EVIDENCE, PROOF AND PERSUASION IN WTO DISPUTE SETTLEMENT

WHO BEARS THE BURDEN?

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INTRODUCTION

Determinations on who bears the burden of proof in a World Trade Organization (WTO)¹ dispute settlement case gain prominence. To such extent that they sometimes offer dispute settlement panels a welcome tool in deciding in favour of one or the other party. A tool which is particularly attractive to adjudicators: clouded in an air of procedural neutrality but, by the same token, falling to a considerable extent within the quasi-discretionary powers of the panel.

In this new era of numerous and detailed WTO rules following the close of the Uruguay Round and of increasing reliance by states on the WTO to solve their trade disputes, including the complex factual ones, questions of burden of proof are destined to surface under a myriad of WTO provisions.² Gone are the days when panels were able to adjudicate on a 'cluster of undisputed facts' yielded, without great effort, after two sets of submissions and oral hearings. These days panels are flooded with evidence. Not only so in disputes under new, rather technical, WTO agreements [such as the Agreement on Sanitary and Phytosanitary Measures or on Trade Related Aspects of Intellectual Property Rights (TRIPS)], but also under more 'conventional' General Agreement on Tariffs and Trade (GATT) provisions (the prime example so far being the Panel on *Japan – Measures Affecting Consumer Photographic Film and Paper*³).

* Legal Affairs Division, World Trade Organization, Geneva. The opinions expressed are strictly personal. Thanks for useful comments are due to William Davey, Gabrielle Marceau, Petros Mavroidis, Peter Van den Bossche and Werner Zdouc. All errors remain mine. The cut-off date for the case law relied upon in this paper is 1 February 1998.

¹ World Trade Organization, established by the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994 and entered into force on 1 January 1995.

² See J. C. Thomas, 'Litigation Process under the GATT Dispute Settlement System, Lessons for the World Trade Organization?', 30 *Journal of World Trade* 2, 53 at 54 (1996) and 'The Need for Due Process in WTO Proceedings', 31 *Journal of World Trade* 1, 45 at 46 (1997).

³ See, for example, 'Japan film case tough test for WTO system on facts, legal issues', *Inside US Trade*, 9 May at 15 (1997): 'Both the USA and Japan, with the advice of American law firms,

This development prompted nine out of the 11 WTO panels which have, as of 1 February 1998, completed their work explicitly to address the issue of burden of proof.⁴ In the two remaining cases, the parties to the dispute submitted arguments in that respect.⁵ Moreover, four of the nine Appellate Body reports circulated to date, also address burden of proof questions.⁶

The rules on burden of proof, though inevitably of a technical nature, are rather straightforward. The major source of confusion lies, however, in the terminology used to express these rules and in the often overlooked distinction between burden of proof and the presentation and evaluation of evidence. In the author's view this confusion also stems, to some extent, from differences between common law and civil law in this field. As long as parties to a dispute are unclear as to which of them bears the burden of proof, there is a genuine risk that both sit still during the panel proceedings and

have adopted a 'scorched-earth tactic of contesting everything and conceding nothing' by compiling enormous amounts of contradictory evidence on the facts of the case, one trade law expert pointed out. This approach could present a danger for the WTO dispute settlement system as a whole if it moves toward a US-style civil litigation process which relies on extensive documentation, and would represent a departure from previous GATT practice in which countries often negotiated an agreed-upon set of facts which was then represented to panels, trade law sources said'.

⁴ These are the Panel Reports on (1) *USA – Standards for Reformulated and Conventional Gasoline* ('USA – Gasoline', adopted on 20 May 1996, WT/DS2/9), (2) *Japan – Taxes on Alcoholic Beverages* ('Japan – Alcohol', adopted on 1 November 1996, WT/DS8/11, 10/11 and 11/8), (3) *USA – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* ('USA – Underwear', adopted on 25 February 1997, WT/DS24/R), (4) *USA – Measures Affecting Imports of Woven Wool Shirts and Blouses* ('USA – Shirts and Blouses', adopted on 23 May 1997, WT/DS33/R), (5) *Canada – Certain Measures Concerning Periodicals* ('Canada – Periodicals', adopted on 30 July 1997, WT/DS31/R), (6) and (7) *European Communities – Measures Affecting Meat and Meat Products (Hormones)* ('EC – Hormones', circulated on 18 August 1997 and proposed for adoption on 13 February 1998, WT/DS26/R/USA and DS48/R/CAN), (8) *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ('India – Patent', adopted on 16 January 1998, WT/DS50/R), and (9) *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ('Argentina – Footwear', circulated on 25 November 1997, WT/DS56/R, at the time of writing on appeal).

⁵ These are the Panel Reports on *Brazil – Measures Affecting Desiccated Coconut* (adopted on 20 March 1996, WT/DS22/R) at 21–22, paras. 85–88 (arguments by the Philippines) and 50–51, para. 95 (arguments by Brazil) and *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (circulated on 22 May 1997, WT/DS27/R/ECU, DS27/R/MEX, DS27/R/GTM and DS27/R/USA), *inter alia*, at 40, 42, 43, 124, 132 and 141 (paras. 4.56, 63, 65, 295, 321 and 348, arguments by the complaining parties).

⁶ These are the Appellate Body Reports on (1) *USA – Gasoline* (adopted on 20 May 1996, WT/DS2/9), (2) *USA – Shirts and Blouses* (adopted on 23 May 1997, WT/DS33/AB/R), (3) *India – Patent* (adopted on 16 January 1998, WT/DS50/AB/R) and (4) *EC – Hormones* (circulated on 16 January 1998, proposed for adoption on 13 February 1998, WT/DS26/AB/R and WT/DS48/AB/R). A fifth Appellate Body Report also includes arguments on burden of proof raised against conclusions made by the panel. The Appellate Body noted, however, that these conclusions of the panel are factual conclusions and found that, since the Appellate Body is restricted in scope to issues of law, it had to decline to rule on these arguments (Report on *European Communities – Regime for the Importation, sale and distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R, at 100–101).

merely claim that it is for the other party to persuade the panel. Such attitude, though understandable for strategic reasons, could end in a great surprise for one of the parties. This, in turn, could lead to severe criticism of the dispute settlement system and potentially destabilize it.

1. BURDEN OF PROOF IN COMMON LAW AND CIVIL LAW

Common law

In common law countries the phrase 'burden of proof' is an ambiguous term. It is used to refer to two different meanings. Its primary and real sense refers to substantive law and corresponds to 'the duty of a party to persuade the trier of fact by the end of the case of the truth of certain propositions'.⁷ This burden is called the 'burden of persuasion' or 'risk of non-persuasion'. In essence it means that, in the event the evidence submitted by the parties is incomplete or with the evidence in equipoise, the party with the burden of persuasion loses. The 'benefit of the doubt' plays in favour of the opposing party. This is the real meaning of burden of proof and the sense given to it when referred to in this article.

In common law, there is, however, a second sense attributed to the 'burden of proof'. It is a procedural issue and stems from the division of labour in most common law cases between judge and jury. This burden is one of 'producing sufficient evidence to justify the judge in leaving the issue to the jury or, where there is no jury, to allow the hearing to continue'.⁸ This meaning of 'burden of proof' is sometimes called the 'duty of passing the judge'. This burden corresponds to the duty resting on the proponent of a claim to present a *prima facie* case, i.e., to adduce enough evidence in order to convince the court that there is a case to answer. By establishing such *prima facie* case, which usually does not require much evidence, the proponent party will create a triable issue of fact and thus avoid that the court makes a judgement as a matter of law (i.e., dismisses the claim). However, the degree of evidence required for such *prima facie* case will not be enough for the fact to be proven as a matter of law, even if the opposing party does not respond.

Civil law

The civil law notion of burden of proof has only one meaning. It simply refers to the duty of parties to prove their allegations (*actori incumbit probatio*). It corresponds to the first and real sense of burden of proof in common law, namely the burden of persuasion. The functions of a court adjudicating a civil case, and even most criminal cases, in a civil law system are not

⁷ Heydon, *Cases and Materials on Evidence* (1975) at 13.

⁸ Cross and Wilkins, *Outline of the Law of Evidence* (5th edn, 1980) at 27.

divided between judge and jury. The legal concept of ‘duty of passing the judge’ does not exist in civil law.⁹

Common elements

Common and civil law share the following two principles. First, the burden of proof (in its real sense), as a fundamental substantive obligation, does not shift and remains on a party that bears it throughout the proceedings. This does, of course, not mean that the burden of proof will always rest on the same party (e.g., the complaining party). Each party will bear the burden to prove the claims and facts it alleges. The defending party will, for example, bear the burden to prove the exceptions or affirmative defences it invokes. Second, in both common and civil law, the scope of the burden of proof is the same. It is limited to issues of fact. In principle it is the duty of the court to know and apply the law (*jura novit curia*). It is not for the party making a claim to persuade the court on issues of law. The court is assumed to know the law as it stands and needs no persuasion. In practice, it will, of course, be in the parties’ interest to bring forward as many legal arguments as they can in support of their claim. Moreover, it will often be difficult to distinguish facts from issues of law. However, with respect to issues of law, none of the parties bears a risk of non-persuasion the way they do for factual issues. If the court is unclear on issues of law after an examination of the arguments put forward by the parties, it cannot sit still and let the party making the legal claim lose (as it should do in the event of unpersuasive evidence on issues of fact). The court is under an obligation to make its own legal examination and to come up with the ‘correct’ legal finding.

