

BURDEN OF PROOF IN WTO LAW

**A study of the manner in which the concept of burden of proof has been interpreted
and applied by the WTO Dispute Settlement Body**

Dissertation by

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Introduction

This paper will give a terse overview of the manner in which the Dispute Settlement Body of the WTO has applied the legal concept of burden of proof. Part One will briefly address the meaning of the concept as defined in municipal and international law and the manner in which the WTO Dispute Settlement Body has applied the concept. Part two focuses on the role of other participants, apart from the proponent of a particular claim or affirmative defense, in WTO dispute settlement proceedings with respect to the burden of proof. It deals specifically with the duty to collaborate in the administration of proof and concludes with a critical assessment of the role performed by Panels in WTO dispute settlement and the effect it has on discharging the burden of proof. Standard of proof, to be distinguished from the burden of proof is discussed in Part Three. Attention is given to the concept of "*prima facie*" evidence and the manner in which the Dispute Settlement Body deals with this concept. Part Four concludes the paper and provides an overview into the manner in which exceptions and affirmative defenses affect the allocation of the burden of proof. It attempts to identify any criteria used in WTO cases which could assist in deciding whether a particular provision constitutes an obligation or establishes an exception.

Part One

What does the legal concept of burden of proof mean?

The basic rule pertaining to the allocation of the burden of proof in most legal systems is generally that he who asserts must proof.¹ Put differently, "each party, apart from its

1 S.E. Van der Merwe, et al, *Evidence* (Cape Town, Juta & Co. Ltd, 1990) p. 425.

procedural position as claimant or respondent, has to prove its claims and contentions".² This rule is captured in the maxim *actori incumbit probatio*. Kazazi³ points out that a distinction can be made between the application of the concept in municipal legal systems (common law systems as opposed to civil law systems) and before international tribunals.

In municipal Legal Systems

(i) Common law systems

In this system the concept of "burden of proof" is used in two senses. The first or primary sense is referred to as the "legal burden", the "persuasive burden", "the burden of proof on the pleadings", "the fixed burden of proof" and the "risk of non-persuasion". It relates to substantive law and captures the idea that it is the duty of a party to convince the trier of facts by the end of the case of the truth of the propositions made by such party.

A secondary meaning is given to the phrase which could be referred to as the "evidential burden", the burden of "adducing evidence", the "duty of passing the judge", or the "burden of evidence". Burden of proof in this sense refers to the assessment earlier on in the proceedings whether sufficient evidence has been submitted to justify the hearing of the claim to continue. The notion of "absolution from the instance" is linked with this secondary meaning. In a civil trial, '[a]fter the plaintiff has closed his case, the defendant may apply for absolution from the instance on the grounds that no reasonable court might find for the plaintiff on his evidence. If the application is successful, the defendant will not be called on to present his case'.⁴ This usually implies that the plaintiff must establish a *prima facie* case, *infra*, first before the burden of evidence shifts to the defendant.⁵ To avoid confusion it might be helpful to draw a distinction between the evidentiary burden (or burden of evidence) to

²M. Kazazi, *The Burden of Proof and Related Issues – A Study on Evidence Before International Tribunals* (The Hague, Kluwer Law, 1996)(hereinafter referred to as "Kazazi") p.378.

³Kazazi, op. cit. n.2, pp.24 – 30.

⁴S.E.Van der Merwe, et al, op. cit. n.1, p.430.

establish a *prima facie* case, i.e., the duty on the proponent of a claim or a special defense, as opposed to the evidentiary burden (or burden of evidence) resting on the other party, i.e., the duty to adduce evidence to *refute or rebut* the evidence presented by the proponent. The other party will succeed in refuting or rebutting the *prima facie* case established by the proponent if by presenting evidence in rebuttal, all the evidence presented and considered as a whole regarding a certain point is inconclusive or contradicts the evidence presented by the proponent.⁶ Whereas the burden of proof is fixed on the pleadings, the burden of evidence may shift during a trial between the parties involved. In the usual manner of proceedings, it is the claimant in a dispute which carries the overall burden of proof. The other party (or responding party) does however under certain circumstances carry the burden of proof with respect to certain propositions it may be asserting. A typical example would be where the respondent against whom a claim is made, is not content with a mere denial, but sets up a special defense, which will, provided all the conditions are fulfilled, relieve that respondent from liability. For the purpose of that special (or affirmative) defense the responding party is in the same position as the claimant with respect to the burden of proving his entitlement to succeed upon that defense.⁷ McGovern refers to the exposition set out above as the "traditional doctrine"⁸. Whereas formulating the traditional doctrine seems to be stating the obvious, it is not always that clear in a particular dispute which party carries the burden of proof. The allocation of the burden of proof is an important function of the tribunal and can itself become a major point of contention in litigation. Discharging the burden of evidence does not necessarily imply that the burden of proof has been discharged as well. Satisfying the first allows the hearing to continue i.e. that the proponent has

⁵McGovern, *International Trade Regulation*, (Globefield Press) p.2.23-50.

⁶*Ibid.*,

⁷S.E.Van der Merwe, et al, op. cit. n.1, p.425.

⁸McGovern,op.cit.n.5,p.2.23-50

sufficiently made out a case for the other party to the dispute to answer. That does not mean that the trier of the facts may at the end of the hearing find that the proponent has provided sufficient evidence to discharge the overall burden of proof resting on the proponent.⁹

(ii) Civil law systems

In civil law systems, the phrase "burden of proof" refers only to the meaning ascribed to the phrase in common law systems in its primary sense viz. the duty on the proponent of a fact to prove the truth of its allegation.¹⁰

In international proceedings

The phrase "burden of proof" is used exclusively in international procedure to refer to the duty on the proponent of a fact to prove its allegations to be true. The use of the concept is therefore closer to the meaning ascribed to it in civil law systems as opposed to common law systems.¹¹ Kazazi observes: ' It should be emphasized, on the other hand, that the concept of "burden of proof" carries its own particular meaning in the context of international law. The flexibility and generality of international procedure, the vast authority of international tribunals in determining the value of evidence, and the discretion of international tribunals in determining the satisfactory standard of proof, are among the criteria that distinguish the international procedure, including the rules of burden of proof, from municipal procedures.'¹²

How does the WTO Dispute Settlement Body apply the legal concept of "burden of proof"?

The importance of the allocation of the burden of proof for resolving a particular dispute has been recognized in WTO dispute resolution.¹³The Appellate Body in *US – Shirts and*

⁹Kazazi, op. cit. n.3, pp.24 -30

¹⁰Ibid.,

¹¹Kazazi, op. cit. n.3, p.367.

¹²Ibid.,

¹³See for example Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("Japan film"), WT/DS44/R, 1998, para.10.28. where the Panel emphasized that both the nature of the factually complex case and the claim for non-violation nullification or impairment made by the United States with respect to sixteen (16) separate "measures", made the issue of allocating the burden of proof of particular importance for the resolution of the case.

Blouses (AB) confirmed the GATT practice with respect to the allocation of the burden of proof whereby -

- ◆ it is for the complaining party to establish the violation it alleges;
- ◆ it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and
- ◆ it is for the party asserting a fact to prove it.¹⁴ The Appellate Body also pointed to the obligation imposed upon the complaining party to provide sufficient evidence to establish a "presumption" of a violation. Once it has done so, the burden then shifts to the other party to adduce sufficient evidence to rebut the presumption.¹⁵ There is however no obligation on a Panel to state expressly which party carries the burden of proof in respect to every claim made.¹⁶ It does not mean however that the Panel needs not to *consider* the issue of the allocation of the burden of proof. In *US – FSC (21.5)* the European Communities read the interim report of the Panel as an indication that the Panel 'did not

¹⁴Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*("US - Shirts and Blouses (AB)"), WT/DS33/AB/R, 1997, sec. IV. The Appellate Body commented as follows: "In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporate 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 claimant or 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 defense." See also Panel Report, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*("Argentina – Textiles"), WT/DS56/R, 1997, para. 6.35.; Panel Report, *Japan film*, *supra*, footnote 13, para.10.372.; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*("US-Shrimp"), WT/DS58/R, 1998, para.7.14.; Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*("Turkey – Textiles"), WT/DS34/R, 1999, para.9.57.; Panel Report *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*("EC - Asbestos"), WT/DS135/R, 2000, para.8.177.; Panel Report, *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*("Thailand Steel"), WT/DS122/R, 2000, para.7.48.; Panel Report, *European Communities – Trade Description of Sardines*("EC – Sardines"), WT/DS231/R, 2002, para.7.50.

¹⁵Appellate Body Report, *supra*, footnote 14. See also Decision by the Arbitrators, *EC Measures Concerning Meat and Meat Products(Hormones) – Original Complaint by Canada – Recourse to Arbitration under Article 22.6 of the DSU by the European Communities*("EC-Hormones (22.6)(Canada)"), WT/DS48/ARB, 1999, para.9

¹⁶Appellate Body Report, *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*("India-QR's (AB)"), WT/DS90/AB/R, 1999, para.137

need to consider the issue of burden of proof because [they] had all the information [they] needed to come to the conclusions [they] did.¹⁷ The EC was of the view that ' a detailed consideration of the issue of the burden of proof is only really necessary when the evidence is incomplete or is in equipoise.'¹⁸ The Panel commented however that it agreed with the United States (US) that it was appropriate for it to identify who carries the burden of proof with respect to Footnote 59 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The *dictum* of the Appellate Body in *US – Shirts and Blouses (AB)*, *supra*, has been interpreted¹⁹ as referring to two aspects namely a *procedural aspect* as well as the *nature of evidence* required. The former refers to the obligation for the complainant to present the evidence first while the latter implicitly require the evidence to be of such a nature so as to raise a presumption of violation. The Appellate Body stated that the nature of the evidence as well as how much would need to be provided to raise the presumption, will vary from 'measure to measure, provision to provision and case to case.'²⁰

McGovern correctly points out that the Appellate Body has given a novel interpretation to the operation of the burden of proof. He remarks: 'According to this doctrine, if the party bearing the initial burden of proof adduces evidence sufficient to raise a presumption that what is claimed is true, the burden shifts to the other party, which will fail unless it adduces sufficient evidence to rebut the presumption.'²¹ Instead of the *burden of evidence* shifting to the other party after the claiming party has established the presumption, the Appellate Body seems to suggest that the *burden of proof* is shifting. What seems to be required from the replying

17Panel Report, *US – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities* ("US – FSC(21.5)"), 2001, para.7.15

18Ibid.,

19Panel Report, *Argentina – Textiles*, *supra*, footnote 14, para.6.37.

20Appellate Body Report, *US – Shirts and Blouses(AB)*, *supra*, footnote 14 Sec.IV.

party is to provide evidence 'that not merely leaves the point uncertain, but *proves the assertion to be wrong*.'²²(Emphasis added). A case in point is US – *Shrimp (21.5)*. After stating that it was up to Malaysia to establish a *prima facie* case that its claim under Article XI: 1 of GATT 1994 was founded, the Panel noted that it was then up to the United States to establish a *prima facie* case that its measure was justified under Article XX, since it was in the nature of an affirmative defense. However, it then continued by stating that '[i]f the United States establishes a *prima facie* case, the *burden of proof* will shift unto Malaysia.'(Emphasis added). The Panel concluded that '[i]f the evidence on a particular claim or defense remains in equipoise, the party bearing the initial burden of proof will be deemed to have failed to provide sufficient evidence in support of its claim.'²³ It is submitted that this interpretation of the allocation of the burden of proof provided by the Panel, i.e., that if the evidence on a particular claim (or defense) remains in equipoise, the party 'bearing the initial burden of proof will be deemed to have failed to provide sufficient evidence in support of its claim' (or defense) can only make sense if it is not the burden of proof regarding a particular point that is shifting to the replying party, but merely the *burden of evidence or burden of rebuttal/refutation*.²⁴ Similarly the Panel in *EC – Hormones (Canada)* concluded that for the purposes of the dispute, 'Canada bears the burden of presenting a *prima facie* case of inconsistency with the [Agreement on the Application of Sanitary and Phytosanitary Measures] SPS Agreement, after which the *burden of proof* shifts to the European Communities to demonstrate that its measures in dispute meet the requirements imposed

²¹McGovern,op.cit.n. 5, p. 2.23-50.

