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The burden and order of proof in WTO claims: evolving issues

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Abstract

Purpose – The World Trade Organization (WTO) is one of the best dispute settlement mechanisms in the world. Under WTO rules, aggrieved parties must establish a "prima facie" case before the panel can call on the offending party to respond to the claims. The objective of the present study is to critically evaluate the application of the concept of burden of proof under WTO dispute settlement mechanism.

Design/methodology/approach – The paper examines the rule of "prima facie" in WTO jurisprudence. To do so, the first part will focus on the development of dispute settlement within WTO. The second part is divided into several subsections that will focus on the burden of proof concept, burden of proof in common law, burden of proof in civil law and the prima facie standard.

Findings – The DSU does not explicitly regulate how to allocate the burden of proof, but panels and the AB needed to address that issue early in their history. Despite this, all aggrieved parties to establish a prima facie case before the case can become the subject of a panel hearing. There is a need to adopt a burden of proof standard that assesses evidence on the basis of preponderance of the available evidence rather than on the basis of a party's failure to adduce evidence to back up or dispute a claim.

Originality/value – The paper is an attempt to address an important issue on the presentation of evidence and proof in international litigation, i.e. WTO.

Keywords WTO, Dispute settlement, International trade, Burden of proof

Paper type General review

1. Introduction

Burden of proof, in the context of international adjudication, denotes the party to a dispute who has the greatest risk of loss in the event that a fact or a proposition is not proven (Kurleka and Turunen, 2010). Therefore, the concept of burden of proof allocates the responsibility on the affected party to adduce sufficient evidence to either prove or disprove a claim (Pauwelyn, 1998). The tribunal adjudicating a case will base its decision on the evidence that the affected party puts forth to support or refute a claim. The role that burden of proof plays in determining the outcome of a dispute often implies that it has a direct impact on the procedural aspects of a tribunal's decision. Consequently, the tribunal must always ensure that their decision is based on the facts that each party has presented, rather than on their subjective assessment of each party's arguments.

The general rule in issues of burden of proof is that the party seeking to prove a fact must bear the responsibility of adducing the nature of evidence that will convince the tribunal to accept his or her position regarding the issue in dispute and provide an award in his/her favor (Pauwelyn, 1998, p. 23). While this rule sounds simple and easy for all parties to appreciate, the reality of the matter is that it is everything else but simple. In many cases of international adjudication, the parties seeking to establish a claim often do not have access to the types of evidence that will convince the tribunal to rule in their favor and make a suitable award. In such cases, the parties are often left with a sense of injustice when the tribunal adjudicating on their dispute comes to the conclusion that the evidence adduced is insufficient to warrant an award or a ruling in favor of the party. Common law attempted to

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remedy the situation through the introduction of concepts such as *res ipsa loquitur* in which the burden shifts to the party with easy access to the evidence (Buckley and Okrent, 2003). However, the rules of international tribunals do not give parties access to similar rules and, as such, parties often face injustice whenever they are aggrieved, but lack sufficient evidence to prove their case.

The World Trade Organization (WTO) is one of the best dispute settlement mechanisms in the world, but developing countries have experienced immense difficulty in maximizing on the effectiveness of the institution because they lack the capacity to participate effectively. Under WTO rules, aggrieved parties must establish a "prima facie" case before the panel can call on the offending party to respond to the claims[1]. The rule regarding "prima facie" implies that aggrieved parties must produce evidence that is sufficient enough to convince the panel that they are entitled to the requested remedies before the burden of proof can shift to the offending party[1]. The burden of proof will never shift from the aggrieved party to the offending party if the panel is not satisfied that the aggrieved party has discharged that burden. The objective of the present study is to critically evaluate the application of the concept of burden of proof under WTO dispute settlement mechanism.

The paper will be divided into two main parts. The first part will focus on the development of dispute settlement within WTO. This part will also outline the history of dispute settlement at the WTO and the rules established to govern burden of proof. The second part will focus on the burden of proof within the WTO dispute settlement system. The second part will be divided into several subsections that will focus on the burden of proof concept, burden of proof in common law, burden of proof in civil law and the prima facie standard. Thereafter, the paper will conclude with a set of conclusions and recommendations.

2. Development of the World Trade Organization dispute settlement mechanism

The emergence of the WTO as an effective dispute resolution body came against the backdrop of the ineffective The general agreement on tariffs and trade (GATT) dispute settlement mechanism. The provisions in the GATT related to the settlement of disputes were included in articles XXII and XXIII. The principles enshrined in the two articles were based on the notion that formal legal actions were unfriendly and would unnecessarily undermine international trade.

The European Communities advocated for a rule widely regarded as the diplomacy rule[2]. The European Community adopted the pragmatic approach, which advocated for the view that GATT dispute settlement framework should be perceived as a natural outcome of the negotiation process (Tarullo, 1985). The USA, in contrast, adopted the adjudication approach, which took the view that the GATT dispute settlement mechanism that investigated violation of applicable treaties and subjected countries violating those treaties to hefty sanctions (Jackson *et al.*, 1995).

The GATT dispute settlement panels adopted an approach in which there was room for the party in dispute to challenge any or all of the decisions of the dispute settlement body. That approach was akin to the approach taken by the International Court of Justice (ICJ) in which the validity and enforceability of a decision hinges on the whether the parties in dispute have accepted the court's jurisdiction on the matter (Alexandrov, 2006; Powell and Mitchell, 2007; Llamazon, 2008). If one of the parties decides to reject its jurisdiction, then the ruling would be unenforceable (Alexandrov, 2006; Powell and Mitchell, 2007; Llamazon, 2008). Similarly, there was a risk that the GATT dispute settlement body would face the same risk of the body being used as an avenue for the settlement of political scores. The

absence of a requirement or rule making the rulings of the body binding meant that the disputing parties could override its ruling.

