Agreement and, on the other hand, Article 2.4 of the TBT Agreement, we see no reason why the Panel should not have relied on the principle we articulated in *EC – Hormones* to determine the allocation of the burden of proof under Article 2.4 of the TBT Agreement. In *EC – Hormones*, we found that a "general rule-exception" relationship between Articles 3.1 and 3.3 of the SPS Agreement does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3. We reached this conclusion as a consequence of our finding there that "Article 3.1 of the SPS Agreement simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement". Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the SPS Agreement, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru—as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the TBT Agreement of the measure applied by the European Communities—to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the

EC Regulation”<sup>693</sup>. (footnotes omitted, emphasis original).

The Appellate Body’s rejection of a “general rule-exception relationship” in respect to international standards accords a greater degree of deference to sovereign policy choices than the panel’s approach to Article 2.4. Placing on the complaining party the burden of proving inconsistency with all of Article 2.4 will make it easier for Members to maintain higher domestic measures<sup>694</sup>.

However, the reversal of the panel’s finding on burden of proof seems not to be fully justified in the context of Article 2.4 of the TBT agreement. In fact, under Article 2.4 Member States are required to use international standards “*except* where they would be ineffective or inappropriate to achieve a legitimate objective”<sup>695</sup>. The use of the word “except” would deem the provisions as an affirmative defence to the general obligation, i.e. a general exception<sup>696</sup>.

Conversely, Article 3.3 of the SPS Agreement is a generally stated provision that Member States may introduce SPS measures which result in a higher level of protection than would be achieved by measures based on international standard. The wording here is not that of an exception provision, but rather that of a provision establishing an autonomous right. Hence, the strong conceptual similarities between the SPS Agreement and TBT Agreement are not so “strong”, as far as their conception of the role of international standards is concerned.

Moreover, allocating the burden of proof on the complainant, the Appellate Body seems to reject the theory that in a choice between laying the burden of proof on the better or on the worse informed party, it is normally better to put it on the more informed party:

“There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be

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<sup>693</sup> Appellate Body report, *EC - Sardines*, para. 274-275.

<sup>694</sup> WTO, “Necessity tests in the WTO”, Note by the Secretariat, S/WPDR/W/27, 2 December 2003, p. 14, para. 49. McDonald, “Domestic Regulation, International Standards and Technical Barriers to Trade”, *World Trade Review*, 4(2), 2005, p. 22-23.

<sup>695</sup> TBT Agreement, Article 2.4, emphasis added.

<sup>696</sup> Heiskanen, “The Regulatory Philosophy of International Trade Law”, *Journal of World Trade*, 38(1), 2004, p. 30-31.

encountered by the complainant and the respondent in collecting information to prove a case<sup>697</sup>.

It seems to be too burdensome, where not impossible, for the complainant to assert the appropriateness or effectiveness of the measure in respect of objectives which it would have to guess<sup>698</sup>.

This report may reflect the Appellate Body reluctance to require from a Member State a burdensome justification of its deviation from an international standard in cases of non-discriminatory domestic regulations which nonetheless violate Members' obligations under the TBT<sup>699</sup>.

Alternatively, the Appellate Body ruling could also suggest the intent not to make it too burdensome for a Member to deviate from the international standards, considering the their dubious legitimacy in the WTO legal system<sup>700</sup>. However, the imperfection and incongruence of the WTO covered Agreements cannot be fixed by the Appellate Body, which as a judiciary body, cannot act as a legislator<sup>701</sup>. Moreover, a procedural tool as the burden of proof does not seem to represent the proper method of dealing with such matters, which would be better addressed in substantive terms rather than procedural<sup>702</sup>.

#### 4.4. Agreement on Anti-dumping

Dumping is not unfair trade practice *per se*. It was the anti-dumping, rather than the dumping, that was the target of disciplinary action under the GATT Article VI, as well as under the WTO Agreement on Anti-Dumping. This is because the imposition of anti-dumping duty is contrary to the fundamental principles of

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<sup>697</sup> Appellate Body report, *EC-Sardines*, para. 281.

<sup>698</sup> Horn and Weiler, *European Communities – Trade Description of Sardines (WT/DS231/R)*; *DSR 2002: VIII, 3359*; *DSR 2002: VIII, 3451*: *Textualism and its Discontent*, in Horn and Mavroidis (eds), *The American Institute Reporters' Studies on WTO Case Law. Legal and Economic Analysis*, Cambridge University Press, 2007, p. 567-568.

<sup>699</sup> Heiskanen, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, 38(1), 2004, p. 9 and 32.

<sup>700</sup> Mavroidis, *Looking for Mr and Mrs Right: Ten Years of the Appellate Body at the WTO*, in (Sacerdoti, Yanovich and Bohanes (eds), *The WTO at Ten. The contribution of the Dispute Settlement System*, Cambridge University Press, Cambridge, 2006, p. 355.

<sup>701</sup> *Ibidem*.

<sup>702</sup> Heiskanen, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, 38(1), 2004, p. 32.

“tariff bindings” (by raising import duties above the bound rates) and MFN (by applying different tariff rates to different GATT Members).

For applicants in a commercial defence dispute, the burden of proof may constitute a more formidable hurdle than in other areas of WTO law. This is for two reasons. First, anti-dumping disputes are fact-intensive and often fact-decisive. At the same time, the respondent, i.e. the WTO Member that imposed the measure, often has a monopoly position as the possession of all facts because of the confidentiality system that prevail in most jurisdictions<sup>703</sup>. Such confidentiality systems preclude applicants from gaining access to factual information with regard to which confidential treatment has been claimed, either by the respondent or its domestic industry<sup>704</sup>.

For the most part, WTO panels and the Appellate Body considering anti-dumping disputes have respected the well-known rule on burden of proof that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof<sup>705</sup>.

The US has routinely argued in those cases in which it is the defending party that Article VI of the GATT is not an exception. On the contrary, it argues that Article VI and the Anti-Dumping Agreement confer a right to impose anti-dumping duties. To diminish this right, by characterizing Article VI and the Anti-Dumping Agreement as “derogations”, would constitute an impermissible failure to respect this balance<sup>706</sup>. In the *US-Japan Steel* case, the US argued that anti-dumping measures do not constitute exceptions from the rest of the WTO framework, and that these measures are subject to the same rules of interpretation as any other

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<sup>703</sup> Vermulst and Graafsma, *WTO Disputes. Anti-Dumping, Subsidies and Safeguard*, Cameron May, London, 2002, p. 85.

<sup>704</sup> The problem is most acute with regard to the pre-initiation determination of standing in anti-dumping cases, not only because the determination entirely relies on confidential information supplied by the petitioning domestic industry and confidential analysis thereof by the domestic authorities, but also because often few details regarding this standing determination are provided in the notice of initiation of the proceeding. Even though the standing provisions impose positive obligations on the administering authority, panels have assigned the burden of proof of establishing a *prima facie* to the applicant. The respondent therefore has the strategic advantage that it can decide whether to provide such information to the panel and, if so, which portions. *Ibidem*, p. 86.

<sup>705</sup> Choi and Gao, “Procedural Issues in the Anti-Dumping Regulations of China: a Critical Review Under the WTO Rules”, *Chinese Journal of International Law*, 5(3), 2006.

<sup>706</sup> See, e.g., Panel report, *Korea - DRAMS*, paras. 4.77-4.80.

provision of the other WTO Agreements, except that they enjoy a more deferential standard of review<sup>707</sup>.

On the other hand, some other WTO Members have endorsed, either explicitly or implicitly, the position that, although anti-dumping measures are authorized under international trade rules, WTO Members have tried to constrain the use and abuse of anti-dumping measures to protect the trade liberalizing principles that underlie other WTO obligations<sup>708</sup>. As a result, the WTO permits only anti-dumping measures that comply with a specific and detailed set of legal disciplines<sup>709</sup>. In the *US-Japan Steel* case, Japan forcefully argued that the threshold of the US for application of anti-dumping measures is becoming lower and lower, while the anti-dumping measures themselves are erecting higher and higher barriers to trade. Therefore the panel should reject the result-oriented and economically dubious determinations of dumping, injury, and causation by the US in that case<sup>710</sup>.

Panels and the Appellate Body seem to have adopted a relatively middle ground. The panels have generally required the complaining party (i.e. the exporting country) to present a *prima facie* case of violation of the Anti-Dumping Agreement. Where the complaining party presents a *prima facie* case in respect of a claim, it is for the defending party to provide an effective refutation by submitting its own evidence and arguments in support of the assertion that the challenged activities are consistent with its obligations under the Anti-Dumping Agreement<sup>711</sup>.

In *US—DRAMs*, Korea initially argued that anti-dumping measures constitute “derogations” from alleged free-trade principles of the WTO<sup>712</sup>. Therefore, the

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<sup>707</sup> Panel report, *US-Japan Steel*, Annex A-2, para. 52. See also Spamann, “Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis”, *Journal of World Trade*, 38(3), 2004.

<sup>708</sup> Yu, “Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System”, *Columbia Journal of Asian Law*, 15, Spring 2002, p. 293.

<sup>709</sup> Panel report, *US-Japan Steel*, Annex A-1, paras. 43-45.

<sup>710</sup> Panel report, *US-Japan Steel*, Annex A-1, para. 45.

<sup>711</sup> Yu, “Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System”, *Columbia Journal of Asian Law*, 15, Spring 2002, p. 293.

<sup>712</sup> Panel report, *US—DRAMs*, para. 4.90. Later in the proceeding, Korea distanced itself from this assertion.

burden of proof should be on the party applying the anti-dumping measure<sup>713</sup>. The panel in rejecting these notions, had noted that Korea had failed to “advance anything beyond conclusory arguments in support of its claim”<sup>714</sup>. Consequently, the panel held that Korea had failed to establish a *prima facie* case that the United States had violated any provision of the Anti-Dumping Agreement<sup>715</sup>.

One of the most important cases on the burden of proof is *Poland-Steel*, where Poland argued that, under the Anti-Dumping Agreement, anti-dumping duties are an exception to the otherwise applicable freedom to trade between WTO members<sup>716</sup>. It reasoned that anti-dumping measures may be levied only “in order to offset or prevent dumping”<sup>717</sup>, since WTO Members have agreed that anti-dumping measures may be applied only (1) “under the circumstances provided for in Article VI, and pursuant to investigations initiated and conducted in accordance with Anti-Dumping Agreement”<sup>718</sup>; (2) “where all requirements for the imposition have been fulfilled”, including a proper determination of both dumping and injury<sup>719</sup>; and (3) “shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury”<sup>720</sup>.

The panel seemed to agree with Poland and stated:

“We believe that just as the extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence, so also a panel’s extensive authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable to such facts is not conditional in any way upon a party having established, on a *prima facie* basis, a claim or defence. We view this authority as essential in order to carry out our mandate and responsibility under the DSU and the AD Agreement”<sup>721</sup>.

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<sup>713</sup> Layton and Miranda, “Advocacy Before World Trade Organization Dispute Settlement Panels in Trade Remedy Cases”, *Journal of World Trade*, 37(1), 2003, p. 88-89.

<sup>714</sup> Panel report, *US—DRAMs*, para. 6.69.

<sup>715</sup> Panel report, *US—DRAMs*, paras. 6.69 and 6.80.

<sup>716</sup> Panel report, *Poland-Steel*, para. 48.

<sup>717</sup> Panel report, *Poland-Steel*, para. 48.

<sup>718</sup> Anti-Dumping Agreement, Article 1.

<sup>719</sup> Anti-Dumping Agreement, Articles 2, 3, 9.1 and Article VI.1 and VI.6 of GATT 1994.

<sup>720</sup> Anti-Dumping Agreement, Article 11.1.

<sup>721</sup> Panel report, *Poland-Steel*, para. 7.239.

The panel claimed that it “must examine whether and how the Thai investigating authorities evaluated all the relevant factors having a bearing on the state of the industry under Article 3.4” and held that the complaining party bears the burden of establishing a violation of a provision of a covered agreement does not ‘freeze’ a panel into inaction<sup>722</sup>. Thailand appealed to the WTO Appellate Body and challenged the panel decision under the burden of proof. Specifically, it alleged that the panel did not make specific and explicit findings whether Poland, as a claimant, had established a *prima facie* case of violation, and that the panel improperly made Poland’s case for it. However, the Appellate Body upheld the panel decision and concluded that a WTO panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case. In doing so, it cited its ruling in the *Korea-Dairy* case that no provision in the DSU requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent’s defence and evidence”<sup>723</sup>, and recalled that the panel is not required to state expressly which party bears the burden of proof in respect of every claim made<sup>724</sup>.