2. BURDEN OF PROOF BEFORE INTERNATIONAL TRIBUNALS

International procedure tends to be free from technical and detailed rules on evidence known in municipal law. International tribunals have frequently enjoyed the privilege of deciding for themselves what is admissible as evidence and of evaluating the probative value of each piece of material evidence submitted.¹⁰ They will also determine which party carries the burden

⁹ The divergence between common and civil law was articulated by Herzog and Weser [in *Civil Procedure in France* (1967) at 310] as follows:

‘French law and doctrine makes no sharp distinction between the burden of going forward – that is, the burden of producing sufficient evidence to permit the court to find in favour of the proponent of the evidence – and the burden of persuasion that is, the burden of actually persuading the court to find in favour of the proponent of evidence. Since the court must determine both the law and the facts and as no procedural motion is available to test whether sufficient evidence has been introduced to permit the court to find a certain way before the court decides which way it will actually find, the distinction between the two burdens is of no practical significance’.

¹⁰ See, for example, the following statement of the International Court of Justice (‘ICJ’) in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, the

of proof. The WTO dispute settlement system forms no exception in that respect.¹¹

After a thorough analyses of different international tribunals, Mojtaba Kazazi has drawn the outline of the concept of burden of proof in international procedure as: 'the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with the rules acceptable to, the tribunal'.¹² This notion of burden of proof corresponds to the burden of persuasion in common law and the singular notion of burden of proof in civil law. The International Court of Justice (ICJ) set out this rule in the *Temple of Preah Vihear* case where it had to decide whether Cambodia or Thailand had sovereignty over the said temple:

As concerns the burden of proof it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward.¹³

'*Nicaragua case*'), Merits, Judgment of 27 June 1986, ICJ Reports at 40, para. 60 (1986): '[The Court,] within the limits of its Statute and Rules, . . . has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved'. In the *Case concerning the Frontier dispute (Burkina Faso v Mali)* the ICJ stated the following on the probative value of cartographic materials presented as evidence of a frontier: 'maps can . . . have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with maps' [Order of 10 January 1986, ICJ Reports at 583, para. 56 (1986)]. See also M. Kazazi, *Burden of Proof and Related Issues, A Study on Evidence Before International Tribunals* (1996) at 180–220.

¹¹ See, for example, the Panel Report on *Argentina – Footwear*, where the Panel made a decision that evidence (90 additional invoices and customs documents submitted by the USA) had been submitted timely: 'We note that the rules of procedures of panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that 'due process' is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible. In light of the difficulties faced by Argentina in responding to this evidence on such a short notice, we decided to accept this additional evidence on the understanding that Argentina would have a period of two weeks to provide further comments on these additional invoices and customs documents' (para. 6.55 at 97–98). On the probative value of copies (as opposed to originals) of documents, the same panel found as follows: 'In the absence of the originals, and after careful examination and consideration of the evidence, we consider that the copies submitted by the USA constitute sufficient evidence to allow us to make the conclusions we have reached' (para. 6.58, pp. 98–99). See also paras. 6.63–6.64 of the same Panel Report where a claim of non-admissibility of evidence (because it had been submitted after the consultations) was rejected.

¹² Kazazi, above n. 10 at 30.

¹³ *Cambodia v Thailand*, Judgment of 15 June 1962, ICJ Reports at 15–16 (1962). See also in the *Nicaragua case*, Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports at 437, para. 101 (1984): 'Ultimately, [. . .] it is the litigant seeking to establish a fact who bears the burden of proving it'.

It should come as no surprise that the technical notion of the ‘duty of passing the judge’ known in common law as a consequence of a particular feature of that system (trial by judge and jury) has not found access to international tribunals.¹⁴ International proceedings do not include participation of a jury, nor do they consist of two stages, with the court’s decision to proceed to the second phase depending on whether or not enough evidence has been produced in the first phase. In this respect, international tribunals have followed the pattern of civil law countries.¹⁵

As is the case with the burden of proof in municipal law, the burden of proof in international procedure does not shift and remains with the party that bears it throughout the proceedings.¹⁶ Again, the party bearing this burden will not always be the same (e.g., the complaining party). Each claim or fact will need to be proven by the party submitting it. The defending party will, therefore, bear the burden to prove the exceptions or affirmative defences it invokes. In the case concerning *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, the ICJ found, for example, that the burden of proof with respect to the exception of inadmissibility of the proceedings related to the rule of exhaustion of local remedies, rests on the defending party invoking the exception:

It is never easy to decide, in a case [like the present one] where there has in fact been much resort to municipal courts, whether local remedies have truly been ‘exhausted’ . . . [H]owever, it was for Italy [which claimed in the present case the inadmissibility of the proceedings by invoking the local remedies rule] to show, as a matter of fact, the existence of a [local] remedy [that had not been tried, or at least, not exhausted] which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.¹⁷

The scope of the burden of proof in international procedure is generally identical to that in common and civil law, i.e., it is limited to issues of fact. Both international tribunals and legal writers have generally favoured the applicability of the principle of *jura novit curia* in international proceedings.¹⁸

¹⁴ Kazazi, above n. 10 at 31–32.

¹⁵ See Kazazi, above n. 10 at 31: ‘a review of the general characteristics of this aspect of international procedure reveals that there is no place in international proceedings for the Anglo-American dual concept of the burden of proof.’

¹⁶ *Ibid.*, at 36 and 251–253.

¹⁷ Judgment of 20 July 1989, ICJ Reports at 46–47, paras. 62–63 (1989). For another example where the burden of proof (with respect to a claim that a special meaning should be given to a specific phrase) rested on the defending party: *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, Judgment of 11 September 1992, ICJ Reports at 585, para. 377 (1992).

¹⁸ Judgment on the Merits of 25 July 1974, ICJ Reports at 9, para. 17 (1974). See also in the *Nicaragua Case*, Merits, above n. 10 at 24, para. 29: ‘For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the arguments of the parties before it with respect to the applicable law...’ and M. Kazazi, above n. 10 at 44 with references to legal writers.

In the *Fisheries Jurisdiction* case (*United Kingdom v Iceland*), for example, the ICJ stated the following:

It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.¹⁹

3. BURDEN OF PROOF VERSUS PRESENTATION AND EVALUATION OF EVIDENCE BEFORE INTERNATIONAL TRIBUNALS

Issues to be distinguished

As warned against in the introduction, the *determination* of who bears the burden of proof is often confused with the process of presenting or evaluating evidence necessary to decide whether or not the burden of proof has been *discharged*.

First, the fact that it will obviously be for the party that initiated the procedure to *start* making claims and presenting evidence and to outline first the case before the tribunal (for example, to take the floor first at the first oral hearing) does not necessarily mean that this party also bears the burden of proof, at least not for all allegations.

Second, the duty to *present* evidence on a specific allegation does not only rest on the party bearing the burden of proof. Following the general principles of peaceful settlement of disputes and good faith in the settlement of disputes, the opposing party will have the duty to co-operate with the proponent party in order to uncover the truth by placing material evidence before the tribunal (in the event such evidence is, for example, only in the

¹⁹ Merits, Judgment of 25 July 1974, ICJ Reports at 9 (1974). However, as mentioned in Section 1, third subsection, the difficulty of distinguishing facts from issues of law is apparent. The following quote from the ICJ's judgment in the *Border and Transborder Armed Actions* case (*Nicaragua v Honduras*) is instructive:

'The existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts. The determination of the facts may raise questions of proof. However [as] the facts in the present case . . . are not in dispute [there is no question of burden of proof]; the issue is, what are the legal effects to be attached to them' (Jurisdiction and Admissibility, Judgment of 20 December 1988, ICJ Reports, para. 16 at 76 (1988)).

In this respect, it is interesting to note that the Appellate Body in *India - Patent* stated the following in reply to an argument by India that its municipal law is a *fact* that must be established by the party relying on it:

In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. ... In this case, the Panel was simply performing its task in determining whether India's 'administrative instructions' for receiving mailbox applications were in conformity with India's obligations under Article 70.8(a) of the *TRIPS Agreement* (para. 65, at 24-25, footnotes omitted).

possession of the opposing party).²⁰ This principle of co-operation is confirmed in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the WTO.²¹ The related duty to co-operate and present material evidence to a WTO panel has been confirmed and interpreted as follows in the Panel Report on *Argentina – Footwear*:

Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case.²²

Finally, in order to fulfil its task of *evaluating* evidence, an international tribunal will usually have rules on the presentation of pleadings and evidence. These rules, though distinct from the issue of who bears the burden of proof, will be crucial for the tribunal's decision on whether or not the burden of proof has been discharged.

The use of factual presumptions in the evaluation of evidence

In order to discharge its burden of proof, a party may want to invoke presumptions, for example, by creating *prima facie* (but inconclusive) evidence in its favour. International tribunals can also rely on and apply presumptions on their own initiative.²³ However, this, what one could call 'presumption

²⁰ M. Kazazi above n. 10 at 371–372.