Unlike the GATT dispute settlement tribunals, the WTO dispute settlement system has an unfettered dispute settlement authority. This not only implies that WTO panels can settle disputes between members but also implies that decisions of WTO panels are binding on the parties to the dispute and there are trade sanctions that the panel can impose out on members that do not abide by its decisions (Pauwelyn, 1998, p. 227). The debates about jurisdiction that dogged the GATT dispute settlement body are non-existent under the WTO dispute settlement framework.

These unfettered powers are enshrined under rules of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU gives WTO Dispute Settlement Body (DSB) the authority to settle disputes and prescribe trade sanctions for states that contravene the rules contained under WTO agreements. The extent of the powers of the WTO dispute settlement bodies is clearly outlined under article 2(1) of the DSU. Under that article, the DSU establishes the DSB whose primary mandate will be to administer the dispute settlement rules enshrined under the DSU[3]. Further, the DSU provides that the DSB has the sole responsibility of establishing not only the panels that will adjudicate on disputes instituted by member states but also the Appellate Body that will review the decision of the panel whenever a party of a dispute is dissatisfied with the ruling of the tribunal[3]. Additionally, the DSB will have the sole mandate of supervising the implementation of the DSU and supervising parties' adherence to panel rulings.

Article 3 of the DSU provides further support to the provisions in article 2 by outlining general rules that will govern dispute settlement under the WTO dispute settlement mechanisms. The DSU states that the primary objective of the rules enshrined under the DSU is to ensure predictability and security within the global trading system[4]. Further, the DSU states that the dispute settlement mechanism was developed because of member states' realization that there was need for a system to safeguard their rights and clarify existing rules[4]. Prompt settlement of dispute is a cornerstone of the dispute settlement mechanisms established under the DSU[5].

The discussion above suggests that the member states, in establishing the dispute settlement mechanisms under the WTO system, wanted to ensure that they had a mechanism that could settle international trade disputes in a prompt manner so as to avoid the disruption of trade (Palmeter and Mavroidis, 2004).

3. Burden of proof in World Trade Organization law

When instituting disputes under the WTO dispute settlement mechanisms, parties must adhere to the rules set out in article 3(7) and article 3(8) of the DSU. According to the DSU, the member state instituting the action must consider the merits of their case and determine whether it will be fruitful[1]. The article goes on to state that the primary objective of the DSU is to ensure prompt and fruitful resolution of disputes[1]. Although this provision does not clearly outline the prima facie case, an analysis of its implication indicates that it requires all aggrieved parties to establish a prima facie case before the case can become the subject of a panel hearing.

The rule implies that panels will have the responsibility of dismissing frivolous disputes or disputes whose evidence is so insufficient that it does not warrant an award in favor of the aggrieved party. The effect of article 3(7) is that it places the burden of proof on the member state instituting the legal proceeding.

Once the DSB has established the panel, and it finds that the aggrieved member state has established a prima facie case, the panel will call on the offending member state to respond

to the complaint. This happens after both parties submit their submissions and make arguments during the hearing. The panel will decide only at the end whether a complainant met the burden of proof. Indeed, article 3(8) of the DSU clearly underscores this fact when it states that the presence of clear evidence of an infringement of WTO rules will be an indication that the aggrieved state has established a prima facie case that will give rise to a nullification of the action and the provision of an award. The article goes on to state that the establishment of a prima facie case will automatically lead to an assumption that the offending party has breached the stated WTO rules, and, as such, it will be upon the offending state to adduce sufficient evidence to rebut the claim[6]. The implication of this article is that it acknowledges that the establishment of a prima facie case leads to a shift in the burden of proof from the complainant to the defendant. The obligation of the offending state will be to adduce evidence that is cogent enough to cast doubt on the aggrieved state's claims.

On the face of it, the DSU provisions on the burden of proof seem concise and clear. However, a close analysis of those rules demonstrates that one important issue is missing. The rules do not specify the standards of evidence that will be deemed "prima facie" and the standards of evidence that will be deemed to have refuted the prima facie case established by the aggrieved state. The rules merely state what the aggrieved state needs to establish to obtain the remedy it desires, but they do not expressly state the quantity of the evidence that the panel will deem as prima facie. The absence of clear rules on the standard of proof implies that panels have the discretion to determine whether the evidence that the aggrieved state submits meets the threshold for a prima facie case.

Additionally, the rules do not expressly outline the standards that the panel will use to assess whether the offending state has satisfied its burden. The panel has the discretion to decide these issues on a case by case basis, and it opens up the possibility of the panel deciding on an issue in one way and later on deciding on a similar issue in a different way (Kazazi, 1996). The decision to give the panel the leeway to make decisions on standards of proof severely limits aggrieved state's ability to obtain justice.

The limit imposed on aggrieved states is evidenced by the terms of reference of any panel[7]. The DSU rules play an important role in determining the manner in which the panel will interpret evidence adduced towards it. The DSU, under article 7(1), clearly states that the parties to the dispute can establish the terms of reference that will govern the operations of the panel. However, when the parties fail to establish the terms of reference within 20 days, the rules under DSU will kick in, and they will be forced to rely on the provisions of article 7 of the DSU. Article 7 of the DSU states that in the absence of agreement between parties, the terms of reference for the panel will be to critically evaluate the facts of the dispute from the prism of rules established under the DSU and other covered WTO agreements and to make findings that will make it easier for the DSB to decide the nature of punishment that fits the offending state. The wording of article 7(1) implies that there is a window for parties to the dispute to decide the terms of reference. The window is normally 20 days, but there is very little evidence, that there will be consensus on the part of the offending state. The requirement of consensus among the parties demonstrates that the most probable terms of reference that the panel will use in the settlement of the dispute are the terms outlined in article 7(1).

