INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

(ISSN 2582 - 6433)

VOLUME 2 ISSUE 6

(April 2022)

Email –

editor@ijlra.com

Website – www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 5 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

 ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Ms. Ezhiloviya S.P.
Nalsar Passout

Ms. Priya Singh
West Bengal National University of Juridical Science

Mr. Ritesh Kumar
Nalsar Passout

Mrs. Pooja Kothari
Practicing Advocate

Dr. Shweta Dhand
Assistant Professor

IJLRA
INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

 ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN
2582-6433 is an Online Journal is Quarterly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN
2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

IJLRA
INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

DISPUTE SETTLEMENT MECHANISM OF WTO: A STUDY OF CONSTITUTIONAL CONSTRAINTS

By: Kailash Kumar Sharma

INTRODUCTION:

The establishment of WTO was motivated with the intent of rectifying the deficiencies and shortcoming which General Agreement of Tariff and Trade couldn't meet up. It is in the Uruguay Round with the signing of charter called 'Understanding on Rules and Procedures Governing the Settlement of Dispute' a way was forwarded for the effective Dispute settlement system under the WTO regime.[1] However, it has been two decades now, since from the inception of WTO's Dispute Settlement mechanism, and it has undoubtedly complimented and rather enhanced the dispute settlement system of erstwhile GATT regime. The WTO Dispute Settlement Procedure is way more structured and institutionalised as compared to GATT's scheme of Dispute Settlement.[2] Its ideals and institutions have undoubtedly proven its efficiency and hence the statistics of participation of developing nations have also improved but it doesn't mean that it has fared developing nations to the fullest. There are evidences that the developing nations still find constraint to participate in the existing framework of WTO dispute settlement system.

This system has however given a voice to the nations which are comparatively smaller and weaker to stand out against the powerful nations but ironical truth is the developed nations are still in the better positioned to access and utilise the disputes settlement system because of their institutional and structural dominance.[3]

[1] William J. Davey, "The WTO Dispute Settlement Mechanism", (2003) (Research paper No 03-08, University of Illinois, College of Law).
[2] Magda Shahin, "WTO Dispute Settlement for a middle-income developing country: the situation of Egypt" in Gregory Shaffer, Manfred Elsig. (eds.), *The Law and Politics of WTO Dispute Settlement*, 275-276 (oxford University press, California, Irvine, ed. 2016).
[3] Ibid.

Hence, without denying the accomplishment of the WTO Dispute Settlement System, this article will highlight the existing constraints which exist within the system and as consequence of which the developing nation's interest often get into the loop. These constraints have however been summarised by Shaffer as (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including the hiring of outside counsel; and (iii) fear of political and economic pressure.[4]

Hence, these constraints have gradually limits the participation of developing country in the WTO dispute settlement system because their confidence over the system gets affected. This article attempts to exemplify and understand these problems debarring the developing nations and the inadequacies within the charter of Dispute Settlement Understanding of WTO.

STANDARD OF REVIEW UNDER WTO DISPUTE SETTLEMENT UNDERSTANDING:

Under the present WTO system, disputes are resolved primarily through panel adjudication and a second tier review by the WTO Appellate Body. It is the role of the panel, to review measures of another member in order to determine measures consistent with WTO obligation. Hence, the concern here is as to what kind of standard of review a WTO panel should apply is important because it is part of border issue of determining the role of panel in WTO dispute settlement system.[5] If the standard is less intrusive in nature, then panels may not have a great deal of power to review domestic measures. Accordingly, the standard of review may be seen as a procedure that has a number of substantive and institutional consequences.[6] The expression 'Standard of review' refers to the manner in which an adjudicative body reviews a party's compliance with a form of regulation or the correctness of prior decisions made in the same matter.[7]

Generally standards of review are regulated as instruments of legal procedure given that they directly concern or are part of the process by which a proceeding or a review is conducted.[8] The

[4] Gregory Shaffer "The challenges of WTO law – strategies for developing country adaptation" *World Trade Review* 177 (2006).
[5] James HeadenPfitzer and Sheila Sabune, "Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence" 9 *International Centre for Trade and Sustainable Development,* p.5-6(2009).
[6] Ross Becfroft, *The Standard of Review in WTO Dispute Settlement: Critique and Contention*, (Edward Elgar Publishing Ltd., ed. 2012).
[7] Ibid.