Even though a panel is justified to resort to Article 13.1 of the DSU, it may be reluctant to do so in practice. These facts give respondents with the sole access to confidential information, an unfair advantage in WTO dispute settlement, which is disproportionately important in commercial defence cases and affect due process and fair play<sup>725</sup>.

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<sup>722</sup> Panel report, *Poland-Steel*, para. 7.239.

<sup>723</sup> Appellate Body report, *Poland-Steel*, para. 132, referring to the Appellate Body report, *Korea-Dairy*, para. 145.

<sup>724</sup> Appellate Body report, *Poland-Steel*, para. 133, referring to the Appellate Body report, *India-Quantitative Restrictions*, para. 137.

<sup>725</sup> In appropriate cases the burden of proof could be shifted to the respondent. Alternatively, the possibility could be created for applicants and the panel to obtain access to the full confidential file in the course of panel proceeding. The release of such confidential information could be subject to appropriate confidentiality provisions, applicable to both panellists and Members of the delegations. There is already ample precedent in WTO dispute settlement proceeding for such conditions. Vermulst and Graafsma, *WTO Disputes. Anti-Dumping, Subsidies and Safeguard*, Cameron May, London, 2002, p. 88-89.

The Anti-Dumping Agreement also expressly regulate the submission and admissibility of evidence.

To determine whether a product is dumped, the anti-dumping authority of the importing country must determine whether there is a difference between the export price and the normal value of the product. In *Argentina - Ceramic Tiles*, the panel interpreted Article 6 entitled “Evidence” of the Anti-dumping Agreement, which expressly deals with evidence required and the opportunity to present evidence<sup>726</sup>, and confirmed that the burden of satisfying oneself of the accuracy of the information is on the investigating authority:

“Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying. [...] We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require”<sup>727</sup>  
(footnotes omitted)

In the context of the Anti-dumping Agreement, one could argue that whereas Article 6.8 permits authorities to make determinations on the basis of the facts available, this is not so if the interested party can prove that it acted to the best of its ability in the sense of point 5 of Annex II. Therefore, the provisions can be considered an affirmative defence, in which the party invoking a defence has the burden of establishing it<sup>728</sup>. Annex II to the Anti-dumping Agreement specifies that information which should be taken into account is “information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, (and) which is supplied in a timely

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<sup>726</sup> In particular, the panel interpreted Article 6.6 of the Agreement on Anti-Dumping provides that: “[...] the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based”.

<sup>727</sup> Panel Report on *Argentina - Ceramic Tiles*, para. 6.57.

<sup>728</sup> Vermulst and Graafsma, *WTO Disputes. Anti-Dumping, Subsidies and Safeguard*, Cameron May, London, 2002, p. 83.

fashion...”<sup>729</sup>. On the other hand paragraph 5 indicates that even if information is not “ideal in all respects” this should not justify it being disregarded “provided the interested party has acted to the best of its ability”. Where evidence is not accepted, the supplying party should be informed and given reasons and given an opportunity to provide other evidence<sup>730</sup>.

The issue of burden of proof in the context of the Anti-Dumping Agreement also arises concerning the determination of injury.

Determination of injury for antidumping purposes must “be based on positive evidence and involve an objective examination...” of relevant data. Article 3.5 of the Anti-dumping Agreement indicates that demonstration of a causal relationship between dumping and injury “shall be based on an examination of all relevant evidence before the authority. The authority shall also examine any known factors other than the dumped imports’ which are also injuring the domestic injury<sup>731</sup>. A determination of threat of material injury must be based on facts and not merely allegations, conjecture or remote possibility<sup>732</sup>. Article 3.4 Anti-dumping Agreement indicates that the examination of the impact “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry”. In *Egypt - Steel Rebar*, Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities’ evaluation of all those factors on its written analysis. The panel stressed the importance of the written record in the context of an anti-dumping investigation for burden of proof purposes and held:

“Here we must emphasize that in the context of an anti-dumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record - whether in the disclosure documents, in the published determination, or in other internal documents - of how certain factors have been

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<sup>729</sup> Annex II, para. 3, AD Agreement.

<sup>730</sup> Annex II, para. 6, AD Agreement. See e.g.,

<sup>731</sup> Article 3.5 AD Agreement.

<sup>732</sup> Article 3.7 AD Agreement.

interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent. Thus, while Egypt attempts to derive support from the panel report in the *US - Hot-Rolled Steel* dispute for its position that Article 3.4 does not require an explicit written analysis of all of the factors listed therein, to us, the findings in that dispute confirms our interpretation, in that what was at issue, was the substantive adequacy of the authority's written analysis of *each* of those factors.<sup>733</sup> (footnote omitted).

Standard of proof is different when the relevant Agreement expresses the degree of likelihood of a certain outcome. For example, Article 3.7 of the Anti-dumping Agreement refers to a protective action being possible where 'material injury would occur'. The amount of evidence required will also depend on the stage of the process at issue. In *United States – Softwood Lumber*, the panel indicated that the evidence sufficient to justify an investigation would necessarily be less than that required at the time of a final determination<sup>734</sup>. Nevertheless, it must be more than mere allegation or conjecture and must be founded on a factual basis<sup>735</sup>.

Standard of proof would also be different in case dealing with a provision such as Article 11.2 of the Anti-dumping Agreement. This stipulates that an anti-dumping duty is no longer to be applied when it is no longer 'necessary to offset dumping' that is causing injury. Because the duty can only be maintained where it is 'necessary', it ought to be a lower evidentiary burden to show that this is not the case. The complainant still carries the burden of proof. The panel in *US - DRAM* has also said that:

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<sup>733</sup> Panel Report on *Egypt - Steel Rebar*, para. 7.49. See also Spamann, "Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis", *Journal of World Trade*, 38(3), 2004.

<sup>734</sup> GATT Panel Report, *United States – Measures Affecting Import of Softwood Lumber from Canada*, BISD 40S/358, para. 332.

<sup>735</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 574.

“The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be "necessary" in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the "necessity" standard, even where the need for the continued imposition of an anti-dumping duty is tied to the "recurrence" of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping”<sup>736</sup>.

Article 10.7 of the Anti-dumping Agreement refers to ‘sufficient evidence’. What will be sufficient depends upon the determination in question. The type of evidence needed to justify initiation of an investigation would be less than that needed to make a preliminary or final determination<sup>737</sup>.

In *US – Hot Rolled Steel* the panel considered that the question whether the establishment of the facts by domestic authorities was ‘proper’ as referred to in Article 17.6(i) of the Anti-dumping Agreement does not involve the question whether all relevant facts were considered including those that might detract from an affirmative determination. It merely involves determining whether relevant and

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<sup>736</sup> Panel report, *US – DRAM*, para. 6.43.

<sup>737</sup> Panel report, *Mexico – HFCS*, para. 7.97; Panel report, *Guatemala – Cement I*, para. 7.77; Panel Report, *US – Hot Rolled Steel*, para. 7.153. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 575.

reliable information was collected. Thus it essentially goes to the investigative process<sup>738</sup>. The issue of whether relevant facts were ignored goes to the second element, namely whether the evaluation of the facts was unbiased and objective. The US argued that the panel could not consider evidence that was not before the investigating authority under the anti-dumping investigation. The US relied on Article 17.5(ii) of the Anti-dumping Agreement and argued that it is not the panel's role to collect new data or to consider evidence which could have been presented to the decision maker but was not<sup>739</sup>. This view was approved by the panel<sup>740</sup>.

Article 11.3 of the Anti-dumping Agreement provides that any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This “sunset clause” has been interpreted by the Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* regarding its implications for the allocation of the burden of proof. In particular, the panel interpreted the provision as laying down a mandatory rule and an exception. Indeed, Members are required to terminate an anti-dumping duty within five years of its imposition “*unless*” the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated<sup>741</sup>. Therefore, the authorities invoking the sunset review bear the burden of demonstrating that the condition set out in the provision are satisfied.

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<sup>738</sup> Panel report, *US – Hot Rolled Steel*, para. 7.26.

<sup>739</sup> Panel report, *US – Wheat Gluten*, para. 8.6.

<sup>740</sup> Panel report, *US – Hot Rolled Steel*, paras. 7.6-7.7.

<sup>741</sup> Appellate Body report, *US — Corrosion-Resistant Steel Sunset Review*, para. 104.

#### 4.5. Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures does not contain a preamble or specific provisions on its object and purpose; however, it was noted that WTO regulation, like the previous discipline under the GATT, have a twofold objective<sup>742</sup>: the establishment of a framework of rights and obligations relating to subsidies and countervailing duties, and the creation of a set of rules which WTO Members must respect in the use of such duties<sup>743</sup>.

The issue of the allocation of the burden of proof has been addressed also in the context of disputes challenging the admissibility of subsidies and countervailing measures under the WTO SCM Agreement, which aims at regulating the use of In *Canada - Aircraft*, Canada justified its refusal to provide information on the disputed financing of the transaction at issue on the grounds that Brazil had not established a *prima facie* case that such financing constituted a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. The Appellate Body, referring to the concept of *prima facie* case for inconsistency, stated:

"[...] 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. Furthermore, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. However, no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party. That competence is necessarily vested in the panel under the

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<sup>742</sup> Hoekman and Kostecki, *The Political Economy of the World Trading System*, Oxford University Press, 1995, p. 106.

<sup>743</sup> In *US-Germany Steel*, the Appellate Body agreed with the panel that the objectives and purposes of the *SCM Agreement* include "the establishment of a framework of rights and obligations relating to countervailing duties, and the creation of a set of rules which WTO Members must respect in the use of such duties". Appellate Body report, *US-Germany Steel*, para. 74.

DSU, and not in the Members that are parties to the dispute”.<sup>744</sup>

The jurisprudence on burden of proof under the SCM can also be examined with respect to the relevant exception provisions. In the context of the SCM an affirmative defence can be found in Annex I, item (k), second paragraph which establishes that:

“Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement”.

In *Brazil - Aircraft (Article 21.5 - Canada)*, Brazil asserted that the first paragraph of item (k) could be interpreted in an *a contrario* manner, so as to establish that subsidies constituting payments, of all or part of the costs incurred by exporters or financial institutions in obtaining credits, but which were not used to secure a material advantage in the field of export credit terms, would not be prohibited export subsidies within the meaning of Article 3.1(a). The Appellate Body found that Brazil’s argument under item (k)<sup>745</sup> constituted an alleged affirmative defence for which Brazil bore the burden of proof. Referring to its report on *US - Shirts*, the Appellate Body confirmed that Brazil, as the party asserting a defence, bore the burden of proof of proving that the revised PROEX was justified under the first paragraph of item (k). However, the Appellate Body did not make an explicit

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<sup>744</sup> Appellate Body report on *Canada - Aircraft*, para. 192. See also Appellate Body report on *Canada - Aircraft*, paras. 217-219.

<sup>745</sup> Item (k) of Annex I of the SCM Agreement: “The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members, or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement”.

finding on whether or not it was permissible to use the first paragraph of item (k) in an *a contrario* manner as an affirmative defence. Rather, the Appellate Body found that Brazil had not met its burden of proof of showing that the PROEX payments were not used to secure a material advantage in the field of export credit terms and set forth in what manner Brazil could successfully discharge its burden of proof:

“We recall that, before the original panel in *Brazil – Aircraft*, Brazil conceded that it had the burden of proof in demonstrating its alleged "defence" under item (k). However, in these Article 21.5 proceedings, Brazil argues that this burden of proof, under item (k), is on Canada. In our view, the fact that the measure at issue was "taken to comply" with the "recommendations and rulings" of the DSB does not alter the allocation of the burden of proving Brazil's "defence" under item (k). In this respect, we note that Brazil concedes that the revised PROEX measure is, in principle, prohibited under Article 3.1(a) of the *SCM Agreement*; yet Brazil asserts nonetheless that the PROEX measure is justified, under the first paragraph of item (k). Thus, in our view, Brazil is, clearly, using item (k) to make an affirmative claim in its defence [...]”<sup>746</sup>.

The panel on *Brazil - Aircraft (Article 21.5 - Canada II)* considered that, while the programme as such allows the Member to make payments in such a way that they do not secure a material advantage in the field of export credit terms, payments under the programme are not the payment by the Member of “all or part of the costs incurred by exporters or financial institutions in obtaining credits”. Therefore, the panel concluded that considered that Brazil had failed to demonstrate the required elements for its defence under the first paragraph of item (k) and that, in any event, the first paragraph of item (k) cannot, as a legal matter, be invoked as an affirmative defence<sup>747</sup>. However, the panel also noted that the second paragraph of item (k) provides for an “exception” from any prohibition on

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<sup>746</sup> Appellate Body report, *Brazil - Aircraft (Article 21.5 - Canada)*, paras. 66-67. Note that the panel on *Canada - Aircraft (Article 21.5 - Brazil)* did not state explicitly that Canada bore the burden of proving that its measure qualified for the “safe haven” clause under the second paragraph of item (k) of the Illustrative List. However, the panel termed Canada’s invocation of the second paragraph of item (k) a “defence to Brazil’s claim”. Panel report on *Canada - Aircraft (Article 21.5 - Brazil)*, para. 5.73.