4. Burden of proof in World Trade Organization jurisprudence

The burden of proof concept is an evidentiary principle that is important in all legal systems. Under the WTO law, burden of proof usually rests on the state that seeks to prove or disprove a claim related to the violation of GATT 1994[8]. The DSU, under article 3(8),

enshrines the principle of burden of proof under WTO law. The article states that the aggrieved member state must adduce evidence to demonstrate that it is entitled to the remedy it is seeking[8]. Once the WTO panel has established that the evidence is sufficient, the burden of proof will shift from the aggrieved state to the state alleged to have committed a violation of GATT 1994[8]. One of the important aspects of the burden of proof enshrined under the DSU is the concept of "prima facie". This concept implies that the evidence tabled to support the aggrieved state's claim must meet a given threshold for the tribunal to shift the burden from the aggrieved state to the offending state. The threshold, according to the DSU, is the existence of sufficient evidence that would enable the panel to grant the requested remedy in the absence of a rebuttal from the offending state.

An analysis of cases adjudicated upon by WTO panels demonstrates that they have applied the same rule on burden of proof as enshrined under article 3 of DSU. In the *Shirts and Blouses* case, the USA implemented a transitional safeguard mechanism pursuant to article 2 of the Agreement on Textiles and Clothing (ATC). India instituted a case alleging that the move violated ATC[9]. A WTO panel ruled that the burden of proving that the USA's safeguard measure had violated the ATC rested in India. The panel argued that it was India's duty to adduce legal and factual evidence to demonstrate that the safeguards implemented by the USA violated article 2 of the ATC[9]. Furthermore, the panel argued that it was India's duty to demonstrate that the USA serious threat determination under article 6 of ATC had no legal basis.

The argument of the panel seemed to be that the aggrieved state must not only adduce evidence to support its claim but also adduce evidence to poke holes on any defense that the offending party might raise. In the present scenario, India adduced evidence to support its claim that it deserves a remedy, but it failed to adduce evidence to dislodge the USA claim that it had implemented the safeguards pursuant to article 6 of the ATC.

The same view on burden of proof was confirmed in the *Beef Hormones* case[10]. In that case, the European Commission implemented a law prohibiting the importation of beef from countries that are known to inject their cattle with certain growth hormones[10]. This ban led to reaction from the USA and Canada because the two states believed that the law violated WTO rules[10].

The panel ruled that the initial burden of proving a claim under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) rests on the aggrieved state (Kurleka and Turunen, 2010). The panel argued that the scope of that burden was on the state to adduce prima facie evidence to back the claim that the offending state's conduct was inconsistent with the rules enshrined under the SPS. The panel further argued that the alleged violation breach of the SPS must identify the specific provision or provisions of that agreement that the offending state had breached. The panel argued that once the offending state has put forth a prima facie case, the burden will shift to the offending party. The panel, therefore, concluded by stating that the burden of proof will fall on a party, irrespective of whether it is the defendant or claimant, that claims a given issue or refutes it.

WTO panels have gone out of their way to guard against states that attempt to impose new rules on BOP. In the *Shirts and Blouses* case, the Indian representatives attempted to reject arguments that they present prima facie evidence because it was evident that the US actions amounted to a violation of the ATC. However, the panel rejected this contention on the basis of the view that an absurd situation would arise when a state's claims would automatically amount to proof that the alleged offending state. In addition, the panel stated that the rule on the prima facie was clearly established under English common law.

The burden of proof concept plays an important role in ensuring that there is stability and certainty under the international trade system. Member states relying on the system are

aware that other states cannot take away some of the rights they enjoy under GATT 1994. Whenever a member notices that its right has been infringed or nullified, it will be at liberty to institute legal proceedings with the WTO. However, the legal dispute will become futile if there is no clear evidence to support the claim. Another important aspect of the WTO is that there is a presumption that one state party's decision to breach the rules adversely affects other states that are party to the WTO agreement. This implies that other states have a right to institute the case against the individual state that violated the WTO agreement.

In certain instances, the actions of states can lead panels into difficult situations that might not have been contemplated by the DSU drafters. This is especially the case in instances where the states in question opt to flood the panel with evidence without due regard to the rules on presentation of evidence. The *Panel on Japan – Measures Affecting Consumer Photographic Film and Paper* is a classic case of a situation where states deliberately decided to ignore existing rules and developed their own procedures of presenting evidence.

In that case, the USA instituted a complaint against Japan and the latter instituted a complaint against the USA. The two countries then decided to simultaneously offer evidence to support their claims[11]. This led to an absurd outcome where the panel could not determine what would happen when the two states put forth prima facie evidence and where the burden would shift to. This outcome prompted the panel to criticize the two states for relying on the American legal system where parties in dispute adduce as much evidence, as they can to support their respective position. The panel argued that such tactics would adversely affect the WTO panel system and contribute to its collapse[11]. This ruling suggests that there are inherent weaknesses in the rules on burden of proof. These rules are not effective and, as such, there is need for the development of a full proof system that can effectively assign the burden of adducing evidence among parties to a dispute.

The nature of difficulties WTO panels face in defining burden of proof in the cases they are handling has been demonstrated in the wide array of cases that on the WTO agreement on Technical Barriers to Trade (TBT). To be more specific, panels have experienced difficulties in defining the scope of the concept of burden of proof as relates to the issue of 2(4) of the TBT. Article 2(4) of the TBT expressly mandates member states to use internationally accepted standards when defining the technical regulations that will determine the entry of goods into their country. The article states that the rule on technical standards will be ousted when it would be an inappropriate and ineffective strategy for the achievement of a state party's legitimate objectives.

