THESIS ON: PROCEDURAL ISSUES OF WTO DISPUTE SETTLEMENT SYSTEM- Exploring Facts About Evidentiary Matters.

By

Gony Md. Osman

THESIS

Submitted to

KDI School of Public Policy and Management

in partial fulfillment of the requirements

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ABSTRACT

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Dispute settlement system of WTO is deemed to be the most effective forum to settle trade disputes between governments. WTO jurisprudence lacks exhaustive body of laws on evidence needed for discharging justice. Specially, on evidentiary matters WTO jurisprudence is silent. The adjudicators and contesting parties from different law family are in trouble in absence of threadbare rules on evidentiary matters. Not only the contesting parties, but also the adjudicators of the Panel and AB faces critical junctures in absence of complete code on evidence. The argument that other international courts as well do not have complete code on evidence[1] is not tenable and based on real life judgment, as because, no other international court is dealing with cases having political as well as economic/trade implication. Moreover, almost every case of other international courts is different in nature from each other. In absence of wholesome code on evidence, over dependence on generally accepted principles, inherent power of the courts, jurisprudence of other international courts and jurisprudence developed by the AB is not good enough for a long lasting, sustainable as well as predictable adjudication system for multilateral trading system. However, DSU - being devoid of coordinated procedural details regarding evidence - is supplemented by some covered agreements having explicit laws on certain issues on evidence. Till then these few covered agreements are not well equipped as they provide some case/issue specific guidelines.

[1] Judgment of 27 June 1996, ICJ Reports t 40, para.60(1986). Case regarding Military and Paramilitaer Activities in and against Nicaragua(Nicaragua v USA, the `Nicaragua case')

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ABBREVIATIONS

AB AB

ADA Anti-Dumping Agreement

DSB Dispute Settlement Body

DSU Understanding on Rules and Procedures Governing the Settlement of Disputes

EC European Councils

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

GC General Council

GOK Government of Korea

ICJ International Court of Justice

ITO International Trade Organization

LDC Least Developed Countries

MC Ministerial Conference

NGO Non Governmental Organization

TRIPS Agreement on Trade Related Aspects of Intellectual Property Rights

USA United States of America

VC Vienna Convention

WP Working Procedure

WTO World Trade Organization

Table of Contents

CHAPTER ONE

1. Introduction

1.1. Background of the Study

Dispute Settlement System is one of the main pillars of WTO. Being the *building block* of multilateral trading system the mechanism is in operation since the emergence of WTO in 1995. Since inception, the dispute settlement mechanism has been functioning as most important supra-national tribunal for settling trade related disputes. The members are obliged contractually to abide by the decision of WTO dispute settlement system. To be frank, WTO system has neither any jail nor has the power to inflict pecuniary penalty or other mandatory economic sanctions. The main thrust of the system is that, the mechanism upholds sovereignty of an independent country and builds on remedies agreed upon under WTO regime by them. Voluntary compliance by sovereign action of alleged member is the core of the effective functioning of the system.

Main judicial part of the system is of two tiers - panel process and appellate review. These two tiers almost resemble usual court process. Similarly, the system is a set of several institutions as well. Procedural aspect regarding evidence meant to settle three questions of what to probe, how to probe and by whom to probe. Rules on evidentiary matters, in fact, supposed to guide the entire trial process as it provides a code of conduct for both adjudicators and the contesting parties as well.

Judicial system without well defined law on evidence is beyond imagination in domestic dispute settlement. Interestingly supra-national judicial system like WTO does not have such codified law on evidence. This adduced curiosity for me to search for how evidentiary issues are being handled in WTO dispute settlement process.

The dispute settlement system of WTO encourages exercising principal of good faith between/among the parties in exchanging, collecting and presenting evidence. This doctrine of collaboration together with discretionary authority vested in panel to seek information is a lifeline for the system. In handling evidences of complex nature requiring scientific as well as econometric analysis and synthesis, the authority of the Panel to seek information deemed to be an effective weapon.

AB has no remand power in the system. This may create huge gap as opportunity to adduce new arguments in Appellate stage is not lawful. Lack of remand power has wider consequences & ramification. Even allowing an opportunity to adduce new argument at Appellate stage may not be a exact substitute for remand system. The power of the AB is limited to the contended issues covered in the Panel report and legal interpretation developed by the Panel[2].

Objective assessment is the fast-track standard of reviewing the evidence by the Panel as it does not provide a definite yardstick to analyze the legislation of a sovereign nation[3]. But in absence of any guidelines in DSU as to what type and what amount of evidence is required to make a presumption of truth objective assessment by the Panel is seems to be difficult. Relying on customary rules and individual faculty of the adjudicators are not a full proof solution as these may lead to distortion of evidence and non-harmonized analysis. Assumption, presumption, induction and deduction based not on clear- cut & well-set rules on evidence animated the debate to promulgate a all-exhaustive law on evidence. Parties as well as judges are in confusion whether to follow common law or civil law while facing evidentiary problems. For example, Argentina's objection to accept

[2] Article 17.12 of DSU requires the AB to address each of the contended issues covered in the Panel report and legal interpretation developed by the Panel.
[3] Article 11 of DSU makes it compulsory for the Panel to make an objective assessment of the matters before it.

copies instead of original document is a good testimony to this confusion.[4]

WTO jurisprudence allows much flexibility on different evidentiary issues. For example regarding time frame for submission and sufficiency of evidence the DSU maintains much flexibility to ensure high quality reports. This flexibility has different dimensions as well. Firstly, countries from different law families may confuse the actual course of action. The judges coming from different law family may be in confusion in reaching decision on the basis of consensus. This flexibility leads to much liberty for the judges and liberty leads to high ethical standard. But there is no guarantee that this high ethical standard is common ethical standard. In fact, development of ethics varies depending on culture and years-long social taboos. Virtually, to ensure unity in diversity, a common platform is required. WTO provides a common platform bringing in unity in diversity. This common platform needs common rules for the players as well as referees.

Flexibility in the DSU has other dimensions as well. Frequent practice of allowing delayed evidence may encourage the parties to take recourse of litigation technique which will ultimately cause delay in settlement of dispute. This flexibility not necessarily exerted obligation even to make adverse inference on delayed submission of evidence. Flexibility is also there for the Panel to make departure from the working procedure. It is interesting to see whether this power and flexibility may be a possible solution to the Panel to address evidentiary matters not defined or clarified in DSU and other covered agreements.

Unsolicited evidence from third parties may add value to the dispute settlement process. It seems bizarre to think that an important evidence will not be addressed simply because of its source. Interesting to note that even a NGO can produce evidence under the veil of

[4] Argentina - Measures Affecting Imports of Footwear, Textiles Apparels and Other Items Argentina raised objection on accepting copy of certain documents instead of originals. But the Panel ruled that submission of copies of original documents did not affect the probative value of evidence. WT/DS56/R, The Panel Report, para 6.58.

Panel's right to seek information.[5] But a third party having trade interest in the dispute cannot come up with evidence to unearth the truth. These issues are contradictory requiring further in-depth attention of the law makers.

The flexibility, right as well as power of the adjudicators are supposed to be a tentative solution to different unsettled issues of evidence. But the world is not that much even. Parties, adjudicators as well as office staff associated with judicial process are coming from diverse law background. This diversification made the evidentiary issues complex requiring codified law on evidence.

The complex adjudicatory system of WTO is mostly built on practice and procedures developed through GATT practice. However, Uruguay Round modified the GATT system for healing the problems of GATT system. Till then, the procedural aspect of WTO system is not exhaustive. Specially, evidentiary matters remain less focused in WTO jurisprudence. More importantly, making the procedural aspects unique and exhaustive is a *Herculean task*, though not impossible. Against this backdrop, the primary focus of the paper is to explore how key evidentiary matters are addressed in the WTO dispute settlement mechanism. The objectives of the paper would be met and progressed through issue-base discussion.

1.2. Purpose of the Study

The purpose of the study is two folds. As discussed earlier, the research aims at finding how different evidentiary issues/matters are being addressed in the WTO dispute settlement mechanism. The secondary focus is on how the adjudicators of WTO are

[5] Article 13.1 empowered the Panel to seek technical advice from any individual or body which it deems appropriate. Further unsolicited evidence may be injected in under the veil of Article 12.1 of the DSU considering the Panel's right to make addition or departure from Working Procedure.

dealing with different evidentiary matters in absence of codified detailed law on evidence. To enrich the above main two discourse the paper further targets to analyze how evidentiary laws/rules of other international jurisprudences and courts are spilling over to WTO mechanism. In setting objective of the study I was curious to see how the biggest international adjudication system is running without codified law on evidence.

1.3. Methodology of the Study

After getting a synopsis of the aim of this thesis it is pertinent to know the methodology to be used for the whole discourse. Needless to say, this is not a scientific or social research and hence it is not laboratory or data base analysis. Rather the discussion is truly based on the existing laws and documents about evidentiary matters if international disputes. Needless to say that, complete and detailed literature encompassing all the issues of evidence is not commonplace. So WTO laws, dispersed contribution by the scholars and decisions of the past GATT-dispute settlement practice as well as present WTO-dispute settlement process are analyzed meticulously with deep insight. Side by side other international laws on evidence and decision of other international courts are also got much importance to give the study multi-dimension. Chronological and issue based discussion are key in achieving the objectives of the paper.

In search of in-depth knowledge and information about cases and decisions, I have analyzed panel and AB reports. Articles, research papers, and different official WTO documents also gave me ample information to judge evidentiary matters from different looks. Tracking WTO's website has always been a beacon for me to keep in touch with the latest development of the area. Of great importance, taking the three courses on WTO related laws during my course work in KDI School of Public Policy and management opened the avenue to conduct the study. Specially, lecture by the professor and discussion

by the argumentative fellow course mates helped me a lot to garner knowledge. Experience I gathered being a Magistrate of lower judiciary of Bangladesh helped me a lot to inject practical perspective to the study.

1.4. Literature Review

International courts to a great extent are liberated from compulsion of defined procedural laws like evidentiary law and rules simply because detailed and well defined procedural laws are absent for them. Specially, these tribunals have a free-riding opportunity while dealing evidentiary matters during court proceedings. For example, ICJ opined that:

> "The Courts within the limits of its Statutes and Rules,……has freedom in estimating the value of the various elements evidence, though it is clear that general principals of judicial procedure necessarily govern the determination of what can be regarded as proved."[6]

Regarding probative value of evidence (cartographic materials) in relation to frontier the ICJ opined that "Maps can……have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with maps".[7] It seems peculiar - if not bizarre- that international courts are running without vital legal infrastructure called law on evidence giving the adjudicators wider discretion. Needless to say that WTO judicial system is also prey to such legal lacuna.

The adjudicators of WTO dispute settlement system are fortunate enough not to go through the defined and complete law on evidence. In fact the law makers spared themselves as well not to delve deep into such a critical issue. This privilege of the adjudicators and the inertia from the part of law makers of WTO have adduced much interest for the academicians and practitioners to come up with intellectual thinking on evidentiary issues to supplement the substantive laws. These scholarly contributions are

[6] Judgment of 27 June 1996, ICJ Reports t 40, para.60(1986). Case regarding Military and Paramilitaer Activities in and against Nicaragua(Nicaragua v USA, the `Nicaragua case')
[7] Order of 10 January 1986, ICJ Reports at 583,para 56(1986).Case regarding Frontier Dispute(Burkina faso V Mali)

playing the role of pathfinder for the adjudicators of WTO court system. However, complete and blanket literature on evidentiary law still a far cry.

As discussed earlier, WTO dispute settlement mechanism lacks well-set procedural framework posing a growing tension for multilateral trading system. Pauwelyn (1998) put importance on well matched procedural laws against the backdrop of matured substantive laws[8]. The growing need for matched procedural framework on evidence is further substituted by the fact that factual and legal issues ore somehow & some time overlapping. The difference between these two overstated frequently in legal discourse. Horn & Mavroidis (2007) found that, "…….. disagreement about facts can be formulated in terms of legal issues".[9]

It is widely expected that, findings, reasoning and decisions of the courts would be substantiated/supplemented even complemented or at least be built on economic logic as well. But the flip side of the coin is that many of the decisions of WTO dispute settlement system are criticized heavily as they devoid of economic analysis or logic. This legal vacuum is attributed to the absence of codified laws/rules on evaluation of evidence. WTO jurisprudence suggests a blunt weapon called 'objective assessment' to be the criterion of evaluation. Sykees (2003) came up with the argument that systematic entities are hard to be found[10]. Corroborating this idea Horn & Mavroidies assumed confusion about method of analysis[11].