²¹ Article 3.10 of the DSU provides as follows:

It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

²² Above n. 4, para. 6.40 at 92. See also para. 6.58 at 98. With respect to fact-finding, it is interesting to note the following statement of the Appellate Body in *India – Patent*: 'If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding ... It is worth noting that, with respect to fact-finding, the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings' (paras. 94–95 at 33–34). Even if one of the parties would not at its own initiative present evidence to the panel, the latter still has, according to Article 13.1 of the DSU, the 'right to seek information and technical advice from any individual or body which it deems appropriate', including the parties to the dispute. Moreover, according to that same provision, '[a] Member [including the parties to the dispute] should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate'. Of course, in practical terms a panel will never be able to 'force' a party to produce evidence. Ultimately, all that it could do, is to draw negative inferences from a refusal to submit specific evidence.

²³ According to Cheng '... it is legitimate for a tribunal to presume the truth of certain facts or of a certain state of affairs, leaving it to the party alleging the contrary to establish its contention' [B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) at 304].

technique', is only a tool which can be used by a tribunal in the *evaluation* of evidence submitted by the parties; a tool only used in the event the evidence before it is inconclusive. It relates to the *standard* of proof required (i.e., it assists in answering the question: 'does the evidence submitted meet the tribunal's standard of proof?') in that its application implies that conclusive evidence is not required; a presumption of truth, not rebutted by the opposing party, will be enough for the tribunal to accept a fact as a matter of law. It does not affect the *determination* of which party bears the burden of proof for a specific allegation nor does it impose any additional procedural obligation on the proponent party. In that sense, the option for a proponent party to invoke a presumption in order to discharge its burden of proof should be clearly distinguished from the 'duty of passing the judge' which always rests on a proponent party in common law. This common law duty imposes an additional procedural burden on the proponent party (separate from the burden of proof in its real sense) to make a *prima facie* case in order to convince the court that there is a case to be answered (i.e., in order to 'pass the judge' and avoid a negative judgment as a matter of law). As will be seen in Sections 7 and 8, the Appellate Body has embraced the presumption technique, but tends to characterize it as the basic rule on who bears the burden of proof in a WTO dispute settlement. It thus seemingly confused the determination of who bears the burden of proof with the process of evaluating evidence in order to check whether the burden of proof has been discharged.

4. BURDEN OF PROOF IN GATT 1947 PANEL PRACTICE

Two rules related to burden of proof seem to emerge from the panel practice prior to the establishment of the WTO.

First, the rule that it is for the complaining party to prove the GATT violation it alleges. No panel report *explicitly* allocated this burden to the complaining party.²⁴ This first rule can, however, be implicitly deduced from many panel reports. For example, as early as 1954 the panel on *Treatment by Germany of Imports of Sardines* concluded as follows:

The examination of the evidence submitted led the Panel to the conclusion that no sufficient evidence has been presented to show that the German Government had failed to carry out its obligations under Article I:1 and Article XIII:1.²⁵

²⁴ The reason why this rule was never explicitly articulated is most probably the fact that, as noted in the introduction, in GATT 1947 panel practice the parties often presented the panel a set of facts they agreed upon (i.e., the so-called 'cluster of undisputed facts').

²⁵ Panel Report adopted on 31 October 1952, BISD 1S/53, para. 15. See also the Report of the Working Party in *The Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD Vol. II/188, para. 11; *EEC – Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49, para. 4.21; *European Communities – Refunds on Exports of Sugar, Complaint by Brazil*, adopted on 10 November 1980, BISD 27S/69, para. (e) of the Conclusions; *Canada, Administration of the*

Second, the rule that the party invoking GATT Article XX, in practice the defending party, has to convince the panel that the conditions set out in that provision are met. GATT Article XX provides for general exceptions to GATT obligations, such as the protection of public morals or human health. An example can be found in the panel report on *Canada – Administration of the Foreign Investment Review Act*. There, the panel found that certain purchase undertakings imposed by the Foreign Investment Review Act on foreign investors (e.g., undertakings to purchase goods of Canadian origin in preference to imported products), were inconsistent with the national treatment clause of GATT Article III:4. Canada argued, however, that these undertakings fell within the exception of GATT Article XX(d) since the Foreign Investment Review Act constitutes ‘a law which is not inconsistent with the provisions of the General Agreement’ and the purchase undertakings are ‘measures necessary to secure compliance’ with that law. The panel found as follows:

Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act. On the basis of the explanations given by Canada the Panel could not, however, conclude that the purchase undertakings that were found to be inconsistent with Article III:4 are necessary for the effective administration of the Act.²⁶

The same approach has been taken with respect to GATT Article XI:2(c)(i) which provides a specific exception to the general prohibition of quantitative restrictions.²⁷ Similarly, panels have also explicitly required the defending party to demonstrate the applicability of other provisions it was asserting as a defence. An example can be found in the panel report on *USA – Customs User Fee*. There, the panel, *inter alia*, examined whether certain custom service operations, for which the USA imposed customs fees, could be considered as ‘services rendered’ within the meaning of Articles II:2(c) and

Foreign Investment Review Act, adopted 7 February 1984, BISD 30S/140, para. 5.13; *Japan – Tariff on Import of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167, para. 10; *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, para. 5.3 and; *USA – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, DS44/R, para. 82.

²⁶ *Panel Report on Canada – Administration of Foreign Investment Review Act*, adopted on 7 February 1984, BISD 30S/140, para. 5.20. See also Panel Reports on *USA – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, para. 5.27 and *USA – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, paras. 5.41 and 5.52.

²⁷ See Panel Reports on *Japan – Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, para. 5.1.3.7 (‘The Panel further noted that the CONTRACTING PARTIES recognized in a previous case that a contracting party invoking an exception to the General Agreement had the burden of demonstrating that the requirements of the exception were fulfilled’); *EEC – Restrictions on Imports of Dessert Apples*, complaint by Chile, adopted on 22 June 1989, BISD 36S/93, para. 12.3; and *Canada – Import Restrictions on Ice Cream and Yoghurt*, adopted on 5 December 1989, BISD 36S/68, para. 59.

VIII:1(a) of GATT. The panel considered these provisions to be exceptions and found as follows:

As noted in the previous section of this report, the Panel was of the view that Articles II:2(c) and VIII:1(a) contained a limitation upon the type of charges that could be imposed under these two provisions, a limitation to be found in the term 'services rendered'. . . The Panel was of the view that the government imposing the fee should have the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation had been given, it would then be upon the complainant government to present further information calling into question the adequacy of that explanation.²⁸

In this case, the panel (to this author's knowledge, for the first time) applied the presumption technique outlined above: the burden of proving that a customs fee corresponds to a 'service rendered' rests on the party imposing the fee; however, once that party provides sufficient evidence to raise a presumption of consistency ('a *prima facie* satisfactory explanation'), it will be up to the other party to rebut that presumption (to 'present further information calling into question the adequacy of that explanation').

5. WTO PANEL AND APPELLATE BODY REPORTS CONFIRMING GATT 1947 PANEL PRACTICE

The first rule: it is for the complaining party to prove the GATT violation it alleges

The rule that it is up to the complaining party to prove the GATT violation it alleges, was explicitly confirmed in the panel reports on *Japan – Alcohol* and *India – Patent* and the Appellate Body report on *USA – Shirts and Blouses*.²⁹

The *Japan – Alcohol* panel examined complaints by the European Communities, Canada and the USA that the Japanese liquor tax system discriminated against spirits exported to Japan. The complainants alleged that Japan violated GATT Article III:2 by levying a substantially lower tax on shochu (a traditional Japanese spirit) than on whisky, cognac and white spirits. When addressing the claim under GATT Article III:2, *first sentence*, the panel noted that:

. . . complainants have the burden of proof to show first, that products are like

²⁸ Panel Report on *USA – Customs User Fee*, adopted on 2 February 1988, BISD 35S/245, para. 98. See also Panel Reports on *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 22 March 1988, BISD 35S/37, para 4.34, concerning Article XXIV:12 of GATT 1947 (one could, however, question whether Article XXIV:12 is a defence to be invoked by the defending party and consider it rather as a general obligation, the breach of which needs to be proven by the complainant) and *USA – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, para. 5.44, concerning the Protocol of Provisional Application.

²⁹ Above n. 4 and 6.

and second, that foreign products are taxed in excess of domestic ones (emphasis added).³⁰

When turning to the claim under GATT Article III:2, *second sentence*, the panel made clear that:

. . . *the complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production (emphasis added).*³¹

The *USA – Shirts and Blouses* case involved a complaint by India that the transitional safeguard measure imposed by the USA on imports of woven wool shirts and blouses from India was inconsistent with Articles 2, 6 and 8 of the Agreement on Textiles and Clothing (ATC). In addressing the issue of burden of proof the Appellate Body noted the following:

. . . we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the *rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.*³² Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence* (emphasis added).³³

. . . a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.³⁴

The second rule: it is for the party invoking an exception or defence to prove it

The finding of the Appellate Body in *USA – Shirts and Blouses* just quoted, at the same time confirmed the second rule developed under GATT 1947 panel practice, namely that the party invoking an exception or defence has to prove that the conditions contained therein are met. In the same case, the Appellate Body confirmed that GATT Articles XI:2(c)(1) and XX are such affirmative defences:

We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence, such as those found in Article XX

³⁰ Panel Report, para. 6.14.

³¹ Ibid., para. 6.28.

³² A footnote to this sentence refers to M. Kazazi, above n. 10 at 117.