[8] Stefan Zleptnig, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority" Vol. 6 European Integration online Papers (EIoP), p.6,13. (2002). Available online,

World Trade Organization (WTO), however, defines "standard of review" somewhat differently.[9] Here, the term refers to the review of national decisions or policies by WTO panels or the Appellate Body (AB).[10] The question of applying the standard of review comes into play under the WTO in two ways. Firstly, they arise at the panel level, specifically when a panel is required to review a domestic administrative determination and decide if such domestic ruling is in compliance with WTO rules and obligations. The second context in which standard of review arises in WTO dispute settlement is when the Appellate Body reviews decisions of a panel.[11] There are two type of standard for reviewing the decisions, namely de nova and total deference. De nova generally refers to situation where the reviewer conducts a full merit of a matter and is not required to defer to or accept any of the findings of the original decision-maker.[12] When a de nova review is conducted, usually the degree of intensity of review is not prescribed, but rather the adjudicating body has the role of examining the case as if no prior decision has been made in order to arrive at an independent decision.[13] On the other hand, total deference therefore refers to an avoidance of the responsibility of reviewing the substantive question of law.[14]

Professor Spamann, however contended that the de nova review of fact is the most beneficial standard to apply, but he limited the application of this standard to the trade remedy disputes, which in itself limits the whole scheme of this standard of review. However he tries to justifies this standard of review by explaining that the de nova review mostly involve a reasoning exercise where more 'complex' fact are inferred from the domestic authority's record and conclusions are drawn from it in a simple way. He argues that it is simpler and it does not focus on procedures but on the rights and obligation of the parties by way of 'reason' and 'relevant factors' and 'adequate fact'.[15] However this standard was not left alone from the criticism. The expression 'relevant', 'reasoned' and 'adequate' are very broad terms and it does not allow in reality for members to hold the large degree of deference to such expressions. Another major difficulty of de nova review is, it does not

http://eiop.or.at/eiop/texte/2002-017a.htm, visited on 10th Oct, 17

[9] Matthias Oesch, "Standards of Review in WTO Dispute Resolution", 6 J. INT'L ECON. L. P.637-39 (2003)

[10] Ibid.

[11] Supra note. 23

[12] *De nova* has a literal English translation of ' Anew'. See *Concise Law Dictionary,* Sweet and Maxwell, (2005)

[13] William Wade, *Administrative Law,* 309-10(Oxford University Press, 10th ed. 2009)

[14] Macquarie Dictionary (5th ed. 2009).

[15] Holgar Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis", *38(3) Journal of World Trade*, p. 81-82(2004)

define the scope of panel and Appellate Body for fact finding. There is no guidance on when panel should seek expert evidence and when it should limit to the factual records.[16]

Hence there is a considerable academic debate contending that the existing charter of Dispute Understanding does not prescribe a particular standard of review for settlement of disputes. Similar assertion was made by the Appellate Body who stated that there is no formal doctrine of stare decisis in the WTO standard of review for determining the cases and complaints.[17]

Hence, ineffective and complex standard of review result in debarring the members from attaining the ultimate objective of dispute settlement system to provide security and predictability to the multilateral trading system.[18] The faith of members, basically the developing nation members can be attain only if the charter of Dispute Settlement Understanding is well formulated and principally executed by the different organs of authority.

STANDARD OF REVIEW AND PANEL:

WTO dispute settlement involves interpretation of the WTO Agreements. Panel are charged with the responsibility of providing ruling and recommendations in relation to provision of the WTO Agreements. Article 11 of the DSU requires that panels make an "objective assessment of the facts."[19] It was for the first time in late 1990s the question of standard of review and role of panel was brought into question in EC-Hormones case,[20] whereby the Appellate body reviewed a decision of panel concerning whether European Union measures prohibiting the importation of hormone treated meat was consistent with the SPS Agreement. After hearing the contention of both the parties, the Appellate body articulated the standard of review in following terms:

"Article 11 of the DSU should be articulate with great succinctness but with sufficient clarity the

[16] Ibid note. 74

[17] See Appellate Body Report , *Japan-Alcoholic Beverage II,* 13-14.

