

## [ARTICLES]

# BURDEN OF PROOF IN WTO-A CONSISTENT TALE OF INCONSISTENCIES

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## ABSTRACT

*The WTO dispute resolution mechanism aimed at amicable resolution of disputes, rather than imposition of judgment of the Panel or Appellate Body has deliberately opted to do away with prescription of detailed rules of procedure in excess of what is provided for in the Dispute Settlement undertaking. The results of leaving procedural matters to the WTO dispute resolution body have resulted in consistency in the matter of burden of proof. The AB applies the criterion which it deems fit, without having due regard to previous rulings so as to cause dramatic differences in the outcomes of similar disputes. The lack of a coherent underlying principle in identifying the criterion to be used in allocation and operationalization of burden of proof results in unpredictability and inconsistency on the WTO dispute resolution mechanism.*

## 1. INTRODUCTION

Ronald Dworkin, the famed American jurist introduces to us Judge Hercules, an ideal judge who always gives the right answers which best fits and justifies the law as a whole.<sup>1</sup> Dispute Settlement Body (hereinafter "DSB"), the opus magnum of the World Trade Organization is this which Dworkinian Hercules,<sup>2</sup> who interprets the highly nuanced web of interparty obligations under General

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<sup>1</sup>R. Dworkin, *Law's Empire* (1986).

<sup>2</sup>Sungjoon Cho, "Of the World Trade Court's Burden", *European Journal of International Law*, 20, 675-727 (2009).

Agreement on Tariffs and Trade (hereinafter "GATT") and the allied Multilateral Trade Agreements, in a manner which fits and justifies the entire WTO regime and is still correct. Procedural law of international tribunals have been called the "Antarctica of International Law"<sup>3</sup> the DSB is no exception to this, though much water has flown under the bridge of time since the DSB came into existence, large scale uncertainties plague the DSB system with Appellate Body (hereinafter "AB") engaging in a judicial ping pong on matters of procedure like burden of proof.<sup>4</sup> The *causa causans* of the uncertainty is the lack of express rule concerning the burden of proof in Panel and AB proceedings within the DSU.<sup>5</sup> Kazazi, in his authoritative work on international procedure, defines burden of proof as the obligation of parties to a dispute to prove the claims to the satisfaction of the tribunal which hears the dispute.<sup>6</sup> The English Common Law concept of burden of proof and the French Civil Law ideal of 'La charge de la preuve' both ply in the same sphere of the Roman Law notion of 'onus probandi', and all the three are indiscriminately used in International Law, giving away its humble beginnings from municipal law,<sup>7</sup> despite the ideological similarity that the concepts share, and the difference of operational dimension creates problems of procedure in international law. Burden of proof in a Common Law System takes multiple forms while in operation but La charge de la preuve holds its conceptual form even in

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<sup>3</sup>A.H Feller, *The Mexican claims commission, 1923-1934*, vii (1936).

<sup>4</sup>A glimpse through the WTO reports shows inconsistency in defining when is burden of proof discharged, while the earlier reports like *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997) set the standard at establishing a prima facie case while the latter cases like, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001 lays down that weighing and assessing of the entire evidence is a prerequisite to determine whether a party has established its claim.

<sup>5</sup>Dispute Settlement System Training Module, World Trade Organization, 10.6, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c10s6p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c10s6p1_e.htm) (last accessed on Dec. 13 2016).

<sup>6</sup>Mojtaba Kazazi, "Burden of Proof and Related Issues: A Study on Evidence before International Tribunals", *Kluwer*, 30 (1996).

<sup>7</sup>*Ibid.*

operation. An international forum which deals with disputants coming from differing systems would come across as inconsistent if the above stated rules of evidence are used interchangeably.

Despite the WTO Dispute Resolution Mechanism being in existence for over two decades, issues of procedure like standard of review, judicial economy and burden of proof are yet to be made certain by the AB. The statements made by the AB regarding the allocation of burden of proof though look similar but they reveal substantial differences leading to dramatically different outcomes. The AB in earlier cases has adopted the classic plaintiff to prove allegation and defendant to prove exceptions.<sup>8</sup> However, in cases like US- Wool Shirts and Blouses<sup>9</sup> and EC - Hormones<sup>10</sup> the AB drew further distinction between provisions which are 'categorized' as exceptions and affirmative defences which the AB itself opted not to follow in later cases.<sup>11</sup> The result of this inconsistency is that no coherent principle underlying the allocation of burden of proof can be identified when different provisions of the covered agreements are to be interpreted in a single case.<sup>12</sup> The AB and Panels have failed to produce a consistent line of cases which conclusively lays down the law as to such procedural matters.<sup>13</sup>

The Panel and AB seem to be have zeroed in on a few criteria and have been relying on them in fits and starts without any consistency. The most common tool for allocation of burden of proof is the old school way of the plaintiff proving violation and defendant proving

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<sup>8</sup>Appellate Body Report United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (hereinafter US - Gasoline).

<sup>9</sup>Appellate Body Report United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R (hereinafter US - Shirts and Blouses).

<sup>10</sup>Appellate Body Report EC -Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R(hereinafter EC - Hormones).

<sup>11</sup>Appellate Body Report India - Additional and Extra-Additional Duties on Imports from the United States, WT/DS360/AB/R.

<sup>12</sup>David Unterhalter, "Allocating the Burden of Proof in WTO Dispute Settlement Proceedings", *Cornell Int'l. Law Journal* 42, 209 (2009).