³³ Appellate Body Report at 14. The Appellate Body then referred to a series of GATT 1947 cases supporting the proposition that the burden of establishing a violation under GATT 1947 was on the complaining party.

³⁴ Ibid., at 16. This quote has been referred to and confirmed in the Panel and Appellate Body Reports on *India – Patent*, above n. 6, respectively, para. 7.40, at 55 and paras. 73–74 at 27.

or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. *Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it* (emphasis added).³⁵

This second rule was also explicitly confirmed in the panel and Appellate Body reports on *USA – Gasoline*, the panel report on *USA – Underwear* and the panel report on *Canada – Periodicals*.³⁶

In the *USA – Gasoline* case the panel found that a US gasoline regulation violated GATT Article III:4 by treating imported gasoline less favourable than domestic gasoline. The panel then addressed the defences invoked by the USA under GATT Articles XX(b), (d) and (g):

The Panel noted that as the party invoking an exception [*in casu* Article XX(b)] the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied.³⁷

The Appellate Body report in the same case elaborated on the burden of proof with respect to the general introduction (or 'chapeau') to Article XX, which rests on the party invoking an exception under Article XX, as follows:

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.³⁸

³⁵ Appellate Body Report at 16, footnotes omitted. In one footnote (n. 23) the Appellate Body refers to the following Panel Reports as reports dealing with affirmative defences: *USA – Customs User Fee* (concerning GATT Article II:2); *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (concerning GATT Article XXIV:12); and *USA – Measures Affecting Alcoholic and Malt Beverages* (concerning the Protocol of Provisional Application).

³⁶ Above n. 4 and 6.

³⁷ Panel Report, para. 6.20 (not appealed). The panel made similar statements with respect to GATT Articles XX(d) and (g), at paras. 6.31 and 6.35. The *USA – Gasoline* panel's findings on burden of proof were confirmed in the Panel Report on *Canada – Periodicals*, para. 5.7.

³⁸ Report of the Appellate Body, at 22–23. The Appellate Body thereby specified that the burden of proof under the chapeau of Article XX will be more difficult to discharge than that under any of

In *USA – Underwear*, the panel examined the consistency of import restrictions, imposed by the USA on textile imports from Costa Rica, with Articles 2, 6 and 8 of the ATC. Article 2 prohibits, in principle, new restrictions on textile imports. However, Article 6 allows specific safeguard mechanisms to be set up during a transition period. The USA and Costa Rica presented divergent views on the question of burden of proof. The USA argued that it is not its duty to re-establish the consistency of the restriction it imposed with the ATC since it had already done so in a statement made at the time it imposed the restriction. Costa Rica, on the other hand, insisted that it is for the USA to establish to the Panel's satisfaction that the conditions required before imposing a restriction under Article 6 have in fact been met. The panel's finding on this crucial question was as follows:

We recall in this context that one of the central elements of the ATC is the prohibition, in principle, for Members to have recourse to any new restrictions beyond those notified under Article 2.1 of the ATC. Article 2.4 of the ATC reads as follows:

'... 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).

We further note that Article 6.2 of the ATC reads as follows:

'Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is *demonstrated* that . . . ' (emphasis added).

In our view, Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC. It is a general principle of law, well-established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception. Consequently, in our view, it is up to the United States to demonstrate that it had fulfilled the requirements contained in Articles 6.2 and 6.4 of the ATC in the March Statement which, as the

the individual paragraphs of Article XX. The reason for this differentiation could be twofold. First, the chapeau of Article XX deals with how the measure is 'applied', whereas the individual paragraphs of Article XX impose conditions on the measure as such. Second, the conditions to be met under the chapeau of Article XX are negative (measures '*not* applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade'), whereas those under the individual paragraphs of Article XX are positive (e.g., Article XX(b): 'necessary to protect human, animal or plant life or health'). On the other hand, even the burden of proof under the individual paragraphs of Article XX involves some degree of negative proof. Indeed, according to panel practice, a measure will only be 'necessary' to protect, for example, human health if *no* alternative measure consistent with other GATT provisions is reasonably available or, in case no such measure is reasonably available, *no* measure with a lesser degree of inconsistency with other GATT provisions (e.g., less trade restrictive) is at hand. See, for example, Panel Report on *USA – Section 337 of the Tariff Act of 1930*, L/6439, adopted on 7 November 1989, para. 5.26. However, the difficulty of proving something in the negative is to a large extent alleviated by the duty resting on both parties to submit evidence and co-operate with each other so that the panel can come to the truth of the matter (as set out in Section 3, first subsection).

parties to the dispute agreed, constitutes the scope of the matter properly before the Panel (emphasis added).³⁹

Observations

Three observations can be made at this stage. First, as opposed to providing a singular rule on burden of proof (such as *actori incumbit probatio*), GATT/WTO practice has forwarded two rules, tailor-made for, respectively, complaining and defending parties. The first rule focuses on the complaining party and the violations that party alleges; the second on the defending party and the defences it invokes. An explanation for this bipolar approach can readily be found. As opposed to most other international tribunals, the WTO dispute settlement system does not allow the linking, in one and the same dispute, of counter-complaints in regard to distinct matters.⁴⁰ Moreover, any review by a panel of a measure has to be preceded by consultations requested for by the country challenging that measure.⁴¹ Therefore, in any given dispute only the complaining party (i.e., the party that requested the consultations and initiated the proceedings) can claim violations of WTO rules and only the measure imposed by the defending party (i.e., with respect to which consultations were requested for) will be at issue. Once brought before a panel, the defending party will not be able to come forward with its own claim of WTO inconsistency directed at measures imposed by the complaining party. Nevertheless, for the sake of clarity and simplicity, it would seem to be preferable, also in WTO jurisprudence, to state the rules

³⁹ Panel Report, adopted on 25 February 1997, WT/DS24/R, paras. 7.15–7.16. As will be discussed in Section 7, first subsection, the Appellate Body in *USA – Shirts and Blouses* had different views on Article 6 of the ATC and did not consider it to be an ‘exception’, but ‘a fundamental part of the rights and obligations of WTO Members’ (Appellate Body Report, at 16). It is also worth noting that the panel report on *USA – Underwear* also addressed the standard of review under the ATC (which, in turn, will influence the standard of proof to be met under that Agreement). The USA proposed a ‘reasonableness test’, affording national authorities considerable discretion in making their determinations. The panel referred to Article 11 of the DSU: ‘... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...’. Rejecting both the idea of a total deference to the findings of national authorities and of a *de novo* review, the panel decided to make an objective assessment of the facts and arguments before it (Panel Report, paras. 7.7–7.13). This standard of review has been confirmed for the determination and assessment of facts in proceedings under the SPS Agreement by the Appellate Body in *EC – Hormones* (paras. 110–119).

⁴⁰ Article 3.10 of the DSU provides as follows: ‘It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked’. Cases dealt with by the ICJ, for example, are often brought before the Court by *both* parties (e.g., by means of a notification of a special agreement; see Article 36.1 of the Statute of the ICJ) and claims and counter-claims can be made before the ICJ (e.g., the *Temple of Preah Vihear* case, quoted in Section 2, where both Cambodia and Thailand claimed sovereignty over the said temple).

⁴¹ See Article 4 of the DSU (and the corresponding consultation provisions in other WTO agreements summed up in footnote 4 to Article 4), in particular Article 4.7: ‘If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel’.

on burden of proof in one singular principle, in the sense it has been done in *USA – Shirts and Blouses* by the Appellate Body: ‘the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.’⁴² However, as will be seen in Section 7, in recent case law the Appellate Body, in turn, risks to move away from this basic principle on burden of proof to focus on one technique for the evaluation of evidence (the presumption technique) which it seems to put forward as the substantive rule on burden of proof.

Second, to focus on the respective obligations of the litigating parties poses another risk. In so doing, one tends to require from the complaining party to ‘prove’ the *violation* it alleges, i.e., to prove an inconsistency with a WTO *provision*. The same risks to happen on the defending side, where one requires that party to ‘prove’ the *exceptions* it invokes, i.e., to prove the consistency with a specific WTO *provision*. However, as set out in Sections 1 and 2, the concept of burden of proof in principle only applies to facts, not to issues of law. None of the parties can be required to ‘prove’ the legal inconsistency or consistency of a measure with a WTO provision. Panels and the Appellate Body alike are presumed to know the law (*jura novit curia*). Of course, parties will be expected to submit legal arguments in support of their claims, but in theory they do not bear any burden of proof in respect of issues of law. Therefore, instead of addressing the issue of burden of proof either in general under a WTO agreement or a specific WTO provision⁴³ or in a way which generally requires complainants to prove WTO inconsistencies and defendants to prove WTO consistencies,⁴⁴ it would seem to be preferable to only address the issue of burden of proof with respect to a specific fact (mostly a requirement) to be present under a specific WTO provision and require the party invoking the particular fact to prove it.

Finally, it seems that, following other international tribunals, the GATT/WTO case law outlined above did not adopt the notion of ‘duty of passing the judge’ (or the requirement of providing a *prima facie* case in order to proceed) known in common law.