<sup>747</sup> Panel report, *Brazil - Aircraft (Article 21.5 - Canada II)*, para. 5.276.

export subsidies, such that it may be invoked as an affirmative defence to a claim of violation:

“On a reading which gives meaning to all of the terms used, the second paragraph suggests that export credit practices which are in conformity with the interest rates provisions of the relevant international undertaking *are* export subsidies - and, as such, would normally be prohibited under the provisions of Article 3 of the SCM Agreement -, but that they are nevertheless not *prohibited* under the SCM Agreement”. And “This interpretation leads us to the conclusion that the second paragraph of item (k) provides for an exception from any prohibition on export subsidies laid down elsewhere in the SCM Agreement. The fact that the second paragraph does not, itself, impose *obligations* supports that conclusion”. And “Consistently with our view that the second paragraph of item (k) makes available an exception, it must be possible to invoke it as an affirmative defence to a claim of violation. As is clear from relevant WTO jurisprudence, the burden of establishing an affirmative defence rests with the party raising it.”<sup>748</sup> (emphasis original)”

The distinction between an autonomous right and an exception may not always be readily evident. In *US - FSC (Article 21.5 - EC)*, the Appellate Body further clarified that, unlike an autonomous right, an affirmative defence does not determine the proper scope of a general rule<sup>749</sup>. More specifically, the Appellate Body addressed the issue of the burden of proof under the fifth sentence of footnote 59 of item (e) of the SCM Agreement<sup>750</sup> and upheld the findings of the panel in this regard. In reviewing the panel’s findings, the Appellate Body considered whether the footnote provides the “proper scope” of the Article 3.1(a) obligations, or whether it determines an “exception” for a measure that is otherwise an export contingent subsidy. The Appellate Body concluded that footnote 59 does not modify the scope of the definition of a “subsidy” in Article 1.1, the scope of item 1(e) of the Illustrative List, nor the meaning of

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<sup>748</sup> Panel report, *Brazil - Aircraft (Article 21.5 - Canada II)*, paras. 5.61-5.63.

<sup>749</sup> Appellate Body report, *US - FSC (Article 21.5 - EC)*, para. 128.

<sup>750</sup> Item (e) of Annex I of the SCM Agreement: “The full or partial exemption remission, or deferral specifically related to exports, of direct taxes<sup>58</sup> or social welfare charges paid or payable by industrial or commercial enterprises”. Fifth sentence of footnote 59 of item (e) of the SCM Agreement: “Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member”.

export contingent subsidies under Article 3.1(a). The Appellate Body thus concluded that: (i) measures falling within the scope of footnote 59 may continue to be export subsidies under Article 1.1; and (ii) the fifth sentence of footnote 59 is an “exception” to the legal regime applicable to export subsidies under Article 3.1(a), by allowing Members to take or adopt measures to avoid the double-taxation of foreign-source income, while the latter may continue to be considered as export subsidies, within the meaning of Article 3.1(a). The Appellate Body also concluded that footnote 59 is an “affirmative defence” that may justify a prohibited export subsidy, and that the burden of proof is on the party invoking the exception:

“[...] In the same way that we do not see the fifth sentence of footnote 59 as altering the scope of the definition of a 'subsidy' in Article 1.1 of the *SCM Agreement*, we do not see it as altering either the scope of item (e) of the Illustrative List or the meaning to be given to the term 'subsidies contingent ... upon export performance' in Article 3.1(a) of the *SCM Agreement*. Thus, measures falling within the scope of this sentence of footnote 59 may continue to be export subsidies, much as they may continue to be subsidies under Article 1.1 of the *SCM Agreement*.

The import of the fifth sentence of footnote 59 is that Members are entitled to 'take', or 'adopt' measures to avoid double taxation of foreign-source income, notwithstanding that they may be, in principle, export subsidies within the meaning of Article 3.1(a). The fifth sentence of footnote 59, therefore, constitutes an exception to the legal regime applicable to export subsidies under Article 3.1(a) by explicitly providing that when a measure is taken to avoid the double taxation of foreign-source income, a Member is entitled to adopt it.

Accordingly, as we indicated in *US - FSC*, the fifth sentence of footnote 59 constitutes an affirmative defence that justifies a prohibited export subsidy when the measure in question is taken 'to avoid the double taxation of foreign-source income'. In such a situation, the burden of proving that a measure is justified by falling within the scope of the fifth sentence of footnote 59 rests upon the responding party<sup>751</sup>.

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<sup>751</sup> Appellate Body Report, *US - FSC (Article 21.5 - EC)*, paras. 131-133.

It is worth to acknowledge the relevance of rules on burden of proof in the context of the special and differential treatment provisions contained in the SCM Agreement.

A special and differential treatment is provided in the SCM Agreement for developing country Members under Article 27, which has been interpreted as an affirmative defence to be proved by the party asserting it, i.e. the respondent.<sup>752</sup>

In *Brazil - Aircraft*, the panel and the Appellate Body were called upon to address the issue of allocation of the burden of proof under Article 27.2 and 27.4 of the SCM Agreement<sup>753</sup>. More specifically, the panel was called upon to determine the allocation of burden of proof applicable to the special provision of Article 27.7<sup>754</sup>, which establishes that the prohibition contained in Article 3.1(a) shall not apply to developing country Members, provided that the requirements of Article 27.4 are met. The panel considered that “until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a)”<sup>755</sup>. The panel hence supported the interpretation that “developing country Members are excluded from the scope of application of the substantive obligation in question provided that they comply with certain specified

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<sup>752</sup> Vermulst and Graafsma, *WTO Disputes. Anti-Dumping, Subsidies and Safeguard*, Cameron May, London, 2002, p. 83.

<sup>753</sup> Article 27.2 of the SCM Agreement: “The prohibition of paragraph 1(a) of Article 3 shall not apply to: (a) developing country Members referred to in Annex VII. (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4”. Article 27.4 of the SCM Agreement: “Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period”.

<sup>754</sup> Article 27.7 of the SCM Agreement: “The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7”.

<sup>755</sup> Panel Report, *Brazil - Aircraft*, para. 7.56.

conditions”<sup>756</sup>, confirming the interpretation according to which Article 27 is not an exception, but rather a provision that excludes the application of another<sup>757</sup>.

The panel specifically stated:

“[...] the relevant provisions of Article 27, which extend 'special and differential treatment to developing countries', serve to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of certain substantive obligations found elsewhere in the Agreement for specified periods of time”<sup>758</sup>.

Brazil argued that it benefited from the special and differential treatment for developing countries under Article 27.4 of the SCM Agreement. Canada appealed the panel’s finding that, in a case involving a claim of violation of Article 3.1(a) against a developing country Member, the complaining party has the burden of proving that the developing country Member in question has not complied with at least one of the elements set out in Article 27.4 of the SCM Agreement. Canada, on the one hand, argued that since Article 27.4 of the SCM Agreement is in the nature of a conditional exception or an affirmative defence, the respondent developing country Member has the burden of proving it. On the other hand Brazil submitted that since Article 27 is a transitional provision that contains a set of special and differential rights and obligations for developing country Members, the complaining party, namely Canada, has the burden of proving that the developing country Member is not in compliance with Article 27.4 of the SCM Agreement<sup>759</sup>.

Interestingly, the Appellate Body concluded on the basis of the plain meaning of ‘shall not apply’ in Article 27.2 of the SCM Agreement that developing countries falling under that provision do not fall within the scope of application of Article 3.1(a) of the SCM Agreement<sup>760</sup>. According to the Appellate Body, a careful reading of paragraphs 2 and 4 of Article 27 clearly reveals that ‘the conditions set

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<sup>756</sup> Panel Report, *Brazil - Aircraft*, para. 7.52.

<sup>757</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 622.

<sup>758</sup> Panel Report, *Brazil - Aircraft*, para. 7.53.

<sup>759</sup> See Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 331-332.

<sup>760</sup> Appellate Body report, *Brazil - Aircraft*, para. 139.

forth in paragraph 4 are positive obligations for developing country Members, not affirmative defences<sup>761</sup>. The Appellate Body noted that ‘paragraphs 2 and 4 of Article 27 contain a carefully negotiated balance of rights and obligations for developing country Members’<sup>762</sup>. The Appellate Body also referred to the purpose of Article 27, i.e. to provide special and differential treatment to developing countries in recognition of the fact that subsidies may play an important role in the economic development programmes of those countries<sup>763</sup>. Therefore, the Appellate Body agreed with the panel that the burden of proof was on the complaining party (a developed country) to demonstrate that the developing country Member was not in compliance with at least one of the elements set forth in Article 27.4<sup>764</sup> and stated:

“On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does *not* comply with those obligations, Article 3.1(a) *does* apply”<sup>765</sup> and “For these reasons, we agree with the Panel that the burden is on the complaining party (*in casu* Canada) to demonstrate that the developing country Member (*in casu* Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member”. (emphasis original)<sup>766</sup>

It has been noted that the criterion that the party who raises an issue must bear the burden of proving it (i.e. the *actori incumbit probatio* rule) is not followed consistently in this case. Indeed, Canada had not raised any claims under Article 27 of the SCM Agreement in its request for establishment of a panel and Article 27 was raised by Brazil. Brazil argued before the panel that because Canada had not raised Article 27, Brazil could not be found in violation of Article 3 of the

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<sup>761</sup> Appellate Body report, *Brazil - Aircraft*, para. 140.

<sup>762</sup> Appellate Body report, *Brazil - Aircraft*, para. 139.

<sup>763</sup> Appellate Body report, *Brazil - Aircraft*, para. 140.

<sup>764</sup> Appellate Body report, *Brazil - Aircraft*, para. 139.

<sup>765</sup> Appellate Body report, *Brazil - Aircraft*, paras. 140.

<sup>766</sup> Appellate Body report, *Brazil - Aircraft*, paras. 141.

SCM Agreement. Canada, on the other hand, argued that it had no obligation to include Article 27 in its panel request, because Article 27 was an affirmative defence, and, therefore, it was for Brazil to raise this provision<sup>767</sup>. Despite WTO jurisprudence has established that claims which are not properly raised in the request for establishment of a panel cannot later be considered by the panel, both the panel and the Appellate Body, nonetheless, imposed on Canada the burden of proving that Brazil did not meet the conditions contained in Article 27.2 and 27.4<sup>768</sup>.

#### 4.6. Agreement on Safeguards

Safeguards and safeguard measures refer to the right of a WTO Member to impose temporary tariffs, quotas, tariff-rate quotas or other measures to ensure that its economy or domestic industries do not suffer serious harm from imports and trade concessions<sup>769</sup>.

The WTO Safeguards Agreement amplifies and supplements Article XIX of the GATT. In itself the Safeguard Agreement is an exception to the general rule of non-discrimination in the GATT. In short, the Safeguard Agreement allows a Member State to impose import restrictions if the imported product causes or threatens to cause “serious injury to the domestic industry that produces like or directly competitive products” (Article 2). The Agreement defines the procedures for applying such a measure and developing countries have frequently relied on the Safeguards Agreement<sup>770</sup>.

As far as evidence and the allocation of the burden of proof are concerned, the Appellate Body in *US – Cotton Yarn* has held that panels are not to engage in *de*

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<sup>767</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, footnote 62.

<sup>768</sup> *Ibidem*, p. 628.

<sup>769</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, practice and policy*, Oxford University Press, 2006, p. 439.

<sup>770</sup> Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 336-337.

*novo* examinations of the facts before investigating authorities<sup>771</sup>. However, the Appellate Body has also held in the *US – Wheat Gluten* case that investigating authorities have an obligation to investigate all relevant factors to determine the causal relationship between imports and serious injury to a domestic industry in a safeguard investigation – even if the interested parties did not make arguments or present evidence regarding those issues<sup>772</sup>. This suggests there is some room for the introduction of evidence not included in the administrative record, if it is used solely for the limited purpose of demonstrating that although the investigating authorities had reasonable access to relevant information concerning additional factors, they did not conduct an objective and reasonable examination of the relevant facts<sup>773</sup>.

Additionally, the Appellate Body in *US – Steel Safeguards* stated that Article 3.1 of the Agreement on Safeguards assigns the competent authorities — not the panel — the obligation to ‘publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law’. Therefore, it is for the competent authority, and not for the panel, to explain how the facts supported its determination with respect to “unforeseen developments”. Consequently, the burden of proof is on the competent authority while the panel has the function to assess the adequacy of the “reasoned conclusions” put forward by the competent authority<sup>774</sup>.