<sup>13</sup>Michelle T. Grando, "Allocating the Burden of Proof in WTO Disputes: A Critical Analysis", *J. of Intl Econ. Law*, 9, 615-656 (2006).

exception. The WTO bodies use the language criterion based on the plain language of the provision, the hierarchical criterion which looks into the hierarchy of the provisions<sup>14</sup> and the pleading criterion which allocates the burden on the party who pleads the provision to allocate burden of proof. The identification of one criterion and its consistent application of that can go a long way in establishing it as a formal GATT panel practice and bring in much needed certainty in the GATT regime. Unlike the Dispute Resolution bodies under GATT, the International Court of Justice in the *Corfu Channel Case*<sup>15</sup> ruled that the burden of proof rested on the applicant, managing to avoid controversy by being consistent with the maxim of 'Actori in umbra probatio' which places the burden squarely on the shoulder of the plaintiff to prove his case. The wisdom of ICJ in adopting the aforesaid old Roman maxim of allocation of burden of proof ensures that there is clarity qua procedure at the ICJ; the WTO Dispute Resolution Bodies on the other hand epitomize the 'too many chefs spoil the broth' adage by employing Common Law and Civil Law principles in addition to the old Roman maxim to operationalize burden of proof, causing a chaotic state of affairs at the Panel and Appellate body level.

The inconsistency in adhering to a specific criterion for the allocation of burden of proof is only the tip of the iceberg; greater uncertainties prevail over the rules as to discharge of burden of proof. The Panels and Appellate Body, at times, prefer establishment of prima facie case as the criterion and endorse the shifting of onus,<sup>16</sup> and at other times, onus shifting is discarded and a static burden of proof being determined at the end of the proceedings is preferred.<sup>17</sup> The irony is that the Panel and AB reports set varying standards for

<sup>14</sup>Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* 168 (2009).

<sup>15</sup>*Corfu Channel (UK v Alb)*, 1949 ICJ 4 (Apr 9, 1949).

<sup>16</sup>Panel Report India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and their member States, WT/DS79/R, (hereinafter *India Patents*).

<sup>17</sup>Panel Report, Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R and Corr.1, as modified by Appellate Body Report WT/DS98/AB/R (hereinafter *Korea Dairy Products*).

the establishment of prima facie case. While India - Patents specify a mere proof of violation US - Shirts and Blouses requisitions adducing of evidence and US - Section 301 Trade Act<sup>18</sup> fuses the Korea - Dairy and US - Shirts and Blouses to a limited extent for determining the discharge of burden of proof. The Panel and AB seem to draw a distinction between the use of prima facie case as a threshold question and as a question of standard of proof.<sup>19</sup> The burden of proof seems to be an imbroglio in both its aspects of allocation and operationalization as the dispute resolution bodies adopt an inconsistent approach in dealing with these aspects of burden of proof.

## 2. BURDEN OF PROOF- ELUCIDATION OF THE CONCEPT

Burden of proof is a concept belonging to the law of evidence which when discharged, unsettles the default position. In the simplest of terms, it can be stated to be analogous to 'the burden of introducing evidence'.<sup>20</sup> Burden of proof decides who amongst the disputing parties must prove an issue, entailing a risk of adverse adjudication in case of failure to discharge the evidentiary burden. The function of burden of proof is twofold, with one arm directing the parties and the other operating on the court. First, it casts an obligation on one of the parties to initiate the presentation of evidence at the risk of losing the case on failure to do so, and second, it guides the Court on the way forward if the evidence presented is insufficient to arrive at a conclusion or if the evidence remains equivocal or equipoise. The success or failure to discharge the burden of proof results in one of three possible outcomes. A successful discharge of evidentiary burden by the Plaintiff or Defendant leads to a fact being proved or disproved, i.e., after considering the matters before it, the Court is convinced of the existence of a fact or believes in its existence or

<sup>18</sup>Panel Report, United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, (hereinafter Section 301 Panel Report).

<sup>19</sup>Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW, (hereinafter EC Bed Linen).

<sup>20</sup>Woodroff and Amir Ali, *Law Of Evidence*, 3188 (2012).

considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists or vice-versa in the case of 'Disproved'. A failure in discharge results in a fact not being proved or disproved resulting in a conclusion of not proved and an adverse conclusion who fails to prove the existence of such fact. From the above definitions, it is clear that the belief or disbelief of the Court is the paramount factor which makes or breaks a case. Court weaves its own answers and selects one party at the end as a winner, which is dependent more on the Court approving that a party has discharged his/her burden than on the actual burden of proof itself.

The WTO, being a global body, is an agglomerate of common law and civil law jurisdictions. The perception of the notion of burden of proof in this varying system is rather simple when compared to the sheer labour of determination of the DSB understanding of burden of proof which is notoriously fickle.<sup>21</sup> Burden of proof is ascribed with two meanings in Common Law, the first being the 'duty of a party to persuade the trier of fact, by the end of the case of the truth of the propositions'<sup>22</sup> and the second being what is called as 'burden of passing the judge',<sup>23</sup> which makes itself felt at an early stage and 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.<sup>24</sup>

In Civil Law countries, the phrase of 'La charge de la preuve' takes a single meaning and is used to refer to the duty of the parties to prove their allegations as seen in the maxim 'actori incumbit probatio'.<sup>25</sup>

<sup>21</sup> *Supra* note 4.

<sup>22</sup> J.D Heydon, *Cases And Materials On Evidence*, 13 (1984)

<sup>23</sup> Joost Pauwelyn, "Evidence, Proof, and Persuasion in WTO Dispute Settlement: Who Bears the Burden?" *Journal of International Economic Law*, 1, 227-258 (1998).

<sup>24</sup> Cross & Wilkins, *Outline Of Law of Evidence*, 25 (1971).

<sup>25</sup> Mojtaba Kazazi, "Burden of Proof and Related Issues: A Study on Evidence Before International Tri-bunals", *Kluwer*, 26 (1996); Joost Pauwelyn, "Evidence, Proof, and Persuasion in WTO Dispute Settlement: Who Bears the Burden?" *Journal of International Economic Law*, 1, 227-258 (1998).