[18] See Article 3.2 of DSU

[19] The function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, 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 and make such other findings as well to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement.

[20] *See* Appellate Body Report, European Community- Measures Concerning Meat and Meat Products (Hormones), 115, WT/DS26/AB/R, WT/DS48/AB/R Jan. 16, 1998)

appropriate standard of review of panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements."

In applying Article 11, the Appellate body noted that the fact finding by panel and their activities are constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de nova review as such, nor "total deference", but rather the "objective assessment of the fact". [21] This decision made it clear that objective assessment was the applicable standard of review of both fact and law. But the question which surpasses the realm of this decision is as to what does not constitute the "objective assessment", there is no positive definition of this term is expressly provided. The use of the concept of objective assessment without the addition of further criteria therefore poses a number of difficulties because it does not really signify any particular degree of deference or intrusion for panel to adopt in examining measures. There is therefore an absence of conceptual sophistication that would provide guidance to panel in their review of measures.

Holgar Spamann critically commented that 'objective assessment' principle is not at all helping Appellate Body in ascertaining as to which extreme to lean, either toward de nova review or total deference.[22] It does not provide any material guidance to panel nor to the Appellate Body in ascertaining the dispute. Other commentators also had a similar concern with regard to the use of Article 11 as a standard of review; it is unclear, misses the mark conceptually and generates confusion.[23]

Gradually an effort was made during` the Post EC-Hormones Case, several other decisions and judgements followed it where an Appellate Body tried to widen up the scope of standard of review and clarify the mandate of Article 11 of the DSU. The Appellate Body in US-wool shirts and Blouses[24] ruled that panels "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[25] A panel has discretion to determine the claims it must

[21] Ibid. Note 34.
[22] Holgar Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis", *38(3) Journal of World Trade*, p. 540(2004)
[23] Catherine Button, *The Power to Protect: Trade Health and Uncertainty in the WTO,* p.168, (Hart publishing, 2004)
[24] Panel Report, United States-Measure Affecting Import of Woven Wool Shirt and Blouses from India, WT/DS33/R, adopted 23 May 1997, as upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343.
[25] See Appellate Body Report, US-Wool shirts and Blouses, para340.

address in order to dissolve the dispute between the parties effectively. The Appellate Body has, however, cautioned panels to be careful when exercising judicial economy. To provide only a partial resolution, a dispute may be false judicial economy since the issues that are not resolved may well give rise to a new dispute.[26]

In US-Carbon Steel[27], Appellate Body ruled, Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Provided that panel's actions remain within these parameters, however, it been said, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings, and an appeal, we will not interfere lightly with a panels exercise of its direction".

In US-Cotton Yarn[28], the Appellate Body drew upon the safeguard decisions of Argentina-Footwear (EC)[29], US-Lamb[30] and US Wheat Gluten[31] and described the standard of review of fact as follows:

The standard may be summarised as follows: panels must examine whether the competent authority has evaluated all relevant factors: they must assess whether the competent authority has examined all pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination: and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panel must not conduct a de nova review of the evidence nor substitute their judgement for that of the competent authority.[32]

---

[26]See, Appellate Body Report Japan-Agricultural product II, WT/DS7/R, adopted 19th March 1999, as modified by Appellate Body Report WT/DS7/AB/R, DSR 1999:I, 315.

[27] See,Appellate Body Report, United States-Anti Dumping Measures on Certain Hot-Rolled Steel products from Japan, WT/DS184/AB/R adopted 23 August 2001, DSR2001: X, 4697.

[28] See, Appellate Body Report US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan. WT/DS192/AB/R, adopted 5th nov 2001: XII, 6027.

[29] See, Appellate Body Report, Argentina-Safeguard Measures on Import of Footwear Footwear(EC), WT/DS121/AB/R, adopted 12th Jan 2000, DSR2000:I,515.