Evidentiary standards applied by the adjudicators assumed much attention of the scholars as well. Grossman & Sykees (2006) studies how rule of waiver would affect the number

[8] Joost Pauwelyn. "Evidence, Proof and Persuasion in WTO Dispute Settlement- Who Bears the Burden?" HeinOneline—1 J. Int'l Econ. L. at 258. 1998. Concluding Remark.

[9] Horn,Henric,Mavroidis,Peter C .A Survey of the Literature on the WTO Dispute Settlement System.CEPR Discussion Paper Series NO-6020 at 4.2007
[10] Alan O. (2003b) The Least Restrictive Means, University of Chicago Law Review. 70: 403-416.2007
[11] Horn,Henric,Mavroidis,Peter C.A Survey of the Literature on the WTO Dispute Settlement System. CEPR Discussion Paper Series NO-6020 at 34.2007

of claims[12]. Horn & Mavroides (2004) viewed that burden of proof is easy to be shifted to the respondent[13]. This easy shifting would multiply convictions. Scientific expert opinion and expert opinion on econometrics are also two facets of evidentiary standards requiring codified rules and research thereon.

Panel's right to seek information under the coverage of Article 11 of the DSU is challenging task for the Panel to exercise. It is challenging in the sense that, exercising such right produces a moral obligation for the adjudicators to receive *amicus curie* brief. Chakravarthi (2000) made an interesting and informative study on this issue terming AB as rule-less and DSB as powerless[14]. Panel right to seek information has to do with judicial fact finding. Judicial fact finding is relevant to avoid voluntary omission of evidence by the parties. There are arguments and counter arguments regarding maintaining an independent agency within WTO for investigation. John Jackson (1998) said that "a serious and prolonged fact-type hearing could easily bankrupt the resource allocation to the WTO dispute settlement system"[15]

Determining level, quality or threshold of evidence is a crucial issue in many cases. It is important for both the adjudicators as well as parties to a dispute in WTO courts. WTO jurisprudence lacks clear-cut evidentiary threshold. For example, to initiate anti-dumping investigation countries are at dilemma as to decide the level or adequacy of evidence required before initiating investigation. Gingrich (1999) studied the evidentiary threshold needed for antidumping investigation putting opinion for well defined evidentiary standard/threshold[16].

[12] Grossman, Gene M. and Alan Oslan O Sykes. European Communities- anti Dumping Duties on Import of Cotton-Type Bed Linen from India Recourse to Article 21.5 of DSU by India. 2006

[13] Horn,Henric, Mavroidis,Peter C. The Allocation of Burden of proof in Non Discrimination Cases before the WTO- cited in A Survey of the Literature on the WTO Dispute Settlement System. CEPR Discussion Paper Series NO-6020 at 35.2004

[14] Raghavan Chakaravarthi." Ruleless Appellate Body and Powerless DSB", *South-North Development Monitor* (SUNS) 2000,

[15] John H. Jackson. The World Trade Organization: Constitution and Jurisprudence, 92.1998

[16] Gingerich, Tara . Why the WTO Should Require The Application of the Evidentiary Threshold Requirement in Anti Dumping Investigation.1999

In dispute settlement process a questions always comes forth as to who will present the evidence and who will bear the burden of proof. M. Kazazi (1996) observed that in the international tribunals each party has the responsibility to prove its claim according to the acceptable rule[17]. Interestingly, if all the parties bear the burden of proof then confusion arises whether all the parties have the same duty to present necessary evidence. Pauwelyn (1998) however, argued that parties bearing the burden of proof not necessarily have the resultant burden of presenting evidence [18]. Similarly, the opponent in the dispute settlement system of WTO has some responsibility resulting presentation of evidence kept in its disposal simply because the dispute settlement mechanism has an in-built element of principal of cooperation and good faith. As per the decision of AB, good faith in Article 3.10 of DSU to be read with Rule 30(1) of the WP substantiated the right of the parties suggesting that conditional withdrawal in a particular case would neither diminish the said right nor would it stand on fair, prompt and effective disposition of a case.[19] This principal of good faith is a fair attempt to ensure fairness in WTO judicial process. Panizzon (2007) opined that the WTO Panels have introduced constitutional ingredients to the WTO jurisprudence adopting the principles of fairness and good faith[20]. Botha (2002) studied the application of burden of proof in WTO and found that the doctrine introduced by the AB like burden of evidence burden of proof as well shift to the opponent as and when prima facie case is established by the proponent[21].

Lack of remand power of AB is a crucial issue for dispute settlement system of WTO.

[17] M. Kazazi." Burden of Proof and Related Issues, A Study on Evidence Before International Tribunal" at 30.1996

[18] Joost Pauwelyn. "Evidence, Proof and Persuasion in WTO Dispute Settlement- Who Bears the Burden?" HeinOneline—1 J. Int'l Econ. L. at 233. 1998.

[19] EC–Sardines, Appellate Body Report, para. 141.

[20] Marion Panizzon,Dr. Fairness, Promptness and Effectiveness: Creating a Good Faith Standard for WTO Dispute Settlement Procedures. NCCR TRADE WORKING PAPERS No 2007/19, at 18. MARCH 2007. www.nccr-trade.org.

[21] Botha Hendrik Lambert. Burden of Proof in WTO Law. A study of the manner in which the concept of burden of proof has been interpreted and applied by the WTO Dispute Settlement Body.2002

Member of the AB Yasuhei Taniguch[22] put emphasis on amendment of DSU to introduce remand power to remedy member states. He also suggested AB to be more sensitive on the issue of due process. Citing the example of France he argued that the judges cannot apply law on his/her own without listening the parties. He advised the same principal for dispute settlement mechanism.

Like any judicial system dispute settlement system of WTO also got same importance for standard of review. It has a decisive role limiting the review power of the adjudicators. Using proceduralist approach Zleptnig (2002) argued that WTO legitimacy challenge of WTO can be withered way by applying standard of review by the panel. He further advised to adopt a strict proceduralist bias for fixing and using standard of review[23].

Use of presumption technique is a vital tool for the adjudicators to evaluate evidence. This technique is further needed to decide issues relating to prima facie case and rebuttal of the case by the defendant. However, Pauwelyn (1998) refused to accept presumption technique as a substantive rule to decide as to who assume the burden of proof[24].

To highlight the gap in DSU some case references may be cited here. In absence of categorical compulsion for holding consultation in Mexico-HFCS (Art.21.5) Panel was established. Mexico argued that the US had violated Article 6.2 DSU. Mexico also argued that the dispute is not fruitful under the coverage of Article 3.7 DSU as the Panel was established without prior consultation.[25] In Canada-Aircraft (1999) Canada refused number of times to provide information to the Panel on the plea that Brazil had not established *prima face* case. However AB reinforced the principal of good faith &

[22] Professor of Law, Senshu University Law School, Tokyo; Professor Emeritus, Kyoto University; LL.B., 1957, Kyoto University; LL.M., 1963, U.C. Berkeley School ofLaw; J.S.D., 1964, Cornell Law School; Appellate Body Member of WTO 2000– 2007

[23] Zleptnig T Stefan."The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority". European Integration online Papers (EIoP) Vol. 6 .2002. N_ 17; at 19 .http://eiop.or.at/eiop/texte/2002-017a.htm

[24] Joost Pauwelyn. "Evidence, Proof and Persuasion in WTO Dispute Settlement- Who Bears the Burden?" HeinOneline—1 J. Int'l Econ. L. at 252. 1998

[25] Mexico-HFCS (Art.21.5), Appellate Body Report, paras 71-74.

collaboration maintaining that it is upon the Panel to seek information even before *prima face* is made by the opposing party.[26] In EC-Sardins(2002) after the withdrawal of original notice of appeal by EC Peru asserted that there is no right of making appeal twice.[27] Interestingly AB treated EC's new notice as replacement notice.

WTO jurisprudence is silent as well regarding estoppels. However, in Guatemala – Cement II as Mexico had not made allegations at the earliest opportunities regarding certain violations of Anti-Dumping Agreement Guatemala maintained that Mexico's allegation was subject to estoppels.[28] The Panel rejected Guatemala's claim on the plea that Mexico was under no obligation to object immediately to the violations.[29] Regarding admissibility of evidence US - Countervailing Duty Investigation of Drams Case is a perfect case of complexity and confusion. The panel refused to consider the evidence that was part of US's investigation but was not cited in its decision imposing duties. The Panel considered the evidence *ex post* rationalization.[30]

The legal system for international trade beneath the umbrella of WTO is still under the process of development and so does its jurisprudence. Scholarly contributions are playing an important role ceaselessly to further enrich both the trade literature and legal literature of WTO. A comparative study of the legal system has virtually opened up the new vista to decimate the confusion and tricky legal issues of WTO jurisprudence. AB rejected Panel's finding and opined that it does not require Members to cite or discuss every piece of supporting evidence in its final determination.[31]

[26] Canada – Aircraft, Appellate Body Report, para.190
[27] EC-Sardins, Appellate Body Report, para 135
[28] Guatemala – Cement II, Panel Report, para 8.3
[29] Ibid 8.24
[30] US - Countervailing Duty Investigation of Drams Case, Appellate Body Report, Para 159
[31] Ibid 164

1.5. Outline of the Chapters

WTO jurisprudence is a big legal literature and so does its procedural aspects. A detail discussion would require huge volume of work. The thesis aims at exploring associated evidentiary issues from different viewpoints. Formal discourse starts with giving an overview of the dispute settlement system in chapter two. For this, a supplementary pictorial presentation and time limit for settling disputes are shown as annex.

Chapter three introduces us to out-world. Law of evidence applied for other international courts and some generally accepted principals – accepted to each law family- are discussed in this chapter. Analysis is done to show how interdependency is observed on evidentiary matters in absence of defined law of evidence. Chapter four focuses on finding relevancy and importance of law of evidence for settlement of trade dispute. In fact law of evidence, being regulator of the conduct of the parties, shows the path to be followed by all concerned in dispute settlement mechanism. In this chapter, an effort is done to unearth the evolutionary process of evidentiary rules as well. It further continues, to reveal the sources of evidentiary laws in WTO jurisprudence per se.

Chapter five contains an analytical review on different specific issues. The countries, adjudicators as well as court's staff are alike concerned with these issues. At the beginning efforts, has been made to discuss how prima facie of a case distributes burden of proof and burden evidence. It goes further to diagnosis why collaboration among the parties on exchanging evidence is a must in absence of policing mechanism to discover evidences which are in sole possession of either party. Relevant discussion is also made about the locus standai of the Panel on determining relevancy of evidence. Different technical issues like maintaining confidentiality of evidence, absence of remand system and its affect on evidentiary rules, implication of circumstantial evidence and economic

evidence are discussed side by side. This chapter as well contains a thorough discourse on adducing new evidence, expert opinion serving otherwise the purpose of investigating authority for the Panel and why remand power deserves newer attention. The chapter, *inter alia*, touched at how DSU accommodates three basic rules of due process. These are - bias rule, hearing rule and no evidence rule. These are virtually three basic monolithic pillars serving the purpose of due process. Discussion on due process, in this chapter, is followed by a threadbare analysis of rules on burden of proof, probative value of evidence. More importantly, this chapter critically analyzes other two fundamental issues namely rules on standard of review of evidence and standard of proof. Here it is pertinent to say that adjudicators need weighing mechanism to weigh evidences submitted by the parties. Techniques used by the adjudicators to evaluate evidences are also touched at.

Some more technical evidentiary issues are accommodated as well in this chapter five. This penultimate discourse also studies the basic rules on how to present evidence, means of evidence and deposition, time limit for submission of evidence, responsibility of the parties while producing evidence, sufficiency of evidence & exclusion of evidence third parties' evidence, unsolicited evidence and evidence from consultation stage are addressed by DSU and adjudicators. The discourse sequentially comes to an end with the concluding part in chapter six. Depending on the threadbare discussion summarizes the main findings of this study. Chapter seven outlines some thought provoking issues for interested readers.

CHAPTER TWO

2. Overview of the Dispute Settlement System

2.1. Basic Rules Guiding Dispute Settlement System

Broadly dispute settlement system of WTO has four major steps; namely- consultation, panel proceedings, appellate review and implementation and enforcement. Each stage of this mechanism has defined timeframe[32] to be followed by the adjudicators.

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) is the guiding rule of WTO dispute settlement system. The DSU- as Annex 2- is a part of Marrakesh Agreement Establishing the World Trade Organization (hereinafter called WTO Agreement). Though the system seems to be new, pre-existing GATT regime is the central to it. Article 3.1 of the DSU reconfirms the adherence and application of Article XXII and Article XXIII of GATT 1947. Similarly Article XVI:I of WTO Agreement provides that "except as otherwise provided under this Agreement or Multilateral Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and bodies established in the framework of GATT 1947".

