WTO Dispute Settlement Process

Tasnuva Jahan
LLM International Commercial Law, Bournemouth University, UK.

Abstract: The World trade organization’s (WTO) Dispute settlement Understanding (DSU) is the legally-binding agreement promising WTO members to settle their international trades related disputes. An important presumption in the WTO is that States are expected to comply with their obligations in line with Article 26 of the Vienna Convention on the Law of Treaties (VCLT). However, the WTO dispute settlement process is a debatable instrument of compromise as there is option for political flexibility in resolving disputes, on the other side of the coin, under Article 3.2 of the DSU it must provide legal integrity, security and predictability of WTO law. Nevertheless, WTO provisions are not clear and need to clarification. This article will examine the burden of proof considering the DSU and WTO jurisprudence, specifically Panels decisions and Appellate division decisions.

1. Introduction:

International dispute settlement is a development of an arrangement that deals with international trade dispute that started last century.¹ Now it is the most important and effective way to settle international disputes with regards to the trade agreements which come under World trade organization (WTO). WTO monitors and deals with international trades related disputes. Dispute settlement Understanding (DSU) is the significant part of WTO’s dispute settlement process.² WTO was established in 1995 after the Uruguay round of the multilateral trade discussion. It was formerly known as General Agreement on Tariffs and Trade (GATT). WTO inherits GATT’s some of the existing rules and provisions and adds some new ones.iii This paper discusses Panels decisions and Appellate Body (AB) concepts regarding the burden of proof is confusing and misleading in some cases. Because DSU does not explicitly define rules regarding burden of proof which is required the Appellate body to settle a dispute process also the Panels decisions.

2. Basic Concept of Proof and Prima facie:

The burden of proof is an abstract concept. It based on traditional rules of both civil law and common law. Common law has two provisions. They are burden of productions and burden of persuasion. iv In burden of productions, sufficient evidence needs to be produced for the Judge or Jury to evaluate. This process case is decided by facts and arguments. And the burden of persuasion is where decision is made based on the evidences provided by a party. If the proof is not sufficient the party that bears the burden of persuasion might lose. Along with the burden of proof, the party needs to present prima facie evidence to support their cases. If the party cannot present enough evidence, their claim can be and prima facie case may not stand or fall automatically. In Civil law, there is one concept of burden of proof. It relates to Common laws burden of persuasion concept. There is no specific provision to deal with the issue of burden of proof in the DSU. Allocating the burden of proof is also inconsistent with AB’s decision. v It is an important factor because the ultimate result depends on the allocation of the burden of proof. vi Even though it is a non-discriminatory factor but panels sometimes assign the burden of production incorrectly. Also, it does not clearly mention when the burden of proof is transferable.xix

3. Case analysis:

Currently, WTO handles different type of cases and disputes. These disputes are technical, environmental and WTO agreements like the Agreement on Sanitary and Phytosanitary Measures (SPS)xi, Technical Barriers to Trade (TBT) xii and Trade-Related Aspects of Intellectual Property Rights(TRIPS)xiii. The following cases will be discussed to enlighten how much Appellate Body’s decisions are inconsistent prima facie and burden of proof to settle dispute cases.

The trademark case and one of its kinds in WTO dispute settlement is the US-wool shirts and Blouses.xiv In this case, the Appellate body decided that the burden of proof lies with the party asserting a fact. It would not depend on the party who came up with the fact as a defendant or the complainant. They also stated that the safeguard measured will
not be treated as an exception to the general principle and they created a new standard that burden of proof will be shifted only after the prima facie standard has been satisfied. This decision given by AB is like any decision given by a National court. It didn’t make any standard decision for WTO dispute settlement case.

In USA - Gasoline case, the panel found that US gasoline regulation violated a specific GATT Article by treating imported gasoline less favourable than domestic gasoline. Appellate body explained that the party who will invoke an exception will bear the burden of proof according to GATT Article XX. Similar reasoning was adopted in Appellate Body reports on the USA - Underwear and on the Canada - Periodicals. In India-Patent case, Appellate body also applied the same prima facie standard that it applied in US wools-shirts.

In EC - Hormones case recognized that, the complaining party had the initial burden and prima facie of inconsistency. The defending party just needed to prove the sufficient evidence. In the absence of defending party’s effective refutation, the Panel must rule in favour of complaining party. Though, accurately how much and what type of evidence will be essential varies from ‘measure to measure, provision to provision and case to case.’ As well as the decision of burden of persuasion about the consistency condition are not clear and it also created ambiguity to regulate own suitable level of human health protection of a WTO member state.

In EC – Hormones case, AB acknowledged that WTO members can legally pursue zero risk policies but in Japan-apple case no regulatory involvement was acceptable. Such outlook goes straight contrary to its own declarations that in the perspective of comparable disputes.

Also, in some cases AB accepts “exception” clause and in some cases AB rejects it. In USA-Gasoline case it accepted GATT article XX to be an exception to other GATT provisions. And in EC Tariff, it was accepted the exception for the shift of burden. But AB did not make any clarification as why it reached dissimilar conclusions. It might be difficult in deciding future cases as whether which specific WTO provisions need to use as an exception or affirmative defence.

In the opinion of Steve Charnovitz, Appellate Body mentions that according to SPS article 3, it protects life and health of its member countries while making decisions in the cases. But it is uncertain if the member countries should be up to the international standard to protect life and health. Though slight consideration has been set under article 3.1 that sanitary and phytosanitary methods be founded on international standards. Moreover, food concern is growing and it may increase the number of cases in future. The panel will face the challenge and will fail to provide right justice. SPS rules under the DSU need to be modified to keep up with all these concerns to provide better justice to its member.