#### **4.7. Other Agreements**

##### *Textiles and Clothing*

The Agreement on Textiles and Clothing (ATC) lapsed on January 2005. The expiry of the ten-year transition period of ATC implementation means that trade

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<sup>771</sup> Appellate Body report, *US – Cotton Yarn*, paras. 74, 76-79; Appellate Body report, *Argentina – Footwear (EC)*, para. 121.

<sup>772</sup> Andersen, *Administration of Evidence in WTO Dispute Settlement Proceedings*, in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, 2005, p. 180.

<sup>773</sup> See e.g., Ehlermann and Lockhart, “Standard of Review in WTO Law”, *Journal of International Economic Law*, 7(3), (2004), pp. 491-521.

<sup>774</sup> Appellate Body report, *US – Steel Safeguards*, para. 506.

in textile and clothing products is no longer subject to quotas under a special regime outside normal WTO/GATT rules, but is now governed by the general rules and disciplines embodied in the multilateral trading system.

However, in its ten years of operation under the WTO framework, the Agreement has been applied and interpreted by panels and the Appellate Body, also concerning procedural aspects. In particular, the allocation of the burden of proof has been examined regarding Article 6 which provides that during the transitional period Members could apply a specific safeguard mechanism.

In *US – Shirts*, a milestone in the WTO jurisprudence on burden of proof, India had argued that under the Agreement on Textiles and Clothing the burden of proof should be shifted to the importing country taking temporary safeguard action. In rejecting the Indian argument, the Appellate Body had clarified that the ATC was a transitional arrangement containing carefully negotiated language which reflects an equally carefully drawn balance of rights and obligations of Members. Hence, the transitional safeguard mechanism in Article 6 of the ATC was seen as a part of the fundamental rights and obligations of WTO Members and not as an affirmative defence<sup>775</sup>. The Appellate Body, held that it was for India to demonstrate that the United States measure had been imposed in violation of Article 6<sup>776</sup>:

“We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption. [...] The transitional safeguard mechanism provided in Article 6 of the ATC is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period. Consequently, a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the ATC. We agree with the

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<sup>775</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 555. Appellate Body report, *US – Shirts and Blouses*, p. 16.

<sup>776</sup> In so doing, the it also indirectly reversed a statement by the panel on *US - Underwear*, which had held, in a finding not reviewed by the Appellate Body, that the burden of proof under Article 6 fell upon the Member imposing the safeguard measure.

Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States 'violated the provisions of Articles 2 and 6 of the ATC'.<sup>777</sup>

If Article 6 were interpreted as an affirmative defence, the complaining party would be required to demonstrate a violation of Article 2.4 and it would have been up to the respondent to avail itself of the possibilities offered by Article 6 to excuse its conduct. This was different in *US – Shirts* where India tried to show that Article 6 had not been respected whereas it could have limited itself to arguments in the context of Article 2.4<sup>778</sup>.

#### *Trade-related Investment Measures*

The TRIMs Agreement applies to investment measures related to the trade in goods (TRIMs Article 1) and imposes on Member States an obligation to notify the measures covered by its disciplines. The TRIMs Agreement ensures standstill during the transitional period, at the end of which Member States must have eliminated all measures judged inconsistent with the TRIMs disciplines.

Article 3 of the TRIMs Agreement provides that “All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement”. In

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<sup>777</sup> Appellate Body Report on *US - Wool Shirts and Blouses*, pp. 13, 16 and 17.

<sup>778</sup> Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, Cameron May, London, 2002, p. 555. Vermulst, Mavroidis and Waer criticise the Appellate Body's conclusion. They consider that it should have been for India to prove a violation of Article 2.4 of the ATC and for the US to avail itself of Article 6 to excuse its behaviour. They imply that the situation might be different if India merely relied on an allegation of violation of Article 2.4. Yet if the Appellate Body does not describe Article 6 as an affirmative defence, the fact that India might not have referred it should not have altered the burden of proof. If in consultation the US explained to India that it was relying on Article 6, then it would have made little sense not to refer to that Article in the claim. After all a panel could have found that whether Article 2.4 was breached or not would depend on Article 6 analysis. Vermulst, Mavroidis and Waer, “The Functioning of the Appellate Body After Four Years: Towards Rule Integrity”, *Journal of World Trade*, 33(2), 1999, p. 11. See also Vermulst and Graafsma, *WTO Disputes. Anti-Dumping, Subsidies and Safeguard*, Cameron May, London, 2002, p. 83.

*Indonesia - Autos*, the panel referred to Article 3 in discussing the relationship between the TRIMs Agreement and GATT 1994:

"In this regard, we note first that on its face the TRIMs Agreement is a fully fledged agreement in the WTO system. The TRIMs Agreement is not an 'Understanding to GATT 1994', unlike the six Understandings which form part of the GATT 1994. The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter. But when the TRIMs Agreement refers to 'the provisions of Article III', it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such. Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions"<sup>779</sup>. (footnote omitted)

Therefore, the rules on burden of proof under exception provisions set out in the GATT Agreement equally apply to the TRIMs Agreement.

#### *Customs Valuation*

Tariff values can be greatly influenced by differences or anomalies in the way the valuation of goods is calculated for customs purposes<sup>780</sup>. The WTO Valuation Agreement sets forth five alternative measures of valuation<sup>781</sup>.

For customs valuation purposes, since the acceptance of the transaction value is *prima facie* based on the condition that the buyer and seller are not related, the burden of proof generally rests on the importer to demonstrate that the transaction value is otherwise acceptable: in spite of the fact that the buyer and the seller are

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<sup>779</sup> Panel Report, *Indonesia - Autos*, paras. 14.60-14.61.

<sup>780</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 263-264.

<sup>781</sup> Articles 1 to 6 of the Agreement on Customs Valuation.

related, the price is not influenced by the relationship<sup>782</sup>. The notion of the burden of proof on the importer is also reinforced by Article 17 of the Customs Valuation Agreement and by a Decision of the Committee on Customs Valuation<sup>783</sup>.

Article 20 of the Agreement on Customs Valuation provides for a special and differential treatment for developing country Members. Pursuant to paragraph 1 of Article 20, 58 developing country Members, which were not party to the 1979 Agreement on Implementation of Article VII of the GATT, requested a five-year delay in the application of the WTO Customs Valuation Agreement. This five-year delay was computed from the date of entry into force of the WTO Agreement for each of the Members concerned. However, 22 Members requested a further extension of this five-year period, pursuant to paragraph 1 of Annex III. The length of this additional extension varied by Member. Panels and the Appellate Body have not ruled on Article 20 of the Customs Valuation Agreement so far. However, the relevant rules on burden of proof would be possibly borrowed by the analogous provisions on special and differential treatment contained in other WTO Agreements.

### *Pre-shipment Inspections*

The WTO Agreement on Pre-shipment Inspection specifies certain standards for pre-shipment inspections activities. Most importantly, inspection entities must

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<sup>782</sup> Ping, “Transfer Pricing and Custom Valuation: Exploring Convergence”, *Global Trade Customs Journal*, (2(3), 2007, p. 127.

<sup>783</sup> Article 17 of the Agreement on Customs Valuation provides that: “Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes”. Decision of the Committee on Customs Valuation, G/VAL/M/1, Section F: “[...] When a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8. If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11, be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1. Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, its grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond. When a final decision is made, the customs administration shall communicate to the importer in writing its decision and the grounds therefore. [...]”.

observe certain guidelines for price verification of goods<sup>784</sup>. Dispute between pre-shipment entities and exporters are to be resolved by mutual consent<sup>785</sup>. If this is impossible, either party may refer the matter for review to the Independent Entity administered by the WTO, which will appoint a panel of three experts to decide the matter within eight working days. The decision is binding upon the parties<sup>786</sup>.

Article 2.22 of the Agreement provides that:

“By derogation to the provisions of Article 2, user Members shall provide that, with the exception of part shipments, shipments whose value is less than a minimum value applicable to such shipments as defined by the user Member shall not be inspected, except in exceptional circumstances. This minimum value shall form part of the information furnished to exporters under the provisions of paragraph 6”.

The wording of this provision could lead to deem it as an exception. However, neither panel nor Appellate Body jurisprudence on this Article, which could clarify its content with respect to the allocation of the burden of proof, exists.

### *Rules of origin*

The WTO Agreement on Rules of origin was entered into the Uruguay Round to bring about harmonised rules of origin. It provides that the “last substantial transformation” test must be used to determine origin<sup>787</sup>.

The Agreement, though, does not contain any provision that could raise issues on the allocation of the burden of proof and to date there is no jurisprudence of WTO adjudicating bodies on procedural aspects related to the application of this Article.

### *Import Licensing Agreement*

The Import Licensing Agreement is designed to minimise the trade impact of the procedural aspects of licensing when the latter is permitted under the GATT.

The Agreement includes some special and differential treatment provisions, which generally speaking only instruct WTO Members to take into account developing

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<sup>784</sup> Article 2.20 of the Agreement on Pre-shipment Inspection.

<sup>785</sup> Article 4 of the Agreement on Pre-shipment Inspection.

<sup>786</sup> Article 4, subheadings (e) and (h) of the Agreement on Pre-shipment Inspection.

<sup>787</sup> Article 3(b) of the Agreement on Rules of Origin.

countries' interests<sup>788</sup>. Therefore, such provisions cannot be described as mandatory<sup>789</sup>. However, in *EC – Poultry*, the panel did interpret the provision. Brazil argued that because of the EC's new measures caused trade distortion, since its share of poultry export to the EC had declined. The panel found that Brazil had not sufficiently established its claim and in fact had increased its export to the EC and that the EC's measure was not inconsistent with Article 2.1 of the Agreement.

The Appellate Body upheld panel's finding on this regards and made a statement which clarifies that the burden of proof is on the complainant to demonstrate that a distortion of trade occurred:

“The Panel, in examining whether there had been trade distortions in out-of-quota trade, dismissed the evidence submitted by Brazil on its falling market share. This evidence relates to Brazil's claim that the licensing system distorts total trade. According to Brazil, in holding that an increase in exports demonstrated that the decline in the percentage share in total trade was, first, not relevant and, second, not due to a violation of the *Licensing Agreement*, the Panel failed to address the real issue, which is, whether the fall in the market share was caused by the introduction of the licensing system. Brazil believes that it established a *prima facie* case of distortion of trade and that the burden of proof had shifted to the European Communities to show why the licensing system was not distorting trade. The Panel did not address this matter”<sup>790</sup>.

#### **4.8. General Agreement on Trade in Services (GATS)**

The Agreement on Trade in Services has only been interpreted in the *US-Gambling* case so far. However, the reports of the panel and the Appellate Body in this case contain interesting statements concerning the allocation of the burden of proof, especially under the GATS general exception provision enshrined in Article XIV.

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<sup>788</sup> Article 2.1 of the Import Licensing Agreement.

<sup>789</sup> Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 336.

<sup>790</sup> Appellate Body report, *EC – Poultry*, para. 19.

#### 4.8.1. Analogy of GATT Article XX and GATS Article XIV

Typically, general exceptions provisions, like GATT Article XX and GATS Article XIV, are invoked by the party complained against, and considered by the panel only once it has determined a violation of some other provisions<sup>791</sup>.

In *US—Gambling*, the panel stated that it is well established under WTO law that it is for the Member invoking the application of a justification provision (such as Article XIV of the GATS) to demonstrate that it has complied with the requirements of such a provision and a party seeking to invoke Article XIV of the GATS bears the burden of proof to demonstrate that the various elements comprising a defence under this Article have been fulfilled<sup>792</sup>.

Therefore, the complainant's task will be, in the first instance, to make a *prima facie* case of violation, while the Member maintaining the measure, as the respondent, will bear the burden of demonstrating that the measure can be justified under an exception provision<sup>793</sup>. If an exception is asserted under the Article XIV General Exceptions, then the burden of proof is on the respondent<sup>794</sup>. Where this is successful, the other party has then to rebut it. If no effective rebuttal follows then the case is decided in favour of the first party<sup>795</sup>.

Article XIV of the General Agreement for Trade in Services consists of a list of general exceptions and a *chapeau* that is almost identical to that of GATT Article XX. However, GATS provides only five grounds of exceptions from its obligations.

In particular, Members are not prevented to adopt any measure: 1) for the protection of public morals and public order; 2) for the protection of human, animal or plant life or health; 3) in compliance with laws or regulations which are

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<sup>791</sup> Abbott, *WTO Dispute Settlement Practice Relating to the Agreement on Trade Related aspects of Intellectual Property Rights*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 443-444.