Too much emphasize on GATT 1947 seems confusing, because it was meant for trade in goods. On the other hand, existing dispute settlement system covers any dispute arising out of any of the multilateral WTO agreements. These agreements are collectively called "covered agreements''[33] which are listed in Appendix 1 of the DSU. Some multilateral agreements under WTO system contain additional and special rights and obligations. Article 1.2 of DSU also recognized these special rules in its Appendix 2 following the

[32] Please refer to Annex- I
[33] Covered agreements WTO Agreements, Multilateral Agreements on Trade in Goods, General Agreement on Trade in Services, Agreement on Trade-Related Aspects of Intellectual Property Rights, Understanding on Rules and Procedures Governing the Settlement of Dispute and Plurilateral Agreements.

general notion that ‘‘special laws and subsequent legislative development will prevails over general laws’’.

It is easily understandable that special rules and procedures contained in Appendix 2 will prevail over rules and procedures under “covered agreements” contained in Appendix 1 to the extent of difference. But what will be the way out in case a measure is challenged under two agreements and two covered agreements are conflicting with each other? We may argue that WTO system provides no rules for this. To find the explanation for this we have to look at the decisions of the Panel and AB. In Canada-Periodicals, the AB attuned to the Panel that “the obligations under GATT 1994 and GATS can co-exist and that one agreement does not override the other.”[34] So the case law base jurisprudence prescribes that, when a Panel analyzes such issue under GATT, it should focus “on how the measures affect the goods involved”.[35] When a Panel discusses the issue under GATS, it should focus “on how the measures affect the supply of the service or service suppliers involved”.[36] The legal issues would be different when both GATT and GATS apply to a particular measure.

WTO regime is a conventional or contractual treaty law within the meaning of Article 38(1)(a) of the Statute of the International Court of Justice (ICJ)[37]. In other words the WTO legal system is not something that is isolated from public international law regime. The interpretive principles bear a good testimony to this idea. Article 3.2 of DSU categorically specifies the recourse to customary principles of interpretation in determining the right/privilege and duties/obligations of parties to the dispute. The AB found that:“ The GATT is not to be read in clinical isolation from public international

[34] Canada- Periodicles, The AB Report, para.20
[35] EC- Bananas, AB Report, para.221
[36] Id
[37] Article 38:1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Law".[38] The Body also found that in absence of explicit reference in DSU or the WTO Agreement, general principles of international law like good faith, due process, rules regarding burden of proof and the right to adequate representation are applicable to DSU process and are to be considered in interpreting WTO provisions.[39]

Here, it is worth mentioning that canons, traditions, guidelines and sources for customary principles of interpretation emanate from Article 31[40] and 32[41] of the Vienna Convention (VC) on the Interpretation of Treaty. Article 31 of VC prescribes that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose''. Article 32 of the VC allows the use of background/preparatory work for the treaty agreement for clarification confusion or obscurity. But the interpreter is at liberty to adopt a reading that would otherwise reduce the whole clause or paragraphs of a treaty to redundancy.[42]

However, on top of the other international agreements mentioned in the covered agreements and customary international laws, a Decision of the Ministerial Conference and General Council will be the superior source of law under WTO system.[43] Such interpretation of covered agreements is binding upon the Panel and AB.[44] For interpretation of a Multilateral Trade Agreement mentioned in Annex 1 of the WTO Agreement, recommendation by the Council monitoring the compliance of that

[38] US- Gasoline, The AB Report, p16,DSR 1996:I,3,at 16
[39] Korea- Procurement, Panel Report, para.7.96:''Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that WTO treaty agreements do not contract out from it.''
[40] Article 31: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
[41] Article 32*:* Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable.
[42] Reformulated Gasoline, p.22
[43] Article IX(2) of the WTO Agreement.
[44] Id,

Agreements would be the basis of decision. Three-fourth majority of the Members is also required to adopt an interpretation.

2.2. Institutional Arrangement

Dispute settlement system as a whole comprises of several institutions.[45] The apex body is the Dispute Settlement Body or DSB. The DSB establishes Panels, adopts Panel and AB Reports, take care of the implementation of rulings and authorizes sanction against non-complying country.[46] Next to the DSB, Panels and AB are mainly responsible for the adjudication which is the core of the system.

The panel procedure of GATT 1947 is somehow retained under WTO system with necessary modification. Generally three panelists[47] are in a Panel who are selected on ad hoc basis for each individual dispute from a list of persons proposed by WTO Members. The Panel reviews the factual as well as the legal issues of a dispute and the final outcome of the panel process is recommendation to be submitted to the DSB.

The AB which reviews merely the challenged legal issues of Panel's ruling is a permanent body. It is the final stage of the adjudication process under WTO dispute settlement system. The AB has seven persons appointed for four-year terms. Members hear the cases in divisions of three. Needless to say, the AB is the new outcome of Uruguay Round discussion. Apart from the above three main focused institutions, WTO Secretariat, arbitrators, independent experts and several specialized institutions are also giving support to the system.

[45] Please refer to Annex- II
[46] DSU Article 2.1
[47] Panel may be composed of 5 persons in exceptional situation.

CHAPTER THREE

3. Law of Evidence in the Context of other International Courts

3.1. Law of Evidence in Other International Courts

It is widely accepted fact that international law traditionally remains liberal on evidentiary matters associated with inter-state disputes. Pauwelyn (1998) found that, "International procedure tends to be free from technical and detailed rules on evidence known municipal law".[48] This approach allows flexibility and leeway for the adjudicators to deal with the adduced evidence. Another facet of this liberal approach is that the different international laws and courts are fragmentary[49] triggering unpredictability while facing evidentiary questions. So the evidentiary laws for the inter-state dispute settlement mechanism are transitory, dispute specific and sometimes court specific as well. The absence of comprehensive, coherent, consistent and codified laws of evidence may be attributed to – apart from the lenient view of the member states- the multiplicity of disputes. Moreover, inertia of the adjudicators to pass ruling on these complex nature of evidence fearing that the parties may not be willing to welcome the judgment/decisions. This unearths sheer *ad-hocism* in international dispute settlement mechanism.

Now a days, international dispute settlement system has changed. International dispute settlement is now more rule-base rather than power-base. International courts- be it International Court of Justice (ICJ) or WTO Dispute Settlement Body(DSB)- are now facing increasingly evidentiary questions with much intensity and complexity having political and economic implication for the member states. Even more, sometimes

[48] Joost Pauwelyn. "Evidence, Proof and Persuasion in WTO Dispute Settlement- Who Bears the Burden?" HeinOneline—1 J. Int'l Econ. L. at 230. 1998

[49] International Law Commission, Report of the Study Group on Fragmentation of International Law, 54th Session of the International Law Commission, Geneva, 29 April-7 June and 22 July-16 August 2002,A/CN.4/L.628, para 6. It says "It is not considered a new concept, but rather a characteristic of international law which is 뱋nherently a law of a fragmented world

sovereignty of a state come across while addressing evidentiary issues. Lack of common approach for international evidentiary laws might evolve as a major decision bottlenecks in near future for international courts and tribunals in discharging fair trial just administering of justice. In absence of uniform evidentiary laws more debates may be animated as well as treasured about the decisions of international courts due to inconsistent and unpredicted handling of evidence.

Constituent law of the international courts and related treaties are supposed to be the building-bloc and potential sources to deal with the evidentiary issues. However, on diverse evidentiary issues, constitutional laws are silent. The gap in-built in the treaties, may be significantly bridged by applying the inherent or implied power of the court. Inherent power can be exercised so long it does not antagonize the purpose and object of the law establishing the court. Similarly, tenets and procedural rules developed by other international tribunals under the veil of inherent power may also be used in other courts of similar jurisdiction.

Generally accepted principles and customary international laws are other significant sources for international law on evidence. Secondary procedural laws or rules made by judges are also a widely recognized and important source of international evidentiary laws. Almost all the international courts/tribunals are entrusted with the power to formulate own rules of procedure or code of conduct or practice manual. Case laws, as well, feeding the international courts with supportive literature as subsidiary means to understand evidentiary issues. McRae, said that "the WTO agreements are themselves creatures of international law; they are treaties binding only because of the underlying norm of international law *pact a sunt servanda*'.[50]"

[50] Donald McRae, 'Comments on Dr Claus-Dieter Ehlermann's Lecture' 97 American Society of International Law Proceedings 87, 89.2003

3.2. Generally Accepted Principles Regarding Evidence

International courts/tribunals while dealing with inter-state disputes follow some tenants without much debate and questions. These generally accepted fundamental procedural principles are called 'general principles of international procedural law'. The route of these principles is Article 38(1)(c)[51] of the Statute of the International Court of Justice (ICJ). Regardless of the nature of dispute, subject matter & courts, these principles are commonly used and subject to uniform practice by the adjudicators. This principles cast light on admissibility and taking of evidence. Simultaneously, these principles have interpretive role as well. Sooth to say, WTO judiciary maintained normative relationship with generally accepted principles to retain the standard of procedural justice. For example Pauwelin (2003) opined that "In international law, principles play an important role in filling the gaps left by the international legal order and to avoid a non liquet in rulings by international judges".[52]

The first and foremost principle is the right to fair trial. It ensures procedural equality of the contesting a case. This corollary developed to recognize and uphold the concept of sovereignty of the states. Sovereign equality results in the right to be heard. From the viewpoint of evidentiary rules this principles ensures unalienable right to the parties to present all relevant evidences in support of their claim. Side by side, it allows the parties access to evidence of the counter party to generate counter arguments.

The idea of recognizing state autonomy also necessitates that the parties are the sole authority to bring a case before the court/tribunal and to define the scope the litigation. The courts should not step beyond what is asked by the contesting parties. The sovereign

[51] Article 38(c): the general principles of law recognized by civilized nations;
[52] Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law,129. 2003

parties have the right to bring an end to the dispute. This issue of autonomy brings forth a critical issue regarding the court & other independent organ's right to adduce/discover evidence. In international criminal justice this principle is deviated may be because of the fact that international criminal court does not deal with state versus state cases. Same sort of deviation is observed in WTO dispute settlement mechanism which allows the Panel to seek information from any corner. The principal of public hearing is also present in almost every international dispute settlement system. WTO dispute settlement mechanism is one of the exceptions to this. The Panel meets in closed session and maintains secrecy on many issues.

Regarding distributing/allocating duties and responsibilities on gathering evidence international courts follows modified adversarial model. It is holy marriage between adversarial and inquisitorial model. Parties to the disputes assume the primary responsibility for gathering evidences and proving specific case while the adjudicators have the inherent competence to draw out factual basis. Courts are also at liberty to adduce expert opinion, to call witness and to decide on if and when to call for evidence from the parties.

Principal of cooperation and good faith are also two guiding principles in settling international dispute. Parties to the case are duty bound to cooperate the each other to ensure access to evidence/information so that the other party gets ample opportunity to make counter argument. This extensive disclosure obligation seems to be the backbone of the system. In fact international dispute settlement systems are not a mechanism to win a case by some cleverly acts. Nor it is driven purely by game theory. Rather the parties involved are pledge bound to cooperate to nurture a world public goods. Regarding enforcement of evidentiary rules the effective recourse for the courts is making adverse

inference although making adverse inference is not usual in international courts.

CHAPTER FOUR

4. Evidentiary Laws and WTO Jurisprudence

4.1. Relevance of Evidentiary laws in WTO Dispute Settlement System

WTO dispute settlement system is a paradigm shift from GATT-1947 dispute settlement process. During GATT regime dispute settlement was basically a conciliation based mostly on diplomatic efforts. But WTO dispute settlement system is legalistic in the sense that the final decision of the process comes through an adjudication process. WTO dispute settlement process is not court in truest sense; but the system to a great extent akin to court proceedings. That is why the issue of substantive and procedural issues comes forward. The procedural laws basically determine the equity and efficiency of any judicial process. Substantive norms may be crippled due to inappropriate procedural system. Procedural issues of WTO system are more important because all the members of the multilateral system do not belong to same family of law. Due to diversification of the legal practice among the member states a well design trade-off is sine-qua-non for WTO dispute settlement system.

In WTO dispute settlement system the regulation, rules, laws and action of a sovereign state are challenged. Losing a case results in changing/amending and sometimes repealing the whole law promulgated by people's representative of an independent state[53]. So, settlement of dispute upholding the sovereignty of a state has made the whole process more challenging and onerous. In doing so, insufficient focus by the adjudicators on the procedural and technicalities of adjudication process- especially technicalities of dealing with evidence- will jeopardize the sacred aim of the process. The litigant's view on the findings will be affected negatively which will ultimately undermine the predictability of

[53] Not only the executive decision; even some laws promulgated by Parliament may be challenged it WTO dispute settlement system.

the rule based multilateral trading system.