6. ARGUMENTS ON A GENERAL REQUIREMENT FOR THE COMPLAINANT TO ESTABLISH A *PRIMA FACIE* CASE

Overview of USA arguments in early cases

The idea of imposing on the complaining party in a WTO dispute the general obligation to establish a *prima facie* case whereafter it will be up to the defending party to rebut that case, was articulated for the first time in the

⁴² Appellate Body Report on *USA – Shirts and Blouses*, at 14.

⁴³ See, for example, the Panel Reports on *EC – Hormones*, paras. 8.51–8.55 (USA complaint) and paras. 8.54–8.58 (complaint by Canada).

⁴⁴ See, for example, the Appellate Body Report on *EC – Hormones*, para. 104 at 39.

US arguments submitted before the *Japan – Alcohol* panel. There the USA argued as follows:

On the issue of the burden of proof, the United States argued that it is up to the complainant to produce a *prima facie* case that an origin-neutral measure has both the aim and effect of affording protection to domestic production [under GATT Article III:2, first sentence]. Once the complainant has demonstrated that this is the case, then it would be up to the defending party to present evidence to rebut the claim. The panel would decide whether it were more likely than not that the measure is applied so as to afford protection.⁴⁵

In the subsequent *USA – Underwear* case (complaint by Costa Rica), the USA, acting as defending party this time, reiterated its point of view as follows:

In the present case the burden was on Costa Rica to bring forward evidence and arguments demonstrating a *prima facie* case that the United States had acted inconsistently with Articles 6.2 and 6.3 of the ATC.

. . . the United States argued that, consistent with accepted GATT dispute settlement practice that had been carried over in the WTO, *the burden was on Costa Rica in the first instance to demonstrate that United States actions were inconsistent with the ATC*. The burden was not on the United States to re-demonstrate that its actions were justified. It was considered that the United States had presented ample material in the TMB justifying the safeguard measure, and they were prepared to refute the claims that Costa Rica had made; however, *the Panel should first determine whether Costa Rica had indeed brought forward factual information and legal arguments substantiating its case, which, in their view, Costa Rica had not done*' (emphasis added).⁴⁶

Especially in the last sentence quoted above, the USA seems to argue that there is an obligation on the complainant in a WTO dispute to first 'substantiate its case'. In the US view, only once this has been done, and only once the panel has explicitly decided that this has been done, can the case proceed. To adopt this approach would be to impose a 'duty of passing the judge' on a WTO complainant; a procedural duty known in common law, but foreign to civil law and international procedure.⁴⁷

In *USA – Shirts and Blouses* (complaint by India) the same question arose as that dealt with by the panel in *USA – Underwear*.⁴⁸ The issue was, again, whether or not Article 6 of the ATC constitutes an exception to Article 2 of the ATC for which the burden of proof would rest on the defending party. As could be expected, India (the complainant) argued that Article 6 *does* constitute an exception and that, therefore, the USA bears the burden of proving that the US restrictions fulfil the conditions imposed by Article 6. The USA, on the other hand, repeated its established viewpoint:

⁴⁵ Panel Report, para. 4.32.

⁴⁶ Panel Report, paras. 5.41 and 5.67.

⁴⁷ See Sections 1, 2 and 5, third subsection.

⁴⁸ See Section 5, second subsection.

The United States argued that, consistent with accepted GATT 1947 dispute settlement practice which had been carried over in the WTO, the burden was on India in the first instance to make a *prima facie* case that the United States' application of a transitional safeguard on imports of woven wool shirts and blouses from India had been inconsistent with the ATC. The language of Article XXIII of GATT 1994 and practice under GATT 1947 supported this principle . . . In this case, *India had the initial burden of demonstrating that the United States had failed to carry out its obligations under the ATC and, in the view of the USA, India had failed to sustain that burden* (emphasis added).⁴⁹

Origins of the arguments on a general requirement to establish a *prima facie* case

Four explanations can be found for making the argument that there is a general obligation resting on the complaining party in a WTO dispute to establish a *prima facie* case of inconsistency with WTO rules (hereafter referred to as 'the *prima facie* case argument'). First, adopting the *prima facie* case argument could merely mean that the complaining party in a WTO dispute has a duty to *present* claims and evidence first (see Section 3, first subsection), without having any influence on who actually bears the substantive burden of proof.⁵⁰ This seems to be too much of a statement of the obvious and cannot seriously be considered as the real *rationale* behind the *prima facie* case argument.

Second, as hinted at above,⁵¹ the argument could stem from common law which imposes, on the complainant, a distinct procedural obligation to establish a *prima facie* case for the proceedings to continue, i.e., a 'duty of passing the judge'.⁵² The fact that a common law country (the USA) has first forwarded the argument could support this. However, as seen in Section 2, this notion of a 'duty of passing the judge' is foreign to international procedure. There seems to be no reason why this should be different in a WTO dispute settlement. No provision in the DSU or rule of procedure adopted by any panel so far, nor any GATT panel report,⁵³ imposes a *duty* on the complaining party to establish a *prima facie* case (and a corresponding duty on the panel to make a decision thereon) before the panel can proceed its examination. This second justification for making the *prima facie* case argument is, therefore, not a valid one.

⁴⁹ Panel Report, para. 5.4. The USA did, however, not provide any reference to past panel practice where the notion of *prima facie* case in this sense was used.

⁵⁰ See the Panel Report on *Argentina Footwear*, para. 6.37 at 90: 'We consider that when the Appellate Body refers to the obligation of the complainant party to provide evidence to establish a 'presumption', it refers to two aspects: the procedural aspect, i.e. the obligation for the complainant to present evidence first, but also to the nature of evidence needed'.

⁵¹ See Section 6, first subsection, discussion of quote from *USA – Underwear*.

⁵² See Section 1, first subsection.

⁵³ See Section 5, third subsection.

Third, the *prima facie* case argument could be copied from established practice under GATT Article XXIII, now incorporated in Article 3.8 of the DSU, where similar language was used to link the finding of a GATT 'inconsistency' with the under Article XXIII required result of a 'nullification or impairment' of benefits accruing to the party invoking the inconsistency. Article XXIII forms the legal basis for any dispute settlement procedure under GATT 1994. Similar provisions have been incorporated in most other WTO agreements. The crux of Article XXIII is that the real task of a dispute settlement panel is not to decide whether there is an inconsistency with a GATT provision, but whether a benefit accruing to the party invoking such inconsistency has been nullified or impaired. To move from the first step, a finding of inconsistency with a GATT/WTO rule, to the second step, a finding of nullification or impairment, GATT 1947 panels,⁵⁴ and (since 1995) Article 3.8 of the DSU, have applied the presumption technique outlined above: once an inconsistency with a GATT/WTO obligation established, this inconsistency will constitute a *prima facie* case of nullification or impairment, to be rebutted by the defending party. Article 3.8 of the DSU provides as follows:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.⁵⁵

However, the concern of recent WTO panel and Appellate Body reports dealing with the burden of proof is *not* the relationship between a WTO inconsistency and a finding of nullification or impairment of benefits (and the proof required to move from the *first* step to the *second* step). Of interest today is how one gets at this very *first* step of finding a WTO inconsistency, i.e., the relationship between, on the one hand, evidence and arguments submitted by the parties and, on the other hand, the finding of a WTO inconsistency. Article 3.8 of the DSU, and the GATT 1947 practice preceding it, have nothing to do with these questions of who or how a WTO inconsistency should be established.⁵⁶ As the Appellate Body noted in the *USA – Shirts and Blouses* case:

⁵⁴ See, for example, the Panel Report on *USA – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34/136 at 155–159.

⁵⁵ In this respect, it is interesting to note that Article 3.8 of the DSU may have qualified the GATT 1947 panel practice that in practice the presumption that measures inconsistent with GATT obligations cause nullification or impairment operates as an irrebuttable presumption (see Panel Report on *USA – Taxes on Petroleum and Certain Imported Substances*, at 155–159).

⁵⁶ Article 3.8 of the DSU (being itself an application of the presumption technique outlined above), though not relevant for the determination of which party bears the burden of proving a WTO inconsistency, could only be used as a precedent to apply this same presumption technique (and, in particular, the standard of proof this technique implies) in deciding whether the burden of proving a WTO inconsistency has been discharged.

However, the issue in this case is not what happens after a violation is established; the issue in this case is which party must first show that there is, or is not, a violation. More specifically, the issue in this case is which party has the burden of demonstrating that there has, or has not been, an infringement of the obligations assumed under Article 6 of the *ATC*.⁵⁷

Therefore, this third justification for making the *prima facie* case argument cannot be a valid one either.