The overlapping of definitions can be seen in the former meaning of burden of proof in common law jurisdictions which is the burden to persuade the trier of facts.

The procedures adopted by International tribunals are more akin to civil law proceedings rather than common law proceedings.<sup>26</sup> Although the Respondent is expected to co-operate in the production of evidence, no harm is caused to the Respondent's case owing to wilful default in production of evidence; the failure of Claimant to produce evidence and non-persuasion, however, results in a decision against the claimant i.e., party bearing the burden of proof in Civil Law system.

The ICJ in the *Corfu Channel Case* ruled against the Claimant, i.e., UK when she failed to provide evidence of her assertion that Albania's acts caused damages to its ships remarking that it would 'pay no further attention to this matter'. Thus, burden of proof is that tie breaker element which helps the Court in ruling against the party bearing the burden, if the issue remains equivoque or at the failure of the proponent to drive home his assertion.

The first aspect of burden of proof is allocation of evidentiary burden which has already been dealt with, the next aspect of burden of proof is how and when a party is deemed to have discharged the burden that is cast upon him. When considering the discharge of burden of proof, the twin meanings of the phrase acquire significance. Burden of proof, in the first context, means the burden of establishing the case which never shifts from the party on whom the pleadings place such burden. In the second context, the meaning of burden of proof is the burden of introducing evidence which shifts constantly as evidence is introduced by the other side so as to preponderate over the other.<sup>27</sup> This burden that shifts on sufficient evidence being produced so as to warrant a finding is denoted as onus of proof which assists the Court in coming to a conclusion. The

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<sup>26</sup>Michelle T Grando, *Evidence, Proof, and Fact-Finding In WTO Dispute Settlement*, 80 (2009).

<sup>27</sup>Woodroff and Amir Ali, *Law Of Evidence*, 3188 (2013).



person on whom the onus rests, if he fails to provide further evidence so as to cause the onus to shift, will invite an adverse order owing to the failure to discharge the onus of proof.<sup>28</sup>

### 3. ALLOCATION OF BURDEN OF PROOF AT THE WTO

Burden of proof was an issue considered by the quasi-judicial bodies under the GATT regimen right from the beginning. As early as in 1954, the Panel dealt with the issue of burden of proof qua the Complainant and proceeded to dismiss the complaint owing to non-discharge of burden of proof;<sup>29</sup> three decades later, in 1984, the Panel laid down rules regarding the discharge of burden of proof by the Defendant.<sup>30</sup> US Gasoline,<sup>31</sup> the first ever case to be heard and decided by Appellate Body, held that burden of proof rests on the party invoking an exception, laying down one of the canonical rules on burden of proof. US - Gasoline was a mere harbinger of what was to come, the DSB regime established under GATT 1994 had considered the question of Burden of proof in great detail- in fact, nine of the first eleven panel reports explicitly dealt with the issue of burden of proof.<sup>32</sup>

<sup>28</sup>Cross & Wilkins, *Outline Of Law Of Evidence*, 27 (1971).

<sup>29</sup>Panel Report - Treatment by Germany of Imports of Sardines, BISD 1S/53" 5.

<sup>30</sup>Canada - Administration of the Foreign Investment Review Act Report of the Panel, L/5504 - 30S/140.

<sup>31</sup>Appellate Body Report United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R.

<sup>32</sup>US - Gasoline(*Supra* note 32); Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R.; Appellate Body Report, United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R.; Appellate Body Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R.; Appellate Body Report, Canada - Certain Measures Concerning Periodicals WT/DS31/AB/R.; Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R.; Appellate Body Report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R.; Appellate Body Report, Argentina - Safeguard Measures on Imports of Footwear, WT/DS121/AB/R.

In US - Wool Shirts and Blouses<sup>33</sup> the AB considered the nature of Article 6 of the WTO Agreement on Textiles and Clothing (hereinafter referred to as "ATC") and devoted 5 pages only to discuss the issue of burden of proof.

The DSB endorsed the GATT panel practice<sup>34</sup> of placing the burden of proof on the party who asserts and held that "it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."<sup>35</sup>

The second contribution of US- Shirts and Blouses to WTO jurisprudence is that it brought out the concept of an affirmative defence by holding that Article XX or Article XI:2(c)(i), are limited exceptions to GATT obligations in Articles I:1, II:1, III or XI:1 and thereby adorn the cloak of affirmative defences as against being positive rules establishing obligations in themselves.<sup>36</sup> The AB concluded that Article 6 of the ATC is not an affirmative defence but is an integral part of the transitional arrangement manifested in the ATC.

In view of Article 6 being a transitional safeguard, the Court allocated the burden to the complainant India.<sup>37</sup> The rules on burden of proof consolidated till the US - Wool Shirts and Blouses can be summarized as follows: the Plaintiff must prove the violation of any GATT obligation that it alleges,<sup>38</sup> the defendant must prove any

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<sup>33</sup>Appellate Body Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R.

<sup>34</sup>United States - Customs User Fee, adopted 2 February 1988, BISD 35S/245; ; Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD 35S/37; United States - Measures Affecting Alcoholic and Malt Beverages, BISD 39S/206.

<sup>35</sup>*Id.* at 14.

<sup>36</sup>*Id.* at 15-16.

<sup>37</sup>*Id.* at 16.