The WTO panel has been experiencing challenges in determining the scope of the burden of proof in dispute arising from this provision. In the *EC – Sardines* case, the panel ruled that the burden of proving that a given restriction did not amount to an international standard rested with the party with access to information on policies that led to the decision, rather than the complainant[12]. In that case, the European Community had argued that the burden of proving that the Codex standard was an international standard within the meaning of article 2(4) rested on Peru because it was the party that was asserting its inconsistency[12]. However, the panel overruled this view by arguing that the burden of proof rested with the European Community because Peru was not in a position to clearly spell out the legitimate objectives that prompted the European Community to implement the Codex restriction[13]. The panel also argued that the burden rested on the European Communities because it was in a better position to clearly outline the factors that made the restriction consistent with the international standard.

The European Communities appealed this decision and the Appellate Body ruled in its favor by arguing that the burden fell on the complainant. It argued that that burden should

be borne by the party arguing that a given restriction is inconsistent with article 2(4) of the TBT agreement. The Appellate Body argued that the presence of provisions in the TBT agreement providing adequate avenues of access to information on the objectives that a government or regional body will achieve when it implements technical regulation.

The divergence between the rulings of the panel with the original jurisdiction on the issue and the Appellate Body suggests that there was confusion in the application of the burden of proof concept. On the one hand, the panel felt that Peru could not effectively prove an issue that was ostensibly within the custody of the European Community and, as such, it argued that the European Community had the burden of proof. It made this ruling despite the knowledge that Peru was the party with the greatest risk of loss in the event that it failed to adduce evidence. It is highly probable that the panel made that decision because of its assumption that the rule on burden of proof being on the party with the greatest risk of loss would have occasioned an injustice in the circumstances before it.

On the other hand, the Appellate Body had different considerations when it overruled the panel. The Appellate Body made its decision on a strict interpretation of the law. The Appellate Body argued that the burden of proof must always rest with the party who is at the greatest risk of loss in the event that no evidence is adduced. The Appellate Body considered other relevant provisions of the TBT and argued that there were enough safeguards for ensuring that parties with burden of proof have access to all the evidence they require to prove support their claim. This move seemed to suggest that the Appellate Body would have ruled in favor of Peru if there were no provisions that would have given it access to the documents it required to prove its case. The absence of clarity is an indication that panels are facing challenges in their attempt to incorporate the burden of proof concept into their arguments. It is highly probable that the main factor accounting for this state of affairs could be the absence of a provision that clearly outlines how the WTO Panels will allocate the burden of proof in any given case.

5. Burden of proof in common law

The cases analyzed above demonstrated that the concept of burden of proof is straight forward, but it might pose a challenge in its application. An analysis of literature on the possible causes of the difficulty demonstrates that it arises from parties' confusion regarding their respective roles in the process of adducing evidence (Pauwelyn, 1998, p. 22). Parties are no longer aware of their evidentiary burden, and the result in certain cases like the one between Japan and the USA is that the parties might just decide to sit on their laurels and wait for the panel to make a determination on the decision that is the most credible. The main cause for this state of affair is the difficulty in WTO litigators' attempts to reconcile the rules of civil law systems and rules under common law systems (Pauwelyn, 1998, p. 227). Under common law system, the phrase burden of proof has two meanings. First, it denotes the rule that the party with the risk of losing the case in the absence of evidence is the one who bears the responsibility of adducing the evidence (Pauwelyn, 1998, p. 22). Second, the phrase "burden of proof" denotes the division of labor that arises when a party adduces sufficient evidence for the jury or judge to rule if the other party does not produce sufficient evidence to rebut the claims (Pauwelyn, 1998, p. 22). This second aspect of the definition is what is widely referred to as the prima facie case, and it plays an important role in defining the concept of burden of proof under the common law system.

The system under the second aspect of the common law definition of burden of proof is that there is no clear rule on the level of evidence that a party should adduce. In most cases, the party to a dispute merely adduces evidence that is capable of sustaining a trial and the courts call on the other party to rebut the claims (Pauwelyn, 1998, p. 22). Although common

law decisions clearly stipulate that the prima facie case requires the offended party to present evidence that is sufficient for him to obtain a ruling in his favor, courts operating under the common law system have generally tended to rule that a prima facie case has been established in situations where the aggrieved party adduces evidence that is capable of sustaining a trial, but is insufficient to obtain a favorable ruling (Pauwelyn, 1998, p. 22).

Another difficulty that arises from the second common law definition of burden of proof is that it contradicts the first definition. Under the second definition, burden of proof arises when the aggrieved party to a dispute adduces evidence that seems plausible enough for a judge to rule in his favor. Under the first definition, burden of proof denotes the rule requiring the party at risk of losing the case to adduce the requisite evidence. Under this definition, there is a clear indication that there is no need for the establishment of a prima facie case. The only thing that the court will consider is the party at risk and whether he or she has exercised the burden so as to increase his/her chances of obtaining a favorable ruling. This contradiction in the implication of the two-common law definition of burden of proof is one of the factors that has led courts in common law states to make rulings that are contradictory.

In *J Spurling Ltd* v *Bradshaw* (1956) 1WLR 461, Lord Denning outlined the common law position on burden of proof in his discussion about contracts of carriage. In that case, Bradshaw had instituted a claim against J Spurling Ltd after it failed to deliver goods as stipulated in a contract of carriage. Lord Denning, delivering the majority opinion, argued that in a case involving the non-delivery of goods all the duty of the claimant is merely to adduce evidence on the existence of a contract and adduce further evidence to demonstrate that the defendant company had failed to deliver the goods as requested [*J Spurling Ltd* v *Bradshaw* (1956) 1WLR 461, p. 466]. Once the claimant has adduced that evidence, it will be upon the defendant to adduce evidence demonstrating that it was not at fault for the failure to deliver or it failed to deliver but it is exempt from any claims by virtue of a clause in the contract of carriage [*J Spurling Ltd* v *Bradshaw* (1956) 1WLR 461, p. 466].