²²Ibid.,

²³Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*("US – Shrimp(21.5)"), WT/DS58/RW, 2001,para. 5.19.

²⁴Reading the Report however, it appears as if the Panel, in practice, imposed a burden of rebuttal on Malaysia (and not a burden of proof) with respect to the *prima facie* defense established by the US under Article XX(g) of GATT 1994 (see for example paras. 5.104.; 5.111.; 5.116.; 5.120.;5.125.; and 5.137. of the Report), unless the Panel equates (in the writer's view, incorrectly) the burden of proof with the burden of rebuttal.

by the SPS Agreement."²⁵ It is difficult to understand the allocation of the burden of proof by the Panel, unless reference to the "burden of proof" is replaced with "burden of evidence". If the evidence presented by both parties are in balance, the rule is that the party bearing the burden of proof, loses the case, but how do one apply that to what the Panel is saying here, namely that both parties carry the burden of proof? The Appellate Body confirmed the basic rule referred to by the Panel for the allocation of the burden of proof when it stated: '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...*²⁶(emphasis added). As pointed out by McGovern that, although a number of objections may be raised against the Appellate Body's doctrine with respect to the allocation of the burden of proof, the circumstances in which the application of that doctrine would bring about a different result from the traditional doctrine is limited. He mentions one example where it would make a difference namely where a Panel would find that a party has established a *prima facie* claim or defense *and* at the same time finds, after considering all the evidence presented (including that presented by the responding party), the evidence as a whole to be inconclusive. Whereas the claim or defense under the traditional doctrine would fail, it would succeed under the doctrine of the Appellate Body.²⁷

²⁵Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*("EC – Hormones(Canada)"), WT/DS48/R/CAN, 1997 para.8.58.

²⁶Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("EC-Hormones (AB)") 1998, para. 98.

²⁷McGovern, op cit.n.5, p. 2.23-51.

Part Two

The roles performed by other actors involved in the resolution of a dispute with respect to the burden of proof

Kazazi points out that '[i]n each litigated case three main actors are actively involved: the claimant, the respondent and the judge or arbitrator. Each of these actors plays a particular role with respect to the burden of proof, and it is the aggregate effects of their roles altogether that eventually determines whether or not the burden of proof has been met in a given case. Accordingly, the main aspects of the burden of proof include the roles played by those parties.'²⁸ It has been pointed out before that the maxim *actori incumbit probatio* can apply to both parties to a dispute, i.e., to the party making a claim as well as to the party responding to a claim by raising an exception or affirmative defense. The focus in this Part of the paper is to establish the role of the responding party (either to a claim or to an affirmative defense) and that of the Dispute Settlement Body. More particularly, the role performed by the Panels in WTO dispute settlement in so far as it relates to the burden of proof will be addressed.

The duty of the parties to cooperate in the administration of proof

(i) Introduction

There is a duty on both parties to a dispute to collaborate in placing before the tribunal all facts relevant to the disputed issues. Kazazi notes that '[t]his obligation stems from the idea of the peaceful settlement of disputes in international law, and the objective of enabling international tribunals to base their decisions on as many facts and as much information in the case as possible.'²⁹ This rule to collaborate operates for the benefit of both the claimant and the respondent in the sense that it assists both parties to uncover the truth. The

objective of the rule is not however to relieve the proponent of either a claim or affirmative defense of its duty to meet the burden of proof. Furthermore, the duty to collaborate with the proponent does not and should not amount to a request for discovery as it is known in common law legal systems. Kazazi emphasizes that '[t]he respondent's duty of collaboration does not commence until such time that the claimant presents the documents at its own disposal. The rule of collaboration is not to be imposed on a party unnecessarily. If the claimant is able to prove its case without any assistance from the respondent, it should do so.'³⁰ 'An inherent weakness of the rule is that its effective application largely depends on the active and voluntary participation of the responding party. Neither can a party be compelled to cooperate nor can the request be enforced. Although international tribunals tend to be tolerant with respect to an uncooperative party, there have been instances where tribunals have drawn adverse inference against a party withholding evidence'.³¹

(ii) Application of the rule of collaboration in WTO dispute resolution

It has been confirmed in *Argentina – Textiles* that there is an obligation on both parties, especially the adversary, to collaborate in presenting facts and evidence at the disposal of the Panel, which are in the sole possession of such party. According to the Panel, this duty only arises when the claimant party has done its best to secure the evidence and furthermore, has actually presented some *prima facie* evidence to support its case.³² In *EC-Hormones (22.6)(Canada)* the Arbitrators stated that this duty to produce evidence and to collaborate in presenting evidence to the arbitrators 'is crucial in Article 22 arbitration proceedings.'. They remarked that it is upon the EC to 'submit evidence showing that the proposal is *not* equivalent. However, *at the same time and as soon as it can*, Canada is

28Kazazi, op.cit.n.2, p. 369.

29Kazazi, op. cit., n.2, p. 375.

30Kazazi, op. cit., n.2, p. 372.

31Kazazi, op. cit., n.2, p. 373.

required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered.' (emphasis added). The Arbitrators stated that because some evidence such as data on trade with third countries, export capabilities and affected exporters may well be in the sole possession of Canada as the party that suffered the trade impairment, they requested Canada to submit a so-called methodology paper.³³ In *US – Copyright Act* the Panel remarked that the duty to produce evidence and to cooperate with the Panel rests on both parties. The Panel pointed out that this is an issue which has to be distinguished from the question of who carries the ultimate burden of proof for establishing the claim or defense.³⁴ McGovern observes that the Appellate Body 'has expressly encouraged panels to be prepared to draw adverse inferences... when evidence is withheld by a party in sole possession, and to warn disputants of this prospect.'³⁵

The role and function of international tribunals in matters related to evidence

(i) Introduction

Kazazi mentions the following powers of international tribunals as well as the role which they fulfill in matter related to evidence namely: Powers: (1) fact-finding authority, including the power to investigate, *proprio motu*, the facts at issue; (2) the power to allocate the burden of proof between the parties; (3) the power to determine if the burden of proof has been satisfied; (4) the power to schedule the production of pleadings and evidence; (5) the power

³²Panel Report, *supra*, footnote 14, para.6.40.

³³Decision by the Arbitrators, *supra*, footnote , para.15; See also Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration under Article 22.6 of the DSU by the European Communities*("EC Bananas(22.6)Ecuador"), WT/DS27/ARB/ECU, 2000,para. 37; and Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*(*Brazil-Aircraft*(22.6)), WT/DS46/ARB, 2000,para.2.9.

³⁴Panel Report, *United States – Section 110(5) of the US Copyright Act*("US – Copyright Act"), WT/DS160/R, 2000, para. 6.15. See also Decision by the Arbitrators, *EC – Hormones (22.6)(Canada)*,*supra*, footnote15, para.11.

to accept or refuse further pleadings and evidence, and (6) they have the discretion and freedom in admitting, weighing and evaluating evidence³⁶; Function and role:(1) impartiality requires that a tribunal may not provide evidence in favor of or against either of the parties;(2)an inevitable consequence of the application of the fact-finding power of the tribunal is that it affects the burden of proof in that the party that carries the burden of proof may find its task either easier or more difficult, as the case may be.³⁷

Tribunals can exercise their fact-finding power by requiring the parties, 'in the course of both the written and oral phases of the proceedings, to furnish relevant documents and information at their disposal.'³⁸ Technical issues can be referred to independent experts appointed by the tribunal or inquiries can be made from third parties not involved in the case. Moreover, judicial notice can be taken of some facts which need not be proved. All these measures may result in assistance to the party which carries the burden of proof with respect to a particular claim or defense.

'Another important area where international tribunals enjoy authority is the admissibility and evaluation of evidence. The fact that international tribunals are free from technical rules of evidence applied in municipal law provides them with wide authority in determining the admissibility of evidence. International tribunals have applied this power flexibly and have found it justified to receive every type of evidence, but to attach to each such kind of evidence the probative value it deserves under the circumstances of a given case.'³⁹

35McGovern, op. cit., n. 5,p. 2.23-44, where the writer refers to Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 1999, paras. 202 et seq.

36Kazazi, op. cit., n.2, p. 375.

37Kazazi, op.cit., n.2, p.374.

38Ibid.,

39Kazazi, op. cit.n.2, p. 375.

(ii) The powers and role of Panels in WTO dispute settlement with regards to evidence and the burden of proof

(a) The power of the Panel to control and manage the process

One of the clearest descriptions of the role and function of Panels in WTO dispute settlement is found in *Thailand Steel* where the Panel stated: "The burden of proof is "a procedural concept which speaks to the *fair and orderly management and disposition* of a dispute". We consider that, pursuant to Articles 12 and 13 of the [Dispute Settlement Understanding] DSU and in order to conduct an objective assessment of the facts of the matter pursuant to Article 11 DSU and Article 17.6 of the [Anti-dumping] AD Agreement, we as a panel have *broad legal authority to control the process* by which we inform ourselves of the relevant facts of the dispute and the legal principles applicable to such facts.

(b) The Panel's power to ask questions

"We as a panel have the mandate and the duty to manage the Panel proceedings and *the ability to pose questions* to the parties in order to *clarify and distill* the legal arguments that are asserted by the parties in support of their claims. We are conscious that, in our assessment of the facts of the matter, we *may not relieve* Poland of its task of establishing the inconsistency of Thailand's [anti-dumping] investigation and resulting measure with the relevant provisions of the [Anti-dumping] Agreement. In particular, we are aware that, in our questions posed to the parties, we must not "overstep the bounds of legitimate management or guidance of the proceedings ... in the interest of efficiency and dispatch.". However, the fact that it is for the party asserting the affirmative of a particular claim or defense to discharge the burden of proof does not mean that *a panel is frozen into inactivity*. 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 defense, 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 defense. We view this authority as essential in order to carry out our mandate and responsibility under the DSU and the AD Agreement.'(footnotes omitted and emphasis added).⁴⁰

(c) The power of the Panel to determine the law applicable to the facts of the dispute

Parties are responsible to prove the facts they claim. It is within the competence and it is the duty of the Panel to determine the law applicable to the facts presented. To enable it to make an objective assessment of the matter before it, it can use the arguments presented by the Parties and use its own arguments and legal reasoning, provided it does not go beyond the terms of reference.⁴¹ Claims regarding the legal characterization of facts by the parties, however, cannot bind the Panel.⁴²

(d) The Panel's authority to consult with experts—

The consultation of experts by Panels in accordance with Article 13 of the DSU is usually brought about by the complex factual and scientific nature of the particular case. This is especially true for disputes arising from the application of the SPS Agreement where scientific facts and data play an important role. The Panel in *EC -Asbestos* spelled out the role of panels in making use of the power given to them under Article 13 in the following manner:

- ◆ It is for the parties to present clear evidence and arguments in supports of their claims;

⁴⁰Panel Report, *supra*, footnote 14, para.7.50.