Procedural rules ensure efficiency and equity of adjudication. Simultaneously, free and fair play of the parties is also guided by procedural matters. More importantly, it gives a supervisory tool to ensure the right and obligation of the parties. So, probative and prohibitive value of justice depends largely on procedural laws. On this matter the ruling of the AB is pertinent which goes 'the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade dispute.'[54]

WTO introduced a dispute settlement system which has wider ramification and complexity. It has to deal with economic question like substitutability and complementary feature of goods, econometric issues of cause and effect of measures, accounting questions like valuation of goods, calculation of subsidy related issues, anti-dumping and counter-veiling duty determination. Other sensitive issues like environment, safeguards, health protection also has made the process a sensitive one. All these have a constant ethical compulsion on the adjudicators. So well designed elaborate procedural laws categorizing evidentiary laws are precondition for the dispute settlement system. The issue is further felt to be sensitive because the mechanism has the automatic adoption process of the Panel and AB report. Any error of law would be hampering the credibility of the process.

Law of evidence is one of the important branches of laws required in a court procedure because it has pivotal toll in determination of any dispute. Law of evidence directs the parties as what are the materials, facts & information (hereinafter called evidence) to be brought to press home the demand made in complaints, how to bring those materials,

[54], US-FSC, AB Report ,para 166.

facts & information, who is to bring these evidence in which manner/procedure and under what compulsion & limitation as well as with what effect. Law of Evidence being branch of Adjective Law solve three questions – what, how and who.

For the very complex nature of international trade dispute when parties fail to come to agreement on factual basis, the law of evidence provides the beacon to the Panel and AB to determine a case. Law of evidence finally paves the way for effective, efficient and objective enforcement of substantive laws of WTO jurisprudence. Virtually, the legitimacy of decisions of the Panel and the AB as well as the effectiveness of dispute settlement mechanism of WTO largely depends on the settlement of complex set of evidentiary rules by the adjudicators. There is widespread criticism that the Panels address the evidence in the most informal way. May be international law is liberal on this issue, but the multiplicity of issues infesting world trade calls for more attention of dispute settlement mechanism of WTO on evidentiary matters of trade related inter-state disputes.

4.2. Importance of Evidentiary Law in WTO

WTO dispute settlement system address the inter-state dispute having the onerous and visionary job of fact finding in an objective manner. In this fact finding mission evidentiary laws/rules play the role of pioneer as issues relating to evidence gained much importance and significance in settlement of international dispute. For WTO dispute settlement mechanism evidentiary law is more important than international criminal court. Because, it deals with political as well as economic interest of a sovereign body politic.

Legitimacy and effectiveness of dispute settlement mechanism of WTO also oscillate around- to a large extent- how the adjudicators deal with evidentiary issues. Mishandling of evidentiary issues will lead to misjudgment which will consequently discourage the

member states to come to the WTO dispute settlement mechanism. The far reaching effect is the disruption, if not demolition, of the predictability of the world trading system. For enforcement of the substantive laws of WTO the auxiliary role of evidentiary rule has got paradigm shift to pivotal role as because subject matter scope of trade dispute has widened as well as become complicated further by comprehensive set of rights and obligations of the parties.

4.3. Evolution of Evidentiary Laws - From GATT to WTO

Dispute settlement mechanism under WRO regime has got a paradigm shift from the dispute settlement system of GATT. One may reasoned that during GATT trade disputes were only all about trade in goods. Obviously there are other reasons. The legal perspectives and imperatives of dispute resolution mechanism in GATT was quiet absent. Amicable settlement to reap a political consensus was the *prima donna*. The Panels did not face complex evidentiary matters due to the reality that most disputes before Panels did not unravel ramification of issues related to proof. After 1994 the world trade scenario has changed outright. Visible & invisible, tangible & intangible, physical & intellectual as well as from low-profile to high-profile goods and services have been subjected to the dispute settlement mechanism.

The decisions of the Panel and AB become obligatory for the parties to a dispute after adoption by the DSB. However, Member not a party to the said dispute is not under any legal binding of any decision of the system. Nor subsequent cases are under binding interpretations of previous cases. Nonetheless, the Panel and AB are at liberty to rely on reasoning of the past reference. In fact, though the WTO regime is not precedence base, the Panel and AB try to adhere to the interpretations established by precedents. But un-adopted report has no legal status either for the Panel or AB. In its report on Argentina –

Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items the AB criticized the Panel for relying heavily on past GATT practice saying that –" in our report in Japan- Taxes on Alcoholic Beverages, we agreed with the Panel that 'un-adopted' panel reports have no legal status in the GATT or WTO system …., although we believe that a panel could nevertheless find useful guidance in the reasoning of an un-adopted panel report that it considered to be relevant."[55]

WTO members by signing the Marrakesh Agreement Establishing the World Trade Organization have captivated them to a more legalistic and formal rule based codified dispute settlement system that was not evident during GATT era. Trade rules under WTO are deepened and broad based. The measures at issues before the Panel, that is the subject-matters of dispute have emerged to be complex and diversified that necessitates the Panel to pay exert exhaustive attention to contentious facts and adduced evidence. Nonetheless, DSU containing the formal set of rules and procedures are not complete whole to cover all issues relating to the evidence. Hence the adjudicators shoulder more responsibility to address the complex issues of evidence to maintain the predictability of world trade. Here it is important to note that the AB- in absence of complete set of law of evidence- plays the role of doyen to constitutionalize different evidentiary issues not touched upon by WTO jurisprudence.

4.4. Sources of Law of Evidence for Dispute Settlement Mechanism of WTO

The sources of evidentiary laws for dispute settlement mechanism may be discussed from the view point of primary sources, secondary sources and tertiary sources. Being constitutional law, Understanding on Rules and Procedures Governing the Settlement of Disputes and the covered agreements can be enumerated as primary sources. The

[55] WT/DS56/R, AB Report on 11 March 1998.

understanding is also called the DSU which is the brain-child of the WTO legislators. This common understanding is supposed to be all inclusive, coordinated and explicit. But interestingly, like other international laws DSU lacks technical and procedural details about evidentiary matters. Numbers of covered agreements have some specific rules on different aspects of evidentiary matters. The problem is that these specific rules have no generic value; rather these are issue specific. However, some covered agreements have expressed obligation on certain issues of evidence. These are discussed below;

[I] Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade 1994 or Anti-dumping Agreement. The obligations under this agreement are;

a)Article 3.4- Impact assessment of dumping shall include all relevant economic factors and indices having bearing on the state of the industry.

b) Article 3.5- Causal relationship between dumping and injury shall be based on an examination of all relevant evidence before the authority including other known factors than imports causing injury.

c) Article 3.7-Threat of material injury is to be determined based on facts and merely on allegation, conjecture or remote possibility.

d) Article 10.7- Deals with the sufficiency of evidence.

e) Annex II- para 1- The investigating authority can rely on facts available if the information is not supplied within reasonable time.

f) Annex II- para 3 – Requires that during determination are made, verifiable, appropriately submitted, timely supplied shall be taken into account.

g)Annex II- para 5- If the information providing party makes best endeavor, investigating authority cannot disregard the information not ideal in all respect .

h) Annex II- para 6- Supplying party should be informed forthwith of reasons therefore and be given an opportunity to supply other evidence if the prior information is not

accepted.

[II]Agreement on Subsidies and Countervailing Measures-

Article 4.2- Requested for consultation should be supported by statement of available evidence on existence and nature of subsidy.

Article 11- Application by domestic industry for investigation shall

includes sufficient evidence on subsidy , injury and causal link.

Article 12- It details evidentiary matters on countervailing duty.

Annex V- Laid down the procedures for developing information

concerning serious prejudice.

[III] Agreement on Safeguards: a) Article 4:2:a- In investigation all

relevant factors of an objective and quantifiable nature must be evaluated.

b) Article 3:1- Application of safeguard measure must be in the public interest and a report on findings and reasoned conclusions made on all pertinent issues of fact and law shall be published.

c) Article 4:1:b – Determination of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

d) Article 4:2:b – Causal link between injury and increased import must be based on objective evidence.

Apart from the above three notable covered agreements, other agreements like Agreement on Custom Valuation, Agreement on Sanitary and Phytosanitary Measures, Agreement on Pre-shipment Inspection and Agreement on Textile and Clothing incorporated some obligations concerning evidentiary matters. The gap in WTO jurisprudence regarding different issues of is the potential source of moral hazard problem when grey area is eminent. Inherent power of the court deemed to a tentative solution. One may raise the

question whether inherent power of the court could be given the same status of constitutional laws. But there is no denial to the fact that inherent power is complementing the constitutional laws. Inherent power is exercised if and only when it is necessary for exercising jurisdiction of the court provided that such exercise of power does not antagonize the object and purpose of the treaty establishing the said court. In international law the practice developed by a court under the doctrine of inherent power is transferred to another court with similar jurisdiction. Generally accepted principles and customary international laws are another main two significant sources for international law on evidence.

As far as secondary source is concerned, judge-made laws are also recognized in WTO jurisprudence. Article 17(9) of the DSU has empowered the AB to develop working procedure. In addition case law emanates through decisions of the Panel & AB are also vital source in WTO dispute settlement mechanism. The AB bridges the gap/lacuna created by or in-built in WTO jurisprudence on evidentiary issues and thus constitutionalize the same. From critical viewpoint, there is danger of filling the gap by case law. Over-exercise of case law gradually and slowly makes the main law incomplete. In such a case, judges raise them to the role of legislators leaving a chance of judicial activism. It invites co-ordination problems for the future thus constraining future decisions due to inconsistency in explanation.

CHAPTER FIVE

5. Evidentiary Matters & WTO Court Proceedings

5.1. Prima Face Evidence and Burden of Evidence

Prima face evidence may be defined as evidence sufficient to deduce a reasonable belief regarding the truthfulness of the claim in a dispute provided that no counter evidence is adduced. In common law system, once the *prima face* case is made the complainant is relieved of providing further evidence. This means that he/she has discharged the burden of evidence and enough is done in favor of his/her claim. The opponent party bears the risk of being given adverse judgment if he/she fails to produce any/ some rebuttal evidence. Making *prima face* case off course and does not necessarily bring an end to the dispute simply as because discharging burden of evidence is not akin to discharging burden of proof.

As far as *prima face* issue is concerned, the doctrine of WTO dispute settlement system is that burden of proof as well as burden of evidence shift to the other party. In WTO jurisprudence once a *prima face* case is established and the opponent produce some rebuttal evidence the Panel has to examine all available evidence as a whole. That is, fragmentation or choose & pick of evidence is highly disregarded if not prohibited. Totality of evidence is a corollary in the Panel proceeding of WTO.

5.2. Burden of Evidence vis a vis Rule of Collaboration

Adjudicators of dispute settlement system of WTO base their decision on all available evidence rather than on best available evidence. No doubt the dispute settlement system of WTO is participatory one and the adjudicators have the responsibility of objective assessment of fact. More so, WTO jurisprudence allows flexibility in producing evidence,

mode of evidence and means of making submission. All these flexibilities are meant for sustaining the security and predictability of world trading system. While the Panel assumes the onerous responsibility, the parties to the dispute are not enjoying *laissez faire* on the issue of providing the Panel with all the relevant facts and evidence on the disputed issue. This entails the duty of collaboration to unravel the truth which eventually helps both the parties. This rule of collaboration does not however free the parties from discharging the burden of evidence and burden of proof.

The obligation of collaboration is reinforced in Argentina-Textile obliging that the parties to the dispute are duty bound to collaborate in providing the Panel with evidence and facts kept in sole possession of such party. Argentina's refusal to produce documents requested by USA led the Panel make an observation that parties in an international dispute have a duty to "collaborate" in terms of providing evidences that are in sole possession of either party as there is "no discovery system in international proceedings".[56] Such sort of refusal results in panel's discretion to draw adverse inference against party so refusing.[57&58]

5.3. Discovery of Evidence and Panel's Right to Seek Information

Broad, comprehensive and discretionary right is conferred on the Panel in Article 13 of the DSU to seek information and technical advice from any individual or body which it seems proper and just. To examine factual issues relating to scientific or other technical matters raised by any party advisory report from an expert review group may be sought by the Panel. Appendix 4 of the DSU goes on details empowering the Panel as to selection of independent experts, setting terms of reference for the expert and the manner

[56] Argentina-Textile,Panel Report. Para 6.40 of
[57] Related case- Canada-Aircraft. Moreover DSU Article 3.10 also related
[58], WT/DS70/AB/R, AB Report,p aras 202 et seq.

by which the opinions will be handed over to the parties.