Fourth, the *prima facie* case argument could be considered as an application of the presumption technique outlined in Section 3, second subsection: In order for the complaining party to establish the claims it makes (i.e., in order to *discharge* its burden of proof with respect to the facts it invokes) it will be sufficient to submit evidence of a *prima facie* case, whereafter it will be up to the defending party to rebut that case. If the defending party fails to do so, the complainant will win. If this fourth explanation is correct, it would imply, as pointed out in Section 3, second subsection, that (1) the complaining party has the burden of proof for the claim/fact in question, a burden which remains with that party during the entire proceedings and (2) the degree or standard of proof required is set, no longer at conclusive evidence, but at a non-rebutted presumption of truth. In the author's view, this fourth justification for the *prima facie* case argument is the only valid one. In conclusion, in order to avoid confusion as to the real *rationale* and meaning behind the *prima facie* case argument (i.e., an application of the presumption technique), the argument should refer to a duty to provide 'evidence sufficient to raise a presumption that what is claimed is true',⁵⁸ rather than an 'obligation to establish a *prima facie* case'.⁵⁹

7. PANEL AND APPELLATE BODY FINDINGS ON THE REQUIREMENT TO ESTABLISH A *PRIMA FACIE* CASE

The *USA – Shirts and Blouses* case

The *prima facie* case argument was successful, for the first time in a WTO case, before the panel on *USA – Shirts and Blouses*. That panel came to the following findings on the question of burden of proof:

The parties seem to have addressed two different aspects of what one might call the 'burden of proof' issue. We believe that a distinction should be made. First, we consider *the question of which party bears the burden of proof before the Panel*. Since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put forward factual and legal arguments

⁵⁷ Appellate Body Report, at 13–14. For an example where Article 3.8 of the DSU was, mistakenly, used as an argument on burden of proof to establish a WTO inconsistency, see Canadian argument before the *EC – Hormones* panel: 'With respect to burden of proof, Canada submits that under Article 3.8 of the DSU it is up to the [EC] to rebut Canada's *prima facie* case' (Panel Report, para. 8.52).

⁵⁸ As in the Appellate Body Report on *USA – Shirts and Blouses*, at 14.

⁵⁹ As in the Panel and Appellate Body Reports on *EC – Hormones*, see Section 7, third subsection.

in order to establish that the US restriction was inconsistent with Article 2 of the ATC and that the US determination for a safeguard action was inconsistent with the provisions of Article 6 of the ATC. Second, we consider *the question of what the importing Member must demonstrate at the time of its determination*. Concerning the substantive obligations under Article 6 of the ATC, it is clear from the wording of Article 6.2 and 6.3 of the ATC that, in its determination of the need for the proposed restraint, the United States had the obligation to demonstrate that it had complied with the relevant conditions of application of Article 6.2 and 6.3 of the ATC' (emphasis added).⁶⁰

Answering comments made by India on these findings (at the interim review stage⁶¹) the panel added the following in clarification to its final report, mentioning for the first time the idea of a *prima facie* case in this context:

. . . it was for India to submit a *prima facie* case of violation of the ATC, namely, that the restriction imposed by the United States did not respect the provisions of Articles 2.4 and 6 of the ATC. 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.⁶²

This finding was one of the elements of the panel report against which India appealed. In its report, the Appellate Body devoted not less than five pages to the question of burden of proof. Although it considered the panel's findings in this respect not to be 'a model of clarity', it did not believe the panel 'erred in law'.⁶³ In a passage quoted in Section 5, first subsection, the Appellate Body confirmed the two rules developed in GATT 1947 panel practice. However, it also added language related to the notion of a *prima facie* case developed in the panel report:

. . . the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.*⁶⁴

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case (emphasis added).⁶⁵

The Appellate Body then found that GATT 1947 panel practice conferring the burden of proof on the party invoking an exception under, for example,

⁶⁰ Panel Report, para. 7.12.

⁶¹ According to Article 15 of the DSU, the panel first needs to issue an interim report to the parties, including its findings and conclusions. Thereafter, the parties may submit a written request for the panel to review the interim report prior to circulation of the final report.

⁶² *Ibid.*, para. 6.7.

⁶³ *Ibid.*, at 13.

⁶⁴ A footnote to this sentence contained an (in GATT/WTO history) unprecedented number of references to legal writers and law dictionaries and manuals (12 in total).

⁶⁵ Appellate Body Report at 14.

GATT Article XX, is not relevant for Article 6 of the ATC and continued as follows:

The transitional safeguard mechanism provided in Article 6 of the *ATC* is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the *ATC*. We agree with the Panel that *it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim.* This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States ‘violated the provisions of Articles 2 and 6 of the *ATC*’ (emphasis added).⁶⁶

The *India – Patent* case

In *India – Patent*, the USA claimed violations of Articles 27, 63, 65 and 70 of the Agreement on TRIPS because of the alleged absence of patent protection for pharmaceutical and agricultural chemical products in India. The panel confirmed and applied the Appellate Body’s findings on burden of proof in *India – Shirts and Blouses* as follows:

The United States has raised these questions [with respect to the Indian mechanism to file patent applications] in a persuasive manner. As the Appellate Body report on *Shirts and Blouses* points out, ‘a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim’.⁶⁷ In this case, it is the United States that claims a violation by India of Article 70.8 of the TRIPS Agreement. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, again to paraphrase the Appellate Body, the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so.⁶⁸

On appeal, India alleged that ‘the panel, after having required the USA merely to raise ‘reasonable doubts’ suggesting a violation of Article 70.8, placed the burden on India to dispel such doubts’.⁶⁹ The Appellate Body confirmed the panel’s findings as follows:

⁶⁶ Ibid., at 16–17.

⁶⁷ Appellate Body Report on *USA – Shirts and Blouses* adopted on 23 May 1997, WT/DS33/AB/R at 16.

⁶⁸ Panel Report, above n. 4, para. 7.40 at 55.

⁶⁹ Appellate Body Report, para. 72 at 26–27.

A careful reading of paragraphs 7.35 and 7.37 of the Panel Report reveals that the Panel has done so [i.e., has applied the burden of proof correctly] in this case. These paragraphs show that the United States put forward evidence and arguments that India's 'administrative instructions' pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward rebuttal evidence and arguments. *India misinterprets what the Panel said about 'reasonable doubts'. The Panel did not require the United States merely to raise 'reasonable doubts' before the burden shifted to India.* Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that *it* had 'reasonable doubts' that the 'administrative instructions' would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court (emphasis added).⁷⁰

The EC – Hormones cases

1. The Panel Report

In EC – Hormones both the USA and Canada claimed (before legally distinct panels but panels comprising the same three panelists which in the end issued very similar reports) that the EC import ban on meat and meat products treated with any of six specific hormones was inconsistent with Articles 2, 3 and 5 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). Dealing with the burden of proof under the SPS Agreement *in general*, the panel found the following:

In addressing the burden of proof under the SPS Agreement, we consider that, as is the case in most legal proceedings, the initial burden of proof rests on the complaining party in the sense that it bears the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement. It is, indeed, for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim that a sanitary measure is inconsistent with the SPS Agreement. In other words, it is for the United States to present factual and legal arguments that, if unrebutted, would demonstrate a violation of the SPS Agreement. 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 (emphasis added).⁷¹

The panel then provided three reasons why it thought that 'the allocation of evidentiary burden under the SPS Agreement to the Member imposing a sanitary or phytosanitary measure'⁷² was appropriate: (1) the wording of many SPS provisions ('Members *shall ensure* that . . .');⁷³ (2) the obligation

⁷⁰ Ibid., para. 74 at 27.

⁷¹ Ibid., respectively para. 8.51 and para. 8.54. In a footnote to this sentence, the panel explicitly referred to the Appellate Body's findings on burden of proof in *USA – Shirts and Blouses*, quoted above in Section 7, first subsection.

⁷² Ibid., respectively para. 8.52 and para. 8.55.

⁷³ Ibid.

contained in SPS Article 5.8 for WTO members to *explain* deviations from international standards;⁷⁴ and (3) the presumption introduced in SPS Article 3.2 in favour of the member imposing a sanitary measure (sanitary measures which conform to an international standard are presumed to be consistent with the SPS Agreement) which seems to 'presuppose that the burden of proof under that agreement in principle . . . rests on [the party imposing a sanitary measure]'.⁷⁵ In conclusion, the panel made the following determination for the specific case before it:

We thus find that, for the purposes of this dispute, the United States [Canada] bears the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement, after which the burden of proof shifts to the European Communities to demonstrate that its measures in dispute meet the requirements imposed by the SPS Agreement.⁷⁶

The panel further addressed the question of burden of proof under two specific SPS provisions. First, under Article 3.3 of the SPS Agreement which contains specific requirements to be fulfilled with respect to a sanitary measure which is *not* based on an international standard. The panel found that Article 3.3 provides an exception to the general obligation, contained in Article 3.1, according to which all WTO Members are to base their sanitary measures on international standards. Referring to the second rule developed under GATT 1947 panel practice (imposing the burden of proof under an exception on the party invoking it), the panel concluded as follows:

We find, therefore, that once the complaining party provides a *prima facie* case (i) that there is an international standard with respect to the measure in dispute, and (ii) that the measure in dispute is *not* based on this standard, the burden of proof under Article 3.3 shifts to the defending party.⁷⁷

The panel also addressed the burden of proof under SPS Article 5 in case no international standard, in the sense of SPS Article 3.1, exists. It recalled its findings on burden of proof under the SPS Agreement in general and confirmed its view, for the specific provisions of SPS Article 5, that an allocation of evidentiary burden to the Member imposing a sanitary measure is appropriate. For the case at hand, the panel concluded as follows:

Therefore, in this dispute the United States [Canada] has to present a *prima facie* case that the EC measures in dispute relating to MGA [the only hormone for which no international standard exists] are *inconsistent* with the requirements of Article 5, after which the burden shifts to the European Communities to prove that it *has* complied with these requirements.⁷⁸

⁷⁴ *Ibid.*, respectively para. 8.53 and para. 8.56.

⁷⁵ *Ibid.*, respectively para. 8.54 and para. 8.57.