⁴¹Panel Report, *supra*, footnote 14, para.8.32 read with footnote 24.

⁴²Panel Report, *supra*, footnote 14 , para.8.60.

- ◆ Failing which, the Panel will be unable to determine and conclude that a *prima facie* case has been made out by the claimant to establish its claim;
- ◆ The Panel will only be able to reach a *finding* concerning a particular claim if the claimant has "spontaneously made a *prima facie* case" to establish its claim. In *Korea – Alcohol (AB)* the Appellate Body ruled that the Panel did not err in allocating the burden of proof between the parties.⁴³ Among the reasons provided by the Appellate Body in reaching its conclusion is that the Panel made only findings of inconsistency with Article III: 2, second sentence of GATT 1994, with respect to products for which a *prima facie* case has been established on the evidence presented.⁴⁴
- ◆ The information obtained by the Panel from experts consulted under Article 13 cannot be used to establish the validity of a claim if the claimant has failed to make a *prima facie* case to establish its claim first. The Panel Report in *India-Autos* is a case in point where the Panel found that India failed to establish a *prima facie* case that its measure was justified by Article XVIII: B. India took issue with the Panel that the latter did not consult with the IMF in determining India's balance of payments position on the dates when each of the claimants requested the establishment of the Panel. The Panel left the question open whether it is under an obligation or not to consult with the IMF before it makes a final factual resolution on the balance-of-payment situation of India. The Panel did however make it clear that any consultation with the IMF or any other expert cannot be used as a 'total substitute for asserting and providing a *prima facie* case as to a defense under Article XVIII: B and in the absence of any indication of how the measure might fall within the terms foreseen in that provision.'. It confirmed that the fact-finding mandate of

⁴³Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("Korea – Alcohol(AB)"), WT/DS75/ab/r, WT/DS84/AB/R, 1999, para. 157.

⁴⁴Appellate Body Report, *Korea – Alcohol(AB)*, *supra*, footnote 43, para.156.

the panel should never be used to make out a *prima facie* case where it is not achieved by the relevant party. The Panel stated that it could be helpful at a certain stage of the proceedings to consult with international experts or authorities in establishing whether one of the specific situations foreseen in Article XVIII: B applied to India's situation. It referred to *India – QR's* where the Panel noted that such consultations could assist the panel in 'assessing the claims submitted'.⁴⁵ Similarly, the *Japan – Agricultural Products (AB)* case serves as an example where the Panel, in the view of the Appellate Body, exceeded its investigative authority 'by ruling in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.'. The US claimed that Japan's varietal testing requirement is inconsistent with Article 5.6 of the SPS Agreement in that it was more trade restrictive than required to achieve the appropriate level of protection determined by Japan. The US argued that "testing by product" is an alternative measure, which meet the requirements of Article 5.6. The Panel however was of the view that the US did not provide sufficient evidence to suggest that that measure would achieve the appropriate level of protection.⁴⁶ Instead the Panel turned to a measure *suggested* by the experts consulted viz. "determination of sorption levels". The Appellate Body referred to the Panel's explanation that 'it *deduced* this alternative measure from the written answers of the experts to the Panel's questions and from their statements at the Panel's meeting with the experts.'. It noted that the

⁴⁵Panel Report, *India – Measures Affecting the Automotive Sector*("India-Autos"), WT/DS146/R, WT/DS175/R, 2001, para.7.294. The Panel referred in footnote 432 to the comment of the Appellate Body in *Japan – Measures Affecting Agricultural Products*("Japan – Agricultural Products(AB)"), WT/DS76/AB/R, 1999, para.129 which reads: '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 favor 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.'.

⁴⁶Appellate Body Report, *Japan – Agricultural Products (AB)*, *supra*, footnote 45, para.124.

Panel 'explicitly stated that the United States, as complaining party, did not *specifically argue* that the "determination of sorption levels" met any of the three elements under Article 5.6. On the basis of the evidence before it, including its deductions from the views expressed by the experts, the Panel came to the conclusion that it could be presumed that the 'determination of sorption levels was an alternative measure which would meet all of the elements under Article 5.6.'. The Panel pointed out that the US had "'given views which were consistent with" the argument that this alternative measure met the first and third elements under Article 5.6 and had "suggest[ed]" that it would meet the second element.'⁴⁷ The Appellate Body ruled that the general rules regarding the allocation of burden of proof required that the US as the complainant carried the burden of establishing a *prima facie* case of inconsistency with the provisions of Article 5.6 by showing an alternative measure which would meet the requirements of Article 5.6. As the US did not even claim that "determination of sorption levels" is an alternative available which would meet the requirements of Article 5.6, the United States failed to establish a *prima facie* case⁴⁸. It was not for the Panel then to do that for the complainant.⁴⁹

- ◆ The information referred to above is to be used to 'help the Panel to understand and evaluate the evidence submitted and arguments made by the parties.'
- ◆ 'On any legal matter, notably the interpretation of the Agreements concerned, the Panel will be assisted by the arguments of the parties but will not be bound by them.'⁵⁰.

The Panel made it clear that it will not set itself up as an arbiter of the opinions expressed by the scientific community, i.e., those submitted by the parties and those submitted by the

⁴⁷Appellate Body Report, *Japan – Agricultural Products (AB)*, *supra*, footnote 45, para.125.

⁴⁸Appellate Body Report, *Japan – Agricultural Products (AB)*, *supra*, footnote 45, para.126.

⁴⁹Appellate Body Report, *Japan – Agricultural Products (AB)*, *supra*, footnote 45, para.129. See also Panel Report, *EC- Asbestos*, *supra*, footnote 14, para.8.60.

experts it consulted. It defined its role, taking into account the burden of proof, as to determine whether sufficient scientific evidence has been presented for it to conclude that a risk exists with respect to human life or health and that the measures taken by France were necessary with respect to the objectives pursued. Immediately after stating that any conclusions it may draw will be based on the scientific evidence presented by the parties and the comments of the experts consulted, the Panel qualified its statement by declaring that the 'opinions expressed by the experts we have consulted will help us to understand and evaluate the evidence submitted and the arguments advanced by the parties.'⁵¹ In stating that the (EC) has established a *prima facie* case both with respect to showing a health risk posed by the use of chrysotile⁵² as well as the necessity⁵³ of the measure taken by France, the Panel was careful to base its conclusion on the evidence presented by the EC and *confirmed* by the comments received from the experts it consulted.

The question of *when* a Panel may consult experts for advice (as well as taking into consideration evidence submitted by the defending party) has been addressed by the Panel in *Australia – Salmon (21.5)*. The Panel referred to *Canada -Aircraft*⁵⁴ and *India -QR's*⁵⁵ for authority that 'a panel is *not* precluded from considering expert advice or evidence submitted by the defending party until the complaining party has established a *prima facie* case.'

⁵⁶The panel continued: 'As noted in *Canada – Aircraft*, "[a] panel may, in fact, need the

50Panel Report, *EC-Asbestos*, *supra*, footnote 14, paras.8.81 – 8.82.

51Panel Report, *EC-Asbestos*, *supra*, footnote 14, paras.8.181 – 8.182.

52Panel Report, *EC-Asbestos*, *supra*, footnote 14, para.8.194.

53Panel Report, *EC-Asbestos*, *supra*, footnote 14, para.8.222.

54Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*("Canada -Aircraft"),WT/DS70/R, 1999.

55Panel Report, *India – Quantitative Restrictions on Imports of Agricultural , Textile and Industrial Products*("India -QR's"), WT/DS90/R, 1999.

56Panel Report, *Australia – Measures affecting importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (21.5)"),WT/DS18/RW, 2000, para.7.118; See also Appellate Body Report, *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*("Thailand – Steel (AB)"),WT/DS122/AB/R,2001, para.135 where the Appellate Body noted that there

information sought in order to evaluate evidence already before it in the course of determining whether the claiming or responding Member, as the case may be, has established a *prima facie* case or defense"^(footnotes omitted). During its deliberation of the matter the Panel examined the evidence and arguments *submitted by the parties and the experts*⁵⁷ advising the Panel, while recalling that Canada bears the burden of proof. On another occasion the Panel considered the arguments and evidence presented by Canada *in light of*⁵⁸ expert advice it received. The Panel concluded that Canada had established a *prima facie* case of inconsistency with the relevant provisions of the SPS Agreement and that Australia failed to rebut the presumption established by Canada, after examining the evidence presented by both parties in support of their claim and rebuttal respectively.⁵⁹ In *Korea – Dairy Safeguards (AB)* Korea argued on appeal that the Panel erred in that it did not first establish whether the (EC) had established a *prima facie* case before it required Korea to present evidence and arguments in rebuttal. The Appellate Body responded by remarking that nowhere in the DSU or the Agreement on Safeguards is there any requirement that a Panel need to make an explicit ruling whether the complaining party has established a *prima facie* case before the Panel can examine the evidence and arguments of the defending party.⁶⁰ The Appellate Body observed that the thrust of Korea's appeal was that the Panel had in effect made the EC's case for them. It concluded however that '[o]n the basis of the questions posed by the Panel and the reactions of the European Communities, we see no ground to conclude that the Panel relieved the European

is no authority which precludes a Panel from *asking questions* 'relating to claims for which the complaining party had not first established a *prima facie* case ...'.

57Panel Report, *Australia – Salmon (21.5)*, *supra*, footnote 56, para.7. 71.

58Panel Report, *Australia – Salmon (21.5)*, *supra*, footnote 56, para.7.124.

59Appellate Body Report, *Australia – Measures affecting importation of Salmon*, (Australia – Salmon(AB)), WT/DS18/AB/R, 1998, para.258.

60Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy Safeguards(AB)"), WT/DS98/AB/R, 1999, para.145.

Communities of its task of showing the inconsistency of Korea's safeguards investigation with Article 4.2 of the *Agreement on Safeguards*. The Panel did not overstep the bounds of *legitimate management or guidance of the proceedings before it in the interest of efficiency and dispatch*.⁶¹ (emphasis added).

Part Three

The Standard of Proof

(i) Introduction

Tribunals have the authority to determine the standard of proof to be satisfied by a proponent of a claim or affirmative defense, before that Tribunal will be prepared to find that the burden of proof resting on such proponent has been discharged. This it does by weighing the evidence in favor of the proponent against the appropriate standard of proof. It is a subjective measure falling within the discretion of the Tribunal and as Kazazi observes, is subject to human judgment.⁶² "*Prima facie* evidence", "proof beyond reasonable doubt" and "preponderance of evidence" are all examples of different measures of standard of proof which a Tribunal may decide to apply in a particular case.

Prima facie evidence is defined as 'evidence which if not contradicted is sufficient to create a reasonable belief as to the truthfulness of the claim.'⁶³ The question arises what the legal effect is of establishing *prima facie* case? In common law systems once the proponent of a claim or affirmative defense has established a *prima facie* case it has discharged the burden of evidence, i.e., enough evidence has been adduced upon which a reasonable tribunal *might* find for him, when he closes his case. If the responding party did not present any/some-supporting evidence in rebuttal it 'runs the risk of judgment being given against

⁶¹Appellate Body Report, *Korea – Dairy Safeguards*(AB), *supra*, footnote60, para.149.

⁶²Kazazi, *op. cit.* n.2 , p. 377.