The *Glendarroch* case is another common law case in which the reasoning of the judge on the concept of burden of proof contradicted that of Lord Denning (The Glendarroch, 1984). In that case, a company failed to deliver goods to the intended customers because the ship transporting the goods sunk in the sea because it was unseaworthy. Thus, the fact related to non-delivery of goods and the question under consideration was the burden of proof in such instances. Lord Esher, delivering a unanimous verdict on behalf of the other judges, argued that there was a contract of carriage and the defendant company failed to deliver the goods that were subject of that contract. Thereafter, the defendant company will have to rebut the claimant's contentions by adducing evidence that bring it prima facie within an exception (The Glendarroch, 1984). If the court is satisfied with the claim, the burden of proof would shift back to the claimant to demonstrate that so that he can disprove the company's arguments (The Glendarroch, 1984).

An analysis of these two common law cases demonstrates that there are glaring differences in the courts application of the concept. In the case of *J Spurling* v *Bradshaw*, the court relied heavily on the rule that states that the burden of adducing evidence rests squarely on the doorstep of the individual with the highest risk of losing the case (Treitel *et al.*, 2011).

In the second case of *The Glendarroch*, the judge based his arguments on the second definition of burden of proof. It is particularly interesting how the judge argued that once the claimant had proved that there was a contract of carriage and the defendant failed to deliver the goods, it was upon the defendant to adduce prima facie evidence that the failure to deliver was not his fault because the cause of the failure was one of the exceptions permitted

within the contract. This use of the prima facie rule is unique because the judge required the individual with access to the evidence – rather than the individual with the highest risk of losing – to present prima facie evidence to support his claim that the cause of the failure was part of the exceptions envisaged in the contract (Treitel *et al.*, 2011). The contradictory nature in which the court applied the burden of proof concept is one of the factors that have prompted scholars to doubt the applicability of the prima facie concept in WTO proceedings.

The common law practice of developing a prima facie standard of proof in which panels thoroughly assess the evidence to determine whether a state has a case is erroneous. As noted in the foregoing paragraphs, the practice even goes against the literal meaning of the term prima facie. The practice even goes against the common law practice on prima facie cases where courts decided it on the basis a standard referred to as balance of probabilities. The "balance of probabilities" concept referred to a situation in which the courts would assess the merits of the case and decide whether on the face of it or on the assessment of different possibilities the claimant had a cause of action. When one compares that practice to the present WTO practice in which panels conduct thorough analysis of the merits of an aggrieved state's claim, then it becomes clear that the standard of proof that the WTO panels are relying on is much stringent than the one applied in common law courts. The standard of proof is also much more stringent than the literal meaning of the term prima facie. There is, therefore, need for WTO panels to develop a prima facie standard that is equivalent to the prima facie standard envisaged at common law and the prima facie standard that is closer to the general meaning of the phrase.

6. Burden of proof in civil law

Burden of proof in civil law jurisdictions pursues the same direction as the one outlined in the first definition on burden of proof in common law. Under civil law, the duty of adducing evidence rests on the party who will be at the greatest risk of failure. In essence, it rests on the complaining party and, as such, the party must adduce evidence to back up his claim that a give set of facts is the correct state of affairs (Pfitzer and Sabune, 2009). This understanding of the concept of burden of proof is markedly different from the understanding of the concept under the second definition at common law where the courts placed a burden of production on one of the parties to the case. It is also different from the WTO system where panels rely heavily on the burden of production to undermine aggrieved states' capacity to present their respective cases.

The representation of the concept of burden of proof under the German system provides an apt illustration of how civil law countries approach the concept. In Germany, the law clearly states that a complainant's production of evidence will not in any way discharge him/her from the obligation of satisfying the burden of proof (Pauwelyn, 1998, p. 242). In other words, the burden of proof rests on the complainant throughout the case, and there is no instance where the burden will shift to the defendant, with the result being that the party at fault is found guilty or asked to produce compensation because he/she failed to adduce adequate evidence to rebut the presented claims.

The burden of proof concept also rests on the notion that the individual who will win when there is no conclusive evidence cannot decide on the nature of evidence that will be adduced. If, for instance, the defendant agrees that he killed the plaintiff, but killed on the ground of self-defense, the court will not give him the opportunity of solving the question on whether it was self-defense because of the perception that he is the individual who will win in the event that there is inconclusive evidence. As such, the court will request the other party to adduce the evidence to demonstrate that the defendant not only killed the deceased

but also that he did it without any form of provocation or that the provocation did not warrant such an outcome (Pauwelyn, 1998, p. 242). Therefore, the issue under civil law is not for the claimant to prove anything; it is for the claimant to persuade the judge. Because the claimant bears the greatest risk of failure on the issue at hand, he will have the duty to persuade the judge on all elements of the case (Pauwelyn, 1998, p. 233). Further, it is important to note that the success of a case does not always depend on how a party persuades the judge; it depends on the judges' investigation of the facts. Judges have a duty to investigate the issue so as to determine whether the persuasion is accurate or it is faulty.

One of the most peculiar aspects of the burden of proof concept in civil jurisdictions is that the parties will adduce evidence simultaneously throughout the proceedings (Barceló, 2009). In common law jurisdictions, parties can exercise their respective duties to exercise their burden of adducing evidence in turns. The case commences with the complainant adducing evidence and the defendant or respondent adduces evidence after the court rules that the plaintiff has adduced concrete evidence. In contrast, civil law jurisdictions do not have similar procedures when it comes to issues related to burden of proof (Barceló, 2009). Parties to a dispute can exercise their respective burdens any time when there is need for them to refute or prove allegations. This exercise of the burden of proof makes the civil law jurisdictions markedly different from the common law jurisdiction and has been highlighted as one of the factors that make civil law cases stand out. For instance, under German law, the plaintiff will only be called upon to adduce evidence when the facts under issue are in dispute. When the parties outline their agreement about a given fact, the court will not call either of them forward to adduce evidence.