<sup>38</sup>Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

exception/affirmative defence it seeks to raise.<sup>39</sup>

EC - Hormones, the controversial<sup>40</sup> self-styled interpretative ruling<sup>41</sup> given by the AB, was considering the nature of and interplay between Articles 3.1 and 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"). Overruling the conclusion of the Panel that Article 3.3, which allows members, if justified scientifically, to introduce or maintain measures which result in higher level of protection as an exception to Article 3.1 which in turn enjoins members to base their sanitary and phytosanitary measures on relevant international standards, the AB held that Article 3.3, in the grand scheme of the SPS agreement is not an exception to Article 3.1.<sup>42</sup>

The AB cast the burden of proof on the Complainant as it was of the view that Article 3.3 recognizes the autonomous right of a member to establish higher degree of protection subject to the conditions provided within the agreement. The AB concurred with the ruling in US - Shirts and Blouses and ruled that the prescriptive language does not suggest any specific allocation of burden of proof and that mere description of a provision as exception does not make it an exception.<sup>43</sup>

The ruling, however, is an anomaly as the relationship of Article 3.3 with 3.1, i.e., Article 3.1, provides for sanitary and phytosanitary measures to be in sync with relevant international standards and states that this is subject the exceptions in 3.3 in the following words "except as otherwise provided for in this Agreement, and in

<sup>39</sup>Canada - Certain Measures Concerning Periodicals WT/DS31/AB/R; United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R.

<sup>40</sup>Michele D. Carter, "Selling Science under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy", *Minn. Journal Global Trade*, 6 (1997).

<sup>41</sup>Sungjoon Cho, "Of the World Trade Court's Burden", *European Journal of International Law*, 20, 675-727 (2009).

<sup>42</sup>*Supra* note 10, at ¶ 104.

<sup>43</sup>*Ibid.*

particular in paragraph 3.” The relation between 3.1 and 3.3 is unmistakably that of a rule - exception nature<sup>44</sup> and casting the burden to prove an exception on the Complainant by holding that clear cut language of a rule-exception relationship does not mean anything, is rather intriguing.

EC - Sardines concerned the interpretation of the Technical Barriers to Trade (TBT) Agreement relating to the adoption of and variation from international standards.<sup>45</sup> Emphasizing on the similarities that EC - Sardines shared with EC- Hormones, the panel reconfirmed the view taken in EC - Hormones that the nature of Article 2.4 is such that it allows a WTO member ‘to depart from a relevant international standard’ when it would be an ‘ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued’ by that Member through the technical regulation and burden was cast upon Peru, the complaining Member, to establish the inconsistency with Article 2.4 of the TBT Agreement in relation to the measure applied by the European Communities.<sup>46</sup> This burden was held to include establishing that EC has not complied with the international standard and that the prescribed international standard is effective or appropriate for the purposes of objectives sought to be achieved by the defending party.<sup>47</sup> EC -Sardines like EC - Hormones also involves the manipulation of meaning of the word ‘except’ by the AB. The repeated trend of employment of interpretative zeal when the express wording is crystal clear puts a question mark on the basic rule of interpretation that the ordinary meaning is to be given to the words of a treaty while interpreting it.<sup>48</sup> The AB seems to have gone a bit too far by reading too much into the objects and purpose and has over contextualized the issue by conveniently

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<sup>44</sup>Michelle T Grando, *Evidence, Proof, And Fact-Finding In WTO Dispute Settlement*, 80 (2009)

<sup>45</sup>Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R.

<sup>46</sup>*Id.* at ¶274.

<sup>47</sup>*Id.* at ¶275.

<sup>48</sup>Article 31, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (Dec. 13 2016 07:06 AM) <http://www.refworld.org/docid/3a6b3a10.html>.

forgetting the ordinary meaning of the word except found in Article 3.1 of SPS and 2.4 of TBT Agreements.

The next important case which dealt with the issue was Brazil - Aircraft<sup>49</sup> wherein the AB allocated the burden of proof on to Canada, the Complainant, owing to the nature of Article 27.2 (b) of the Agreement on Subsidies and Countervailing Measures (hereinafter mentioned as "the SCM Agreement"), which excluded developing country members from the prohibition on subsidies by allowing them special and different treatment. In line with the conclusion of the nature of right conferred in Article 6 of the ATC in US - Shirts and Blouses, Article 3.3 of the SPS Agreement in EC Hormones and Article 2.4 of the TBT Agreement in EC - Sardines, the AB approved that Article 27.2(a) of the SCM Agreement is a negotiated balance of rights and obligations for developing country Members subject to compliance with certain specific conditions.<sup>50</sup> Thus, as a provision that creates a positive right for developing country members, the burden of proof was allocated to the Complainant. More than the hierarchy of the provisions, it is the language that swayed the decision in Brazil's favour as the AB stressed on the meaning of the phrase 'shall not apply' and held that by virtue of the above phrasing the prohibitions do not apply.

This side stepping of the US - Shirts and Blouses criterion to a simpler and more literal approach of interpretation, showing a leaning towards using language as the criterion for allocating burden of proof, marks the evolution of language criterion in WTO.

US - FSC<sup>51</sup> is a case where the Appellate body applied the rule of defendant bearing the burden of proof in case of affirmative defences. The case pertained to a violation of Article 3.1(a) which was claimed to be justified under 5<sup>th</sup> sentence of footnote 59 to item (e) of the

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<sup>49</sup>Appellate Body Report, Brazil - Export Financing Programme for Aircraft, WT/DS46/AB/R.

<sup>50</sup>*Id.* at ¶ 139.

<sup>51</sup>Appellate Body Report, United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW.

illustrative list of export subsidies read with footnote 5 of the SCM agreement.<sup>52</sup> The AB interpreting footnote 59 in the light of Article 3.1(a) of the SCM Agreement case held that footnote 59 does not alter the scope of item (e) of the Illustrative List or the meaning to be given to the term 'subsidies contingent...upon export performance' in Article 3.1(a) of the SCM Agreement.<sup>53</sup> The AB proceeded to conclude that the fifth sentence of footnote 59 constituted an affirmative defence that justified a prohibited export subsidy and in view of the ruling in US - Shirts and Blouses, the defending party had the burden to establish.<sup>54</sup> The AB conveniently forgot to use the language criterion and followed the approach of interpretation of texts on their hierarchical significance from the US - Shirts and Blouses line establishing a markedly consistent set of rulings in case of allocation of burden of proof in that line.