Article 13.1 allows an unconditional right to the Panel to obtain information from parties to a dispute. This right is important in international dispute settlement process because there no 'discovery system in international proceedings'. It means that, probably all international system of dispute resolution including WTO lacks the authority to collect evidence by act of policing. Similarly, WTO has no investigation mechanism or investigating authority. Hence, making request for information can serve the purpose of collecting evidence indirectly. This right of the Panel is reinforced by the provision laid down in third sentence of the Article 13.1 which goes on as 'A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.' The AB ruling has furthered this right imparting legal obligation on the parties to provide the information sought for by the Panel.[59] Non-compliance by a party of the request means non collaboration and such refusal to submit information results in obvious negative/adverse inference by the Panel.[60] In fact, the Panel has high latitude to interpret the factual matter to the disfavor of the very non-cooperating Member.

5.4. Relevancy of Evidence and the Panel's Stance

It is discussed time and again that the Panel has wider range of authority to seek information from any sources. Similarly, the Panel is at liberty to fix up the need for evidence and advice in specific case. This authority is stretched to deciding the relevancy of evidences. In the practice of dispute settlement system of WTO, this general rule is developed and so far the parties are not objecting to this *de facto* authority of the Panel. The Panel's broad discretion on determining the relevancy of evidence, admitting

[59] Canada- Aircraft, The AB Report, para 188 & 189
[60] Id, para 198-203

evidence and arguments is dispute specific. In *US- Shirts and Blouses* the AB found that the Panel can consider any type of evidence.[61] Here again we see *ad hocism.* But this *ad-hocism* is well established in WTO jurisprudence. But court's discretion on this issue has in-built limitation. First off all this may cause ignorant biasness among the adjudicators. Secondly, adjudicators from different law system may be in trouble in fixing, determining relevancy and admitting evidence. Needless to say, there is no domestic law lacking clear cut laws on relevancy of evidence and admission of evidence.

The relevancy of evidence even not limited to the *prima face* of a case. Here comes the question of exclusion of evidence. In EC-Bed Linen the Panel did not exclude the evidence brought from consultation based on the argument that the evidences were unnecessary or irrelevant. The Panel opined that evidence from consultations is at best unnecessary and might be irrelevant. In fact, the Panel opted not to over-step the legitimate right of the party on adducing evidence in the pretext of irrelevancy of evidence.

5.5. Confidentiality of Evidence

While discussing evidentiary aspect, issues related to confidentiality is very much common as well in dispute settlement process of WTO. As per Article 14.1 and 17.10 both the Panel and Appellate Board process themselves confidential. So it makes sense that the information supplied to this process is also confidential as well. Article 13.1 provisioned that confidential information provided to the Panel shall not be made public without prior permission of supplying authority. Similarly written submission submitted to the process, Panel's deliberation and documents submitted to Panel and information provided to/by the Expert Review Group are confidential. At the end of both the

[61] The AB's finding was referred by the Panel in US-Shrimp, para 7.14

processes arguments made by parties and reasoning of the Panel are subject to disclosure in the form of reports, except information termed as secret or confidential by the supplier country. In fact, while the decision of a particular case has no binding effect on other members (members not party to the very case); so they have no moral right to step into the secrecy of contesting parities.

5.6. Remand System and Evidentiary Issues

WTO jurisprudence does not allow the AB to send back certain cases to the Panel for conducting retrial for insufficient findings by Panel. It has two conflicting aspects. On the one hand, it is time-saving while on the other hand chance is there that some issues might remain unresolved because of insufficient factual findings by Panel. However there are other pros and cons of the remand authority. The remand issue is more important because as per 17.14 of the DSU the report of the AB will be adopted by the DSB automatically unless DSB decides unanimously otherwise. So, time has come to reconsider this issue.

In absence of remand authority the AB in the name of 'completing the analysis' will bridge the missing gap left out by the Panel. This practice has been developed by the AB *per se* over the years. It is tantamount to re-adjudication by the AB. It is not clear, why the legislators did not consider this remand power. The technique called 'completing the analysis' eventually withering out the benefit of time saving. For instance, after invocation DRAMS case continued for more than two years; but no recommendation was made by the AB. This case animated huge debate. The Panel failed to make proper analysis on evidentiary matters. Failure of the panel left the obligation for the AB to complete the legal analysis. But ironically, AB was unable to do so notwithstanding the fact that AB on many issues reversed the Panel. The case was not remanded to the Panel for further adjudication for the obvious reasons.

5.7. Circumstantial Evidence

Circumstantial evidences have to do with motive and preparation including previous and subsequent conduct or act of either party. Circumstantial evidence explains what moved or influenced the mind and whether being thus seduced any preparation was moved followed by premeditated action. While dealing with circumstantial evidence motive is significant unless evidence is cogent, clear and reliable. Circumstantial evidences are indirect evidence as these do not go directly to the facts in issue. Rather these allow inference or assumptions. Nonetheless, consistency of circumstantial evidences is enough to make a justifiable legal conclusion built on accumulation of evidence. Circumstantial evidence may be stretched from state economic/fiscal/financial policy to distant implication of the policy. For example in *US-Countervailing Duty Investigation of DRAMS* the allegations were (a)that the Government of Korea by its policy support prevented the failure of HYNIX;(b) that GOK controlled the creditors of HYNIX this way or that; (c) GOK's coercion of those creditors; and (d) a prospectus filed by two Korean banks to US Securities and Exchange Commission.[62]

Analysis of circumstantial evidences is to be done on the basis of totality of evidences. Determination of the case is to be based on the cumulative result of the evidences. AB in the said case stated above found that evidence that fell short of the required level by itself would be added with similar piece of evidence to reach accumulative total.[63]

5.8. Economic Evidence and Expert Opinion

The Panel's inalienable right to invite expert opinion is recognized by the lawmakers in the DSU. It makes sense for some economic evidence as economic determinations are now essential in today's trade dispute. Certain trade disputes need high profile specialist economic input. For example dispute having the compulsion of determining like, directly

[62] US-Countervailing Duty Investigation of DRAMS, Panel Report, paras. 7.51
[63] US-Countervailing Duty Investigation of DRAMS, AB Report, paras. 142, 143

competitive or substitute products needs expert opinion regarding price and cross elasticity of demand. Injury determination in trade protection cases as well as causality determination requires use of econometrics and partial equilibrium model. Economic assessment is needed as well in the cases on balance of payment measures. Economic assessment is to be substantiated by the economic evidences.

In trade disputes requiring economic assessment expert opinion does not necessarily always serve all the purpose of objective assessment. It virtually adds decision input for the adjudicators. To ensure the *prima face* regarding the objectiveness & un-bias of the expert evolution, the Panel must assess the economic evidences to be adduced in support of the assessment. For example, in the case titled India-Quantitative Restrictions on Imports of Agriculture, Textile and Industrial Products the Panel on its own made final economic determination side by side with the external advices.

5.9. Adducing New Evidence at Appellate Stage

It will not be exaggerated if we say that WTO regime is silent as to whether new evidence is allowed during appeal or at appellate stage. The appeal is not a *de novo* hearing and it is a usual presumption that no new evidence will be admitted at appellate stage. But situation might be different if some evidence was not admitted by the Panel and Panel erred in law on evidentiary issues.

As far as new arguments are concerned, in *Canada- Aircraft*, the AB found that 'new arguments are not *per se* excluded from the scope of appellate review, simply because they are new'.[64] Does it mean that 'new argument' in this case is truly new or can be raised for the first time? The answer is probably not. New arguments may be invited only when it has to do with the wrong reasoning of the Panel' decision/legal interpretation of

[64] Canada Aircraft, The AB report, para 211

the Panel.

5.10. Due Process vs Submission of Evidence

Perhaps, due process is thought to be the life-blood of any legal system which ensures natural justice or fairness and provides a philosophical code of conduct for both the side - law makers and judges/juries. Law makers are closely concerned with substantive due process which deals with the fairness in law making process and law itself. And adjudicatory body is inseparably linked with procedural due process which addresses the issue of how reasonably and fairly the decision is evolved. For adjudicatory body the principal of due process tends to be more important as because absence of due process in law making may be corrected by judicial review being the last resort. But mistake in adjudicatory body has dire consequence, particularly on losing party.

Due process in international legal system is extended or forwarded from domestic law. It has three facets- bias rule, hearing rule and no evidence rule. The core of 'bias rule' is the maxim *nemo debet esse judex* in *roperia sua causa* which means that no one can be a judge in his own cause. It necessitates that, decision making process should not leave any scope for a fair-minded people suspect or apprehend a bias in it. The 'hearing rule' emanates from the maxim *audi alteram partem* which means to hear the party in opposition. It imposed a compulsion to give reasonable and adequate notice of trial, allowing representation during hearing and ensuring access to the adverse materials. The 'no evidence rule' deals with the rationale behind the decision itself. A decision must be fairly well-founded based on logically probative evidence and examination of all relevant aspects of facts and law, supported by adequate reasons and free from internal contradictions.

The fundamental of the due process is evolved from the requirements laid down in Article

11 of DSU which says *inter alia*

''…Accordingly, a Panel should make an objective assessment of the matter before it…. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.''[65]

Article 13 empowers the Panels the right to seek information and technical advice from any body or individual which it think proper. This article allows the Panel as well to seek information from any relevant sources and consult experts to obtain their opinion on certain aspects of the matter. By observing meticulously, it is found that to some extent a part of due process; that is the hearing rule is barred in DSU. This is clear from the labyrinth created from terms of reference, request for consultation and request for establishing panel is a major obstacle in ensuring hearing rule of due process. Interestingly, though the DSU empowers the panel to invite evidence, it is not clear when and in which manner the evidences will be collected. It is also not crystal clear whether the evidence collected by the Panel per se are subject to the concerned parties' observations. In absence of such clear cut rules regarding it the chance of shattering the maxim of hearing rule of due process might be in jeopardy. The Panel as well as the AB is supposed to be animated meticulously on this issue.

While discussing the evidence related matters the issue of weighing or testing the veracity of evidence comes forward. It is tough job for the Panel to weigh or judge the veracity of evidence specially coming in the form of the submission of the contested parties, expert opinions or materials presented by non-state actors like NGOs.

Keeping in mind the shortcomings of the DSU regarding testing the veracity of evidence, right to adduce evidence and similar other issues, let us see how the three issues of due process are addressed in DSU while dealing with evidences.

[65] Article 11 of the DSU under the title 'Function of Panel' prescribed some mandatory tasks for the Panel while discharging its duty of assisting DSB. Any omission or error on these issues by the Panel would lead to a definite appeal.

Bias Rule in DSU: The issue of bias rule is addressed in DSU in the following manner:

Article 18.1 – Prohibits *ex- parte* communication with adjudicatory body;

Paragraph 10 of the Panel Working Procedure – Representations, rebuttals and statements are to be done in presence of the opposite parties.

On top of these, Rules of Conduct for the Understanding on Rules and

Hearing Rule in DSU: The issue of hearing rule is addressed in the following manner in DSU;

Article 12.6 and 15.1 – Written submissions to the Panel;

Article 7 – Terms of Reference;

Rule 20(2)(d) of Working Procedures for Appellate Review – Errors of the Panel must be made clear in the notice of Appeal;

Rule 21 of Working Procedures for Appellate Review – Appellant must support its standing by arguments in written form.

Article 15 of DSU, Rules 21,22 and 27 of Working Procedures for Appellate Review – Opportunity of the parties to make comment, written submission as well as oral submission- where applicable- on the Panel and the AB's draft report;

Besides case laws also provides such rule for hearing which comprises opportunity to be heard, opportunity to represent at hearing and opportunity to respond to adverse evidence.

No Evidence Rule in DSU: The issue of no evidence rule is addressed in the following way:

Article 12.7 of DSU:- Findings and recommendation of the Panel to be based on basic rationale and the report of the Panel shall set out the finding of facts and the applicability of relevant provisions.

Article 17.12 of DSU:- The AB shall address each of the contended issues covered in the

Panel report and legal interpretation developed by the Panel.

5.11. Rules on Burden of Proof

Burden of proof being procedural concept is a tool for the judge to assign the duty to prove factual claim. Needless to say, burden of proof is not at all relevant for legal issues or legal interpretation. Probably all jurisprudence – be it international or domestic- have the common cannon that a party asserting a fact must provide proof thereof. In other words, burden of proof or evidentiary responsibility goes with the party seeking any remedy, demanding any defense or exceptions and/or claiming any right. This universally accepted principal is also followed in WTO dispute settlement system and it seems that, for this reason DSU does not have any explicit provision regarding this. In *United States Woven Blouse and Shirts* the AB ruled that;

'…a generally accepted cannon of evidence in civil law, common law and in fact, of most jurisdictions, that the burden of proof rest upon the party, whether complainant or defending, who asserts the affirmative of a particular claim or defense.'[66]

Thus, the burden of proof may be either on the complaining or defending party. Burden of proof is the base for assessing or weighing the evidence. The party having the burden of proof should adduce evidences to establish the *prima face* of a complaint. Once the *prima face* is made, the responding party has the onus to disprove the complaining party's claim.