⁶³*Ibid.*,

him if he leads no evidence to combat the **prima facie** case.⁶⁴ It is important however to note the following statement by Van der Merwe, et al, namely: 'It does not mean that judgment will *automatically* be given in favor of the party who has established the **prima facie** case if no contrary evidence is led.'(emphasis added).⁶⁵ Kazazi appears to support this interpretation when he observes: 'Discharging the burden of evidence does not *necessarily* imply that the burden of proof has been discharged as well. Satisfying the first will allow the hearing to continue, i.e., that the proponent has sufficiently made out a case for the other party to answer. That does not mean that the trier of the facts may at the end of the hearing find that the proponent has provided sufficient evidence to discharge the overall burden of proof resting on the proponent.'(emphasis added).⁶⁶ It is to be noted that this situation arises where the responding party did not answer the *prima facie* case established by the proponent of the claim or defense. Where it does answer the case, i.e., it produces some supporting evidence, the Tribunal will examine all evidence presented as a whole, weighing and evaluating within its discretion all the arguments and evidence before it. In common law systems the degree of proof required in a civil trial before a case may be decided in favor of the proponent of a claim or affirmative defense is usually expressed as a proof on a balance (or preponderance) of probabilities. Van der Merwe, et al, quotes Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 374 describing the standard of proof in civil cases as follows: 'It must carry a reasonable degree of probability.... If the evidence is such that the

64S.E.Van der Merwe,et al, op. cit., n.1, p. 429.

65Ibid.,

66Kazazi, op. cit. n. 2, pp.24-30, although it may possibly be argued that this passage does not refer to the situation where the responding party has not presented any or some supporting evidence, but more to the situation where after hearing all the evidence, including the evidence presented by the responding party, the Tribunal may find the evidence presented by the proponent to be inconclusive or contradicted by the evidence presented by the responding party.

tribunal can say 'we think it is more probable than not' the burden is discharged, but if the probabilities are equal it is not.'⁶⁷

"Proof beyond reasonable doubt", is usually the criminal standard of proof. "Reasonable doubt" has been described as "... a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Where there are no probabilities either way and it cannot be said that the innocent version of the accused is not reasonably true, then the evidence does not constitute proof beyond reasonable doubt."⁶⁸ Although a high standard, proof "beyond reasonable doubt" has been applied on occasion by international tribunals especially dealing with humanitarian issues. Kazazi points out that 'most common standard applied by international tribunals, however, is the "preponderance of evidence", which generally means evidence greater in weight than that adduced by the other party.'⁶⁹

(ii) The standard of proof in WTO dispute settlement

It will be recalled that the Appellate Body in *US – Shirts and Blouses* observed that the nature and the amount of evidence required to establish a presumption of truth may vary from case to case, measure to measure and provision to provision. The Panel in *US - Shrimp* phrased the standard of proof required differently namely that it is when the Panel considers that sufficient evidence has been provided to support a particular claim or defense. It referred to the statement by the Appellate Body in the *US Shirts and Blouses*. The Panel noted that the statement had two implications namely (1) that the Panel can consider any type of evidence and (2) that the Panel can reach their decision regarding a particular claim on the basis of the level of evidence which they consider sufficient.⁷⁰ An

⁶⁷S.E.Van der Merwe, et al., op. cit. n.1, p. 431.

⁶⁸S.E.Van der Merwe, et al., op. cit. n.1, p. 423.

⁶⁹Kazazi, op. cit. n.2, p. 377.

⁷⁰Panel Report, *supra*, footnote 14, para.7.14.

example where the Panel was not satisfied with the evidence presented by the claimant is in *Indonesia – Autos*. It ruled that the United States 'has not explained *to our satisfaction* how the ineligibility for benefits accruing under the National Car Programme could constitute "requirements" imposed on foreign trademark holders, in the sense of Article 20 of [Agreement on Trade-Related Aspects of Intellectual Property Rights]TRIPS Agreement."⁷¹(emphasis added). This confirms the subjective and discretionary nature of standard of proof.

(iii) Distinction between burden of proof and standard of proof

The Panel in *EC-Asbestos* did not always distinguish in their report between the *burden* of proof and the *standard* of proof. The Panel referred to "a stricter burden of proof" ⁷²resting on a claimant in a claim for alleged nullification or impairment arising from a measure "justified" under Article XX. On another occasion in the report, the Panel was not prepared to apply the presumption used by the Panel in *Japan- Film*, according to which the claimant should not be considered to have anticipated a measure introduced after the tariff concession had been negotiated, because it would not be consistent with the standard of proof⁷³ found to be applicable in the case. It is submitted that reference to "stricter burden of proof" is technically incorrect. It refers rather to the "what and how much"(viz. the standard of proof) a claimant needs to present the Panel with, before the Panel will be prepared to accept that the claimant has established a case. Similarly, in *Canada – Pharmaceuticals (21.3(c))* the arbitrator remarked that 'as immediate compliance is clearly the preferred option under Article 21.3, it is, in my view, for the implementing Member to bear the *burden of proof* in showing – "[i]f it is impracticable to comply immediately" – that the duration of any

⁷¹Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*("Indonesia – Autos"), WT/DS54/R,WT/DS55/R,WT/DS59/R,WT/DS64/R,1998, para.14.278.

⁷²Panel Report, *supra*, footnote 14,para. 8.301.

⁷³Panel Report, *supra*, footnote 14,para. 8.294.

proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time". And the longer the proposed period of implementation, the *greater this burden will be.*'(emphasis added).⁷⁴

The arbitrator continued: 'If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other had, if there is no such mandate, then a Member asserting the need for a certain period of time must *bear a much more imposing burden of proof.*'(emphasis added).⁷⁵

(iv) "Prima facie" as the standard of proof

The standard of proof generally applied by Panels has been confirmed in *Indonesia – Autos*⁷⁶ namely that it is for the complainant to establish a *prima facie* case of inconsistency with a provision, before the burden of showing consistency with that provision is taken on by the defendant.⁷⁷ The Appellate Body in *EC – Hormones (AB)* stated with respect to the meaning of a "*prima facie*" case that it 'is well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires the panel, as a matter of law, to rule in favor of the complaining party.'⁷⁸ McGovern remarks in response to this *dictum* that '[g]iven that panels have a margin of discretion in the assessment of fact, it might be better to speak of a case that entitles (rather than requires) the panel to reach a

⁷⁴Award of the Arbitrator, *Canada – Patent Protection for Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*("Canada-Pharmaceuticals(21.3(c)"), WT/DS114/13, 2000,para.47.

⁷⁵Award of the Arbitrator, *supra*, footnote 74, para.51.

⁷⁶Panel Report, *supra*, footnote 71, para. 14.106.

⁷⁷The question arises whether the Panel in *Japan- Film* introduced a higher standard of proof with respect to non-violation nullification or impairment claims. The Panel arrived at the conclusion based upon the express provisions of the DSU as well as established WTO/GATT jurisprudence that the claimant, *in casu*, the US, 'bears the *burden of a detailed justification* for its claim in order to establish that what it claims is true'(emphasis added). The Panel also alluded to the observation of the Appellate Body in *US Shirts and Blouses(AB)* relating to the nature and amount of evidence needed to raise the presumption, which the Appellate Body stated may vary depending on the measure, provision or case in dispute.

conclusion.⁷⁹ After finding in *US-Line-Pipe Safeguards* that Korea had failed to rebut the *prima facie* case established by the United States that NAFTA is in compliance with Article XXIV: 5(b) and (c), the Panel was careful to define the scope of its finding in stating that it does not mean that the Panel has found NAFTA to be in conformity with Article XXIV: 5(b) and 8(b). We simply find that the United States has established a *prima facie* case that NAFTA is in conformity with Article XXIV: 5(b) and 8(b), and that Korea has failed to rebut that *prima facie* case.⁸⁰ The manner in which the Panel goes about explaining what their finding meant, is with respect, confusing. It might be that the Panel alludes to the distinction made in the law of evidence between *formal* truth as opposed to *material* truth. Maybe the answer is to be found in the meaning of *prima facie* itself, i.e., evidence which if not contradicted is *sufficient to create a reasonable belief as to the truthfulness of the claim*. It does bring to mind however, the question what the *legal effect* is of a finding that a *prima facie* case has not been rebutted. It may be that the Panel was at pains not to prejudge any decision by the Committee on Regional Trade Agreements regarding the conformity of NAFTA with the provisions of Article XXIV. The decision, however, does not favor legal certainty. Take the following example: assume that the US needs to prove in a particular dispute that NAFTA does conform to Article XXIV and assume that it succeeds in establishing a *prima facie* case. Should the Panel subsequently find that the respondent has failed to rebut the *prima facie* case, the Panel would be under an obligation, according to the *dictum* of the Appellate Body in *EC-Hormones (AB)*, to find in favor of the US as a matter of law, i.e., it has successfully satisfied the burden of proving conformity with Article XXIV. It would be absurd for the Panel then to state that its finding should not be interpreted that

78Report of the Appellate Body, *supra*, footnote 26, para.104.

79McGovern, op. cit. footnote 5, p. 2.23-50 footnote 2.

80Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US-Line Pipe Safeguards"), WT/DS202/R, 2001, para. 7.145 read with footnote 135.

NAFTA conform with Article XXIV, because that was exactly the issue in dispute. Was it because the US raised conformity with Article XXIV as a defense which brought the Panel to its conclusion? It is doubtful whether that should make a difference with respect to the legal effect of establishing a *prima facie* case, as the defendant who raises an affirmative defense is in the same position as a claimant in so far as the burden (and standard) of proof is concerned.

(v) Is it meaningful to speak of a "prima facie case"?

In his evaluation of the new doctrine followed by the Appellate Body with respect to the burden of proof discussed in Part One, McGovern raises the question whether it is still meaningful to speak of a *prima facie* case. He raises the question while observing that not only is the evidence of the party who is required to present a *prima facie* case taken into consideration in deciding whether a *prima facie* case has been established, but also evidence presented by independent experts and 'at least some responses from the other party'.⁸¹ As was mentioned earlier, in common law civil trials 'the degree of proof required before a case may be decided in favor of the party who asserts is usually expressed as proof on a balance (or preponderance) of probabilities'⁸². Establishing a "*prima facie*" case serves the purpose of allowing the case to move forward from the "first phase" where the claimant needs to present the tribunal with evidence supporting his claim to the "second phase" where the responding party needs to rebut the evidence presented by the claimant. An application for absolution from the instance is available to the responding party which, if successful will obviate the need to present any evidence on the part of the responding party. It will be recalled that if such application for absolution from the instance is unsuccessful, the

⁸¹McGovern, op. cit., n.5, p. 2.23-52.

⁸²S.E.Van der Merwe, et al, op. cit. n.1, p. 431.

responding party will need to present some evidence in rebuttal to avoid the risk of losing the case.

In WTO dispute settlement procedure, no allowance is provided for the legal notion of absolution from the instance. In practice, the Panel allows the complainant to present legal argument and evidence to support a claim of violation. It appears as if by stating that the burden of evidence (or rather the burden of proof, according to the "new doctrine") only shift to the responding party *once* the complainant has established a *prima facie* case, the process also allows for a two - phase procedure, within the meaning of the common law procedure. However, from the discussion of some of the cases below, it appears as if that is not necessarily the case. The Panel in *US FSC (21.5)* stated clearly that there is no obligation on a Panel to *expressly rule* on whether a *prima facie* case has been established before it can proceed to examine the evidence presented in rebuttal⁸³. Similarly, in *India – QR's (AB)* India alleged that the Panel wrongfully considered the views of the IMF before concluding that the US had made a *prima facie* case of violation of the Ad Note to paragraph 11 of Article XVIII: B. The Appellate Body commented that there is no obligation on a panel to *conclude* that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. In the words of the Appellate Body: 'such considerations may be useful *in order to determine* whether a *prima facie* case has been made.'(emphasis added). Neither did the Appellate Body find 'it objectionable that the panel took into account, *in assessing whether the US had made a prima facie case, the responses of India to the arguments of the US.*⁸⁴(emphasis added).