In EC - Tariff Preferences,<sup>55</sup> India requested the Panel to find that the 'Drug Arrangements' set out in certain EC Regulation were inconsistent with Article I:1 of the GATT 1994 and that the justifications on the basis of the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries ("**Enabling Clause**") was insufficient. The AB approved the finding of the panel that the Enabling Clause was an exception as it was worded similar to Articles XX, XXI and XXIV:5 of the GATT<sup>56</sup> and dismissed the argument that the Enabling Clause constitutes a 'special regime' for developing countries which 'encourages' the granting of tariff preferences by developed-country members to developing countries. Enabling Clause was held to be an exception in the nature of Article XX, XXI etc., of the GATT as its wordings showed marked similarities to authorize deviations from

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<sup>52</sup>Panel report - United States - Tax Treatment for "Foreign Sales Corporations, Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW.

<sup>53</sup>*Supra* note 52, at ¶ 128, 131.

<sup>54</sup>*Supra* note 52, at ¶ 126, 133.

<sup>55</sup>Appellate Body Report, European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R.

<sup>56</sup>Panel Report, European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R.

the obligations. The Enabling clause was held to permit members to provide differential and more favourable treatment to developing countries despite the express bar against such transgressions in Article I and was therefore an express exception.<sup>57</sup> The plain old *actori incumbit probatio* was adopted by the AB in EC - Tariff Preferences without the additional rills and flares of hierarchy of provisions of US - Shirts and Blouses line marks the return of the conventional rules of allocation of burden of proof in its pure sense in EC Tariff - Preferences.

The AB designed a fourth criterion in India - Quantitative Restrictions<sup>58</sup>-the pleading criterion, which was applied by the AB without its reason being explained and created further uncertainty *qua* procedure in the Apex WTO body.

The Panel allocated the burden of proof to the defendant under Article XXVIII: Section B 11, since India pleaded it as an affirmative defence.<sup>59</sup> This criterion was further used in India - Additional Import Duties<sup>60</sup> and neither the AB nor the Panel properly explained why the burden was allocated on the basis of pleading alone.

The consistent reliance of the AB on the law laid down in US - Shirts and Blouses seems to have come to an end after the earlier parts of the 21<sup>st</sup> century. The decisions in the cases of US - Upland Cotton where the AB meekly refused to consider the question of who bears the burden as the AB found 'no compelling reason for doing so on this particular issue'<sup>61</sup>, India - Additional import Duties,<sup>62</sup> United

<sup>57</sup>*Id.* at ¶ 90.

<sup>58</sup>Appellate Body Report, India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R.

<sup>59</sup>Panel Report, India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R.

<sup>60</sup>Appellate Body Report India - Additional and Extra-Additional Duties on Imports from the United States, WT/DS360/AB/R.

<sup>61</sup>Appellate Body Report - United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil, WT/DS267/RW and Corr.1.

<sup>62</sup>Appellate Body Report, India - Additional and Extra-Additional Duties on Imports from the United States, WT/DS360/AB/R.

States - Large Civil Aircraft (Second Complaint) where the AB delves into the question of obtaining evidence under Annex V of the SCM Agreement and power of the DSB to requisition evidence under Article 13 of the DSU,<sup>63</sup> Canada – Renewable Energy / Canada – Feed-in Tariff Program where the AB considered the burden of proof under several Articles of the GATT and opted for the general line toed by US - Gasoline rather than rely on US Shirts and Blouses criterion,<sup>64</sup> do not go on to discuss the allocation of burden of proof like their earlier counterparts and go in a different tangent when compared to the consistency of criterion seen in the cases discussed earlier. The problem of inconsistency in the criterion employed for allocation of proof is aggravated by such transgressions from the only line of consistent rulings starting from US - Shirts and Blouses qua the issue of allocation burden of proof.

#### 4. DISCHARGE OF BURDEN OF PROOF

The question that gains significance in this circumstance post allocation is what is it that a litigant needs to establish so as to discharge the onus of proof cast upon him. Within the WTO, the ultimate call of who is to prove what and whether a party has discharged its burden of proof is always determined by the Court and the Court alone in the application of its discretion, decides whether a party has discharged its burden allowing the onus to shift to the other party.<sup>65</sup> The discretion of the dispute resolution bodies has been reiterated several times by the AB and the Panels.<sup>66</sup> The stand of the AB in relation to functioning of burden of proof is a murky quagmire. The AB and the Panels tend to rely on prima facie case as one of the trigger events causing the discharge of burden of proof. Even in the use of prima facie case, certain decision use prima

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<sup>63</sup>Appellate Body Report, United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint), WT/DS353/AB/R.

<sup>64</sup>Appellate Body Report - Canada - Certain Measures Affecting the Renewable Energy Generation Sector and Canada - Measures Relating to the Feed-In Tariff Program WT/DS412/AB/R and WT/DS426/AB/R.

<sup>65</sup>Sungjoon Cho, "Of the World Trade Court's Burden", European Journal of International Law, 20, 675-727(2009).

<sup>66</sup>*Supra* note 10.



facie case as a threshold question while others treat it as a standard of proof. Even in cases where prima facie case is treated as a standard of proof, AB and panels opt to use it as an initial standard of proof while certain decisions consider it as a final standard of proof causing more confusion.