So, the burden of proof under WTO is a two tier process

Keeping the generally accepted principal of burden of proof as it is, some covered agreements also pointed out as to who bears the burden. For example, Article 10.3 of the Agreement on Agriculture states as:

''Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of export in question.''

Similarly, Agreement on Sanitary and Phytosanitary Measures placed the burden on

[66] WT/DS33/AB/R para 14

exporting country to show that its export qualifies importing countries sanitary and phytosanitary standards.[67] GATT Article XXIV placed the burden on the respondent to show that formation of custom union would otherwise prevented in absence of measures at issues.[68] Under *Agreement on Subsidies and Countervailing Measures* the claimant country has the burden of proof to show that the developing country fails to comply with the provisions of Article 27 of the same.

The style of burden of proof in WTO dispute settlement system is much akin to inquisitorial system where written submission is predominating form of presenting evidence and deposition. Though the style of burden of proof in WTO is a combination of written submission, answer to written question and oral presentation, the oral deposition has secondary to the written submission. In fact, the *prima face* of a case is made on the written-work/paper-book.

5.12. Rules on Standard of Review

Standard of review of the panel process are equally important in WTO dispute settlement system inasmuch as Panels are reviewing the laws, regulations or measures of a sovereign political body. In domestic jurisprudence standard of review shows the distribution /division/ separation of power between judiciary and law-makers including bureaucracy. But in WTO dispute settlement system a question always comes in mind as to supremacy or subordination between WTO regime and domestic legislation.

Standard of review indicates the answer to the question that to what extent or with what depth or intensity a Panel can review the Member's laws to adjudicate the compliance of domestic regulations *vis- a- vis* WTO regime. Simultaneously, it delineates the degree of respect to be shown to Member's sovereignty by the Panel. Under WTO dispute

[67] Article 4.1 and 6.3 of Agreement on Sanitary and Phytosanitary Measures.
[68] Turkey – Restrictions on Imports of Textile and Clothing Products, AB Report.

settlement system it is inherent that standard of review is mostly specific to WTO agreement and particular fact/circumstances. However in general, Article 11 of the DSU gives a broad guideline in this regard;

'…Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of facts of the case and the applicability of and conformity with the relevant covered agreements….'

In *EC-Hormones* the AB opined that the provisions laid down in the Article 3.2 and 11 of the DSU will be applicable in case any covered agreement does not have specific standard of review.[69] The jargon 'objective assessment' is the buzzword for standard of review. It is neither *de novo* review, nor total deference.[70] Regarding factual determination the jurisprudence come out of the case *US-Cotton Yarn* is a helpful summary of standard of review.[71] According to the finding of the case, standard of review of facts is of two fold. First the Panel must assess whether competent authority of the Member examined all relevant facts and second, whether an adequate explanation is given for the facts in support of the determination.[72]

On the other hand standard of review of WTO law seems to be less difficult. Usually it is *de novo* standard. Perspective of Vienna Convention is a ready guideline towards this end. Side by side, giving adequate/just deference to the Member's own factual findings or interpretation of legal aspect, specially interpretation of domestic legislation, is also a generally accepted practice. However, generally intrusive review-standard does not entails any accurate/exact yardstick or appropriate methods of interpretation. Hence, proper interpretation of WTO regime is crucial and debatable issue in most disputes. In *Argentina-Footwear (EC)* the AB found the standard of review of WTO regime as;

'In addition to "an objective assessment of the facts", we note too, that part of the "objective assessment of the matter" required of the panel by Article 11 of the DSU is an

[69] EC-Hormones, AB Report, para 116
[70] Id, para 117.
[71] US-Cotton Yarn, AB Report, para 74
[72] id

assessment of "the applicability of and conformity with the relevant covered agreements". Consequently, we must also examine whether the Panel correctly interpreted and applied the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguard*.'[73]

Here the compulsion imposed to the Panel is making 'correct interpretation' of the WTO provisions in question. Rather than allowing deference to the interpretation made by Member on WTO laws, emphasis is put on allowing *de novo* interpretation by the disputed parties. In fine, for both the Panel and the AB *de novo* standard of review of WTO regime is recognized widely.

Apart from the general standard some covered agreements have in-built special standard. For instance, Article 17.6 of Anti-Dumping Agreement (ADA) adduced the issue both for factual and legal aspect. For factual determination the said Article put forward the standard for Panel to judge whether the authorities' establishment of facts was proper and whether unbiased and objective evaluation of those facts was done. For legal issues, it is emphasized that interpretation of relevant provisions of the ADA shall be made keeping conformity with customary rules of interpretation of public international law. In case where more than one permissible interpretation are allowed in ADA, the onus of the Panel is to examine the measures to be inconformity with the ADA if the same is subject to one of those permissible interpretations.

Article 11 of the DSU, Article 17.6 of the ADA and the review by the AB provides an appropriate and well-founded standard of review for the Panel. But for the AB the standard of review seems not to be same as the Panel. Because, the AB is not concerned with factual issues of a dispute In this regard the AB depends on its own reasoning and interpretation. The jurisdiction of the AB is wider here.

[73] Argentina – Footwear (EC), The AB Report, para122

5.13. Standard of Proof

National criminal justice system put the responsibility on the party pressing for or asserting a claim to prove the asserted claim beyond any reasonable doubt. However, fixing the standard of proof is a great challenge for many international courts. The ICJ follows the default rule of "clear and convincing evidence". Interestingly, WTO dispute settlement system observes some sort of detachment from other international courts. The different means in-built in WTO jurisprudence is that, at first, the complaining party has to establish the *prima face* case and once the *prima face* is established the presumption goes in favor of its claim. Then the floor is open for the opposite party to rebut this presumption. Nonetheless, the rout is not that much smooth for the Panel as there is no categorical rule for standard of proof to establish the *prima face* and to determine as to the type and amount of evidence to make a presumption of truth. In such situation, 'preponderance of evidence' or 'balance of evidence' is the operational toll for the adjudicators.

5.14. Probative Value of Evidence

Assessment of evidence by the international courts is neither subjected to strict procedure nor governed by formal rules. Neutrality and reliability are the two main components of a particular evidence to measure its influence in proving a fact. In fact, in absence of scientific or economic yardstick, parameters to determine the probative value of each & every evidence have been developed through yearlong practice in international courts. WTO dispute settlement system is not an exception to this. The adjudicators of the Panel have to consider all available evidence. But the Panel has the discretion as to assign the probative value to the individual piece of evidence produced by the contesting parties.

Here it is worthwhile to discuss the probative value of evidence collected by the experts

who are appointed by the Panel *per se*. By appointing expert, the Panel virtually evolves as inquisitor and it is arguable to note that the Panel will certainly own experts opinion and may assign high probative value to it. This will, off course, change the composition of the evidences. In fact, the inquisitorial role of the Panel in the guise of seeking information may seduce the Panel to be selective regarding evidence and this chance to pick and choose evidence is a potential field of distortion of evidence that may seduce potential for affecting the objective assessment. Against the backdrop of two set of evidence - one set coming from the parties while other is coming from the experts appointed by the Panel - the adjudicators have definite role to prevent the chance of distortion of evidence. One possible way is not to give the expert opinion much breathing space. Rather filtering the opinion and allowing the parties to raise their opinion could be a tentative solution to ensure participator dispute settlement.

Discussion on probative value of evidence also calls for mode of presentation of evidence. In Argentina- *Measures Affecting Imports of Footwear, Textiles, Apparels and Other Items'* the panel found that submission of copies of custom documents instead of original did not affect the probative value of evidence.[74]

5.15. Evaluation of Evidences

International legal jurisprudence knowingly or inadvertently allows by tradition much discretion for the judges in evaluating and assessing the probative value of evidence. But nowadays, situation is different. The courts are now more cautious and sensitive as to the base of reasoning of their decision though there is no agreed upon formal rules to ascribe particular weight/value to a particular piece of evidence. WTO jurisprudence as well did not provide any constitutional mechanism for evaluation of evidence. Hence, judges have

[74] Argentina- Measures Affecting Imports of Footwear, Textiles, Apparels and Other Items Panel Report, Para 6.58

to depend on the secondary procedural laws developed mostly by the AB.

Article 11 of the DSU provides only review standard mandating, *inter alia*, that the Panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case……" This standard is very general and subjective in nature. It seems that the Panel has much authority to make a value judgment on the standard set by the DSU. But, the Panel cannot make any *de novo* investigation. In US-Countervailing Duty Investigation of DRAMS case the AB found that, a Panel acts 'as a reviewer of agency action, rather than as an initial trier of fact".[75] Other instruments for evaluation of evidences are concept of totality, accuracy & reliability and supportive features of evidence towards inference/presumptions.

5.16. Presentation of Evidence

Like any other judicial system the measure at issue in dispute settlement system of DSU is mostly determining the production, admissibility and sufficiency of evidence. If the dispute is all about violation of WTO laws, the measure at issue is simply the legislative provisions. Here mere production of the copy of the laws/regulations initiated by the respondent Member constitutes the admissible and sufficient evidence which is nothing but documentary in nature. But if the dispute is fact-sensitive, situation is more complex and delicate for the matters related to 'factual evidence' and 'rebuttal evidence'. The main reason is that, WTO jurisprudence does not have substantial body of rules outlining admissibility, submission, weight and sufficiency of evidence. In the absence of categorical technical rules concerning evidence, it seems that the parties as well as the Panels are enjoying latitude to a great extent. This sort of flexibility is present in other international courts like International Court of Justice simply because harmonized

[75] US-Countervailing Duty Investigation of DRAMS, AB Report, para.188.s

international evidence law is yet to be promulgated in international legal system. Harmonization of technical issues of evidentiary rules is relevant also because in international court/tribunal as well adjudication depends on assumption, presumption, induction, deduction and inference. WTO jurisprudence as well admitted the flexibility in Article 12.2 of the DSU allowing panel procedure to provide sufficient flexibility to ensure high quality panel report without unduly delaying panel process.

The lacuna regarding codified evidentiary rules results in discretionary power to the adjudicatory body and parties to the trade dispute are *in limbo* to best serve their claims and objectives. This happens because *adversarial* and *inquisitorial* model of trial deal with evidentiary issues quite differently. Common law system weigh evidence taking into consideration the *prejudicial* value and *probative* value and parties cannot be selective on relevancy of evidence. Under civil law system parties are enjoying latitude as to the relevancy of evidence and court play more instructive role in presentation of evidence. But WTO literature is not clear which system the Panels will follow. Further complexity arises when parties are from two different family of legal system. For example, in *Argentina - Measures Affecting Imports of Footwear, Textiles Apparels and Other Items* Argentina raised objection on accepting copy of certain documents instead of originals. But the Panel ruled that submission of copies of original documents did not affect the probative value of evidence.[76]

5.17. Means of Evidence and Deposition

Like other international procedural jurisprudence DSU also lacks of all exhaustive list of means of evidence. Among the different means of evidence documentary evidence, of course predominates in WTO dispute settlement system. Simultaneously, there is no hierarchy of different evidences. Rather, the adjudicators judge the evidentiary value of

[76] WT/DS56/R, The Panel Report, para 6.58

each & every evidence. Any type of evidence- it direct or indirect, documentary or oral, primary or secondary – can play a crucial role in determining a case. Like domestic legal system neither DSU, nor the Panel or the AB requires anybody representing the state to give testimony as the documents produced by them are subject scrutiny by the adjudicators. Even the expert opinion of independent body like NOGs is subject to evaluation by the Panel. However, *amicus curiae* brief, to some extent, has more legal footings in WTO dispute settlement mechanism when the adjudicators face the questions of legal interpretation of factual or legal information.

Inspection by the adjudicators themselves to discover evidences is not exercised in WTO dispute settlement system. However, court can get it done by the independent body in the form of expert opinion which is legalized by the Article 12.1. But this mechanism is extremely limited to scientific issues or issues related to econometrics led economic evidence. Written witness statement or affidavit is also not in use, although DSU is silent on using this.