<sup>792</sup> See also Fidler, *Legal Review of the General Agreement on Trade in Services (GATS) From a Health Policy Perspective*, GATS Legal Review Team of the World Health Organization (WHO), Geneva, 2005, p. 150-158.

<sup>793</sup> WTO, "Necessity tests in the WTO", Note by the Secretariat, S/WPDR/W/27, 2 December 2003, p. 11, para. 42.

<sup>794</sup> Arkell, *GATS and Domestic Regulation Disciplines and Sustainable Development: Principles and Operational Conflicts. The Challenges*, Draft presented at an ICTSD Roundtable on GATS and domestic regulation disciplines, Geneva, June 2006, p. 32-33.

<sup>795</sup> *Ibidem*.

not inconsistent with the provisions of this Agreement (including those relating to the prevention of deceptive and fraudulent practices, the protection of the privacy, safety); 4) inconsistent with Article XVII, in order to ensure equitable or effective imposition or collection of direct taxes; 5) inconsistent with Article II, in order to avoid double taxation<sup>796</sup>.

While the first three grounds of exceptions allow for deviation from any GATS provision, the last two do it only from specifically mentioned GATS provisions. As far as the first three grounds of exceptions are concerned, unless a measure is necessary to achieve the end sought, it will be judged inconsistent with GATS Article XIV.

An analysis of GATS Article XIV based on the textual criterion suggests that the drafters, similarly to Article XX GATT, created a special rule deviating from other more general rules, as it provides that “nothing in this Agreement shall be construed to prevent ...”<sup>797</sup>. Hence, the Article is an exception provision to be proved by the respondent<sup>798</sup>.

*US – Gambling*<sup>799</sup> is the first dispute involving an interpretation of GATS exception provision. In this paramount case, the panel and the Appellate Body issued a number of important procedural statements concerning the application of Article XIV.

After noting the absence of WTO jurisprudence on this provision, the panel, upheld by the Appellate Body<sup>800</sup>, stated that GATT Article XX jurisprudence may be relevant and useful for interpreting GATS Article XIV, given the textual similarity between Article XX of GATT and Article XIV of the GATS, and the similar purposes that both Articles are designed to serve<sup>801</sup>. In fact, the Appellate Body in *US - Gambling* referred to *Korea – Beef* and *EC – Asbestos* in three

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<sup>796</sup> Article XIV of the GATS.

<sup>797</sup> Grando, “Allocating the Burden of Proof in WTO Disputes: a Critical Analysis”, *Journal of International Economic Law*, 9(3), 2006, p. 620.

<sup>798</sup> Diebold, “The Moral and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole”, *Journal of International Economic Law*, 11(1), 2007, p. 59-61.

<sup>799</sup> Appellate Body report, *US – Gambling*. See also Mathis, ‘Gambling – with regulation and market access in the GATS’, *Legal Issues of Economic Integration*, 32(3), 2005.

<sup>800</sup> Appellate Body report, *US – Gambling*, paras. 309-311.

<sup>801</sup> Appellate Body report, *US – Gambling*, para. 291. The panel report of *US – Gambling* referred to the jurisprudence of GATT Article XX in paras. 6.569-6.582 and the Appellate Body in paras. 291-292.

paragraphs<sup>802</sup> as a confirmation of the analogy between the two exception provisions<sup>803</sup>.

Following the interpretations of Article XX of GATT, the Appellate Body in *US—Gambling* held that under Article XIV a two-tiered testing is appropriate. Accordingly, the measure must be provisionally justified under the concrete exception invoked, i.e. it has to fall within the scope of one of the listed exceptions, which requires that the challenged measure addresses the particular interest specified in that paragraph and that there shall be a sufficient nexus between the measure and the interest protected<sup>804</sup>. Only if the GATS-inconsistent measure satisfies all the requirements of the specific exception into which it falls, the same measures must be further applied in a non-discriminatory manner, as required by the *chapeau* of Article XIV<sup>805</sup>:

“Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or "degree of connection"—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to". Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the *chapeau* of Article XIV”<sup>806</sup>. (The original footnotes, here omitted, referred to the Appellate Body reports in *US-Shrimps* and *US-Gasoline*).

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<sup>802</sup> Appellate Body report, *US – Gambling*, para. 306-308.

<sup>803</sup> Bhala and Gantz, “WTO Case Review 2005”, *Arizona Journal of International and Comparative Law*, 23(2), 2006, p. 335.

<sup>804</sup> Appellate Body report, *US – Gambling*, para. 292.

<sup>805</sup> Appellate Body report, *US – Gambling*, paras. 292. Vermulst, Mavroidis and Waer, “The Functioning of the Appellate Body After Four Years: Towards Rule Integrity”, *Journal of World Trade*, 33(2), 1999, p. 22. The Appellate Body made clear that the complainant, in order to establish discriminatory treatment, must show evidence of patterns of enforcement and not mere individual instances of differential treatment. *US – Gambling*, Appellate Body report, para. 356. Thus, the evidential standard associated with the burden of proof under the *chapeau* of GATS Article XIV is quite demanding. Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006.

<sup>806</sup> Appellate Body report, *US-Gambling*, para. 292.

The *chapeau* of Article XIV (akin to that of GATT Article XX) provides that measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services”. Therefore, the aim of both GATT Article XX and GATS Article XIV *chapeaux* is to prohibit the application of non-compliant measures in a manner that would constitute a (1) means of arbitrary or unjustifiable discrimination between countries where like conditions prevail; or a (2) disguised restriction on trade. The *chapeau* applies disciplines to the manner in which such discriminatory or trade-restrictive measures are applied by a WTO Member<sup>807</sup>.

The purpose of the *chapeau* in both agreements is to prevent abuse of the general exceptions by WTO Members<sup>808</sup>. Analytically, a case never reaches scrutiny under the *chapeau* of Article XIV, unless a measure discriminates or restricts trade in violation of some GATS provision.

As the Appellate Body affirmed in *US—Gasoline*, the central question the *chapeau* raises is whether non-compliant measures have been “applied reasonably, with due regard to both the legal duties of the party claiming the exception and the legal rights of the other parties concerned”<sup>809</sup>.

The Appellate Body in *US – Gambling* confirmed that the *chapeau* of Article XIV focuses on the application of a GATS-inconsistent measure (as opposed to its substance) in order “to ensure that Members’ rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded to other Members by the substantive rules of the GATS”<sup>810</sup>.

It should be underlined that this important finding in *US – Gambling* came after concluding that the challenged measures could not be justified under the relevant subparagraphs of Article XIV, therefore in absence of any need to consider the *chapeau*. However, this was done in order to assist the parties in resolving the

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<sup>807</sup> Fidler, *Legal Review of the General Agreement on Trade in Services (GATS) From a Health Policy Perspective*, GATS Legal Review Team of the World Health Organization (WHO), Geneva, 2005, p. 150-158.

<sup>808</sup> *Ibidem*.

<sup>809</sup> Appellate Body report, *US – Gasoline*. Fidler, *Legal review of the General Agreement on Trade in Services (GATS) from a health policy perspective*, GATS Legal Review Team of the World Health Organization (WHO), Geneva, 2005, p. 150-158.

<sup>810</sup> Appellate Body report, *US—Gambling*, para. 339.

underlying dispute and closely following the jurisprudence of GATT Article XX<sup>811</sup>.

Interestingly, in *US - Gambling* both the respondent and the complainant appealed on the ground that the panel erred in its treatment of burden of proof under GATS Article XIV. Interestingly, both the US and Antigua argued that the panel failed to base its ruling on the other party's arguments and evidence adduced in terms of Article XIV, but instead "recycled" previous arguments and evidence submitted by both parties under different provisions<sup>812</sup>. To each party this recycling by the panel was improper since it unduly advantaged the other party.

However, the Appellate Body approved the panel's discretion to reuse those arguments and evidence previously adduced under different yet still relevant provisions<sup>813</sup>. This interpretation is one of the possible means to override the initial allocation of burden of proof by allowing the panel to effectively relieve a certain party of its burden of proof<sup>814</sup>.

#### 4.8.2. *Necessity test and allocation of burden of proof*

In *US—Gambling*, the Appellate Body interpreted the "necessity test" under Article XIV. The panel, upheld by the Appellate Body, referred to *Korea—Beef* and *EC—Asbestos* in determining that the necessity test in Articles XIV of GATS involves a "weighing and balancing test"<sup>815</sup>. The Appellate Body also affirmed that:

"[...] it is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the

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<sup>811</sup> Krajewsky, "Playing by the Rules of the Game? Specific Commitments After *US – Gambling and betting* and the Current GATS Negotiations", *Legal Issues of Economic Integration*, 32(4), 2005, p. 443-444.

<sup>812</sup> Appellate Body report, *US—Gambling*, paras. 277-279.

<sup>813</sup> Appellate Body report, *US—Gambling*, paras. 287-288. Cho, *Of the World Trade Court's Burden*, paper presented to the Jean Monnet Seminar, NYU Law School, New York, March 22, 2007, p. 10.

<sup>814</sup> Appellate Body report, *US—Gambling*, paras. 287-288. Cho, *Of the World Trade Court's Burden*, paper presented to the Jean Monnet Seminar, NYU Law School, New York, March 22, 2007, p. 10.

<sup>815</sup> The necessary test in Articles XIV of GATS involves a "weighing and balancing test" comprised of three elements: (1) the importance of interests and values that the challenged measure is intended to protect; (2) the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and (3) the trade impact of the challenged measure. Panel report, *US – Gambling*, para. 6.477).

interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’<sup>816</sup>.

The Appellate Body clarified the standard of review to be applied by a WTO adjudicating body. First, the relative importance of the interests or values pursued will be assessed<sup>817</sup>. Second, the contribution of the measure to the realisation of the ends pursued by it will be examined<sup>818</sup>. Then, the restrictive impact of the means used on international commerce will be evaluated. This third step is conducted through a comparison between the challenged measure and possible alternatives, “in the light of the importance of the interests at issue”<sup>819</sup>.

The reasonable availability of alternative measures that are more consistent with GATS proposed by the complaining WTO Member, implies that the GATS-inconsistent measure at issue is not necessary<sup>820</sup>. The Appellate Body underlined that the analysis of the availability of less trade restrictive measures is an essential element in the definition of “necessity” under GATS Article XIV(a)<sup>821</sup>. Additionally, the necessity test under GATS Article XIV is considered by the Appellate Body as equivalent to GATT Article XX, since both provisions aim at balancing competing values.

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<sup>816</sup> Appellate Body report, *US—Gambling*, para. 307.

<sup>817</sup> Appellate Body report, *US—Gambling*, para. 306.

<sup>818</sup> Appellate Body report, *US—Gambling*, para. 306.

<sup>819</sup> Appellate Body report, *US—Gambling*, para. 307.

<sup>820</sup> Pouncey and Van Den Hende, “United States Adopts a New Law Banning Cross-Border Internet Gambling, in Spite of WTO Dispute Settlement Ruling”, *International Trade Law and Regulation*, 13(1), January 2007, p. 16-18.

<sup>821</sup> An evolution of the burden to prove the existence of less restrictive alternative measures was shown on the basis of a comparison of *Korea – Beef* with *US – Gambling*. In *Korea – Beef* the Appellate Body agreed with the panel that Korea has not discharged its burden of demonstrating under Article XX(d) that alternative WTO-consistent measures were not reasonably available in order to detect and suppress deceptive practices in the beef retail sector and that the dual retail system is not justified by Article XX(d). Van Damme, “Notes, Comments, and Developments. Sixth Annual WTO Conference: an Overview”, *Journal of International Economic Law*, 9(3), 2006, p. 755. In *US – Gambling*, the Appellate Body first recognized the well-established principle that it was for the party asserting a defence to prove the defence (para. 309) and then found that “it is for a responding party to make a *prima facie* case that its measure is necessary by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be weighted and balanced in a given case” (para. 309, see also *US – Shirts*, Appellate Body report). *Ibid.*, p. 755-756.

GATS negotiators explicitly refused to impose a general necessity test on non-discriminatory domestic regulations<sup>822</sup>. However, in *US – Gambling* the panel imposed such a test through the backdoor, i.e. by finding, first that the US gambling laws are prohibited market access restrictions and, second, that such laws fall under the necessity test in Article XIV exceptions on, *inter alia*, public morals<sup>823</sup>.