The court will only call upon the parties in dispute to adduce evidence when the facts have been contested. Thus, when a party argues that adduces evidence to prove that the defendant trespassed into his property, the judge will immediately call upon the opposite party to refute the evidence. The judge will ask the opposing party the type of evidence he has to refute the allegations. This system is known throughout the legal circles in Germany as *Beweisfuhrungslast* (Barceló, 2009). This is markedly different from the common law system where the court assesses the merits of the evidence prior to calling upon the defendant to refute it. In common law systems, there are no rules on prima facie evidence. In the common law concept of burden of production, the courts will test whether the adduced evidence is sufficient to merit it to call upon the other party to produce rebutting evidence.

Thus, the courts will only call on the defendant to adduce evidence when there is a clear suggestion that the burden has been sufficiently addressed. In the German *Beweisfuhrungslast* system, the focus of the court will be on the plaintiff's willingness to provide evidence (Barceló, 2009). As long as the plaintiff underscores his willingness to provide evidence, the court will accept it and will call on the other party to respond to the claims (Barceló, 2009). The court will not concern itself about the chances of the claimant winning the case; it will only focus on whether the plaintiff wants to produce the evidence.

7. The *prima facie* standard

WTO panels borrowed the prima facie model from the common law system, but their application of the rule is markedly different from the manner in which common law judges applied it (Grando, 2009). The first time that a WTO panel applied the prima facie concept was in the *Shirts and Blouses Case* where a common law state (India) argued that it was applicable under the WTO rules[14]. The second time the rule became applicable was in the *Hormones Case* when the WTO Appellate Body attempted to define it. In the case, the Appellate Body argued that the prima facie case was present in cases where the absence of contrary evidence forces the panel, as a matter of law, to decide in favor of the complainant

who has presented the prima facie evidence[15]. This definition demonstrated that the WTO Appellate Body was adopting the common law definitions of the concepts of prima facie case. While the panel's move to define the prima facie concept was commendable, it failed in one respect. The Appellate Body failed to clearly point out the degree of persuasion that claimants must demonstrate before the panel analyzing the case can argue that they have established a prima facie case. This situation has been compounded by the fact that several WTO panel rulings after the *Hormones* case have held that there is no precise prima facie standard[16]. The prima facie standard will vary from one panel to another depending on the set of unique facts under consideration. Such rulings demonstrate that there is no clear agreement among panels on the factors that constitute the prima facie standard. The absence of a clear agreement leads one to wonder why the Appellate Body in the *Hormones Case* decided to outline the definition of the term prima facie without outlining the nature of arguments or evidence that would be considered as constituting the prima facie evidence.

The absence of a clear definition of the prima facie case is an indication that there is no definition of the prima facie standard (Grando, 2009, p. 108). The act of merely recounting what a prima facie case entails does not in any way provide a concrete definition of the phrase if there is still need for additional facts on what constitutes the prima facie standard. For the prima facie case to have a clear definition, WTO panels must clearly define the factors that constitute the prima facie standard.

Despite the absence of a WTO case that clearly outlines the prima facie standard, an analysis of recent WTO cases suggests that there is a pattern in which WTO panels are using thorough assessment of evidence as the prima facie standard. Unlike in the common law where courts assess the veracity of the prima facie evidence on the basis of their first impression of the presented facts, WTO dispute settlement panels are making decisions on prima facie on the basis of a thorough analysis of the evidence that the aggrieved party has presented. The panel rulings demonstrate that they are clumping down on cases where the aggrieved state fails to adduce concrete evidence. The *US – Section 211 Appropriations Act Case* is an example of a case where a WTO panel attempted to outline the prima facie standard[17]. In that case, the panel argued that the task at hand was for the aggrieved party to present evidence that was cogent enough to raise a presumption in support of its claim and the panel's duty was to critically review the presented evidence to determine whether challenged state conduct was clearly inconsistent with WTO rules. The use of the phrase "critical review" highlights the clear pattern in which WTO panels are inventing a prima facie standard in which they seek to determine the merits of the case instead of seeking to clearly determine whether the facts and evidence presented can sustain a case. In essence, the panel's argument suggests that they always attempt to try the case even before the offending state is called in to answer the claim.

Korea Alcoholic Beverages Case is another example of a case in which the panel conducted a stringent analysis of the evidence presented in its quest to determine whether the aggrieved state had established a prima facie case[18]. In that case, the issue under determination was whether imported and Korean-produced beverages were substitutes or direct competitors[18]. The Korean Government had implemented a policy in which it slapped a higher import duty on imported alcoholic beverages. The Korean Government argued that they did that because imported alcoholic beverages were substitutes and did not compete directly with the local alcoholic beverages[18]. However, the claimants argued that the move violated WTO provisions because it amounted to giving local products a higher level of preference than imported products. The panel assessed the presented evidence and found that the claimants had presented evidence for certain alcoholic beverages – like vodka, admixtures, liqueurs, cognac, brandies, gin, rum and whiskies – and decided against

presenting other forms of evidence in support of a category of alcohol referred to as HS 2208. That finding led the panel to argue that it will not assess claims based on the alcoholic beverages within the HS 2208 category. The panel argued that it would only call upon the offending state to respond to the claims related to the alcoholic beverages that had been supported by clear evidence. Thus, the panel decided to call upon the Korean Government to answer claims related to the alcoholic beverages that the claimant had provided evidence to demonstrate that they were in direct competition with Korean manufacturer alcoholic beverages.