When prima facie case is used as a question of threshold, the Complainant must present a prima facie case and once the adjudicator is convinced of the prima facie case, he/she proceeds to determine the merits. A classic example of how prima facie case works as a question of threshold was given by the Panel in United States - Section 211 Appropriations Act wherein the Panel held that it is for the complaining party 'to submit arguments and evidence sufficient to raise a presumption' as to violation and on successfully raising 'such a presumption, the Panel's task becomes a matter of weighing the arguments and evidence available to it...'.<sup>67</sup> This observation of the Panel sets the tone for a line of rulings of the DSB, both Panels and AB to rule on the lines that it is essential that a presumption in the form of a prima facie case is needed to kick start the plot.

In US - Upland Cotton<sup>68</sup> and EC - Bed Linen,<sup>69</sup> the dispute resolution bodies employed burden of proof as a threshold which makes it similar to that of the duty of passing the judge in common law countries. In EC - Bed Linen,<sup>70</sup> the AB drew a distinction between a measure that is found not to be GATT inconsistent on merits and one which is not prima facie inconsistent with GATT. The AB opined that prima facie case is the penultimate question, which if answered positively, leads to the final question of decision

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<sup>67</sup>Panel Report, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R, as modified by Appellate Body Report WT/DS176/AB/R.

<sup>68</sup>Panel Report, United States - Subsidies on Upland Cotton, WT/DS267/R, Add.1 to Add.3 and Corr.1 as modified by Appellate Body Report WT/DS267/AB/R.

<sup>69</sup>Appellate Body Report, European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW.

<sup>70</sup>*Ibid.*

on merits. In US - Upland Cotton,<sup>71</sup> it was Brazil's case that Extra Territorial Income Act of 2000 passed by the US was violating Articles 8.1 and 10.1 of Agreement on Agriculture and Articles 3.1b and 3.3 of the SCM Agreement. The panel, however, refused to consider the claims as Brazil failed to make out a prima facie case of inconsistency with the WTO Agreements demonstrating that on the prima facie case question being answered in the negative, the final question of merits might never arise. Despite the apparent advantage of weeding out frivolous and vexatious complainants, the major defect of the threshold theory is that the standard of prima facie case requisitions but skin deep proof of an issue which is not really difficult to produce, a better standard of preponderance of evidence and not proof beyond reasonable doubt as opposed this common law-esque duty of passing the judge would serve the DSB better and avoid any major questions on the credibility of the conclusion arrived at.

Like in the case of allocation of burden of proof, US - Shirts and Blouses<sup>72</sup> lays down a major procedural criterion in the case of discharge of burden of proof being the use of prima facie case as an initial standard of proof. When used as initial standard of proof, it must be established by the complainant that there is a violation of a WTO agreement by adducing sufficient evidence and on successful establishment of prima facie case, the burden of proof shifts to Defendant who must adduce 'sufficient evidence'<sup>73</sup> to disprove the presumption. The AB held that once India discharged its burden to establish a prima facie case of violation, it is up to the US to 'convince' the Panel of its compliance with the WTO regime. Thus, the DSB sets the rules of the game in US - Shirts and Blouses to the extent that the party bearing the initial burden must establish a prima facie case which the opposite must rebut leading evidence.

Just like in the case of allocation of burden of proof, EC - Hormones follows US - Shirts and Blouses in the case of discharge of burden of

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<sup>71</sup>*Id.* at ¶ 7.294.

<sup>72</sup>*Supra* note 9, at 14.

<sup>73</sup>*Id.* at 16-17.

proof too. The AB holds that it's a "general rule" that the complainant must establish a prima facie case of violation and once this is shown the onus of proof shifts to the defendant who must show the consistency of the measure with the WTO regime.<sup>74</sup> The AB in this case comes out a lot more clearly with the system of shifting onus by the court on the standard of prima facie case. Both US Shirt and Blouses and EC Hormones set a rather flimsy standard of proof on the party initially bearing the burden/Plaintiff as all that is required of them is establishment of a presumption which is a cake walk most of the times.

India - Patents<sup>75</sup> held that US had discharged the burden of proof by establishing prima facie case of violation of Article 70.8(a) of Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) and shifted the onus on India to rebut the claim. The ruling in US - Shirts and Blouses that India being the complainant had discharged its burden and it was up to US to convince the panel on satisfaction of requirement under Article 6 of ATC,<sup>76</sup> was confirmed by the AB in appeal and held that party bearing the burden must adduce evidence sufficient to raise a presumption as to the truth of its claim, which once successfully pulled off, shifts the burden of proof onto the other party to rebut the presumption.<sup>77</sup>

Later cases like Chile - Price Band<sup>78</sup> and Turkey - Rice<sup>79</sup> come out clearly as the AB and the Panel respectively held that the complaining party will satisfy its burden by establishing a prima facie

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<sup>74</sup>*Supra* note 10, at ¶ 104.

<sup>75</sup>Panel Report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and their member States, WT/DS79/R.

<sup>76</sup>Panel Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R, upheld by Appellate Body Report WT/DS33/AB/R.

<sup>77</sup>*Id.* at 14-15.

<sup>78</sup>Appellate Body Report, Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products - Recourse to Article 21.5 of the DSU by Argentina, WT/DS207/AB/RW.

<sup>79</sup>Panel Report, Turkey - Measures Affecting the Importation of Rice, WT/DS334/R.

case with adequate supporting evidence. Thus, the US - Shirts and Blouses line of prima facie case as an initial standard of proof expressly states that the onus of proof shifts on establishment of the prima facie case and the buck passes to the opposite party to establish the falsity of the case by preponderance of evidence at the risk of adverse ruling on the basis of the prima facie case on failure to counter it.