Also, in *US- Line-Pipe Safeguards* the Panel found that the US has established a *prima facie* case that NAFTA is in conformity with Article XXIV: 5(b) and (c), and with Article XXIV:

⁸³ Panel Report, *supra*, footnote 17, footnote 51 of the Report.

8(b) on the basis of the information provided by the US in the proceedings before the Panel, the information provided by the NAFTA parties to the Committee on Regional Trade Agreements, which the US had incorporated into its submissions to the Panel by reference *and the absence of effective refutation by Korea*.⁸⁵ Both with respect to the remark of the Appellate Body in *India – QR's* and the statement by the Panel in *US – Line Pipe Safeguards* the author finds it difficult to reconcile these views expressed with the *dictum* that the burden of evidence only shifts to the other party *once* the proponent of a claim or defense has established a *prima facie* case. In both these cases the responses of the defendant to the evidence presented by the claimant were taken into account when making the assessment whether or not the claimant has established a *prima facie* case. There is a *burden* on the defendant *to rebut* the *prima facie* case *already* established by the claimant. Whether or not the defendant succeeds in refuting the evidence presented by the claimant, should not determine whether the claimant succeeded in satisfying the standard of proof (i.e. establishing a *prima facie* case) required from the claimant in the first place. Failure to effectively refute the *prima facie* case will mean within the WTO dispute settlement practice, that the complaining party has also successfully discharged the *burden of proof*. The Panel in *EC-Hormones (Canada)* again confirmed that, with respect to the hormone MGA for which an international standard exists, the burden is on Canada to prove that the measures in dispute relating to that hormone is inconsistent with Article 5, 'after which the *burden of proof* shifts to the European Communities to prove that it has complied with these requirements.'⁸⁶The Panel concluded that Canada met its burden of presenting a *prima facie* case of inconsistency with Article 5.1. In other words the Panel found that Canada has

84Appellate Body Report, *supra*, footnote 16, para.142.

85Panel Report, *supra*, footnote 80, para. 7.144.

86Panel Report, *supra*, footnote 25, para. 8.255. For comments on the Panel's use of the phrase "burden of proof" see *supra*.

satisfied the standard of proof (, i.e., establishing a *prima facie* case for the EC to rebut). However, reading the Report and more specifically paragraph 8.256 it is not clear how the Panel could come to such a conclusion. Paragraph 8.256 reads: 'With respect to Articles 5.1 to 5.3 dealing with the requirement of a *risk assessment*, Canada argues that the European Communities *has not submitted any scientific evidence which could constitute a risk assessment for the hormone MGA* and that the European Communities has, therefore, *a priori*, not based its measures with respect to MGA on any risk assessment as required by Article 5.1. We find that Canada thus meets its burden of presenting a *prima facie* case of inconsistency with Article 5.1.' (emphasis added). Subsequently, the Panel found that the EC failed to discharge its burden of proving consistency with Article 5.1.⁸⁷ It appears from reading that paragraph that the basis for the Panel's finding that Canada satisfied its standard of proof (, i.e., by establishing a *prima facie* case of inconsistency) is the fact the EC did not present any evidence of the existence of a risk assessment. The fact that the EC did not provide any evidence of the existence of a risk assessment should be the basis for finding that the EC did not succeed in effectively refuting a *prima facie* case established by Canada. It should not form the basis for finding that Canada has *established a prima facie* case. This goes against the definition of what a *prima facie* case is, as defined by the Appellate Body in *EC – Hormones (AB)*, i.e., a case 'which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the *complaining party presenting the prima facie case*.' (emphasis added).⁸⁸ The part of the definition emphasized clearly states that it is upon the complainant to establish the *prima facie* case. It is for the responding party to rebut that *prima facie* case. It is important to distinguish when a Panel is stating that a party has established a *prima facie* case in the

⁸⁷Panel Report, *supra*, footnote 25, paras. 8.261 and 8.264.

sense of satisfying the *standard of proof* and when it finds that the party has successfully established a *prima facie* case in the sense of discharging the *burden of proof*. In the case of the former, only the evidence of the proponent carrying the burden of proof should be taken into account to determine whether the standard of proof has been satisfied, whereas in the case of the latter, the evidence presented by the other party and also in the case of WTO dispute settlement, information presented by independent experts can be taken into consideration to determine whether the proponent has discharged the burden of proof.

In view of the above, the author submits that the general rule, i.e., that the burden of evidence *only* shifts to the other party *once* the proponent of a claim or defense has established a *prima facie* case is not being applied in all cases. It appears as if the panels are dealing with a "basket of evidence" consisting of the evidence and legal argument of both parties to the dispute as well as arguments and evidence submitted by independent experts, where applicable not only to establish whether the proponent has successfully established a *prima facie* case for the purpose of discharging the burden of proof, but also to determine whether the proponent has established a *prima facie* case for the purpose of satisfying the standard of proof. The author interprets the following comment by McGovern to be relevant with regards to this issue when he stated: "[i]f all the evidence [, i.e., evidence including those provided by the independent experts and some responses from the other party] has been considered then it is no longer meaningful to speak of a *prima facie* case"⁸⁹. The question could then arise whether it would not be better if the burden of proof is discharged rather on the basis of "preponderance of evidence" than on the basis of "establishing a *prima facie* case"? This will allow the panel to consider and evaluate the

88Appellate Body Report, *supra*, footnote 26, para. 104.

89McGovern, *op. cit.*, n.5, p. 2.23-52.

basket of evidence and based upon all evidence and arguments presented determine whether the proponent has discharged the burden of proof.

Part Four

The burden of proof and affirmative defenses/exceptions

(i) The general rule

After stating that it is up to the US to provide sufficient evidence to create a presumption that Argentina has violated Article II of GATT 1994 and that it is for Argentina to provide sufficient evidence to rebut such presumption, the Panel in *Argentina – Textiles* confirmed the general rule, i.e., that where Argentina is relying on a specific affirmative defense, it is up to Argentina to provide evidence to raise a presumption that its conduct, in effect, does not amount to an infringement of GATT/WTO rules.⁹⁰ Account should however be taken of the *caveat* raised by the Appellate Body in *EC-Hormones (AB)* when considering the effect of an exception on the allocation of the burden of proof. It stated: 'The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency of a provision [...] before the burden of showing consistency with that provision is taken by the defending party is not avoided by simply describing the same provision as an exception.'⁹¹

A clear example of such an affirmative defense is to be found in Article XX of GATT 1994. After finding that the US effectively admitted that its measure (Section 609 with respect to countries not certified under that provision) amounts to a restriction prohibited by GATT

⁹⁰Panel Report, *supra*, footnote 14, para. 6.37.

⁹¹Appellate Body Report, *supra*, footnote 26, para. 104 as referred to by the Panel in *India – QR's* para 5.118.

1994, which the Panel is entitled to regard as an accurate fact, the Panel in *US – Shrimp* stated that it is for the US as the party invoking the defense to carry the burden of proof.⁹²

Similarly, in *EC-Asbestos* Canada claimed that the EC violated Articles III:4 and XI: 1 of GATT 1994. The EC considered that, even if its measures amounted to a violation of those provisions, they were justified by Article XX (b). While confirming that it was up to Canada to present sufficient evidence to establish a presumption of inconsistency, the Panel implied that the EC had two options available as the defending party to respond to the claims of inconsistency. It could either present sufficient evidence to rebut the presumption of inconsistency or it could make use of a "particular method of defense in the affirmative". By choosing the latter option it would be up to the EC to present sufficient evidence to support its reliance on that defense just as Canada must with respect to its own claims.⁹³

(ii) The "obligation – exception" relationship

McGovern succinctly summarized *one* of the difficulties surrounding the distinction drawn between a substantive obligation and an exception when he stated: 'A feature of WTO law that had given rise to particular problems in relation to the burden of proof is the existence of rules that are, *at the same time*, both obligations and elements of exceptions to other obligations.'⁹⁴ (emphasis added). He refers to anti-dumping rules as an example. He continued: 'GATT Article VI and the Anti – Dumping Agreement tell Members how they must behave when imposing anti-dumping measures. At the same time these rules comprise conditions which, if satisfied, will protect the Member concerned from being pursued under, say, the GATT MFN rule for putting higher duties on the dumped imports that on imports

⁹²Panel Report, *supra*, footnote 14, para.7.30. See also Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("Korea – Beef"), WT/DS161/R, 2000, para.651, where Korea conceded that it carried the burden of proving that its retail restrictions fell within the scope of Article XX. See also Panel Report, *US -Shrimp*(21.5), *supra*, footnote 23, para.5.19.

⁹³Panel Report, *supra*, footnote 14, paras. 8.78 – 8.79.

⁹⁴McGovern, *op. cit.*, n.5, p. 2.23 – 49.

from other countries. When proceedings are based on the obligations, the burden of proof lies on the party alleging that the respondent Member has improperly imposed anti-dumping duties. On the other hand, in a claim based on the MFN rule the complainant would have to establish the existence of, say, a discriminatory tariff, but it would normally lie on the respondent to prove that the measure qualified as an exception to that rule.'. He concludes that 'the allocation of the burden of proof concerning a single issue (the justifiability of anti-dumping duties) could vary according to the nature of the proceedings.'(footnotes omitted).⁹⁵

A case illustrating this point is *India – QR's*.

In *India-QR's* the US claimed that various measures taken by India violated Article XI: 1 of GATT 1994. India raised the defense that the measures were justified by reason of Article XVIII: B of GATT 1994 (, i.e., measures to safeguard India's external financial position and to ensure a level of external reserves adequate for the implementation of India's programme of economic development). The US claimed however that India violated paragraph 11 of Article XVIII: B by maintaining balance – of – payment restrictions no longer justified under that paragraph. India resorted to the proviso contained in the second sentence of paragraph 11 namely, that the US is violating its obligation not to require India to change its development policy which will make it unnecessary for India to resort to such measures. The Panel confirmed the rules regarding the allocation of the burden of proof as stated in *US-Shirts and Blouses*. It then stated that the issue was to what extent the US needed to prove a violation of paragraph 11, when India is relying on Article XVIII: B as a defense. The Panel referred to the observation made by the Appellate Body in *EC-Hormones (AB)*, *supra*, and stated that this *dictum* requires that it allocates the burden of proof in the following manner: the US needed to prove its claims of violation of Article XI and paragraph 11(i.e. that the

⁹⁵McGovern, op. cit., n.5, p. 2.23 – 50.

measures were no longer justified). It was for India to support its assertions (, viz. that its measures are justified by Article XVIII: B). If the US succeeded in its claim of inconsistency with paragraph 11, it would automatically negate the defense of India in relying on Article XVIII: B. The Panel viewed the proviso to paragraph 11 as an affirmative defense and consequently required from India to present sufficient arguments and evidence to prove its reliance on the proviso.⁹⁶ Paragraph 4(a) of Article XVIII: B provides that a Member, falling within the scope of that paragraph, shall be 'free to deviate temporarily from the provisions of the other Articles' of the GATT 1994, as provided for in Section B. India clearly relied on Article XVIII: B as a defense i.e. that its measures were justified by reason of Article XVIII: B. If it is up to India to prove its defense, surely it was for India to show that the reasons for and extent to which the measures have been implemented complied with the requirements stipulated in Article XVIII:B, including paragraph 11? By claiming an inconsistency with paragraph 11 though, the US brought it upon them to prove inconsistency with that paragraph. This interpretation appears to be correct when reading *India – Autos*. The Panel in that case distinguished it from *India-QR's* by stating that '[i]n this instance, the United States and the European Communities asserted their claims that India had violated Articles III and XI of GATT 1994 and Article 2 of TRIMs. *They made no representations concerning Article XVIII: B*. It is India who invoked Article XVIII: B as a defense to any violation of Article XI which the Panel might find. Therefore, it is for India to assert this defense'⁹⁷ (emphasis added).