⁷⁶ *Ibid.*, respectively, para. 8.55 and para. 8.58.

⁷⁷ *Ibid.*, respectively para. 8.87 and para. 8.90.

⁷⁸ *Ibid.*, respectively para. 8.252 and para. 8.255.

2. *The Appellate Body Report*

The Appellate Body confirmed the panel's finding on burden of proof under the SPS Agreement in general⁷⁹ and reformulated it as follows:

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.⁸⁰

However, the Appellate Body then interpreted the panel's three arguments in support of a shift in burden to the defending party (once the complainant has established a *prima facie* case)⁸¹ as 'a general, unqualified, interpretative ruling that the SPS Agreement allocates the 'evidentiary burden' to the Member imposing an SPS measure'.⁸² It disagreed with all three arguments forwarded by the panel and reversed this 'general interpretative ruling'.⁸³

The Appellate Body also addressed and reversed the panel's finding that Article 3.3 of the SPS Agreement is an exception to Article 3.1 for which the defending party bears the burden of proof. Following the approach it established in *USA – Shirts and Blouses*,⁸⁴ the Appellate Body found that Article 3.3 is an autonomous right and not an exception:

It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3 . . . which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an 'exception'.⁸⁵

⁷⁹ See above n. 71.

⁸⁰ Appellate Body Report, para. 98.

⁸¹ See above n. 72–75.

⁸² Appellate Body Report, para. 99.

⁸³ Appellate Body Report, paras. 99–102 at 37–38.

⁸⁴ See Section 7, first subsection, footnote 65. See, *a contrario*, the Panel Report on *USA – Underwear*, discussed in Section 5, second subsection, footnote 39.

⁸⁵ Appellate Body Report, para. 104.

Without going into the discussion of what should be defined as an ‘exception’⁸⁶ or ‘affirmative defence’ (for which the party invoking it bears the burden of proof according to both domestic law, international procedure and GATT/WTO practice⁸⁷) it should be reminded that the Appellate Body in *USA – Gasoline* did consider GATT Article XX to be an ‘exception’ to other GATT provisions,⁸⁸ whereas it concluded otherwise for Article 6 of the ATC in *USA – Shirts and Blouses* (as an exception to ATC Article 2) and Article 3.3 of the SPS Agreement in *EC – Hormones* (as an exception to SPS Article 3.1). The Appellate Body did not really explain why it reached these different conclusions. This may create problems for future panels in deciding whether a specific WTO provision should be considered as an ‘exception’, ‘affirmative defence’ or as an ‘autonomous right’.⁸⁹

8. AN ASSESSMENT OF THE ‘PRESUMPTION TECHNIQUE’ AS APPLIED IN THE APPELLATE BODY’S RECENT REPORTS

The ‘presumption technique’ is not a substantive rule on who bears the burden of proof

As concluded in Section 6, second subsection, the requirement for a complainant to establish a *prima facie* case whereafter it is for the defendant to rebut that case (a requirement now deeply embedded in the Appellate Body’s case law, see Section 7), can only be based on what we called the presumption technique often used by adjudicators in the evaluation of evidence. As argued in Section 3, second subsection, this presumption technique is only an optional technique used in the *evaluation* of evidence, once the *determination* of who bears the burden of proof has been made; a technique only used in the event the evidence submitted is inconclusive. However, in recent Appellate Body Reports, in particular in *India – Patent* and *EC – Hormones*, this presumption technique seems to be put forward as the singular substantive rule on who bears the burden of proof in a WTO dispute. It is this author’s view that the presumption technique does not say anything about the substantive question of who bears the burden of proof. Indeed, from the general statement that it is for the complainant to raise a *prima facie* case of WTO inconsistency, one cannot deduce on which party the burden of proof for each specific fact rests. It is simply not correct (as acknowledged by the Appellate Body in, e.g., *USA – Shirts and Blouses*) to deduce from this statement that the burden of proof *always* rests on the complaining party. The

⁸⁶ A ‘real’ exception, as opposed to what the Appellate Body defined as ‘merely characterizing a treaty provision as an ‘exception’ (Ibid.).

⁸⁷ See Sections 1, 2, 4 and 4, second subsection.

⁸⁸ The Appellate Body confirmed this in *USA – Shirts and Blouses* where it also considered GATT Articles XI:2(c)(i) and XXIV:12 to be affirmative defences, see Section 5, second subsection.

⁸⁹ It could be noted, for example, that GATT Article XX is entitled ‘General Exceptions’, but that ATC Article 2.4 and SPS Article 3.1 also mention the words ‘except under’ or ‘except for’.

presumption technique can only be used *after* a decision on who bears the burden of proof has been made and this in order to decide whether the party on which the burden of proof rests, has discharged its burden. The correct substantive rule to be followed in determining who has the burden of proof is the one accepted in both domestic law and international procedure⁹⁰ and rephrased by the Appellate Body as follows: 'the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof'.⁹¹

It would, therefore, be preferable to develop that rule as the basic rule on burden of proof in WTO disputes and to establish case law which consistently applies and adapts this rule in the WTO context, rather than to mechanically reiterate the presumption technique in general terms without first making an initial substantive determination on who bears the burden of proof for the specific fact concerned. For example, instead of stating in general terms that under the SPS Agreement it is for the complaining party to establish a *prima facie* case of inconsistency, whereafter it is for the defendant to rebut this (which in essence only says something about how you intend to *evaluate* evidence and what your *standard* of proof is), it could be made clear that, e.g., under SPS Article 3.1, the party claiming that there is an international standard for a sanitary measure to be based on, has to prove that such standard exists. Another example: when in *Argentina – Footwear*, Argentina argued in its defence that its national challenge procedure can be used to correct WTO violations, it was for Argentina to prove this fact.⁹²

The three hypotheses under the 'presumption technique': an assessment of the added value of applying the technique

To embrace the presumption technique as the basic rule on burden of proof raises another problem. In this author's view, to apply the presumption technique, in many cases either states the obvious or begs more questions than it resolves. It is only useful under specific circumstances. When a tribunal decides to apply the presumption technique three possibilities arise.

1. No presumption (or prima facie case): the proponent loses

First, the tribunal may consider that the proponent party (i.e., the party bearing the burden of proof) has not provided sufficient evidence to raise a presumption. In that event, the opposing party will not even be expected to respond. The proponent party will lose.

This first hypothesis only leads to the obvious result any tribunal would end up with: if the proponent party cannot even establish a presumption or *prima facie* case it will *a priori* not be able to meet its full burden of proof.

⁹⁰ See Sections 1 and 2.

⁹¹ Appellate Body Report on *USA – Shirts and Blouses*, at 14.

⁹² Panel Report, paras. 6.37 and 6.66–6.69.

Indeed, logically speaking (and making abstraction of the standard of proof the tribunal in question may have), fully discharging a burden of proof would seem to require a higher degree of evidence than simply establishing a *prima facie* case. In this event the presumption technique is of no help to a tribunal evaluating evidence. It only replaces one, in these circumstances, rather easy question ('does the evidence submitted constitute proof of the claim/fact alleged?') with another more difficult one ('would the evidence, nevertheless, establish a *prima facie* case?').

2. A rebutted presumption: the proponent loses

Second, the tribunal may decide that the proponent party has presented sufficient evidence to raise a presumption. The opposing party will then be required to submit evidence to rebut the presumption. However, the burden of proof, which (as seen in Sections 1 and 2) never shifts, remains with the proponent party. It is, therefore, better to formulate this 'shift' as a shift in the burden to come forward with evidence or simply as an obligation on the opposing party to rebut the presumption.⁹³ To formulate it as a shift in the burden of proof is legally incorrect. In this second hypothesis, the tribunal also considers that the opposing party, in response, has offered sufficient evidence to rebut this presumption. In that event, it will again be up to the proponent party to further discharge its burden of proof. In the end, the tribunal will then have to decide whether, all evidence on both sides considered, the proponent party has met its burden of proof. In this set of circumstances, it could be expected that if the proponent party does not submit any evidence additional to that already submitted for the establishment of the original presumption, the proponent party will lose.

Using the presumption technique under this second hypothesis will often be equally unhelpful as under the first hypothesis. This time because it begs more questions than it answers. It only adds two difficult questions to the, in these circumstances, already difficult initial question of whether the evidence submitted by the proponent party proves the fact alleged. These two additional questions are: first, 'does the proponent's evidence establish a *prima facie* case?' and, second, 'if so, does the opposing party's evidence rebut this *prima facie* case?'.⁹⁴ If both these questions are answered in the affirmative (as we presumed under this second hypothesis), the tribunal will simply make full circle and end up with the original question it was faced with,

⁹³ As, for example, in the Appellate Body Report on *USA - Shirts and Blouses*, at 14 ('... the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption') and at 17 ('... the onus then shifted to the USA to bring forward evidence and arguments to disprove the claim'). See also, the Panel Reports on *EC - Hormones*, when talking about the 'evidentiary burden' (to be distinguished from the substantive burden of proof) resting on the defending party (para. 8.52, USA complaint, and para. 8.55, complaint by Canada).

⁹⁴ It should be noted that usually the degree of proof necessary for discharging a burden of proof is higher than that required to rebut *prima facie* evidence. Sometimes, casting reasonable doubt on the value of the *prima facie* evidence can already be sufficient.

namely: 'considering all evidence on both sides, is there enough proof for the fact alleged?'. In this set of circumstances, the presumption technique would not have alleviated the adjudicators' life but rather made it more difficult.