[30] Supra note 43.

[31] See, Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19th Jan 2001, DSR2001:II 717.

[32]ibid

In US-Continued Zeroing[33] the Appellate Body noted that compliance with Article 11 means that a panel must: evaluate evidence in the totality, by which it mean the duty to weigh collectively all the evidence and in relation to one another, even if no piece of evidence is by itself determinative of an asserted fact or claim.

Hence it has been analyzed that the current standard of review or the mechanics of Dispute Settlement of WTO is inadequate because it imposes obligation on the panel to conduct an objective assessment of the matter before it[34]. This obligation extends both to the fact of the case, and to the ultimate legal question of whether a measure is in conformity with WTO Agreement or not. This standard does not give any material guidance to panel as to how and to what extent they can scrutinize the fact and legal questions. Hence, this could lead panel to 'over' or 'under' scrutinize the cases.

Under the present WTO system, panel proceeding are predominantly adversarial, rather than inquisitorial, in nature.[35] This means that panel adjudicates disputes primarily by reference to the issues and arguments presented by the parties. Panel does not initiate nor maintain the carriage of disputes, as may be the case under more inquisitorial system. The effect of this is that the factual record is likely to be confined to facts and issues that are raised by the parties. A narrower factual record constructed predominantly from material presented by the parties is likely to narrow the standard of review, irrespective of the intensity of review undertaken. Accordingly, the factual record does not need to be curtailed through prescription under the general standard of review. A number of provisions under DSU, and in particular the panel working procedures annexed to the DSU, reflects the basic approach to dispute settlement.[36] These provisions create a structure that

[33] See, Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R, DSR2007:I,3.

[34] See, Article 11 of Dispute Settlement Understanding, which provides that the function of the panel is to assist the Dispute Settlement Body in discharging it responsibility under this understanding. Panel should make an objective assessment of the matter before it, including an objective assessment of the fact of the case and the applicability of the conformity with the relevant covered agreements, and make other such findings as will assist the DSB in making the recommendation or in giving the ruling provided in the covered agreement.

[35] Supra note 37. P.551

[36] Example of adversarial provisions include: 1. DSU Appendix 3, Paragraph 5 (working procedure) which states: At its first substantive meeting with the parties, the panel shall ask the party which brought the complaint to present the case. Subsequently, and still the same meeting, the party against which the

gives the parties relatively high degree of control over the process and this ultimately provide a suitable framework for a panel's findings.[37]

The second feature of the dispute settlement system that circumscribes the scope of standard of panel review stems from Article 11[38] which in itself is a source of a general standard of review. Article 11 of DSU envisages objective assessment test but this test suffers from the fact that it has no jurisprudential framework to dictate its functioning or how it may develop in future. Article 11 is incapable of embodying a more generalized standard of review, and it is unclear when and to what extent the objective assessment test should be varied with substantive WTO obligation. Hence this objective assessment test is confusing and it relies upon the Appellate Body decision for its operation. An ordinary reading of this article ensures due process that is concerned with avoiding bias. In EC-Hormones case the Appellate Body applies Article 11 and equated a panel's duty under this Article as a duty to review disputes in good faith.[39] The requirement to examine a matter in good faith is very different proposition from prescribing how panel are to undertake the review task.[40] Hence in many ways Appellate Body has been forced to articulate a standard of review which reflects the language of the agreement being contested because the objective assessment test does not provide any real framework for review. Without the introduction of the general standard of review, there is therefore a risk that the standard will continued to be applied in an unnecessarily ad hoc manner, or that it will continue to split into different WTO agreement-specific standard because of inadequate guidance from the objective assessment test.

Thirdly, panel review process requires a difficult factual and legal assessment.[41] It is oftenly pointed out that, whether a panel has given adequate consideration to the issue, whether its reasoning is logical and coherent, or whether it has attached the correct weight or importance to

complaint has been brought shall be asked to present its point of view. The DSU also permits the parties to settle their disputes at any stage during panel or Appellate Body proceedings, and complaints may withdraw complaint at any time.