India's response in *India – QR's* to the US's claim of inconsistency with paragraph 11 could, in the view of the Appellate Body, take two forms namely (1) India could, in its defense, rebut the evidence adduced in support of the claim of inconsistency or (2) India could invoke

⁹⁶Panel Report, *supra*, footnote 55, paras. 5.116 – 5.121.

the proviso, which amounts to an affirmative defense.⁹⁸ If India invoked the proviso, as it did, then it was up to India to prove it. Similarly, in *Korea – Dairy Safeguards* the Panel confirmed that Article XIX (Emergency Action on Imports of Particular Products) allows an importing Member to deviate temporarily from its obligations under Articles II and XI of GATT (, i.e., to suspend its concessions or other obligations) under certain circumstances.⁹⁹ Because the EC claimed a violation of Article XIX: 1(a) it carried the burden of proof. Again, the question comes to mind, why the EC decided to file a claim of violation of Article XIX: 1(a). If it merely claimed a violation of Articles II and XI, surely it would be for Korea to either rebut the evidence presented in support of the claim of violation or it could invoke the provisions of Article XIX? Had it done so, the burden of proving justification for its apparent inconsistent measures would have been on Korea, while the EC only needed to rebut evidence in support of such justification.

An interesting issue arises from reading the report of the Panel in *EC-Hormones (Canada)*. The scenario described by McGovern, *supra*, is where a provision may constitute *both* a substantive obligation *and* at the same time be an exception with respect to some other substantive obligation, the issue addressed in *EC – Hormones (Canada)* however, was how to determine whether a particular provision(s) constitutes an exception *or* whether it constitutes a substantive obligation. One of the issues argued before the Panel was that the SPS Agreement itself is an exception to obligations contained in GATT 1994, similar to Article XX (b) of GATT 1994. The Panel found that the SPS Agreement imposes "*substantive*" obligations which go significantly beyond requirements for invoking Article XX (b) of GATT 1994. They are not imposed, as in the case with Article XX, to justify an

⁹⁷Panel Report, *supra*, footnote 71, para. 7.286.

⁹⁸Appellate Body Report, *India – QR's (AB)*, *supra*, footnote 16, para.136.

⁹⁹Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy Safeguards")*, WT/DS98/R, 1999, para. 7.41.

inconsistent measure. No prior violation is therefore required before the SPS Agreement applies, as is the case with Article XX (b). The Panel found that whereas Article XX is an affirmative defense the same is not true of the SPS Agreement. Whereas the burden of proof rests on the party invoking the Article XX (b) defense, it is up to the party claiming that a measure is inconsistent with the requirements of the SPS Agreement, which carries the burden of proof. *The Panel acknowledge that in a particular set of facts, both Article XX (b) as well as the SPS Agreement may apply.* The question arises then whether the claimant in such circumstances will weigh up on the one hand, the likelihood of discharging the burden of proving an inconsistent measure with respect to the GATT Agreement, in which case the defendant will carry the burden of proving that the measure is justified by Article XX (b) – if the general exception is invoked by the defendant – against, on the other hand, the likelihood of discharging the burden of proving that the measure is against the provisions of the SPS Agreement itself? The writer is of the view that it might be easier for the party imposing the measure to show why the measure is consistent with the provisions of the SPS Agreement than for the party claiming the inconsistency of the measure, although there is an obligation on the party taking the measure to provide the claimant with required information. This will in all likelihood prompt the claimant to rather claim violation of another provision of GATT 1994 and then leave it up to the party imposing the measure to show why the measure is justified under Article XX (b). Obviously it does not exclude the possibility of still claiming that the measure violates some other obligation, in addition, imposed by the SPS Agreement, for which it will carry the burden of proof.

In *Turkey – Textiles* it was claimed by India that Turkey violated Articles XI and XIII of GATT 1994. While not denying that the measures imposed amount to quantitative restrictions, Turkey relied on Article XXIV as the bases of its defense that it did not violate the provisions

contained in Articles XI and XIII of GATT 1994. The Panel characterized this as an affirmative defense for which Turkey bears the burden of proof. Hong Kong China, Japan, Thailand and Philippines all argued that Article XXIV amounts to an exception for which Turkey carried the burden of proof.¹⁰⁰ On appeal Turkey argued that Article XXIV is an "autonomous right" and not an exception to other provisions of GATT 1994. It argued that it is not the same as the exceptions under Articles XX and XXI of GATT 1994. The Appellate Body, while noting that Article XXIV has long been regarded by many scholars as an "exception" or a possible "defense" to a claim of violation of a GATT provision, stated that the chapeau of Article XXIV 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 "defense" to a finding of inconsistency.'¹⁰¹

EC – Hormones (Canada) read with *EC – Hormones (AB)* provides a clear example of how a single provision (, i.e., Article 3.3¹⁰² of the SPS Agreement) can be regarded by a Panel as an exception when the Appellate Body regards it, not as an exception but as part of the substantive obligations of the SPS Agreement. In *EC-Hormones (Canada)* the Panel

100Panel Report, *supra*, footnote 14, para.9.58 read with footnote 287. See also Panel Report, *US -Line Pipe Safeguards*, *supra*, footnote 80, para. 7.142, where the Panel noted that the US, as the party seeking to rely on the Article XXIV defense (or "limited exception") bears the burden of proving compliance with the conditions of that Article.

101Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*("Turkey – Textiles(AB)"), WT/DS34/AB/R, 1999, para. 45. See also Panel Report, *US- Line Pipe Safeguards*, *supra*, footnote 80, para.7.158 where the Panel remarked: '[t]hus, just as we found that the United States is entitled to rely on Article XXIV as a defense against Korea's claims under *inter alia* Article XIX, so too the United States is entitled to rely on Article XXIV as a defense against Korea's claim under Article 2.2 of the Safeguards Agreement'(footnotes omitted).

102Article 3.3 of the SPS Agreement reads '*Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.2 notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.*'.

commenced its consideration of the matter by recalling that the initial burden of proof rests on the complaining party, i.e., to present a *prima facie* case of inconsistency with the SPS Agreement. It then continued by stating: 'Once such a *prima facie* case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, *the burden of proof shifts* to the responding party'.¹⁰³ The Panel relied both on the text of the specific Article, the text of the SPS Agreement in general and the context of Article 3.3 in support of its conclusion that the burden of proving compliance with the SPS Agreement rested on the EC. It made it clear that Article 3.3 of the SPS Agreement forms an exception to Article 3.1 of that Agreement when stating that 'if there are international standards, guidelines or recommendations and the European Communities has *not* based its measures thereon, we will need, as a second step, to examine whether the European Communities can justify its measures under Article 3.3 *since Article 3.1*, which imposes the requirement to base sanitary measures on international standards, *explicitly refers to Article 3.3 as providing for an exception to this requirement*'.¹⁰⁴ (emphasis added). The Appellate Body responded by stating that by relying on a so-called "obligation – exception" rule as well as previous practice under GATT 1947 and WTO pertaining to *inter alia* the burden of justifying a measure under one of the exceptions of Article XX of GATT 1994, 'the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship..., 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

¹⁰³Panel Report, *supra*, footnote 25, para.8.54. For comments relating to the use of the phrase "burden of

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".¹⁰⁵

After discussing *EC-Hormones (Canada)* above and noting that the Appellate Body stated that the burden of proof resting on the claimant is not shifted upon the defendant by merely referring to a provision as an "exception", it is noteworthy to observe the reasoning of the Panel in *EC-Sardines* concerning Article 2.4 of the Technical Barriers to Trade (TBT) Agreement.¹⁰⁶ The Panel found that it was for Peru as the complainant to establish a *prima facie* case that the EC Regulation in issue was a technical regulation within the meaning of the TBT Agreement; that relevant international standards existed; and that such standards were not used as a basis for the regulations.¹⁰⁷ Should the EC then attempt to rebut the claim by asserting that the international standard, *in casu* Codex Stan 94 is ineffective or inappropriate to fulfill the legitimate objectives pursued by the EC Regulation, such assertion will amount to an affirmative defense for which the EC will carry the burden of proof.¹⁰⁸ The Panel went further however and expressed what, in the opinion of the author, may be regarded as a policy consideration applicable also with respect to Article 3.3 of the SPS

proof" as opposed to "burden of evidence", see *supra*.

¹⁰⁴Panel Report, *supra*, footnote 25, para.8.49.

¹⁰⁵Appellate Body Report, *supra*, footnote 26, para.104.

¹⁰⁶Article 2.4 of this Agreement provides that ' Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.'.

¹⁰⁷Panel Report, *supra*, footnote 14,para. 7.52.

Agreement. It noted that the complainant might not be in a position to establish on a *prima facie* basis "what the "legitimate" objectives pursued by the respondent are and what factors may render the international standard 'inappropriate in light of the respondents specific conditions ..'. It concluded by stating that only the respondent Member can do so. The Panel made a distinction between effectiveness which bears upon the 'result of the means employed', whereas appropriateness of the international standard bears upon the ' nature of the means employed'. To require the claimant to establish the inappropriateness of an international standard will require it to 'second guess what those considerations of "appropriateness" are which underlie the respondent's decision not to use a relevant international standard as a basis... without knowing on what basis the respondent considers the relevant international standard "inappropriate".¹⁰⁹ The Panel did not deal in the same manner with the "effectiveness" of international standards, but it is submitted that the concerns raised with respect to the "legitimacy " of objectives pursued by the respondent may well be applicable to the "effectiveness " of such international standards with respect to the objectives pursued by the respondent. In concluding that the burden of proving that Codex Stan 94 is " ineffective" or "inappropriate" to fulfill the legitimate objectives pursued under the EC Regulation, rests upon the EC, the Panel remarked in a footnote that '[w]e are cognizant of the Appellate Body's finding in *EC — Hormones[AB]* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception". However, we consider that the Appellate Body's finding in *EC —Hormones[AB]*

¹⁰⁸Panel Report, *supra*, footnote 14, para. 7.50.

does not have a direct bearing on the matter before us.¹¹⁰ Why would the Panel declare that the observation of the Appellate Body in *EC-Hormones (AB)* does not have 'a direct bearing on the matter' before them? Article 3.1 of the SPS Agreement prescribes the adoption of international standards as the basis for sanitary and phytosanitary measures, where they exist. Article 2.4 of the TBT Agreement prescribes the adoption of relevant international standards as the basis for technical regulations, where they exist. Article 3.1 provides for an exception (at least on a literal reading of the text of that provision itself, although the Appellate Body reads it as an *exclusion* and not an *exception*); Article 2:4 provides for an exception. The exception contained in Article 3.1 read with Article 3.3 is that even if there exists an international standard which could form the basis for sanitary and phytosanitary measures, a Member may decide to introduce or maintain measures which would 'result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards'. The author would submit that this relates to the "effectiveness" of the international standard in providing a certain level of protection. This provision is further qualified by three provisos, namely that such measure may be introduced or maintained -

- a)... if there is a scientific justification;
- b)..., or as a consequence of the level of sanitary or phytosanitary protection *a Member determines to be appropriate* in accordance with the relevant provisions of paragraph 1 through 8 of Article 5 (which refers, in the opinion of the author, to the appropriateness of the measures to fulfill the level of protection determined by a Member); and
- c) such measures shall not be inconsistent with any other provision of the SPS Agreement.