The Appellate Body itself, when generally addressing the presumption technique in *USA – Shirts and Blouses*, highlighted the problematic issue of how to decide whether a presumption or *prima facie* case has been established:

In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption ['that what is claimed is true'] will necessarily vary from measure to measure, provision to provision, and case to case'.⁹⁵

For the presumption technique to be useful and transparent, it can only be hoped that in future cases clearer guidelines on how to implement this statement will be provided. In *India – Patent*, the Appellate Body rejected the argument that for a *prima facie* case to be established one only needs to raise 'reasonable doubts' suggesting a violation of a WTO provision:

The Panel did not require the United States merely to raise 'reasonable doubts' before the burden shifted to India. Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that it had 'reasonable doubts' that the 'administrative instructions' would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court' (emphasis added).⁹⁶

As pointed out earlier, under the second hypothesis, it could be expected that if the proponent party does not submit any evidence additional to that already submitted for the establishment of the original presumption, the proponent party will lose. However, in practice a tribunal will not make a distinction, in the process of evaluating the evidence between, first, the evidence establishing a presumption and, second, any additional evidence. It will rather, at the end of the proceedings, consider all the evidence submitted by each party in the aggregate. Therefore, in the circumstances at hand, it would be better for the tribunal to set aside the presumption technique and directly answer the core question with which it would end up anyhow, namely 'does the evidence submitted by the proponent party sufficiently prove the fact it alleges, i.e., is that evidence more convincing than that submitted by the opposing party?'. It is this author's view that panels, like any trier of fact,

⁹⁵ Ibid., at 14. Following this reasoning, it could, for example, be expected that a high degree of evidence will be required to establish a presumption of a case of non-violation nullification or impairment in the sense of Article XXIII:1(b) of GATT. Article 26.1 of the DSU requires a party making such Article XXIII:1(b) claim to 'present a detailed justification in support of' its complaint. In this event, 'precisely how much and precisely what kind of evidence will be required' does, indeed, seem to depend on the kind of measure contested and the provision invoked.

⁹⁶ Appellate Body Report, para. 74 at 27.

are endowed with a wide discretion to weigh evidence. Even if panels consider some evidence to be inconclusive, it is up to them to deem it more persuasive than others. Panels do not need to develop legal rules to justify their conviction. The assessment of evidence is ‘self-executory’.⁹⁷

3. *An unrebutted presumption: the proponent wins*

Third, the tribunal may, as under the second hypothesis, consider that the proponent party has offered sufficient evidence to raise a presumption. However, under this third hypothesis, the opposing party is *not* able to submit evidence to rebut the presumption. This will mean that the proponent party wins, i.e., the tribunal will then have to decide that the non-rebutted presumption established by the proponent party is sufficient to discharge its burden of proof. As stated by the Appellate Body in *EC – Hormones*:

It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.⁹⁸

At this point, it becomes clear why a tribunal, when embracing the presumption technique in evaluating evidence, also automatically sets the degree or *standard* of proof it requires. Indeed, by adopting the presumption technique, the tribunal no longer requires conclusive evidence (or proof beyond reasonable doubt or whatever other standard of proof) of an alleged fact; it will be enough to create a non-rebutted *presumption* of truth.

The only benefit of the presumption technique resides in this third hypothesis. More particularly, where the evidence submitted by the proponent party is incomplete but, nevertheless, sufficient to establish a presumption *and* the opposing party is unable to present any real evidence to rebut that presumption. In these circumstances (the standard of proof being lowered from conclusive evidence to taking satisfaction with a non-rebutted presumption), the proponent party will win. Even though this sequence of thinking also begs the question of what constitutes sufficient evidence to raise a presumption,

⁹⁷ See Section 2.

⁹⁸ Appellate Body Report, para. 104 at 40. See also the Panel Report on *Argentina – Footwear*, para. 6.61 at 99: ‘Therefore, we consider, after review of all the evidence and arguments and the fact that Argentina did not present any convincing evidence to the contrary, that there is a presumption, within the meaning given to it by the Appellate Body, that these documents are official and reflect the amount of duties actually imposed’. For an application of the presumption technique under this hypothesis in another forum, see, for example, *Iran National Airlines Company v The Government of the USA* (Award No. 333-B8-2, 30 November 1987, reprinted in 17 *Iran-USA CTR*, 187), a case decided by the *Iran – USA Claims Tribunal*. There, the burden of proof for the alleged fact, payment of a debt, rested on the respondent and was discharged as follows:

‘On Invoice No. 154219, the Tribunal concludes that the evidence submitted by the Respondent is sufficient to establish a rebuttable presumption that payment was made on this invoice. The Claimant has not submitted any evidence, such as bank records, sufficient to rebut this presumption. The Tribunal therefore dismisses the claim based on Invoice No. 154219’ (at 209–210).

this relatively easy question (the degree of proof required is lower) replaces the, in these circumstances (where the evidence submitted is incomplete), more difficult one of whether the proponent's evidence constitutes conclusive evidence or 'full proof' of the fact alleged.

If, however, the opposing party would provide some form of evidence in rebuttal of the presumption, the attractiveness of the presumption technique fades. Indeed (as outlined above in the assessment of the second hypothesis), in that event the tribunal will be faced with the additional question of whether the evidence submitted by the opposing party is strong enough to rebut the presumption. To answer this question, it will have to decide on the standard of proof required for such rebuttal. Will it be enough for the opposing party to cast 'reasonable doubt' on the evidence which established the presumption or does the opposing party need to come forward with its own evidence establishing the contrary of what can so far be presumed on the basis of the evidence submitted by the proponent party? Since the opposing party only needs to 'rebut' a presumption and does not bear itself any substantive burden of proof, it would seem that a test in the direction of the former standard of proof for rebuttal (i.e., casting 'reasonable doubt' on the evidence constituting the presumption) should be preferred.

In conclusion, the use of factual presumptions (or the concept of *prima facie* case) in the evaluation of evidence, required to decide on whether or not the burden of proof with respect to a specific fact has been discharged, will only be useful if (1) the evidence provided is inconclusive, but (2) nevertheless persuasive (in the sense that it is sufficient to raise a presumption of truth) and (3) no real evidence in rebuttal has been forwarded. On the contrary, if either (1) the evidence is conclusive (i.e., full proof or no proof at all has been forwarded) or (2) the evidence is not conclusive, but serious evidence has been provided by both sides, the use of a factual presumption will, respectively, be obsolete or only complicate matters. In the former case (conclusive evidence), the tribunal should simply find that it considers the alleged fact or claim to be proven or not proven, depending on the sense in which the evidence is conclusive. In the latter case (inconclusive evidence, but evidence, to some extent, in equipoise), the tribunal, on the basis of its discretionary powers to assess factual issues, should weigh the evidence and find either way, depending on its intimate conviction of what evidence it considers to be more persuasive. This approach does not seem to be consistent with the following statement by the Appellate Body in *EC – Hormones*:

. . . the Panel should have begun the analysis of *each legal provision* by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities *under each Article* of the *SPS Agreement* addressed by the Panel . . . Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the

European Communities to bring forward evidence and arguments to disprove the complaining party's claim (emphasis added).⁹⁹

It will be interesting to see how this issue evolves.

CONCLUSIONS

The fact that questions on burden of proof attracted full attention in recent WTO disputes is a positive development. The growing maturity of the WTO's substantive law should, indeed, be matched with an equally developed and refined procedural framework for dispute settlement. However, looking at recent case law two problems may arise. First, this procedural matching exercise, in so far as it concerns burden of proof and evaluation of evidence, is at risk of being overdone. An explicit determination of who bears the burden of proof (and further evaluation of whether or not this burden has been discharged) should only be made in the event the trier of fact is in doubt because the evidence is incomplete or in equipoise. When, in the eyes of the adjudicator, the evidence is complete and clear (in one or the other way), the issue of burden of proof becomes of academic interest only. Second, the Appellate Body, in its report on *USA – Shirts and Blouses* and confirmed in all subsequent cases, seems to have promoted one handy *technique* to *evaluate* evidence (only used in some cases where the evidence is incomplete) to the basic *substantive* rule on *burden of proof*. This newly established rule, though technically clear and straightforward, may create problems and risks in its practical application. The problems are: how and when to decide that a *prima facie* case has been established by the complaining party and, as the case may be, that this *prima facie* case has been rebutted by the defending party? The risk is that panels and/or the Appellate Body may use this, in practice, very open rule as a tool to support result-oriented findings. Indeed, if the determination on who bears the burden of proof is, in practice, no longer made on the basis of the adage *actori incumbit probatio* (a fixed rule imposed on each trier of fact), but remains or shifts, rather, depending on whether or not a *prima facie* case has been established (a criterion, on the basis of the adjudicator's discretion to evaluate evidence, to be decided upon by the adjudicator), it could be easy, and might be very helpful, to decide that the burden of proof rests on, or has shifted to, that party which according to the panel and/or Appellate Body should lose.

⁹⁹ Appellate Body Report, para. 109 at 41. However, the Appellate Body itself (while addressing all SPS provisions dealt with by the panel) only made this evaluation once and this only in a footnote (footnote 180 at 80).