[37] Holgar Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis", *38(3) Journal of World Trade*, p. 551(2004)

[38] Supra note 24

[39] See Appellate Body Report, EC-Hormones (Para 133.)

[40] Andrew D. Mitchell, 'Good Faith in WTO Dispute Settlement', *7(2) Melbourne Journal of International Law*, 339 (2006).

[41] Tania S. Voon and Alan Yanovich, "The Fact aside :The Limitation of WTO Appeals to Issues of Law' *40(2)Journal of World Trade* p. 251-258 (2009)

particular pieces of evidence.[42] Hence the review task of panel is therefore complex and it is impossible for panel to avoid criticism that they have 'over' or 'under' reviewed disputes.[43] In objective assessment test its textual reliance is misplaced, and the Appellate Body has been required to develop the doctrine in such a way that it could be applied in disputes under different agreements.[44]

Hence it can be concluded that international tribunals are ill-equipped to examine evidence properly, coupled with the fact that developing nations have difficulties investigating the evidence of the industrialised opposition, provides for an undesirable situation for developing countries.[45] Accordingly, the new standard of review should be formulated which could satisfy three basic criteria: it should be faithful to the fundamental objective of WTO dispute settlement: it should promote legitimacy of the WTO as an institution: and it should be part of more advance and user-friendly dispute settlement procedures.

BURDEN OF PROOF: ISSUE OF CONTENTION.

As the WTO dispute settlement regime grows more complex and juridical, the question of burden of proof has become increasingly contentious.[46] The allocation of burden of proof is a critical aspect in WTO dispute settlement. The developing nations while presenting their disputes often get backlogged because of their failure to justify their claims because there is no specified norm under the DSU which could efficiently deal with the matter concerning with burden of proof. The WTO dispute settlement process aims for settling the disputes promptly and this eventually limit the chance of parties for proving the burden.[47] The parties cannot present their case in a sequenced way within a small span of time and hence the process of prima facie often turns into the process

[42] Ross .Becroft, 'The Standard of Review Strikes Back: the US-Korea DRAMS Appeal' 9(1) Journal of International Economic Law, p. 207(2006)
[43] Matthias Oesch, *Standard of Review in WTO Dispute Resolution,* p.42(Oxford University Press, 2003).
[44] Ibid.
[45] D.M. McRae, "The WTO in International Law: Tradition Continued or New Frontier?" *3(27) Journal of International Economic Law,* pp. 32-33 (2000).
[46] A. Das and J. Raghuram, 'One Too Many: Significant Contributions of India to the WTO Dispute Settlement Jurisprudence', in A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty,75* (Springer Nature, Singapore, 2016).

[47] See, DSU arts. 3.12, 12.8. the WTO website. World Trade Organization 2015: Understanding the WTO: *available from:* https://www.wto.org/ [viewed october 1, 2017].

of persuasion, whereby the adjudicating authority decides the disputes without ascertaining the facts beyond reasonable doubt.[48]

The burden of proof in dispute settlement basically implies "the law's response to ignorance"[49]. In more simplified term it is an onus of proving the claim. In the WTO panel process, the question of 'who bears the burden of proof' is quite essential because, the allocation of the burden of proof has a substantial impact on the substantive rights and obligations of the parties and may directly determine the outcome of the case.[50]

However, there is no explicit provision in the WTO Agreement which addresses that the party has burden of proof. This is one area where the observations and findings of the panels and the Appellate Body have substantially clarified the concepts. The observations of the Appellate Body in US—Wool Shirts and Blouses[51] and EC—GSP became the foundation of WTO jurisprudence on burden of proof. In examining this issue in US—Shirts and Blouses, the Appellate Body observed that "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. Also, it is an accepted rule 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". The Appellate Body than ruled that, 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.[52]

Hence, it is been contended that determination of the correct burden of proof can be closely linked to the concept of prima facie standard or presumption. Presumption favours the parties to the dispute to shift the burden of proof. The party who is making the claim must have to adduce

[48] John J. Barceló III, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement', Cornell Law Faculty Publications. Paper 119, (2009).
[49] H. Richard, Gaskin, *Burdens of Proof in Modern Discourse,* p.4 (Yale, 1992).
[50] D. Petko Kantchevski, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement, 3 BYU Int'l L. & Mgmt. Rev.* 79, 97 (2006).
[51] Appellate Body Report on *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses* from India WT/AB/DS33/R.
[52] Ibid note.61

evidence for justifying their claim and it is than once the evidence is adduce by complainant, the party defending its claim must have to assert evidences proving that that the claim is untrue.