109Panel Report, *supra*, footnote 14, para. 7.51.

110Panel Report, *supra*, footnote 14, footnote 70.

The exception provided for in Article 2.4 has been discussed in dealing with *EC-Sardines*. Following the arguments and concerns raised by the Panel in *EC-Sardines*, how does the position of the claimant *differ in practice* under Article 3.1 read with Article 3.3 of the SPS Agreement as opposed to Article 2.4 of the TBT Agreement? It is submitted not much. This brings us back to the initial question why the Panel mentioned that the *dictum* in *EC – Hormones (AB)* does not have a direct bearing on the proceedings before the Panel? As if the Panel anticipated that the Appellate Body may reverse its finding on the allocation of the burden of proof, should their ruling be appealed, it stated in the report that Peru 'provided sufficient evidence and legal arguments,, to demonstrate that Codex Stan 94 is not an ineffective or inappropriate means to fulfill the legitimate objectives pursued by the EC Regulation.'¹¹¹

An example where the drafters of an agreement realized that the asymmetry of information between the claimant and respondent might unfairly obstruct the claimant from satisfying the burden of proof, is found in Article 10.3 of the Agreement on Agriculture¹¹². The effect of this provision is to reverse the burden of proof from the complainant to the respondent.¹¹³

In *US – FSC* the EC held the view that Article 10.3 should not only apply to products scheduled for the purpose of reduction commitments, but also unscheduled products not subject to such reduction commitments. The Panel responded in the following manner: ' Finally, we note the European Communities' view that there is no reason why Article 10.3 should apply to scheduled but not to unscheduled products. We can however imagine a number of reasons why the drafters might have made such a distinction. In particular, it is

¹¹¹Panel Report, *supra*, footnote 14, para. 7.114.

¹¹²Article 10.3 provides that ' 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.'

¹¹³See also Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*("Canada Milk/Dairy"), WT/DS103/R, WT/DS113/R, 1999, para.7.33.

reasonable to assume that Article 10.3 places on the defending Member the burden of proof to establish that no export subsidy has been granted in respect of any quantity of a product exported in excess of its reduction commitment level because of *concern that a complainant will generally not have access to information necessary to make a prima facie case of a violation*. It should however be easier, in most cases, for a complainant to establish that an export subsidy had been provided with respect to exports of a particular product, irrespective of amount – as would be the case with respect to unscheduled products, for which the commitment under Article 3.3 is not to provide any export subsidies listed in Article 9.1 – than to demonstrate that an export subsidy has been provided with respect to a quantity of product in excess of some given level.' (emphasis added). In view of its distinction drawn above between scheduled and unscheduled products, the Panel concluded that 'Article 10.3 of the Agreement on Agriculture places the burden on the United States to present evidence and argument sufficient to establish that no export subsidy has been granted in respect of any quantity of a product exported in excess of the reduction commitment levels found in its Schedule for that product. In the case of unscheduled products, however, the burden remains with the European Communities to present evidence and argument sufficient to establish that export subsidies have been provided with respect to that product.'¹¹⁴ It is apparent from the *US-FSC* case that the inability of the claimant to access information to substantiate a claim, may under certain conditions warrant a reversal of the burden proof. Following the Panel's reasoning in *EC – Sardines* and the policy consideration underlying the reversal of the burden of proof in the wording of Art.10.3, the question arises whether the interpretation given to Article 3.1 read

¹¹⁴Panel Report, *United States – Tax Treatment for 'Foreign Sales Corporations' ('US -FSC')*, WT/DS108/R, 1999, para. 7.143.

with Article 3.3 of the SPS Agreement is not a more sobering approach than the interpretation applied by the Appellate Body?

US – Shirts and Blouses (AB) is another example where the Appellate Body overturned the interpretation by a previous Panel of a provision it considered to be an exception. The Panel in *US-Underwear* dealt with a provision in the Agreement on Textiles and Clothing (ATC) as an exception, which caused the burden of proof to shift from the claimant to the respondent relying on that provision. The ATC prohibits any additional restrictions beyond those notified under Article 2.1 of the ATC. The Panel referred to Article 2.4, the relevant part of which reads: '... No new restrictions in terms of products or Members shall be introduced *except* under the provisions of this Agreement or relevant GATT 1994 provisions.' (emphasis added by Panel) as well as Article 6.2 which provides that '[s]afeguard action may be taken under this Article when, on the basis of a determination by a Member, it is *demonstrated* that,....' (emphasis added by Panel). The Panel viewed Article 6 as an exception to Article 2.1 and it was therefore up to the US to demonstrate compliance with the requirements of Article 6.2 and 6.4.¹¹⁵ In *US-Shirt and Blouses* the Panel remarked that India, as the Party initiating the dispute under the dispute settlement process carried the burden of proof to show that the US restriction is inconsistent with Article 2 of the ATC and that the US determination of a safeguard action was inconsistent with the provisions of Article 6. In the interim report the Panel noted that it 'was then for the United States to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC'¹¹⁶ The Appellate Body remarked that although the wording used by the Panel is not a "model of clarity" it did agree with the Panels allocation of the burden of proof. The Appellate

¹¹⁵Panel Report, *United States – Restrictions on Imports of Cotton and Man – made Fibre Underwear* ("US-Underwear"), WT/DS24/R, 1996, paras .7.15 – 7.16.

¹¹⁶Panel Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Shirts and Blouses"), WT/DS33/R, 1997, para. 6.7.

Body took the view that the ATC, and more specifically Article 6 is a carefully drawn balance of rights and obligations of Members which should be respected. The Appellate Body continued: '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. We agree with the 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.'¹¹⁷

It appears from these examples that it is not always clear when an exception provided for in the wording of the text should be regarded as an affirmative defense, which results in a shift of the burden of proof, and when that is not the case. A good illustration of the diverting views on the matter is found in the arguments presented respectively by India¹¹⁸ and the United States¹¹⁹ before the Appellate Body in *US-Shirts and Blouses (AB)*.

It appears that one of the criteria employed to distinguish "limited exceptions" such as Article XX and Article XI: 2(c)(i) of GATT 1994 from substantive obligations is that the former are not "positive rules establishing obligations in themselves".¹²⁰ In *Brazil – Aircraft (21.5) II* the Panel argued that because the *second paragraph* of Item (k) of Annex 1 of the SCM Agreement does not itself impose *obligations*, it supported the Panel's conclusion that the

¹¹⁷Appellate Body Report, *US -Shirts and Blouses (AB)*, *supra*, footnote 14, page 16.

¹¹⁸Appellate Body Report, *supra*, footnote 14, para. II B1.

¹¹⁹Appellate Body Report, *supra*, footnote 14, para. II C1.

second paragraph constitutes an exception from any prohibition on the use of export subsidies laid down elsewhere in the SCM Agreement. It concluded that because it is an exception, 'it must be possible to invoke it as a defense to a claim of violation.'¹²¹

Perhaps the most elaborate deliberation on the issue of distinguishing between a substantive obligation and an exception is found in *Brazil – Aircraft*. It is also a good example of a situation where two parties to a dispute have diametrically opposed views concerning the nature of a particular provision, i.e., whether it forms an exception to a substantive obligation or whether it forms part of the substantive obligation itself. An issue, which was extensively argued between the Parties in that case, was the question of which party had to bear the burden of proof with respect to compliance with the provisions of Article 27.4 of the SCM Agreement.¹²² A point in issue was the nature of the relationship between Article 3.1(a) and Article 27 namely whether Article 27.4 formed an integral part of

120Appellate Body Report, *US -Shirts and Blouses(AB)*, pp. 15-16 referred to in Panel Report, *EC-Asbestos, supra*, footnote 14, para.8.180 read with footnote 122.

121Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse to Article 21.5 of the DSU by Canada*("Brazil – Aircraft (21.5)II"), WT/DS46/RW/2, 2001, para.5.63.

122 Article 27.4 reads: '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. ...'(footnotes omitted).

Paragraph 2(b) reads :'**Article 27: Special and Differential Treatment of Developing Country Members**

27.1

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a)

(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 3 reads: '**Article 3: Prohibition**

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;(footnotes omitted)'

Canada's claim of violation of Article 3.1(a) for which Canada will then carry the burden of proof, or whether Article 27.4 should be viewed as an "exception" from, or an "affirmative defense" to a claim of violation of Article 3.1(a) in which case Brazil will carry the burden of proof in respect of compliance with the requirements of Article 27.4. Canada held the view that while Article 27 grants special and differential treatment to developing countries, it is an exception to the general obligations of the SCM Agreement. Article 27.2(b) constitutes a "limited and conditional exception" to the prohibition contained in Article 3.1(a) and if Brazil wanted to benefit from that exception, it carried the burden of proving compliance with the requirements of Article 27.4.¹²³ Brazil, on the other hand, regarded the provisions of Article 27 as consisting of carefully negotiated language reflecting a carefully drawn balance of rights and obligations.¹²⁴ Brazil pointed out that Article 27.2 made it clear that Article 3.1. (a) *shall not apply*, unless the requirements contained in Article 27.4 is not complied with. The burden was therefore on Canada to show non-compliance with Article 27.4.¹²⁵ Both third parties, namely the EC and the US supported Canada's interpretation of the relationship between the two provisions. The Panel quite correctly observed that '[t]here appears to be *no overriding general principle to guide a panel* in distinguishing between an element of a claim of violation of a provision of the WTO Agreement and an "exception" from, or "affirmative defense" to, a provision of the WTO Agreement.¹²⁶(emphasis added). After referring to the *dictum* of the Appellate Body in *EC – Hormones (AB)* that the burden of proving an inconsistency with a provision in dispute is not avoided simply by describing that

123Panel Report, *Brazil – Export Financing Programme for Aircraft*("Brazil – Aircraft"), WT/DS46/R, 1999, para.7.44.

124This interpretation was confirmed on appeal in Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*("Brazil – Aircraft(AB)"), WT/DS46/AB/R, 1999, para. 139.

125Panel Report, *Brazil – Aircraft*, *supra*, footnote 123, para.7.45.

126Panel Report, *Brazil – Aircraft*, *supra*, footnote 123, para.7.46.

provisions as an "exception"¹²⁷, it commenced its consideration of the issue by pointing out that the determination of the nature of Article 27 will depend on the *wording of the relevant text* of the Agreement in the *light of its context and the objective and purpose* of the SCM Agreement. Noting the explicit *textual link* between Article 27.2(b) and Article 27.4 and between Article 27.4 and Article 3.1(a), the Panel regarded the textual link between Article 27.2(b) and Article 27.4 as requiring the *two provisions to be read in conjunction* to determine the legal nature of the contained in Article 27.4. The wording in Article 27.2(b): '.. subject to compliance with the provisions of paragraph 4' made this provision, in the view of the Panel, determinative for the allocation of the burden of proof with respect to compliance with the conditions of Article 27.4.¹²⁸ The Panel observed: 'An essential element in establishing a claim of inconsistency with a provision of the WTO Agreement is to demonstrate that the particular provision *applies* to the particular Member in question and to the particular factual situation in a given dispute. Part and parcel of asserting the affirmative of a particular claim is to demonstrate that the legal provision forming the basis for that claim applies to the Member against whom that legal provision is being invoked. Naturally, there will be no inconsistency with a given provision if a Member is explicitly excluded from its scope of application or a situation is explicitly identified in the text of the Agreement as falling outside the scope of application of a particular provision.' The *plain meaning of the text* of Article 27.2(b) makes it clear that Article 3.1(a) *shall not apply* with respect to a developing country which complies with the conditions of Article 27.4.¹²⁹ Moreover, the Panel considered that the *context* of Article 27.2 supports such textual interpretation.¹³⁰ Article 27 granted special and differential treatment to developing countries and after referring to

127Panel Report, *Brazil – Aircraft, supra*, footnote 123, para.7.46.