For reasons best known to the Panel and AB, prima facie case has also been used as the final standard of proof to determine the discharge of burden of proof. Prima facie case as a question of final standard of proof is seen in cases like Canada- Aircraft<sup>80</sup> where the Panel after considering all the evidence over a 189 page discussion of law and fact held that prima facie was not established.

In EC - Export Subsidies on Sugar, the Panel in its overall conclusions held that the Complainants had established prima facie case that EC exports of sugar had overshot the limits, prima facie case of subsidies being provided by the EC established that the EC applied governmental measures and cross subsidization through EC Sugar regime when read alongside the fact that EC had been unable to prove that the excess quantities exported were non-subsidized and would result in the conclusion that EC had violated its obligation under the Agreement on Agriculture.<sup>81</sup> The case turned against the EC on the basis of the prima facie case and not on preponderance of evidence showing the power of establishment prima facie case to make or break a case.

In US - Section 301 Trade Act, further improvements were made in the form of additional requirement of presentation of arguments and a simpliciter that the defendant shall rebut "that prima facie case" which includes presentation of arguments and adducing 'sufficient'

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<sup>80</sup>Panel Report, Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/R, upheld by Appellate Body Report WT/DS70/AB/R.

<sup>81</sup>Panel Report, European Communities - Export Subsidies on Sugar, Complaint by Brazil, WT/DS266/R, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R.

evidence.<sup>82</sup> The Panel in US - Section 301 Trade Act takes the discussion further ahead and holds that when the parties submit evidence to a certain claim, the panel must balance the evidence and determine whether the party bearing the burden has 'convinced' the panel of the validity of its claims.<sup>83</sup>

The use of prima facie case as final standard of proof is fine in the absence of proper evidence as a presumption is a logical move in such dire straits, but the presumption method turns into a kamikaze if there exists any piece of evidence that is of worth.

Finally, Korea - Dairy seems to have trodden a new path untrod by the other panels, seemingly discarding the ideas of prima facie case, onus shifting etc. and holds that it is for the panel to weigh and assess the evidence and arguments at the end of the process in order to determine the merits of the claim.<sup>84</sup>

This method of discharge of burden of proof known as the holistic approach deploys the discretion of court at the very end of the proceedings to see whether burden of proof is discharge.<sup>85</sup>

The holistic approach was also adopted by the panel in Canada - Wheat Exports and Grain Imports where the Panel weighed all the evidence on record to conclude that Section 87 of the Canada Grain Act was not GATT inconsistent owing to the failure of United States to establish the inconsistency.<sup>86</sup> Later in Dominican Republic - Import and sale of Cigarettes the Panel examined all evidence produced before it to conclude that fiscal measures of Dominican

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<sup>82</sup>Panel Report, United States - Sections 301-310 of the Trade Act of 1974, WT/DS152/R.

<sup>83</sup>*Id.* at ¶ 7.14.

<sup>84</sup>Panel Report, Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R and Corr.1, as modified by Appellate Body Report WT/DS98/AB/R,

<sup>85</sup>Michelle T Grando, "Evidence, Proof, And Fact-Finding In WTO Dispute Settlement", *Oxford University Press*, 80 (2009).

<sup>86</sup>Panel Report, Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276/R, upheld by Appellate Body Report WT/DS276/AB/R.

Republic was not proved to be GATT inconsistent.<sup>87</sup> Thus, the DSB uses yet another criterion for determination of discharge to muddy the pool further and to create even more uncertainties qua discharge of burden of proof.

## 5. CONCLUSION

An analysis of the AB decisions leads one to a maze of methods leading to numerous conclusions which arise out of circumstances that have a lot in common. The AB lays down the correct abstract legal principle for allocation of burden of proof but fails to apply it correctly owing to excessive reading into the words of the agreements or by ascribing meanings to the multilateral agreements. At times, the AB relies on language of the provision to allocate the burden, while at other times, the AB opts to see who pleaded what and in a third set of cases, the AB looks into the scheme of the agreement to allocate the burden on the basis of the hierarchy of the arrangement of the provision. Even in cases where the language holds the key to allocation of burden the AB brings in hierarchy to arrive at a contrary conclusion. The serially inconsistent and erratic tendencies in allocation of burden of proof has led to a whims and fancies regime of opting for the method which any judge finds good irrespective of how such situations had been dealt with by the AB earlier.

From the analysis of the decisions it is seen that the Panels and AB adopt a criterion based on language and another one based on hierarchy of agreements in majority of these cases. The language criterion fishes out phrases like "...shall not extend to the following..." in article XI: 2(c) as analysed in AB in US Shirts and Blouses, "...Article 3 shall not apply..." in Article 27.3 of the SCM Agreement, the express mention of the word exception in Article 2 of the ATC, Article 3.1 SPS Agreement and Article 2.4 of the TBT Agreement as analyzed in US - Shirts and Blouses, EC - Hormones

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<sup>87</sup>Panel Report, Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, as modified by Appellate Body Report WT/DS302/AB/R.

and EC - Sardines, respectively. In all these cases, the dispute resolution bodies have been keen on analyzing the language of the provision in coming to a conclusion. However, the problem with language criterion is that the reliance on language criterion has been sporadic. Even in cases like US - Shirts and Blouses, despite having more than enough incentive to apply the language criterion, the AB opted not to rely on it and stated that terming a provision as an exception does not make it so and proceeded to apply the hierarchical criterion which is considered next.

The hierarchical criterion was evolved in the case of US - Shirts and Blouses wherein, the AB ruled that merely terming a provision as an exception will not make it an exception and went on to consider the grand scheme of GATT and held that ATC is a carefully negotiated balance of rights thereby rejecting the language criterion. The same pattern was followed in EC - Hormones, EC - Sardines, US - FSC where in the AB appreciated the hierarchy of agreements/provisions in the WTO environment and thereby gave rise to a near set criterion for allocation of burden of proof.