5.18. Time Limit for Submission of Evidence

It is not exaggerated to say that there is no strict deadline for submission of evidence. Either the Article 12 of the DSU outlining panel procedure or Working Procedure for the Panels prescribes no defined sunset rule regarding time limit for production of evidence. *Working Procedures for Panels (WPP)*[77] requires *factual evidence* to be submitted before the 1st substantive meeting of the Panel and *rebuttal evidence* to be submitted in 2nd substantive meeting. In *Argentina- Measures Affecting Imports of Footwear, Textiles Apparels and Other Items* the Panel allowed USA to submit some evidence 2 days before the 2nd substantive meeting and granted Argentina only 14 days to respond. The AB ruled that *Working Procedures for Panels* does not have any strict deadlines for submission of

[77] Appendix 3 of DSU, Paragraph 4,5 & 7

evidence.[78]

Similar story was replicated in the case of Australia – Measures Affecting the Importation of Salmon. The case had the issue of belated production of evidence after the last meeting of the Panel. The debate was furthered animated as the Panel did not go by its own deadline for submission of evidence. Furthermore, the belated evidences were not excluded as well. The AB reinforced the flexibility of the Panel as to the time limit for submission of evidence to bring forth high quality reports.

In the wake of *legal limbo* created for the absence of technical rules on evidentiary matters in WTO system, principals and practices of public international law can show the way. The widely accepted principal is allowing discretionary power to the adjudicators and the values and rules emerged from the practice of such discretionary power. The ethical standard for the adjudicators for such discretionary practice is obviously the principal of 'due process'. In *Argentina- Measures Affecting Imports of Footwear, Textiles Apparels and Other Items* the Panel found, in part, that:-

"We note that the rules of procedures of the panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that 'due process' is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible…."[79]

The due process problem arising out of belated and new evidence was addressed by the AB in the Salmon case right way. The AB found that, in the absence of defined rules on production of evidence, the due process must nevertheless be observed. Here it is interesting to note that ICJ is also very lenient on the issue of new evidence and arguments and the court is at liberty to allow the opposite party reaction time for the belated and newly produced evidences.

[78] WT/DS56/R, The Appellate Body Report, para 77-81.
[79] WT/DS56/R, The Panel Report, para 6.55

Another standard for the Panel is the 'responsibility to make the objective assessment of the matter and facts' as laid down in the Article 11 of the DSU. In *Korea – Taxes on Alcoholic Beverage* the AB endorsed the discretionary power of the Panel regarding the examination and weighing of evidence as the trier of facts and found that a panel's discretion in this regard "is not, of course, unlimited." In line with its findings in *EC – Hormones,* the Body further ruled that such discretion is always subject to, and is circumscribed by, *inter alia* ,the Panel's duty to ensure an objective assessment of the matter under Article 11 of the DSU.[80]

5.19. Responsibility of the Parties as to Production of Evidence

International laws are promulgated on the basis of consensus among the nation states. This consensus results in principal of co-operation and good-faith. This good-faith and co-operation are useful principals for evidentiary matters as well in international adjudication system. The non-cooperation gives the opportunity for making adverse inference. More so, though the Panel has the right to seek information under the Article 13 of the DSU, the Panel cannot force or compel any party to provide information. In *Argentina- Measures Affecting Imports of Footwear, Textiles Apparels and Other Items*, Argentina's refusal to produce documents requested by USA led the Panel make an observation that parties in an international dispute have the duty to collaborate in providing evidences that are in sole possession of either party as there is no discovery system in international proceedings**.**[81] Such refusal results in Panel's discretion to draw adverse inference against party so refusing**.**[82] Apart from this *de facto* adverse inference, another option is opened for panel which is 'facts available' or 'best available information' principal. The Panel can depend on facts available in making its fact-finding.

[80] WT/DS75,84/AB/R, The AB Report, para 159-162
[81] WT/DS56/R, The Panel Report, para 6.40
[82] Related Case- Canada - aircraft

Among the facts available information, newspaper article and media reports can be used.

The principal of good faith among the Members in WTO system is recognized in the Article 3.10 of the DSU. The corollary that Members will act in good-faith reduced the necessity of technical rules for evidentiary matters. The very maxim of good-faith imparted a responsibility on the Members to act reasonably and responsibly as well. Hence the question of authenticity of evidence is not a debatable issue in WTO dispute settlement system.

5.20. Sufficiency of Evidence

It is obvious that, the Panel is at liberty in admitting and evaluating the evidence. Such liberty raises the question regarding sufficiency of evidence. In other words, it is big ask as to how much evidences are needed to establish a *prima face case.* In *Argentina-Measures Affecting Imports of Footwear, Textiles Apparels and Other Item* United States produced evidence on only 118 tariff categories out of alleged 940 tariff categories. That is, out of 940 tariff lines, Argentina collected excess duties in case of 118 tariff lines for textile and apparel products. Argentina argued that, if the collected tariff on remaining tariff lines were examined, the overall tariff rate had not exceeded the maximum level of bound rate in Argentina's Schedule. The Panel opined that the US had adduced sufficient evidence to establish the *prima face* case as Argentina did not provide any affirmative evidence to the contrary. This finding of the Panel was upheld by the AB. The Panel is at latitude as to decide the sufficiency of evidence. In *US Shirts and Blouses*, the AB found *inter alia*, "……The Panel can reach their decision regarding a particular claim on the basis of the level of evidence which they consider sufficient.".[83]Furthermore, how much evidence is needed to reinforce the presumption is also contingent upon and will

[83] The AB's observation was referred by the Panel in US-Shrimp, para 7.14"

vary from case to case, measure to measure, provision to provision.

The case-law jurisprudence discussed above shows that, in absence of any affirmative evidence to the contrary, sufficiency of evidence can be determined basing on the reliability of information. Nonetheless, this discretion of the Panel is approximated by the fact the Panel must take into account all the available evidences to ensure objectivity of their decision.

This necessity of ensuring sufficiency of evidence does not necessarily put the Panel under compulsion to seek information or expert opinion in each dispute. Virtually, the power divulged in the Article 13 to seek information by the Panel is unconditional ant it is the right for the Panel which entails that Panel would exercise this right on its own so that it can reach an unbiased and objective decision.

5.21. Third Parties and Unsolicited evidence

Article 13 of the DSU empowers the Panel to invite information from any appropriate individual or body. Article 12.1 of the DSU allows departure from Working Procedure. Article 10.2 of the DSU prescribed that any member having a substantial interest in the matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submission to the panel. Against the backdrop of the provisions of the Article 10.2, 12.1 & 13 of DSU, one may draw a logical deduction that production of evidence by the third party not at the instance of the panel is admissible.

Interesting to note further that, whether any party having no trade interest at all may have an opportunity to produce evidences under the veil of Article 12.1 & 13 of DSU. If the Panel on its own seeks information from such party for making objective assessment the situation is different. But, what if, a stranger comes forward with very relevant

information. Say for example Country 'X' & 'Y' are contesting in a particular case and in halfway of the case an NGO comes with some information that might be necessary for objective assessment as well. This will definitely, inflict injury to the country against whom such information will go. Nonetheless, in absence of any categorized rules in DSU, lots depend on the particular circumstances and discretion of the Panel. For example, in the case titled Australia Measures Affecting Importation of Salmon and Australia Leather the Panel accepted unsolicited evidence. It seems holistic to some extent considering the noble intention of the legislator and adjudicators.

The issue of addressing uncalled for evidence is legalized by the AB as well. In the case United States- Import Prohibition of Certain Shrimp and Shrimp Products evidence was submitted by NGOs having affiliation for environment. The Panel ruled out the evidence stigmatizing it as unsolicited. The Panel's view was that Article 13 of the DSU did not make any express reference to the acceptance of such uncalled-for evidence. The AB reversed the Panel's finding and thus advocated the Panel to accept unsolicited information. Here the AB considered the Panel's right to make addition or departure from the Working Procedure of the DSU as stated in Article 12.1 of the DSU.[84]

5.22. Delayed Evidence vis a vis Adverse Inference

Article 12.2 allowed the panel process to be flexible for ensuring high quality panel report. Simultaneously this Article imposed a compulsion on the Panel to guard against unduly delaying panel process. The two issues of flexibility of panel process and unduly delaying panel process creates an antipathetic and conflicting situation for the adjudicators. However, these two issues are intertwined and inter-related, thus requiring to be read and judged inseparably. Hence, argument for absolute rule on exclusion of evidence submitted

[84] WTO Appellate Body Report, 'United States – Import of Prohibition of Certain Shrimp and Shrimp Products,' WT/DS58/R ('*Shrimp-turtle Appellate Body report'*) and WTO Panel Report, 'United States –Import Prohibition of Certain Shrimp and Shrimp Products,' WT/DS58/R ('*Shrimp-turtle Panel report*').

by the complainant after first substantive meeting is not tenable. Similarly, Panel exercises judicial restraint in making adverse inference for delayed submission of evidence. Argument in favor of exclusion of evidence and thus resulting in adverse inference may hold water when the party adopts litigation technique to delay the panel Process. Till then, in absence of any sunset rule regarding the time limit of submission of new evidence after first substantive meeting, the process is complicated if the party adduce delayed new affirmative evidence which may be required for objective assessment.

On the back of critical juncture discussed above, it is reasonable to seek prior permission by the party from the Panel for submission of new evidence after substantive meting promising a definite time frame. Again, the panel may notify a tolerable delay for submission of such new evidences and arguments. Because direct exclusion of delayed evidence may jeopardizes the neutrality of the Panel. Rather prudential guideline is more effective and well solicited.

5.23. Evidence from Consultation Stage

Article 13 of the DSU empowers the Panel to seek information from any sources it thinks appropriate. This is a grant discretionary authority given to the Panel to make an objective assessment as required in the Article 11 of the DSU. The investigative power of Article 13 together with the onerous responsibility of Article 11 allows the Panel not to exclude evidence coming from consultation. Rather information garnered during consultation may help the complaining party to focus the subject matter of the case for which it seek establishment of the Panel. More so such information provides a guideline to the Panel for examination of measure at issue.

Evidence emanating from consultation stage may adduce the debate of confidentiality. Article 4.6 states that “Consultation shall be confidential, and without prejudice to the

right of any Member in any further proceedings." But this compulsion does not necessarily impose any restriction to the Panel to exclude evidence gathered from consultation. It makes sense, as because the measure at issue discussed in the consultation stage does not change in the Panel proceeding. More over same parties are involved in the consultation and the Panel Proceeding. Just the forum is different- in fact the Panel is the result of consultation fiasco.

Another aspect to ponder on regarding evidences from consultation stage is that the Panel has to consider all available evidences for making decision, not the best available evidences. Judging the corollary of 'all available evidence' the Panel is neither in latitude to limit the facts and arguments nor to exclude evidences forward from consultation stage.

CHAPTER SIX

6. Conclusion

Dispute Settlement Understanding is the epicenter of international trade and thus the whole process of the system is supposed to be rule-based. The reality is that, conflict between the issues of state-sovereignty and establishing an international legal institution put the process in cross-road.

WTO related laws are not isolated from other trade related international laws. Conflicting or cross rights and obligations are present as well as there are other regulatory bodies and laws on trade. Inclusion of other trade related international laws as covered agreement or allowing these cross-rights and cross-obligation has become an important consideration.

As per Article 11 of DSU the buzzword before the Panel is the ′objective assessment of the matter before it′. But the liberty of the Panel is not absolute or even not enough to uphold the objectivity of trial. Though, it as widely accepted that WTO dispute settlement mechanism is more articulated and rule based, till then, there is lacuna in procedural issues involved in different phase of the mechanism.

WTO jurisprudence lacks a complete law of evidence; even a prudential guideline on this matter is absent. Some may argue that, other international courts also lack complete law on evidence. However, this argument is not tenable, inasmuch as there are very few supra-national court/tribunal where legislature passed in the parliament of a sovereign state is challenged. More so, decision of adjudicators not only affects the sovereignty, a defeat may even trigger domestic political crisis if a big industry is adversely affected.

To address the gap caused by the absence of law on evidence, inherent power- to a great

extent- is a recognized solution. Side by side, procedural rules developed by other international tribunals are also necessary and widely practiced solution to this problem for courts of similar jurisdiction. Generally accepted principles, customary international laws, supportive literature like - secondary procedural laws developed during the court proceedings over the years by judges and case laws - are also widely recognized source of international evidentiary laws. These supportive literatures on evidentiary laws are supplementing the dispute settlement mechanism of WTO. Due to multiplicity and complex nature of trade interest of the disputed states time has come to develop a law on evidence for WTO legal system.

WTO dispute settlement mechanism provides an international public good in the form of world government. Constituent substantive law of WTO may be in total jeopardy in absence of appropriate procedural law. Law on evidence is a beacon for the adjudicators seduced towards fact finding mission in an objective manner. For the contesting parties law of evidence is like a light-house. The informal/semi-formal way of handling the evidentiary issues or otherwise called *ad-hocism* is not conducive for sustainable, effective, efficient and equitable enforcement of substantive trade rules.