In the *Upland Cotton Case*, further evidence of the stringent pattern of assessment of prima facie case is demonstrated[19]. In that case, the USA implemented the FSC Repeal and Extraterritorial Income Act of 2000[19]. Brazil was offended by the demands of the law and instituted a case at the WTO in which it requested the panel to find that article 8 and article 10.1 of the USA statute violated article 3.1 and 3.2 of the Agreement on Agriculture. In the case, the panel assessed the evidence presented with this claim and found that certain aspects of the claim were missing[20]. The panel concluded that Brazil had not presented evidence that was concrete enough for the tribunal to back their case that the highlighted provisions of USA law had violated WTO rules. The panel, therefore, dismissed the case and argued that it could not analyze the case because the aggrieved state did not present sufficient evidence to demonstrate to the panel how US laws contributed to the violation of WTO rules.

In the *Gambling Case*, the same issue of the absence of cogent evidence to support a prima facie case arose[21]. In that case, several US states enacted and implemented laws forcing corporations from Antigua to pay taxes in the USA for all online gambling businesses in the USA Antigua brought in a claim against the USA on the ground that the eight states had violated article XVI of the GATT. Initially, the panel assessed the case and found that there was prima facie evidence. Based on that assessment, the panel concluded that the USA had a case to answer on all the issues that Antigua raised[21].

The USA appealed that ruling and argued that the case should be dismissed because Antigua did not present evidence to back up its claim that Article XVI had been violated. In fact, the Appellate Body ruled in favor of the USA by arguing that Antigua did not present sufficient evidence to demonstrate that US laws were inconsistent with article XVI of the GATT. The Appellate Body argued that it was erroneous for the panel to assess these laws when there was a clear indication that Antigua had not expressly demonstrated how the state laws had violated Article XVI of the GATT[21]. The essence of this ruling was that, in the opinion of the Appellate Body, Antigua had not established a prima facie case.

Nevertheless, the Appellate Body did not clearly specify the nature of evidence that would constitute a violation of Article XVI of the GATT. This failure to specify meant that a state faced with similar facts in future would experience the same challenges because there are no guidelines on prima facie standards. In that case, the Appellate Body stated that such a case required additional evidence to bring forth a prima facie case.

The Appellate Body made that ruling even when the available evidence suggested that US states had violated the rights of Antigua (Barceló, 2009, p. 44). The original WTO panel found that the challenged state laws were in contravention of Article XVI of GATT and requested the USA to remove the offending provisions from its laws. The takeaway from all the reviewed cases is that panels have not developed a prima facie standard, but their rulings suggest that panels have interpreted the requirement for the establishment of a prima facie case in a strict manner. While this strict strategy is good by compelling aggrieved parties to deliver concrete evidence, it may create hardship for parties who do not have access to evidence or might experience difficulties in determining the nature of

evidence that will eventually lead to the prima facie case. Most of the cases outlined in this section of the paper had a strong evidence for states to support their claims, but they failed in the initial hurdles related to establishment of a prima facie case (Barceló, 2009). Such a high failure rate demonstrates that the present rule on prima facie cases is ineffective. There is, therefore, a need for stakeholders to adopt a new rule on the subject.

8. Conclusion

The objective of the article was to critically evaluate the burden of proof concept under the WTO dispute settlement mechanism. The DSU does not explicitly regulate how to allocate the burden of proof, but panels and the AB needed to address that issue early in their history. When instituting disputes under the WTO dispute settlement mechanisms, parties must adhere to the rules set out in article 3(7) and article 3(8) of the DSU. According to the DSU, any member state instituting the action must consider the merits of their case and determine whether it will be fruitful. The primary objective of the DSU is to ensure prompt and fruitful resolution of disputes. Although provisions of the DSU do not clearly outline the prima facie case, the analysis indicates that it requires all aggrieved parties to establish a prima facie case before the case can become the subject of a panel hearing. This rule implies that panels will have the responsibility of dismissing frivolous disputes or disputes whose evidence is so insufficient that it does not warrant an award in favor of the aggrieved party. An analysis of the concept demonstrates that it is in need of reform as aggrieved states are losing cases because of their inability to establish a prima facie case.

There is a need for the WTO to change the current rules on prima facie evidence and adopt burden of proof concept that strikes the balance between the positive aspects of the common law burden of proof concept and civil law burden of proof concept. In essence, there is a need to adopt a burden of proof standard that assesses evidence on the basis of preponderance of the available evidence rather than on the basis of a party's failure to adduce evidence to back up or dispute a claim. Introduction of such a concept will ensure that WTO panels assess evidence in a manner that protects the interests of both the claimant and the defendant state.

The dilemma facing the WTO might be understandable. It is true that it is not possible for the WTO panels to formulate a precise definition of the phrase "prima facie" and determine the appropriate standard of proof because the facts of one case and the circumstances of parties in a given case varies. However, WTO dispute settlement panels have the power to determine the general nature of circumstances that would constitute a prima facie case. The WTO dispute settlement panels can decide to use the literal meaning of prima facie and consider it as the basis for their decisions. An analysis of the literal meaning of prima facie demonstrates that it means "on the face of it". Using this literal meaning implies that the panel assessing the merits of a case will assess whether the evidence that a state has adduced leads can, on the face of it, sustain a case. Thus, WTO panels can base their decisions on their first impression of the evidence provided, rather than on a careful analysis of that evidence. Such a move will permit the panel to dispense justice in a manner that is fair to all parties. It will also bring the present practice of issuing decisions based upon thorough analysis of evidence to an end.

The development of the new meaning does not imply that the WTO should prescribe a precise definition of the phrase. It merely implies that the WTO must develop a prima facie standard that is agreeable to all parties to a dispute. Further, it implies that panels must develop a prima facie standard that brings justice to all parties rather than one of the parties to a dispute. Under the present prima facie standards, WTO dispute settlement panels have the power to determine the cases whose facts merit a prima facie categorization and the

cases whose facts do not merit. However, there are no guidelines on the strategies that a panel will use to rank a given case as prima facie and another case as not constituting prima facie. As such, states presenting their claims to panels are often left disheartened whenever a panel rules that the evidence they have presented has not met the prima facie standard.