128Panel Report, *Brazil – Aircraft, supra*, footnote 123, para.7.49.

129Panel Report, *Brazil – Aircraft, supra*, footnote 123, para.7.50.

130Panel Report, *Brazil – Aircraft, supra*, footnote 123, para 7.51.

Articles 27.7, 27.3 and 27.1 the Panel concluded that 'it supports the view that 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.'¹³¹ Thus on the basis of the *text and the context* of Article 27.2(b) the Panel found that that provision *excludes* developing countries from the scope of Article 3.1(a) if they comply with the conditions of Article 27.4. The Panel remarked that the legal relationship between Article 27.2(b), Article 3.1(a) and Article 27.4 is 'is qualitatively different from the relationship between, for instance, the substantive obligations contained in Articles I or III of the GATT 1994 and the affirmative defenses set out in the "general exceptions" of Article XX of the GATT 1994.'. The reasoning of the Panel behind this observations seems to suggest that in the former case, a Member is *excluded from the operation* of a particular obligation, in a qualified or unqualified manner, whereas in the latter case, all Members are subject to a particular obligation such as Articles I or III, but a particular Member argues that while it may have acted inconsistently with those provisions, its measures should be *excused* on the basis of Article XX.¹³²

The Panel found support for its conclusion regarding the legal relationship referred to above in *US – Shirts and Blouses (AB)* where the Appellate Body noted with respect to the legal

¹³¹Panel Report, *Brazil – Aircraft, supra*, footnote 123, para.7.53.

¹³²Panel Report, *Brazil – Aircraft, supra*, footnote 123, para.7.54. Due to the importance of this dictum for the purpose of the discussion on exceptions in this paper, it may be useful to provide a *verbatim* quotation: '...Article 27.2(b) excludes from the scope of application of Article 3.1(a) a developing country Member referred to in Article 27.2(b) for a period of eight years from the date of entry into force of the WTO Agreement. In other words, Article 27.2(b) recognizes the autonomous right of certain developing country Members to grant or maintain export subsidies during a stipulated period. According to the specific language of that provision, this right is "subject to compliance with the provisions of paragraph 4" of Article 27. Paragraph 4 of Article 27 then sets out the conditions with which a qualifying developing country Member must comply in order to be excluded from the scope of application of the prohibition in Article 3.1(a), that is, in order that the substantive obligation in Article 3.1(a) not apply to it. This contrasts markedly with a situation that could arise with respect to the affirmative defenses set out in Article XI:2 or XX of the GATT 1994, where there is no dispute that the substantive obligation contained in, say, Article I or III of the GATT 1994, applies to the

nature of Article 6 of the ATC that 'Articles XI and XX are 'limited exceptions from obligations under certain other provisions of GATT 1994, *not positive rules establishing obligations in themselves*'. (emphasis added)¹³³. While noting that Article 27.2(b) does not impose any obligations on Members, the same could not be said of Article 27.4 and because of the express textual link between these two provisions and Article 3.1(a), Article 27.4 needs to be considered in conjunction when establishing a claim of violation by a developing country falling within Article 27.2(b). On appeal the Appellate Body confirmed that '[o]n 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 defenses.'¹³⁴

Thus to establish a claim of inconsistency with Article 3.1(a), Canada first had to establish that that provision *applied* to Brazil and in doing so it needed to show that Brazil did not comply with the conditions of Article 27.4.¹³⁵ The Panel's allocation of the burden of proof was confirmed by the Appellate Body on appeal.¹³⁶

Applying the criteria adopted by the Panel in *Brazil – Aircraft* to determine the relationship between two provision, i.e., whether the one constitutes an exception or affirmative defense with respect to the other, may not always be that obvious. Take the example of Item (k) (second sentence) in Annex 1 "Illustrative list of export subsidies".¹³⁷ In *Canada – Aircraft*

Member in question, but that Member argues that, while it may have acted inconsistently with a particular provision, it should be excused from the substantive obligation contained in that provision.(footnotes omitted).

133 Panel Report, *Brazil – Aircraft*, *supra*, footnote 123, para.7.55.

134 Appellate Body Report, *Brazil – Aircraft (AB)*, *supra*, footnote 124, para.140.

135 Panel Report, *Brazil – Aircraft*, *supra*, footnote 123, para.7.56.

136 Appellate Body Report, *Brazil – Aircraft (AB)*, *supra*, footnote 124, para. 141.

137 **'ANNEX I: ILLUSTRATIVE LIST OF EXPORT SUBSIDIES**

(k) 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.

(21.5) Brazil claimed that the measures taken by Canada failed to implement the recommendations of the Dispute Settlement Body. With respect to the so-called Canada Account, Canada stated that the new Policy Guideline would ensure that 'any future Canada Account financing for regional aircraft will comply with the *OECD Arrangement on Guidelines for Official Supported Export Credits* ("the *OECD Arrangement*" or "*the Arrangement*"). In Canada's view, the Policy Guideline meant that any such financing would *not* be considered prohibited export subsidies pursuant to the second paragraph of item (k) of the Illustrative List of Export Subsidies ("the Illustrative List") found in Annex I to the SCM Agreement.¹³⁸ Both Parties agreed that Canada as the party invoking the "safe haven" or "exception" provided for in the second sentence of Item (k) carried the burden of demonstrating that it was entitled to that "positive defense".¹³⁹ However, Article 3.1(a) read with footnote 5 clearly *excludes from the operation* of Article 3.1(a) any measure referred to in Annex I as not constituting an export subsidy (such as export credits complying with the conditions of the second sentence of Item (k)). If one therefore apply the criteria of *express textual linkage* between Article 3.1(a) and Annex 1 and the reasoning followed by the Panel in *Brazil - Aircraft*, should it not be for Brazil in *Canada – Aircraft (21.5)*, who claimed that the implementation measures (such as the Guide Lines concerning payments from the Canada Account), taken by Canada did not comply with the recommendations of the original Panel, to *first demonstrate* that the export credit practice followed by Canada *falls within the scope* of Article 3.1(a), i.e., that the export credit practice followed by Canada in accordance with

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.'

(emphasis added)

¹³⁸Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse to Article 21.5 of the DSU by Brazil* ("Canada – Aircraft(21.5)"), WT/DS70/RW, 2000, para.5.58.

¹³⁹Panel Report, *Canada – Aircraft(21.5)*, *supra*, footnote 138, paras. 5.70 – 5.71.

the new Guide Lines *is not* in conformity with the provisions of the relevant undertaking? In *US-FSC (21.5)* the Panel concluded that the last (fifth) sentence of Footnote 59¹⁴⁰ in the SCM Agreement is of such a nature that the party asserting that its measure falls within the scope of that sentence carries the burden of proving that the measure fulfills the conditions contained in the last sentence. The Panel remarked however that it did not believe that 'it would be incumbent upon a party to assert that a measure was *not* a measure to avoid the double taxation of foreign-source income within the meaning of footnote 59 before the party imposing the measure had invoked the last sentence of footnote 59 as a justification for its measure.'¹⁴¹ Applying that finding to the question posed with respect to the second paragraph of Item (k) it appears that because Canada relied on the safe haven provision, it was for Canada to carry the burden of proving that it complied with the conditions laid down in that paragraph. It was not for Brazil to assert and prove that the export credit practice followed by Canada was not in conformity with the provisions of the relevant undertaking, before Canada has not asserted that its practice did fall within the scope of the safe haven. The Appellate Body in the *US – FSC (21.5)(AB)* provided a helpful insight in the reasoning behind the distinction between a provision laying down obligations and a provision constituting an exception to substantive obligations. It pointed out that the issue for them to determine in reviewing the Panel's finding on the burden of proof under the fifth sentence of Footnote 59 is 'whether that provision determines, in part, the *proper scope* of the obligations under Article 3.1(a) of the *SCM Agreement*, or whether it provides an exception

140The last sentence of footnote 59 reads : '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.'

Paragraph (e) of the Illustrative list reads '(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.' (reference to footnotes omitted).

141Panel Report, *US-FSC(21.5)*, *supra*, footnote 17, para 8.90.

for a provision that is otherwise an export contingent subsidy.¹⁴²(emphasis added). The United States argued that the Panel incorrectly allocated the burden of proof with respect to Footnote 59 on the United States. According to US 'the last sentence of [F]ootnote 59 is inextricably linked to.... Article 3.1(a) [of the SCM Agreement] and it serves to define the scope of Article 3.1(a)'. As such the burden of proof to demonstrate that the measure does *not* fall within the scope of Footnote 59 should be on the European Communities. After considering the matter the Appellate Body concluded however: ' In the same way that we do not see the fifth sentence of [F]ootnote 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 [F]ootnote 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 [F]ootnote 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 [F]ootnote 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.'(emphasis added).

It appears therefore from the reasoning of the Appellate Body that if a provision does establish a "positive obligation" relevant for determining or defining the proper scope of another substantive provision, then it is up to the party asserting a violation of the latter to

¹⁴²Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations'* – *Recourse to*

demonstrate the non-compliance by the other party of the former provision as well. If however, a provision does not alter or determine the scope of a substantive obligation, but in fact provides an exception to such obligation, it is for the party invoking the former provision to demonstrate that its measure falls within the conditions, if any, contained in the exception.

Conclusion

This paper examined the manner in which the legal concept of burden of proof is applied in WTO dispute settlement. It concluded that the Appellate Body has introduced a new doctrine (as opposed to the traditional doctrine) of the burden of proof. According to this new doctrine, it is not merely the burden of evidence that shifts to the other party once the proponent has established a *prima facie* case, but the burden of proof itself. It also looked at the obligation resting on the respondent in a dispute to collaborate in presenting the Panel with evidence which is in the sole possession of the respondent. It observed that the Panels could draw negative inferences from a party's reluctance to collaborate. It also describes the role and powers performed by the Panels in managing the proceedings as well as the authority to request information from independent experts. It noted that the Panel might never use this authority to establish a *prima facie* case on behalf of a proponent of a claim or affirmative defense where the latter has failed to do so. It is submitted that it may not always be possible to ensure that the exercise by the Panels of their investigative authority is not directly or indirectly assisting such proponent in establishing a claim or affirmative defense. The paper also addressed the issue of standard of proof and noted that Panels apply the standard of "establishing a *prima facie* case". It observed that although the general rule has been that the burden of evidence only shift to the other party once the proponent has established a *prima facie* case, in practice, the Panels often relied on evidence presented by

Article 21.5 of the DSU by the European Communities("US – FSC(21.5)(AB)",WT/DS108/AB/RW, 2002,

the responding party as well as information provided by independent experts to determine whether the proponent has established a *prima facie* case in the first place. It raises the possibility of rather adopting "preponderance of the evidence" as the standard of proof. It appears as if such a standard will fit closer the manner in which the Panels deal with evidence presented as a whole. Finally, the paper examined the manner in which exceptions or affirmative defenses affect the allocation of the burden of proof. It also attempted to identify the reasoning behind the findings of Panels and the Appellate Body in deciding whether a particular provision constitutes a substantive obligation or whether it sets out an exception to substantive obligations found elsewhere in the text of an agreement. It concluded that in answering the question, particular attention should be given to the text of the provision itself as well as the relationship and context of the particular provision with the rest of the applicable agreement.

para.128.

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