However the consistency of the hierarchical criterion has turned out to be a flash in the pan. In India - Quantitative Restrictions burden of proof was allocated on the basis of who raised the provision. In Brazil - Aircraft the allocation was made on the basis of the admission made by one party that it bore the burden of proof, and in Dominican Republic - Cigarettes none of the aforementioned criteria was considered and the holistic approach was employed.

The invisible sceptre of *actori incumbit probatio*, the conventional rule of Plaintiff to prove violation and Defendant to prove exception is ever present. Right from the pre-DSU era of German - Sardines to US - Gasoline and US Shirts and Blouses to EC - Tariff Preferences, a consistent reliance on this conventional rule is seen. The entire concept of the US Shirts and Blouses criterion of looking into the hierarchy flies on the wings of the conventional criterion. The rule that if the provision creating the exception is an affirmative right then the burden falls on the plaintiff is but a variant of *le charge de la preuve* of Civil law, *onus probandi* of Roman law and Plaintiff to

prove violation of right of Common Law. The consistency that the conventional criterion would have brought to the DSB is prompted by the whimsical interpretations of what provisions exist in a rule-exception hierarchy and utter disregard of cardinal rules of interpretation like ordinary meaning be given to the words of the treaty.

The question of discerning the discharge of burden of proof is murkier than the allocation of it. The AB and the Panels have used burden of proof as a tool to discern the discharge of the burden while other times they have opted to use the common law concept of arriving at a decision after consideration of all arguments and evidence. Even when prima facie case is employed, at times it is used as a threshold question. In cases like Korea - Alcoholic Beverages and US - Gambling, the dispute resolution bodies takes the stand that prima facie case is threshold question, a reasoning which aligns itself with the common law notion of the passing the judge so as to continue with the case. A reading of this nature would mean that prima facie question is to be answered at the penultimate stage with the final decision on merits being left to be decided on the basis of the decision on establishment of prima facie case.

Authoritative rulings in cases like US - Shirts and Blouses, EC Hormones and Chile - Price Bands support prima facie case as more of a standard of proof for shifting of burden. The sigh of relief one might have on seeing some kind of certainty is short lived as prima facie case, when employed as standard of proof, is further divided into prima facie case as initial standard of proof and prima facie case as final standard of proof. While US - Shirts and Blouses, EC Hormones and India - Patents consider prima facie case as an initial standard which causes the onus to shift causing the defendant to rebut, cases like Canada - Aircraft, EC - Export Subsidies on Sugar consider prima facie case as a final standard of proof.

Though not from the Appellate Body, Panel Reports on Korea - Dairy, Dominican Republic - Cigarettes propose a third approach being the holistic approach wherein the evidence is weighed at the very end so as to assist the panel in determining whether the



evidence adduced was enough to persuade the Panel to come to a conclusion on the claim raised.

## 6. THE WAY FORWARD

The one stop solution is to incorporate the much needed procedural rules in DSU through an instrument like the statute of International Court of Justice, such affirmative action is more likely to cleave the wings of fancy of Panels and AB to conjure even more ways of allocation and discharge of burden of proof. Other alternative is to follow municipal law systems in relation to matters of procedure, a good example is the practice under UNCITRAL Model Law on International Commercial Arbitration (United Nations Commission on International Trade Law) which allows the Arbitral Tribunal to decide on its procedure. The Tribunals, however, opt to adopt municipal law or internationally accepted rules like International Bar Association Rules of Taking of Evidence in International Arbitration. Another option is that the dispute resolution bodies decide to adopt self-restraint and opt to follow one criterion, like the widely recognized hierarchical criterion for allocating burden of proof.

The issue of criterion for discharge of burden of proof is inherently discretionary and setting the discharge in stone will only deprive the Panels and AB of vital discretion. As the WTO dispute resolution mechanism is more related to Civil Law than Common Law, the use of prima facie case as question of threshold must be avoided. Dismissing a case on failure to establish prima facie case is a classic attribute of adversarial litigation and such a practice is never an adornment to amicable dispute resolution envisaged under the DSU. The adoption of prima facie case as initial standard of proof is a viable solution; the decision in *US - Shirts and Blouses* is the leading lamp in deciding the criterion for discharge as well. The AB has provided sufficient safeguards by insisting on evidence being produced and has not diluted the discretion of the dispute resolution bodies in any way. However the trouble here is the markedly adversarial nature of proceedings, which to a great extent can be avoided by adopting the holistic criterion. The preponderance of

evidence considered at the end while employing the holistic criterion takes the proceedings closer to the best evidence rule than the prima facie case which is a lesser threshold.

Jim Rohn, the hero of a famed American rag to riches success story, once noted that success is not magical or mysterious but it's a result of consistently applying basic fundamentals. The DSB is without a doubt one of the greatest achievements of the WTO and it enjoys unparalleled respect amongst most, if not all, trading nations. But the inconsistency in applying basic fundamentals like allocation of burden of proof and discharge of burden of proof can never be good for the Apex adjudicatory body of the WTO. The Panels and AB would be doing themselves huge favours by being consistent in determining the allocation of burden of proof by sticking to the hierarchical criterion established in *US Shirts and Blouses* owing to its proximity to the conventional rules of allocation of burden of proof in both Common Law and Civil Law systems and the flexibility it provides in interpreting multiple provisions. Similarly, the Panels and AB can toe the *India - Patents* way of requiring sufficient evidence for establishing prima facie case and use it as initial standard of proof due to that system being widely used in several municipal law systems. The Panels and AB would do well to remember that the world wants consistent delivery of established standards qua procedural aspects of the DSB and not whims and fancies machinery which makes the entire system unpredictable.