Notes

1. See Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7).
2. For review on the two approaches and the drawbacks of the GATT 1947 dispute mechanism, see Shell (1995). See also Koh (1987) and Young (1995).
3. See Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 2(1).
4. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 2(1), Article 3(2).
5. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 2(1), Article 3(2), Article 3(3).
6. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 2(1), Article 3(2), Article 3(3), Article 3(8).
7. See Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 7(1).
8. See Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, article 3(7), article 7(1), article 3(8).
9. See USA – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Report of the Appellate Body, April 25, 1997, WT/DS33/AB/R.
10. See Report of the Appellate Body, EC – Measures concerning meat and meat products (hormones), WT/DS26/AB/R and WT/DS48/AB/R, AB-1997-4.
11. See Panel Report, Japan – *Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998: IV, 1779.
12. See Report of the Appellate Body, European Communities - Trade Description of Sardines, WT/DS231/AB/R, June 26, 2002, paragraph 282.
13. See Report of the Appellate Body, European Communities - Trade Description of Sardines, WT/DS231/AB/R, June 26, 2002, paragraph 282, at paragraphs 277, 282.

14. See Appellate Body Report, United States – Measures affecting imports of woven wool shirts and blouses from India, WT/DS33/AB/R and Corr. 1, adopted May 23, 1997, DSR 1997:I, 323.
15. See: Appellate Body Report, European communities – Measures concerning meat and meat products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted February 13, 1998, 135 at paragraph 104.
16. See Appellate Body Report, European Communities – Selected customs matters, WT/DS315/AB/R, adopted 11 December 2006 at paragraph 266. See also Appellate Body Report, European Communities – Trade Descriptions of Sardines, WT/DS231/AB/R, adopted October 23, 2002 at paragraph 270; Panel Report, United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/R, adopted April 20, 2005 at paragraph 6. 12.
17. See Panel Report, USA – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R, adopted February 1, 2002 at paragraph 8.19
18. See Panel Report, Korea – Taxes on alcoholic beverages, WT/DS75/R, ADOPTED February 17, 1999 at paragraph 10.57.
19. See Panel Report, USA – Subsidies on upland cotton, WT/DS267/R and Corr. 1, adopted March 21, 2005 at paragraph 7.
20. See Panel Report, USA – Subsidies on Upland Cotton, WT/DS267/R and Corr. 1, adopted March 21, 2005 at paragraph 8.
21. See Appellate Body Report, USA – Measures Affecting the Cross-Border Supply of Gambling and Betting Service, WT/DS285/AB/R, adopted April 20, 2005 at paragraph 154.

References

Alexandrov, S. (2006), "The compulsory jurisdiction of the international court of justice: how compulsory is it?", *Chinese Journal of International Law*, Vol. 5 No. 1, p. 32.

Barceló, J. (2009), "Burden of proof, prima facie case and presumption in WTO dispute settlement", *Cornell International Law Journal*, Vol. 42 No. 1, pp. 33-42.

Buckley, W. and Okrent, C. (2003), *Torts and Personal Injury Law*, Delmar Cengage Learning, Clifton Park, NY, p. 49.

Grando, M. (2009), *Evidence, Proof, and Fact Finding in WTO Dispute Settlement*, Oxford University Press, New York, NY, p. 108.

Jackson, J.H., Davey, W. and Sykes, A., Jr (1995), *Legal Problems of International Economic Relations*, West Group, Eagan, p. 339.

Kazazi, M. (1996), *Burden of Proof and Related Issues: A Study of Evidence before International Tribunals*, Martinus Nijhoff Publishers, Leiden, pp. 328-329.

Koh, H.H. (1987), "The legal markets of international trade: a perspective on the proposed Canada-United States free trade agreement", *Yale Journal of International Law*, Vol. 12 No. 193, pp. 194-197.

Kurleka, M. and Turunen, S. (2010), *Due Process in International Commercial Arbitration*, Oxford University Press, New York, NY, p. 147.

Llamazon, A. (2008), "Jurisdiction and compliance in recent decisions of the international court of justice", *The European Journal of International Law*, Vol. 18 No. 5, pp. 815-832.

Palmeter, N.D. and Mavroidis, P.C. (2004), *Dispute Settlement in the World Trade Organization, Practice and Procedure*, Cambridge University Press, Cambridge, 144.

Pauwelyn, J. (1998), "Evidence, proof and persuasion in WTO dispute settlement, who bears the burden?", *Journal of International Economic Law*, Vol. 1 No. 2, pp. 227-231.

Pfitzer, J. and Sabune, S. (2009), "Burden of proof in WTO dispute settlement: contemplating preponderance of the evidence", International Centre for Trade and Sustainable Development, Geneva, No. 9, p. 10.

Powell, E. and Mitchell, S. (2007), "The international court of justice and the world's three legal systems", *Journal of Politics*, Vol. 69 No. 2, pp. 397-415.

Shell, R.G. (1995), "Trade legalism and international relations theory: an analysis of the world trade organization", *Duke Law Journal*, Vol. 44 No. 5, pp. 829-848.

Spurling Ltd *v* Bradshaw (1956) 1WLR 461.

Tarullo, D.K. (1985), "Logic, myth and international economic order", *Harvard International Law Journal*, Vol. 26, p. 533.

The Glendarroch (1984), The Glendarroch case, CA, p. 226.

Treitel, G., Reynolds, F. and Carver, T. (2011), *Carver on Bills of Lading*, Sweet & Maxwell, London, p. 721.

Young, M.K. (1995), "Dispute resolution in the Uruguay round: lawyers triumph over diplomats", *Harvard International Law Journal*, Vol. 29 No. 389, pp. 392-405.

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