The evolution of the jurisprudence concerning WTO general exception provisions centred primarily on the interpretation of the language of ‘necessary’ in the covered agreements and in Articles XX of the GATT and XIV of the GATS<sup>824</sup>. *Korea – Beef*, *EC – Asbestos*, *US – Gambling* and *Dominican Republic – Cigarettes* seem to demonstrate that the Appellate Body no longer applied a balancing test in such cases, despite what the Appellate Body explicitly claimed as such in its reports<sup>825</sup>. Moreover, these cases revealed a contradiction between the alleged balancing by panels and the Appellate Body and the discretion of WTO Members to determine their own level of protection. In practice, the analysis of the level of protection could not constitute a mathematical exercise and may necessarily imply that panels and Appellate Body assess and balance different values<sup>826</sup>.

However the Appellate Body clarified that the respondent is not requested to identify the universe of less trade-restrictive alternative measures. Rather, it is for a responding party to make a *prima facie* case that its measure is ‘necessary’ by putting forward evidence and arguments that enable a panel to assess the

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<sup>822</sup> Pauwelyn, “Rien Ne Va Plus? Distinguishing Domestic Regulation From Market Access in GATT and GATS”, *World Trade Review*, 4(2), 2005, p. 139. When considering a more or less stringent balancing requirement in GATS Article VI.4, it should be kept in mind that the non-discriminatory and non-quantitative measures at issue are not in violation of any of the obligations stipulated in GATS and do not therefore fall under any of the general exceptions provided for in Article XIV GATS. Members imposing qualification or licensing requirements should not need to bear the burden of showing that they are employing least-trade-restrictive practices. Djordjevic, “Domestic Regulation and Free Trade in Services – A Balancing Act”, *Legal Issues of Economic Integration*, 29(3), 2002, p. 319-320.

<sup>823</sup> Panel report, *US – Gambling*, paras. 6.535 and 6.565. The panel even went beyond any to-be-developed necessity requirement, by shifting the burden of proving necessity from Antigua to the US and limiting the substantive grounds for justification to the exhaustive list in Article XIV. Pauwelyn, “Rien Ne Va Plus? Distinguishing Domestic Regulation From Market Access in GATT and GATS”, *World Trade Review*, 4(2), 2005, p. 139.

<sup>824</sup> Van Damme, “Notes, Comments, and Developments. Sixth Annual WTO Conference: an Overview”, *Journal of International Economic Law*, 9(3), 2006, p. 754.

<sup>825</sup> *Ibidem*.

<sup>826</sup> *Ibidem*.

challenged measure in the light of the relevant factors to be ‘weighed and balanced’ in a given case:

“[...] it is not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party needs not to identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden”<sup>827</sup>.

The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is ‘necessary’<sup>828</sup>. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not, in fact, ‘reasonably available’<sup>829</sup>.

Thus, on the one hand, the respondent has to identify the interest or value and the ends of the challenged measures to consider other factors, like the contribution of the measure to the pursued end and its trade restrictive effect, and to balance the end and other factors. On the other hand, the complainant has to find the less trade-restrictive alternative measures reasonably available and balance the measures and the alternatives<sup>830</sup>. The goal of the challenged measures is weighed with other factors, and then against other options. Assuming that the complaining party is able to find less trade-restrictive alternative measures reasonably available, then the burden of proof shifts on the respondent, who has to prove that such measures are not available<sup>831</sup>. The bifurcated mechanism described above is

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<sup>827</sup> Appellate Body report, *US – Gambling*, para. 309.

<sup>828</sup> Appellate Body report, *US – Gambling*, para. 310.

<sup>829</sup> Appellate Body report, *US – Gambling*, para. 311.

<sup>830</sup> Bhala and Gantz, “WTO Case Review 2005”, *Arizona Journal of international and comparative law*, Vol. 23, n. 2, 2006, p. 335-336.

<sup>831</sup> *US – Gambling*, Appellate Body report, para. 311. Bhala and Gantz, “WTO Case Review 2005”, *Arizona Journal of international and comparative law*, Vol. 23, n. 2, 2006, p. 336.

essential to grant the responding Member not to disprove the negative, i.e. to identify the universe of alternatives and demonstrate that none applies<sup>832</sup>.

An interesting contradiction concerning GATS Article XIV as an exception of Article VI (Domestic Regulation) should be underlined. While the burden of proof under Article XIV rests on the respondent, the burden of proof under Article VI rests on the complainant, i.e. it is for the complainant to demonstrate that the measure is not necessary for its stated objectives<sup>833</sup>.

However, a measure which violates Article VI can in theory still be justified under the general exceptions of Article XIV, although in practice this may be very difficult. In fact, whilst Article VI.4 seems to offer a relatively broad list of legitimate policy objectives, Article XIV offers a closed list. If a measure does not fit under an open list, it is unlikely to fit under a closed list. Second, although Article VI refers to “objective and transparent criteria”, it does not include the non-discrimination and other requirements that the *chapeau* of Article XIV imposes. Thus, quite paradoxically, the exception may be more difficult to meet than the rule itself<sup>834</sup>.

In examining the evolution of the WTO jurisprudence on Article XX GATT and XIV GATS, a trend toward more deference to the responding Member has been noted<sup>835</sup>. However, WTO adjudicating bodies now appear to be deferential through a new methodology, i.e. through the burden of proof rather than the test of less trade-restrictive alternative measures<sup>836</sup>.

It should be recalled that the party who bears the burden of proof should have to prove the factual basis of its argument. If an analysis of the availability of less trade-restrictive measures is an element of the definition of ‘necessary’ in Article XIV of the GATS and the burden of proof with respect to Article XIV is on the respondent, then the respondent should have to prove all the elements of that

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<sup>832</sup> Bhala and Gantz, “WTO Case Review 2005”, *Arizona Journal of international and comparative law*, Vol. 23, n. 2, 2006, p. 337.

<sup>833</sup> Pauwelyn, “Rien Ne Va Plus? Distinguishing Domestic Regulation From Market Access in GATT and GATS”, *World Trade Review*, 4(2), 2005, p. 139.

<sup>834</sup> *Ibidem*, p. 140.

<sup>835</sup> Van Damme, “Notes, Comments, and Developments. Sixth Annual WTO Conference: an Overview”, *Journal of International Economic Law*, 9(3), 2006, p. 755.

<sup>836</sup> *Ibidem*.

definition<sup>837</sup>. Thus, the burden imposed by the necessity test of Article XIV and the *chapeau* of Article XIV are substantial and difficult<sup>838</sup> even if in many cases it is the complainant who is in a better position to present information regarding less trade-restrictive measures that could substitute the measure at issue<sup>839</sup>.

However, the initial burden of the respondent can, in most cases, likely be met by demonstrating the good faith and reasonable nature of a measure in the light of a particular public policy objective<sup>840</sup>. This demonstrates significant deference towards a Member's domestic regulators<sup>841</sup>. Such approach creates the conditions for the necessary flexibility to deal with domestic measures for the protection of relevant policy objectives<sup>842</sup>.

#### **4.9. Agreement on Trade-Related Aspects of Intellectual Property Rights**

The Agreement on Trade-Related Aspects of Intellectual Property Rights aims to provide minimum standards for each of the main categories of intellectual property rights, to establish standards of protection and enforcement, and to provide for the application of the WTO dispute settlement mechanism to resolve dispute between WTO Members.

This brief section addresses the allocation of the burden of proof under the TRIPS Agreements. It should be emphasised that, despite the relevance of intellectual property rights in the WTO framework, the case-law of panels and the Appellate Body concerning burden of proof under TRIPS Agreement is limited. Apart from the numerous references to the well-known *US – Shirts* decisions and the reiteration of the *actori incumbit probatio* rule that are contained in many cases

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<sup>837</sup> Grando, "Allocating the Burden of Proof in WTO Disputes: a Critical Analysis", *Journal of International Economic Law*, 9(3), 2006, p. 652, footnote 161.

<sup>838</sup> Fidler, *Legal Review of the General Agreement on Trade in Services (GATS) From a Health Policy Perspective*, GATS Legal Review Team of the World Health Organization (WHO), Geneva, 2005, p. 12.

<sup>839</sup> Grando, "Allocating the Burden of Proof in WTO Disputes: a Critical Analysis", *Journal of International Economic Law*, 9(3), 2006, p. 652.

<sup>840</sup> Leroux, "Sixteen Years of GATS Case Law: What Have We Learned?", *Journal of International Economic Law Advance Access*, July 10 2007, p. 41.

<sup>841</sup> *Ibidem*.

<sup>842</sup> Correa, "Implementing National Public Health Policies in the Framework of WTO Agreements", *Journal of World Trade*, 34(5), 2000, p. 118.

involving a violation of the TRIPS Agreement, the burden of proof has been only slightly addressed in this context.

A good example is the case *India - Patents (US)*, where India challenged the application of the burden of proof by the panel, arguing that the panel erroneously required the United States, the complaining party, merely to raise “reasonable doubts” suggesting a violation of Article 70.8 of the TRIPS Agreement, and subsequently placed the burden on India to dispel such doubts. The panel stated:

“As the Appellate Body report on *Shirts and Blouses* points out, 'a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim'. In this case, it is the United States that claims a violation by India of Article 70.8 of the TRIPS Agreement. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, [...] the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so (footnotes deleted)”<sup>843</sup>.

The Appellate Body rejected India’s claim that the panel erred in its application of the burden of proof in assessing Indian municipal law as, after having required the United States merely to raise ‘reasonable doubts’ suggesting a violation of Article 70.8, placed the burden on India to dispel such doubts<sup>844</sup>. Therefore, the

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<sup>843</sup> Panel report, *India – Patents (US)*, para. 7.40.

<sup>844</sup> Note that the claimant (US) argued before the panel in *India – Patents* that: “[...] the grant of an additional five years in Article 65.4 to implement the provisions on product patent protection in Article 27 of the TRIPS Agreement had been balanced against the inclusion of obligations to establish fully functional mailbox and exclusive marketing rights systems in Articles 70.8 and 70.9. India could not now be permitted to pocket the benefit of an additional five years of transition and not implement the corresponding obligation. The Appellate Body recently had made this clear in the *Wool Shirts* case, in which India had argued that under the Agreement on Textiles and Clothing (ATC) the burden of proof should be shifted to the importing country taking temporary safeguard action. In rejecting the Indian argument, the Appellate Body had clarified that the ATC was a transitional arrangement containing “carefully negotiated language.... which reflects an equally carefully drawn balance of rights and obligations of Members....”. This characterization was equally applicable to the balance between the transitional rules in Article 65.4 of the TRIPS Agreement and the obligations established in Article 70.8 and 70.9 of the TRIPS Agreement. As the Appellate Body succinctly had stated in the *Wool Shirts* report “[t]hat balance must be respected”. The *quid pro quo* for taking advantage of the transitional period was the grant of exclusive marketing rights. Far from turning Article 70.9 on its head, this represented the core balance in this area of the Agreement. If India did not want to grant patents, then it must grant exclusive marketing rights; conversely, if it did not want to grant exclusive marketing rights, then it must grant patents” (footnotes omitted). Panel report, *India – Patents*, para. 4.28.

Appellate Body upheld panel's findings concerning the allocation of the burden of proof under Article 70.8 of the TRIPS Agreement and, in answering to India's arguments, further clarified that the panel not only enunciated the correct approach to burden of proof, but also applied it correctly<sup>845</sup>. In fact, as the Appellate Body said:

“[...] 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. For these reasons, we conclude that the Panel applied the burden of proof correctly in assessing the compliance of India's domestic law with Article 70.8(a) of the TRIPS Agreement”.  
(footnotes omitted)<sup>846</sup>.

The first part of this section will examine the rules in the TRIPS Agreement concerning exceptions and the related jurisprudence, while the second part will deal with one of the few WTO provisions explicitly addressing the burden of proof, i.e. Article 34 of the TRIPS Agreement on process patents. The Article, which provides for a reversal of burden of proof, has never been examined by WTO adjudicating bodies.

#### *4.9.1. General exception provisions in the TRIPS Agreement*

The TRIPS Agreement addresses seven categories of intellectual property rights: 1) copyright and related rights; 2) trademarks; 3) geographical indications; 4) industrial designs; 5) patents; 6) layout designs of integrated circuits; 7)

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<sup>845</sup> Alavi, “On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process”, *Journal of World Trade*, 41(2), 2007, p. 335.

<sup>846</sup> Appellate Body report, *India - Patents (US)*, para. 74.

undisclosed information. The TRIPS Agreement dedicates one section to each of the above listed categories of intellectual property rights and provides for specific exception clauses for almost all of them.

As a general remark, it should be noted that in *Canada – Pharmaceutical Patents*, the panel clarified in a footnote that:

“The text of Berne Article 9(2) also served as the model for three other exceptions clauses in the TRIPS Agreement - Articles 13, 17 and 26.2, providing respectively for similar exceptions from obligations on copyright, trademarks and industrial designs. Article 13 is a nearly identical copy of Berne Article 9(2). Like Article 30, both Articles 17 and 26.2 made small changes to the text of Berne Article 9(2)”<sup>847</sup>.