In EC Measures Concerning Meat and Meat Products (Hormones Case), Appellate body stated that: prima facie case is one in which the absence of effective refutation by the defending party may result the ruling in favour of the complaining party presenting the case. The Appellate Body in this case further classified the burden of proof in WTO dispute settlement proceedings with respect to the disputes related to SPS Agreement, the initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of SPS Agreement on the part of 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 intern counter or refute the claimed inconsistency.

In Japan-Measures Affecting Agricultural Products, the Appellate Body was faced with the tension between this principle and the right of panel under Article 13 of the DSU to seek information or advice from any individual or body. Specifically, the question was raised as to whether panel could make a finding based on opinion or advice given by experts on a particular issue, when no party had presented a claim or arguments relating to that issue. The Appellate Body found that the authority of panel to seek information cannot be used to rule in favour of a party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it.[53]

In a later opinion, however, the Appellate Body directly reversed itself with respect to restraints upon a panel regarding evidence it considers during the application of the prima facie standard to burden shifting. In August 1999, the Appellate Body in Canada – Measures Affecting the Export of Civilian Aircrafts determined that a panel is free to request and consider information from parties or anyone else, and specifically the panel is under no obligation to wait until the complaining party presents a prima facie case before it is able to conduct its own investigation. Furthermore, the Appellate Body explained that outside information requested at the prerogative of the panel may indeed be necessary for the panel to determine whether the complaining party has presented a prima facie case.

[53] Supra note 20

However, this is not clearly apparent because the Appellate Body in Canada – Aircraft seems to have contradicted its statements in Japan – Agriculture with respect to a panel's ability to freely conduct an independent investigation during the application of the prima facie standard for the purposes of the burden of production. Confusion becomes further evident with the Appellate Body's opinion in India – Quantitative Restrictions, whereby Appellate Body reiterates, that a panel should conduct its own analysis considering all evidence presented by all parties before deciding whether prima facie has been reached or not. The Appellate Body observed that "the panel should conducted its own assessment of the evidence and arguments, rather than simply accepting the assertions of either party.[54] In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States."[55]

In WTO dispute settlement, direct interaction between the parties and the panel is severely limited.[56] The WTO panel procedure does not contain any similar practice to the common law's formal motion practice which tests the sufficiency of the proponent party's evidence at any point in the procedure.[57] It is because of this procedural limitation in WTO dispute settlement that the application of the prima facie standard to the preliminary shifting of the burden of proof has become such a point of confusion within WTO jurisprudence.

From the developing nation's perspective these confusion and limitation within the constitutional framework of WTO Dispute Settlement Mechanism however restrains the developing and least developed countries because they are unable to cope up with these intrigue procedural technicalities.

CONCLUSION

The intention of designing this chapter was to provide a critical insight as to how far the developing nation has fared under WTO Dispute Settlement System. It provides evidence that the participation

---

[54] See Appellate Body Report, *Japan – Apples*, para. 166; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 82.

[55] See, Appellate Body Report, *United States – Laws, Regulations and Methodology For Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (18 April 2006) Para. 220.

[56] Supra note. 60. P. 135.

[57] Ibid note 66.

 ISSN: 2582-6433

in WTO dispute settlement system is way more impressive than that of GATT regime. In general terms, the DSU has substituted a more 'legalised' system of dispute settlement, with new procedural requirements, over the more 'political' system of GATT. In doing so, it has created both opportunities and challenges for developing countries. In one hand, it has helped to level the playing field between weaker and stronger WTO members, while on the other hand, it has raised the bar in terms of resources both human and financial which is required to use the system effectively.