However, the inconsistent decisions in case of environmental protection health and consumer protection disputes will create great controversy because environmental disputes have a broader ecological or social impact than the trade disputes. Trade disputes are related to the interests of individuals. So, it should not create any pointless difficult in trading. AB needs to give a clear and transparent decision because it has a great impact to each member states.

In another case, US-Gambling, the Appellate Body addressed that the complaining party will carry the burden of proof and it’s their duty to prove a prima facie case by adducing sufficient evidence in support of its claim. Once they prove their prima facie, the responding party is then responsible for rebutting it. In China - IP Rights, the Panel has reflected in the similar route as positioned by the Appellate Body in the US – Gambling case. The jurisprudence of appellate body about the rules on burden of proof is described by the US-section 301 Trade ACT. According to this, the duty of the panel is to assess all proof they receive in order to determine if the party’s original burden of proof has met. If a party fails to meet the burden of proof, they end up losing the case. The panel cannot rule in the complaining party’s favour in this case. The burden of proof always stays on one party throughout the case and the party need to satisfy it at the end of the case once all the evidence is presented to the panel.

In WTO case law, the idea of burden of proof is used in combination with the word of a prima facie case. Article 3.8 of the DSU, discuss prima facie and it is related to burden of proof in the case of violation complaint within WTO dispute settlement mechanism. The Appellate Body stated the notion of prima facie in US arguments submitted before the Japan - Taxes on Alcoholic Beverages in 1996 and after the effective process of WTO dispute settlement mechanism.
Alberto J Alvarez and Chad P Bown addressed that though the WTO law says that the complaining party needs to prove the prima facie case is an integral part of the burden of proof but it indicated that the complaining party must bear the burden of production and burden of persuasion and needs to satisfy the panel before the behaviour burden transfers to the defending party, but not the result burden of bearing adverse consequence. During the whole proceedings, both complaining and defending parties who affirm the positive of a claim or defence needs to make out a prima facie for its each claim or defence. However, in the case, where stricter account of a prima facie case lies in the complaining party which belongs to the real sense of the original burden of proof borne by the complaining party. The Appellate Body articulated in *Thailand - H-Beams* that a panel is not required to check for each finding if a party met or rebutted a prima facie case.

However, it is difficult for the party who faces prima facie as they do not get a proper notice to refute but according to the article 11 and 13 of the DSU, all evidence need to be submitted at a proper time. *AB* shifts the burden of proof after getting all the evidence and once the prima facie has been established by the responsible party.

Panel reports have an influence on the explanation of the Covered Agreement that consist the issue the dispute. This explanation will not only shake the rights and obligations of the parties to the specific dispute, but may also be of importance to other WTO members. If we look at the article 10 of DSU, third party is also affected by the inconsistent decision of AB. According to this article, third party who has an interest in the case should be taken in to account and have the opportunity to be head by the panel or if there is any preceding that impairs benefits need to be discussed to the panel.

4. Conclusion:

The WTO Appellate Body’s decision has a mixed blessing in the field of international trade dispute settlement. In sometimes decision-making process remains inconsistent and indeed requires additional improvements in future. Though WTO is successful but it is not out of criticism for its inconsistent decision. In some cases, Appellate Body’s decision created ambiguity. There is also needed to increase the role of alternative dispute systems and transparent decision in each case for reducing the future uncertainty. WTO was established to secure the international trade of the member countries but in some cases their misleading decision fails to provide that security to its member. To ensure member’s security and predictability WTO law should be more defined and they should provide a proper guideline.

Bibliography:

**Treaties and Agreements:**

- Agreement on Textiles and Clothing (15 April 1994) LT/UR/A-1A/11
- Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1
- Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A-1A/12
- Agreement on Technical Barriers to Trade (15 April 1994)
- Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (8 December 1994) LT/UR/A/1
- General Agreement on Tariffs and Trade 18 UNTS 187
- Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1

**Cases:**

- Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products-Second Recourse toArticle 21.5n of the DSU by the Newzealand and the USA-Report of the Appellate Body (17 January 2003) WT/DS103/AB/RW2, para 1o4
- Canada: Aircraft Report of the Appellate Body (20 August 1999) WT/DS70/AB/R
- European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries (7 April 2004) WT/DS246/R


• India: Patent Protection for Pharmaceutical and Agriculture Chemical Products, Complaint by the European Communities (22 September 1998) WT/DS79/R


• United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services (7 April 2005) WT/DS285/AB/R


• United States: Sections 301-310 of the Trade Act 1974 (27 January 2000) WT/DS152/R


Books:


Journal:


Websites:


[3] Dispute Settlement Understanding art 3.2


[18] India: Patent Protection for Pharmaceutical and Agriculture Chemical Products, Complaint by the European Communities (22 September 1998) WT/S79/R

[19] US: Wool Shirts and Blouses (n 12)


[22] US: Wool Shirts and Blouses (n 12)


[24] EC: Hormones (n19)


[27] USA: Gasoline (n14)


SPS (n 9) art 3


DSU (n2) art 3.8


Chad P Bown, ‘How different are safeguards from antidumping? evidence from us trade policies toward steel’ (2013) 42 Review of Industrial Organization 449


Torsten L, ‘WTO Dispute Settlement and Arbitration’ (2003) 6 Int A L R 203

DSU (n 2) art 10, Third Parties