In particular, TRIPS Article 13 concerning copyrights and related rights establishes that “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder”. In the case *US - Section 110(5) Copyright Act* the panel clarified that once the complainant (EC) has established a *prima facie* violation of the basic rights that have been provided under the copyright provisions of the TRIPS Agreement, including the provision incorporated by reference from the Berne Convention, then the burden rests with the United States to establish that any exception or limitation is applicable and that the conditions, if any, for invoking such exception are fulfilled<sup>848</sup>. More specifically, the panel held that:

“Thus we conclude that it is for the European Communities to present a *prima facie* case that Section 110(5)(A) and (B) of the US Copyright Act is inconsistent with the provisions of the TRIPS Agreement (including those of the Berne Convention (1971) incorporated into it). Should the European Communities fail in establishing such violation, it goes without saying that the United States would not have to invoke any justification or exception. However, we also consider that the burden of proving that any exception or limitation is applicable and that any relevant conditions are met falls on the United States as the party bearing the ultimate burden of proof for invoking exceptions” (footnote omitted)<sup>849</sup>.

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<sup>847</sup> Panel report, *Canada – Pharmaceutical Patents*, footnote 420.

<sup>848</sup> Panel report, *US - Section 110(5) Copyright Act*, para. 6.13.

<sup>849</sup> Panel report, *US - Section 110(5) Copyright Act*, para. 6.16.

Indeed, when the panel dealt with the conditions for invoking an exception under Article 13 of the TRIPS, it clarified that while both parties have to adduce evidence supporting their legal and factual arguments, it is on the United States to bear the ultimate burden of proof that Section 110(5) meets all three conditions of Article 13 of the TRIPS Agreement<sup>850</sup>. Then the panel concluded that:

“[...] the ultimate burden of proof concerning whether all of the conditions of Article 13 are met lies with the United States as the Member invoking the exception. In the light of our analysis of the prejudice caused by the exemption, including its actual and potential effects, we are of the view that the United States has not demonstrated that the business exemption does not unreasonably prejudice the legitimate interests of the right holder”.

The section of the TRIPS Agreement concerning trademarks provides for an exception under Article 17, which reads as follows: “Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties”. Neither panels nor the Appellate Body addressed the application of the exception under Article 17. However, it is possible to assume that the provision, being an exception clause of the type of Article 13<sup>851</sup>, would follow the rule on the allocation of the burden of proof described in the relevant jurisprudence on Article 13.

The section of the TRIPS Agreement concerning geographical indications does not provide for an exception clause of the type of those regarding trademarks and copyrights. In fact, Article 24 of the TRIPS Agreement establishes that Members shall enter into negotiations aimed at increasing the protection of geographical indications under Article 23<sup>852</sup> and that the Council for TRIPS shall keep under review the application of the provisions concerning geographical indications<sup>853</sup>.

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<sup>850</sup> Panel report, *US - Section 110(5) Copyright Act*, para. 6.239.

<sup>851</sup> “The text of Berne Article 9(2) also served as the model for three other exceptions clauses in the TRIPS Agreement - Articles 13, 17 and 26.2, providing respectively for similar exceptions from obligations on copyright, trademarks and industrial designs. Article 13 is a nearly identical copy of Berne Article 9(2). Like Article 30, both Articles 17 and 26.2 made small changes to the text of Berne Article 9(2)”. Panel report, *Canada - Pharmaceutical Patents*, footnote 420.

<sup>852</sup> Article 24.1 of the TRIPS Agreement.

<sup>853</sup> Article 24.2 of the TRIPS Agreement.

Therefore, the TRIPS Agreement does not foresee specific exceptions to the application of the relevant rules on the protection of geographical indications, and demands to WTO Members the creation of a legal system of protection where the reputation of a good is “essentially attributable” to its geographical origin<sup>854</sup>.

The exception clause referring to the protection of industrial designs is contained in Article 26.2 of the TRIPS Agreement, which establishes that “Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties”. There is no jurisprudence or decisions of panels and the Appellate Body regarding the application of Article 26.2. However, similarly to Article 17, it is possible to assume that the provision, being an exception clause of the type of Article 13<sup>855</sup>, would follow the rule on the allocation of the burden of proof described in the relevant jurisprudence on Article 13.

The section of the TRIPS Agreements regarding the protection of patent rights provides for an exception provision under Article 30 which, similarly to other exceptions examined above, allows Members to “provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties”. Therefore, three requirements must be met to invoke this exception: first, the exception must be limited; second, it must not unreasonably conflict with normal exploitation of the patent; finally, it must not unreasonably prejudice the legitimate expectations of the patent owner<sup>856</sup>. Indeed, in *Canada - Pharmaceutical Patents*, the panel addressed the basic structure of Article 30 and outlined the conditions for its application and then found that these conditions apply cumulatively:

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<sup>854</sup> Article 22 of the TRIPS Agreement.

<sup>855</sup> “The text of Berne Article 9(2) also served as the model for three other exceptions clauses in the TRIPS Agreement - Articles 13, 17 and 26.2, providing respectively for similar exceptions from obligations on copyright, trademarks and industrial designs. Article 13 is a nearly identical copy of Berne Article 9(2). Like Article 30, both Articles 17 and 26.2 made small changes to the text of Berne Article 9(2)”. Panel report, *Canada - Pharmaceutical Patents*, footnote 420.

<sup>856</sup> Panel report, *Canada - Patent*, para. 7.20.

“[...] The three conditions are cumulative, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 30 exception being disallowed. The three conditions must, of course, be interpreted in relation to each other. Each of the three must be presumed to mean something different from the other two, or else there would be redundancy. Normally, the order of listing can be read to suggest that an exception that complies with the first condition can nevertheless violate the second or third, and that one which complies with the first and second can still violate the third. The syntax of Article 30 supports the conclusion that an exception may be 'limited' and yet fail to satisfy one or both of the other two conditions. The ordering further suggests that an exception that does not 'unreasonably conflict with normal exploitation' could nonetheless 'unreasonably prejudice the legitimate interests of the patent owner'. ”<sup>857</sup>

On the basis of the emerging jurisprudence of panels and the Appellate Body on the allocation of the burden of proof set out in *US – Shirts*, the panel preliminarily clarified that:

“Similarly in the present case, it was the Panel's view that the EC bears the burden to present evidence and argument sufficient to establish a prima facie case that Canada has violated Articles 27.1, 28.1 and 33 of the TRIPS Agreement. It would be up to Canada to advance sufficient argument and evidence to rebut such a prima facie case. Canada has, for all practical purposes, conceded the violation of Article 28, because it has resorted to the exception of Article 30 of the TRIPS Agreement in this case. Since Article 30 is an exception to the obligations of the TRIPS Agreement, it would be up to Canada to demonstrate that the provisions of Sections 55.2(1) and 55.2(2) comply with the criteria laid down in Article 30. It is on this basis that the Panel approached the analysis of the claims submitted to it”<sup>858</sup>.

Accordingly, the panel explicitly addressed the issue of the difficulties of proving compliance with the third condition set out in Article 30, which implies the burden of proving the negative:

“The third condition of Article 30 is the requirement that the proposed exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties'. Although

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<sup>857</sup> Panel report, *Canada – Patent*, para. 7.20-7.21.

<sup>858</sup> Panel report, *Canada – Patent*, para. 7.16.

Canada, as the party asserting the exception provided for in Article 30, bears the burden of proving compliance with the conditions of that exception, the order of proof is complicated by the fact that the condition involves proving a negative. One cannot demonstrate that no legitimate interest of the patent owner has been prejudiced until one knows what claims of legitimate interest can be made. Likewise, the weight of legitimate third party interests cannot be fully appraised until the legitimacy and weight of the patent owner's legitimate interests, if any, are defined. Accordingly, without disturbing the ultimate burden of proof, the Panel chose to analyse the issues presented by the third condition of Article 30 according to the logical sequence in which those issues became defined.<sup>859</sup>

As Canada correctly discharged its burden of proving the conformity of Section 55.2(1) with each of the three conditions for an exception under Article 30, the panel concluded that the contested measure was not inconsistent with Canada's obligations under Article 28.1<sup>860</sup> of the TRIPS Agreement<sup>861</sup>. However, when reviewing the conformity of the measure under Article 27.1 and the applicability of the very same Article to the Article 30 exception clause, the panel concluded that the exception was invalid because it violated the non-discrimination requirement of Article 27.1, which does apply to exceptions of the kind authorized by Article 30<sup>862</sup>. This ruling appears questionable on two grounds. First, the non-discrimination prohibition in Article 27.1 qualifies only that subsection by its terms, and there is no textual basis for transporting it to Article 30; second, a limited exception, specifically allowed in Article 30, would by its very terms be discriminatory in some way<sup>863</sup>.

Moreover, also the rationale that a Member State relying on a TRIPS exception assumes the burden of proving that it acted within the scope of the exception, on

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<sup>859</sup> Panel report, *Canada – Patent*, para. 7.60.

<sup>860</sup> Article 28.1 of the TRIPS Agreement: “A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process”. (footnote omitted)

<sup>861</sup> Panel report, *Canada – Patent*, para. 7.84.

<sup>862</sup> Panel report, *Canada – Patent*, para. 7.93.

<sup>863</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization. Law, Practice and Policy*, Oxford University Press, 2006, p. 727-728.

the basis of an accepted practice developed in cases like *US - Gasoline* and *US - Shirts*, can be questioned. Indeed, under the TRIPS Agreement, international property rights holders are more protected than the public sector, while the public find protection under the exception provision. Thus it would be preferable to assume that Member States invoking exceptions are doing so in order to pursue legitimate public interest and the burden of proof should be on Member States challenging measures adopted for public interest, demonstrating that such measures do not meet the requirements of TRIPS<sup>864</sup>.

While the sections of the TRIPS Agreement regarding layout-designs of integrated circuits and the protection of undisclosed information do not contain any specific exception clause, Article 73 provides for a general exception provision for the protection of security interests:

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The provision has never been interpreted by WTO panels and the Appellate Body.

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<sup>864</sup> Abbott, *WTO Dispute Settlement Practice Relating to the Agreement on Trade Related Intellectual Property Rights*, in Ortino and Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, Den Haag – New York, 2004, p. 443-444.

#### 4.9.2. *Process patents and the reversal of burden of proof*

Under Article 28.1 of the TRIPS Agreement, a process patent shall confer on its owner the exclusive right to prevent unauthorised third parties from the act of using the process and from the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process. Thus, under this mandatory rule, WTO Members are obliged to extend protection of process patents to products manufactured directly by means of protected processes.

Moreover, Article 34 of the TRIPS Agreement provides that, under certain conditions, the procedural principle under which the person asserting a fact must prove it shall be reversed:

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

- (a) if the product obtained by the patented process is new;

- (b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

As the first paragraph of the Article made clear, the reversal of burden of proof logically applies to civil procedures only, since the presumption of innocence generally governs in criminal cases.

The subject of the patent for the reversal to proceed should be a “patent for obtaining a process”. It is left to Members, however, to determine whether such a process should be the sole object of the patent, or whether “hybrid” patents (including claims over both a process and a product) should also be subject to Article 34. Furthermore, the Article only applies in cases where an infringement of the acts described in Article 28.1(b) of the TRIPS Agreement is alleged, that is, whenever the identical product has been directly obtained with the patent process. It is not enough, hence, to argue that the product is *obtainable* with such a process<sup>865</sup>.

Article 34.1 requires Members to empower their judicial authorities to order the reversal of the burden of proof. This is not an operative, self-executing provision, but requires positive actions both by the Members and, in a particular case, by the competent judge. In addition to requiring judges to be empowered to order the reversal, Article 34 provides for the establishment of a *juris tantum* presumption that the patented process has been effectively used. This presumption admits proof to the contrary<sup>866</sup>.

Article 34.2 provides that in the presentation of evidence to the contrary, the legitimate interest of the respondents protecting their manufacturing and business secret shall be taken into account. Obviously, these legitimate interests do not imply the disclosure of the respondent’s trade secrets, such as technical and commercial information, to the other side. Indeed, if the product has actually been produced by a different process, the alleged infringer will not want to disclose his process to competitors<sup>867</sup>. However, the respondent will be bound to disclose the process that has actually been used in order to rebut the *juris tantum* presumption. Otherwise, when it is not possible to produce evidence to the contrary, it is

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<sup>865</sup> UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press, 2005, p. 498-500.

<sup>866</sup> Straus, “Reversal of the Burden of Proof, the Principle of ‘Fair and Equitable Procedures’ and Preliminary Injunctions Under the TRIPS Agreement”, *Journal of Intellectual Property*, 3(6), November 2002, p. 810.

<sup>867</sup> A possible strategy to protect the defendant’s trade secrets is to require the trade secrets to be disclosed only to an independent expert, who is under the obligation of secrecy and who will advise the court under conditions of confidentiality. UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press, 2005, p. 501-502.

deemed that an identical product, manufactured without the consent of the patent holder, was manufactured according to the patent process<sup>868</sup>.

The purpose of the provision enshrined in Article 34 of the TRIPS Agreement is to avoid the so called “*probatio diabolica*”. It is difficult, if not impossible, for a complainant owning a process patent, to prove whether or not the process used by the alleged infringer to manufacture an identical product infringes his exclusive right, unless the complainant gains access to the manufacturing process of the alleged infringer<sup>869</sup>. Furthermore, the rationale of Article 34 is also to ameliorate the weak form of protection for process patents, due to the difficulties involved in proving infringement, and to strengthen the position of the patent owner when enforcing his rights. Therefore, this objective is pursued by shifting the burden of proof to the respondent who has produced an identical product to demonstrate the product was produced without use of the process covered by the patent<sup>870</sup>.

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<sup>868</sup> Straus, “Reversal of the Burden of Proof, the Principle of ‘Fair and Equitable Procedures’ and Preliminary Injunctions Under the TRIPS Agreement”, *Journal of Intellectual Property*, 3(6), November 2002, p. 809.

<sup>869</sup> Vidal-Quadras and Des Bes, “Process Patents on New Products and Reversal of the Burden of Proof”, *European Intellectual Property Review*, 24(5), 2002, p. 237.

<sup>870</sup> Straus, “Reversal of the Burden of Proof, the Principle of ‘Fair and Equitable Procedures’ and Preliminary Injunctions Under the TRIPS Agreement”, *Journal of Intellectual Property*, 3(6), November 2002, p. 807.



## CONCLUSION

Panels and the Appellate Body have still some features atypical for judicial bodies. ‘Recommendations’ and not ‘judgements’ are passed; formal adoption of reports is required and performed by a political body; the panel ‘report’ can be seen and commented at its interim stage; the Appellate Body is defined as body instead of court or tribunal.

This notwithstanding, panels and the Appellate Body *do* constitute a judicial organ, in everything but the name. Of course, considerable room remains for diplomatic flexibility, particularly at the consultation phase, in parallel to the quasi-judicial proceedings and in the aftermath of the reports.

While the discussion still focus on the correct nature of the dispute settlement mechanism of the WTO, it is quite clear that panels’ and the Appellate Body’s proceedings look like a court, work substantially like a court, and parties litigate as in a court.

The Uruguay Round marked a decisive step in the direction of a more judicial process and made the WTO dispute settlement system be a judicial, rather than a diplomatic, organ for the settlement of dispute.

One peculiar feature of the Appellate Body jurisprudence has been the progressive clarification and development, in almost every appellate report so far, of panel and appellate review procedures and matters of treaty interpretation, often with explicit reference to the relevant practice of the International Court of Justice.

Despite the explicit attribution of the competence of giving authoritative interpretation on the Covered Agreements to the political organs of the WTO, panels and the Appellate Body have actually interpreted the Agreements and cited their own jurisprudence in support of their decisions.

The common law doctrine of *stare decisis* does not apply in international trade law and in international law in general, as it is merely a domestic common law principle. Indeed, in terms of legal precedent, the WTO implicitly denies binding legal force to adopted rulings beyond the particular matter and parties in dispute. This is also supported by the fact that the WTO Agreement confers to its political

bodies, i.e. the Ministerial Conference and the General Council, not only the power to amend the agreements, but also the exclusive authority to interpret the covered agreements through their decision-making power. Although it is evident that there is no *stare decisis* doctrine applicable in the context of the WTO, panels and the Appellate Body do utilise past cases. Even if not binding, reasoning in previous reports can be influential, similarly to what happens in high courts in civil law systems.

The concern of preserving its reputation for coherence, made the Appellate Body establish a system of *de facto* precedent, setting clear analytical frameworks, actively encouraging panels to follow its lead and prominently citing its previous decisions in support of its conclusions. Some scholars argue that the Appellate Body has engaged in judicial law making and that this is a regrettable form of judicial activism that strays from the limits of its institutional mandate. Others consider gap-filling and the clarifying of ambiguities to be intrinsic to the interpretative enterprise with which the Appellate Body is engaged.

The development of an impressive body of jurisprudence, that is for the most part consistently cited and followed in panels' and Appellate Body's reports, regards not only substantive law, but also procedural aspects of the functioning of the dispute settlement. In particular, since its early decisions, and on the basis of the general principles of law, the Appellate Body has developed a case-law on the allocation of the burden of proof.

Similarly to other international courts and tribunals, the procedural rules, as well as the whole operation of the dispute settlement system, are the result of the different legal traditions of the Member States. The coexistence of judges coming from different legal systems inevitably has significant consequences on the whole dispute settlement, as well as on its procedural aspects. This is mirrored in the ambiguous definitions attributed to some procedural notions, which refer to different concepts in different legal systems.

However, differently from other international courts and tribunals, whose main characteristic is the flexibility of the procedure if not the reluctance to be bound by defined procedural norms, the Appellate Body dedicated a considerable part of its jurisprudence to the burden of proof. Furthermore, it attempted to follow

consistently such jurisprudence, constantly referring to its previous reports. In fact, WTO adjudicating bodies, departing from general principles and from the practice of other international courts and tribunals, attempted to create a complex system of procedural rules concerning the burden of proof.

Hence, the coexistence of different legal traditions, joined with the renounce to the flexibility that is peculiar of international procedure, resulted in some ambiguous aspects in the allocation of the burden of proof.

In some cases, the two different notions of burden of proof in common and civil law systems overlapped, provoking confusion on the actual meaning that the adjudicators intended to attribute to the burden of proof. In other cases, the definition of burden of proof has been indifferently attributed both to the legal and the evidentiary burden, thus mixing issues of law and issues of fact. Indeed, the concept of burden of proof is often referred to by panels and Appellate Body in respect to legal arguments as well as factual evidence, despite the fact that the burden of proof only applies to facts. Besides, the presentation of a *prima facie* case has been characterised by the Appellate Body as to the basic rule of who bears the burden of proof in a WTO dispute. In fact, the concept of *prima facie* has been intended as coincident with that of burden of proof, or as the first phase of its allocation, rather than as a separate and autonomous concept like it should be. Panels and Appellate Body have also failed in elucidating the definition of 'exception', which is essential for allocating the burden of proof. The Appellate Body has characterized some exceptions not as affirmative defence, but rather as rules determining whether a norm applies, thus demonstrating that the terms 'defence' and 'exception' are not always interchangeable. In addition, the use of the term 'shift' referred to the burden of proof has caused some confusion, as it assimilates the burden of proof to a sort of tennis match in which the onus goes from one party to the other throughout the proceeding. Furthermore, the determination of who bears the burden of proof in WTO disputes has been often overdone, while the issue is of merely academic interest when the evidence is complete and clear. Indeed, the panel and the Appellate Body are not required, in each and every case, to make specific findings that a party has met its burden of proof with respect to a particular claim. The issue of the allocation of burden of

proof should arise in a dispute only in case of uncertainty, when the evidence is incomplete or in equipoise.

The inconsistencies described above have been critically addressed by eminent scholars. Pauwelyn argued that, as long as parties to a dispute are unclear as to which of them bears the burden of proof, there is a genuine risk of potential destabilisation of the dispute settlement system. As affirmed by Cho, the incoherency of WTO jurisprudence on different aspects of the burden of proof risks affecting the vital asset of the dispute settlement system, i.e. its predictability. Grando drastically defined the jurisprudence of panels and the Appellate Body “in a confused state” and argued that WTO adjudicating bodies created artificial differences between similar provisions, failing to produce a consistent line of cases. Similarly, Barceló stated that the Appellate Body’s concepts and terminology concerning burden of proof are “disturbingly ambiguous”, leading to serious misunderstandings and errors.

All these scholars found that the rules on burden of proof applied by panels and the Appellate Body urge a clarification, in order to avoid serious consequences on the credibility and dependability of the dispute settlement system and of the WTO as a whole.

Despite the lack of clarity on the way panels and the Appellate Body have developed the WTO rules on the allocation of the burden of proof, what immediately emerges from this analysis is the prominence of the issue in WTO dispute settlement proceedings. This observation is even more significant if the panels and Appellate Body practice is compared with that of other international tribunals, which in general are reluctant to bind themselves to strict procedural norms.

The interesting and convincing arguments proposed by legal scholars certainly contributed to raise the attention on the subject. Yet, none of them seems to answer to a question underlying the whole WTO jurisprudence. How can the relevance of the burden of proof in the reasoning of panels and the Appellate Body be explained? Why does an international adjudicating body dedicate so many efforts to procedural aspect, despite the typical discretion and flexibility of international courts and tribunals when dealing with procedural issues?

In attempting to answering these questions, it is perhaps wise to leave apart the above described inconsistencies in the allocation of the burden of proof, being them also intrinsic in any judicial body which is the results of different legal traditions and, most importantly, of different political and diplomatic interests.

Given the quasi-absence of the issue of burden of proof before the European Court of Justice, it has been argued that it could be easier for an international quasi-judicial body, like the panel and the Appellate Body, to state that a party has not proved its claim, rather than declaring it is not founded. Although admittedly partial, this hypothesis is valuable in order to approach the subject on the ground of its political implications.

As a matter of fact, the answer that this study attempts to propose to such complex questions does not intend to be purely legal. Indeed, the curiosity for a technical and procedural aspect of the dispute settlement system reveals an interest for what the procedure (or the effort to develop a procedure) underlies from a political and diplomatic perspective.

International law, in fact, has no fixed and defined nature. It is in constant oscillation between two poles. On the one hand, in order to affirm itself as 'law', it must lean towards normativity and enforcement, irrespective of the wishes, threats and demands of specific State entities and of the realities and disparities of the State society. On the other hand, in order to remain viable as a useful coordinator of international relations, it must also take into account the existence of political balances.

Analogously, the use of the burden of proof by panels and the Appellate Body might itself have been guided by the desire to strike a balance between State sovereignty and the judicial authority of the dispute settlement system.

However, if the growing maturity of the WTO substantive law should come with an equally developed and advanced procedural framework for dispute settlement, the effort for the consistency of panels and Appellate Body rulings on burden of proof should be complemented by the exclusive authoritative interpretation of the Ministerial Conference and the General Council on the procedural provisions that lack clarity. Therefore, a twofold effort for clarification of the WTO rules on burden of proof would be required. On the one hand, panels and the Appellate

Body should endeavour to achieve the consistency and predictability that is required to an adjudicative body. On the other hand, Member States should correct the vagueness and ambiguities of the WTO Agreements as they emerged in the dispute settlement practice.

Yet, no serious effort has been undertaken so far to use these political decision-making mechanisms to direct the future work of panels and the Appellate Body, and the obstacles to decision-making among WTO Members invite governments to pursue in litigation what they fail to achieve in political negotiations.

Moreover, the stalemate of the negotiations in the last years prevented the WTO from facing and resolving a number of challenges emerged in the international context, as well as in the interpretation of the Covered Agreements, whose multiple implications could not be fully foreseen and understood at the time of Marrakesh. It is worth to mention in this regard the tension between trade and environment, multilateralism and regionalism, free trade and special and differential treatment for developing countries.

The dispute settlement system, the most important achievement, the real success of the WTO, and the only dynamic aspect of the functioning of the Organisation, which has not experienced deadlocks and stalemate, tackled these dilemmas left unresolved by the negotiating process.

Lacking the authority for interpreting the Agreements, clarifying their content, assessing the extent and the relevance of a provision in the economy of the system, i.e. lacking a guide on the philosophy, the priorities, the founding principles of the WTO, panels and the Appellate Body legitimated the essential choices they were obliged to take through an (apparently) rigorous legal approach. The dispute settlement system concealed itself behind the inevitability and the rigour of the procedure.

The allocation of the burden of proof has become the instrument for resolving the dilemmas posed by the tensions between trade and non-trade values, for setting priorities, healing conflicting interests left unresolved by the Member States. This is confirmed by the fact that the liveliest debate on the allocation of the burden of proof focused on exceptions provisions, which are commonly aimed at balancing competing values. The way an exception provision is treated (and the consequent

allocation of burden of proof) directly affects the protection of alternative frames of values.

The attempt of giving deference to different sets of values and interests revealed some legal and procedural inconsistencies. This notwithstanding, from a diplomatic and political perspective, it has contributed to create a system of fundamental (constitutional?) principles of the WTO that will potentially represent its future heritage.



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