Goods & service of both visible and invisible nature are now subject matter of case before the Panel. Hence, procedural decisions concerning evidence of GATT era play a very insignificant role in present days WTO dispute settlement mechanism. However, decision of GATT dispute settlement system may be used as a general interpretive guideline by the adjudicators. Interestingly, we presume that WTO regime is not precedence based as well. The Panel and the AB enjoys huge liberty in using precedence. This situation is created due to the absence of complete set of law of evidence. Proponent of the WTO system are kowtowing that to-days world trade is purely rule based while the reverse side of the

same coin is that WTO jurisprudence lacks even minimum rule on evidentiary matters if not no rules. Anyway, the AB plays the role of doyen to rescue the legal limbo in-built in WTO legal framework[85]. It will not be exaggerated if one argues that WTO dispute settlement system is plagued with the use of judge-made laws rendering the process vulnerable to the chance of judicial activism. Over-exercise of case laws and liberty of the adjudicators has a risk element of distorting the main law.

Though Dispute Settlement Understanding lacks inclusive, coordinated technical and procedural details about evidentiary matters some covered agreements- not all- have expressed rules on certain issue of evidence. But these covered agreements provide case/issue specific solution. For example, as per Article 3.5 of Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade 1994 or Anti-dumping Agreement, the causal relationship between dumping and injury shall be based on an examination of all relevant evidence before the authority including other known factors than imports causing injury. Equipping different covered agreements may be helpful for solving some specific and very technical/scientific evidentiary matters.

WTO jurisprudence recognizes totality of evidence. Hence, making *prima face* does not obviously relieve the party making *prima face* once rebuttal evidence is produced. The corollary of using all available evidence results in the doctrine of collaboration among the parties in exchanging evidence. This collaboration ensures due process for the parties. This collaboration is vital also because WTO has no policing mechanism to discover evidence. Non-cooperation/non-collaboration means the guillotine of adverse inference. However- may be to avoid the situation arising out of adverse inference- the legislator of WTO gave the Panel huge discretionary authority to seek information from wide range of

[85] Judge-made laws are also recognized in WTO jurisprudence. For example Article 17(9) of the DSU has empowered the AB to develop working procedure.

source as per Article 13 of the DSU. This authority serve two purpose, the Panel can ensure the sufficiency evidence and a sovereign country can avoid a moral defeat from adverse inference. This unconditional authority vested to the Panel results in a dubious authority to fix up evidence, determining the relevancy of evidence and admitting evidence and arguments.

WTO jurisprudence opted to maintain interesting confidentiality regarding evidence produced before the court. This so called secrecy may not be helpful for free, fair and open trial; but this rule demonstrates utmost respect to the secrecy of a sovereign state. Lack of remand system in WTO court system is also a thought provoking issue in support of promulgation of law of evidence. Like criminal case, circumstantial evidence has also a toll in today's dispute settlement mechanism. For example in *US-Countervailing Duty Investigation of DRAMS* Korean Government's policy support was treated as premeditated act to prevent the failure of HYNIX. Trade related evidence are becoming complex in nature as well as because some case requires high profile scientific or econometric analysis. Sometimes scientific/econometric assessment is to be corroborated/supported by scientific/economic evidence. WTO jurisprudence has no articulated rules on these issues. In this legal limbo, the Panels are using the given authority to seek information from the source they think proper.

In a democratic society appellate court without remand power is impossible. But the AB of WTO is crippled- if not handicapped- in absence of remand power. No new evidence is allowed to be heard at appellate stage. Exclusion of evidence by the Panel makes the process further complicated. Though new argument at appellate stage is allowed, but it is not the exact substitute of remand power. So for objectivity and fairness of the trial the AB must be equipped with remand power.

Ensuring substantial due process is the back-bone of each judicial system. Both the law makers and the judges are involved in this philosophical code/rule of conduct. There is no economic yard-stick to measure the extent of due process. The legislators of WTO laws endeavored to address all the three basic issues of due process. There is no criticism regarding bias rule. But hearing rule and no evidence rule is not beyond limitation. In fact, lack of remand power of the AB jeopardizes not only the hearing rule, but also the whole judicial process. As far as no evidence rule goes, WTO law is not enough to ensure objectivity of the trial. Article 17.12 of DSU requires the AB to address each of the contended issues covered in the Panel report and legal interpretation developed by the Panel. This limits the power of the AB as it says nothing about the contended issues remain unattended by the Panel. Same problem arises in case of evidence remains unattended by the Panel. Some in-built limitations of law regarding due process can be decimated by philosophical sixth sense of the judges. But if the law itself reins in the power of adjudicators the consequence is dire. WTO jurisprudence for, reasons unknown, does not allow new evidence at appellate stage and this limitation cannot be healed by the judges of WTO courts.

WTO courts follow the generally accepted principal regarding burden of proof/evidence. The inquisitorial system of presenting evidence in written form predominates. Oral evidence is quit absent and thus no cross examination of witness is required. Other styles of presenting evidence, like video, audio are less practiced. In fact, parties and adjudicators are seduced by the principal of good faith while relying on written submission on evidence which is supported by oral submission. This gentleman agreement among the parties is a good recourse for the adjudicators.

Standard of review of evidence in WTO court system has different and critical facet. The

challenge before the court is to what length and to what intensity they can analyze the legislation of a sovereign government. While Article 11 gives the general weapon called 'objective assessment', till then the standard is specific to particular agreement, fact and circumstances. Generally accepted principal developed through the perspective of Vienna Convention and other international legislation to maintain adequate/just deference to the Member's own factual findings or interpretation of legal aspect, specially interpretation of domestic legislation, is an important beacon on this issue. However, the adjudicators face trouble as because general standards do not entails any accurate/exact yardstick/methods of interpretation of law. The situation is further complex as there is no categorical rule for standard of proof regarding type and amount of evidence is required to make a presumption of truth. Here it is pertinent to state that, like other international legislation WTO regimes also lacks the yardstick to assess and evaluate the probative value of evidence. In such situation, 'preponderance of evidence' or 'balance of evidence' based on the all available evidence is the operational toll for the judges. However, panel further filters other kind of evidence gathered by court *per se* in the form of expert opinion to prevent the distortion of evidence.

WTO jurisprudence does not offer a harmonized set of rules on technical issues of evidentiary matters. This technical rule is essential also because assumption, presumption, induction, deduction and inference are commonplace in WTO dispute settlement mechanism. Rather WTO jurisprudence embraced flexibility on this matter. For instance, Article 12.2 of the DSU allows panel procedure to provide sufficient flexibility to ensure high quality panel report without unduly delaying panel process. Further, as there is no clear cut pre-set rule for the Panel whether to follow common law or civil law system while dealing with evidentiary matters *legal limbo* presents for the parties as well. For example, in *Argentina - Measures Affecting Imports of Footwear, Textiles Apparels and*

Other Items Argentina raised objection on accepting copy of certain documents instead of originals. But the Panel ruled that submission of copies of original documents did not affect the probative value of evidence.[86] Flexibility is also seen as well regarding means of presenting evidence and deposition. In absence of hierarchy of evidence the adjudicators judges their value on their own. No testimony or affidavit is required in support as all the evidences are subject to scrutiny by the judges themselves. Regarding timeframe of submission of evidence Working Procedures for Panels[87] requires *factual evidence* to be submitted before the 1st substantive meeting of the Panel and *rebuttal evidence* to be submitted in 2nd substantive meeting. The AB recognizes this rule several times. For example, In *Argentina- Measures Affecting Imports of Footwear, Textiles Apparels and Other Items* the Panel allowed USA to submit some evidence 2 days before the 2nd substantive meeting and granted Argentina only 14 days to respond and the AB consolidated Panel's decision ruling that *Working Procedures for Panels* does not have any strict deadlines for submission of evidence.[88] No doubt, in such a legal limbo there is certainly a ethical standard which is nothing but 'due process'.

WTO jurisprudence is the outcome of consensus among independent states developed after traveling almost half century. Parties to a dispute are seduced by the principal of co-operation and good faith for each issue including evidentiary matters. Parties have the duty to collaborate in providing evidences that are in sole possession of either party. Principal of good faith demanding cooperation among the members is maintained in Article 3.10 of the DSU. Non co-operation means adverse inference[89] or judgment based on best available information. May be, the principal of good faith withered out the necessity of pr-set technical rules on evidentiary matters.

[86] WT/DS56/R, The Panel Report, para 6.58
[87] Appendix 3 of DSU, Paragraph 4,5 & 7
[88] WT/DS56/R, The Appellate Body Report, para 77-81.
[89] Related Case- Canada - aircraft

Determining sufficiency of evidence is a big challenge for the Panel. In fact the Panel assumes huge liberty on this issue. Though WTO jurisprudence is silent on this issue, the Panel and the AB developed some standards regarding sufficiency of evidence. In *Argentina- Measures Affecting Imports* of *Footwear, Textiles Apparels and Other Item* the AB upheld Panel's decision that the US had adduced sufficient evidence to establish the *prima face* case as Argentina did not provide any affirmative evidence to the contrary[90]. On ground of sufficiency of evidence, the Panel is not under compulsion to seek information or evidence. Nor the party can claim that the AB would exercise its unconditional right to seek information.

WTO legal system has opened the avenue for third party- having substantial trade interest in a particular dispute - to present their view on different issues during panel proceedings. But DSU is not categorical whether third party can produce evidence in support of claim by either of the parties. In criminal justice uncalled for/unsolicited evidence may add value to unravel the truth. From holistic viewpoint one may argue that evidence produced by third party or unsolicited evidence should be allowed. If so, it may cause some diplomatic problem. WTO members may go for grouping/regrouping giving up the philosophical ideology of WTO - the global public goods. However the AB legalized the unsolicited evidence under the veil of Article 12.1 of the DSU considering the Panel's right to make addition or departure from Working Procedure.

WTO dispute settlement mechanism is flexible enough to ensure top quality report by the Panel. Side by side, the Panel is under compulsion to guard against undue delay to ensure fair play. These two inalienable issues contradict each other. Exclusion of evidence

[90] In Argentina- Measures Affecting Imports of Footwear, Textiles Apparels and Other Item United States produced evidence on only 118 tariff categories out of alleged 940 tariff categories. That is, out of 940 tariff lines, Argentina collected excess duties in case of 118 tariff lines for textile and apparel products. Argentina argued that, if the collected tariff on remaining tariff lines were examined, the overall tariff rate had not exceeded the maximum level of bound rate in Argentina's Schedule.

submitted in delay leads to adverse inference. But interestingly adjudicators of WTO maintain judicial restraint in many situations. The issues like flexibility of DSU on admitting delayed evidence and practice of judicial restraint by the adjudicators may seduce the party to restore to litigation technique. To decimate this problem, DSU may set for categorical rule on issue of delayed evidence like prescribing sunset rule on submission of evidence, requiring the parties to seek prior permission.

Adjudicators assume huge liberty to garner information from any sources it thinks appropriate. Panel has the right to depart from Working Procedure. So, both power and right is there to discharge the onerous responsibility to nurture the world public goods called WTO by making objective assessment of facts. It may be argued that the power, flexibility and right of the Panel to cause addition/ deviation from the WP are more than enough to address the evidentiary issues. This argument may not be tenable and well founded. The adjudicators are from different law family. So as the other people associated with dispute settlement – like office staff of WTO, bureaucrats and lawyers defending each state. Subject matters of the disputes are widened. Wide jurisdiction is limited by the terms of reference and in setting the terms of reference the Panel has virtually no role; even the DSB has very limited rule. So, the course of the adjudication is virtually directed by the parties to the dispute. Neither the Panel nor the AB can initiate any legal right of any party *suo motu*.

CHAPTER SEVEN

7. Some Recommendation

With the emergence of World Trade Organization, international trade has become rule based. So it is logical to think that dispute settlement system would be rule based as well to an acceptable extent. If not so, predictability of world trading system would not sustain which will cause anarchy in international trading system. Following few ideas may be shared by the scholars as well as the law makers of WTO can give a thought to make dispute settlement system more pragmatic:

1. Too much flexibility has overburdened the adjudicators. Similarly, too much discretion can be reduced by promulgating rule on different technical matters on evidentiary issues.
2. Categorical rules may be promulgated regarding presumptions, assumption and adverse inference. Similarly to ensure cooperation on evidentiary matters legal compulsion in DSU may be incorporated. A standard procedure may be developed regarding standard of proof and standard of review
3. Cross right and obligation present in other trade laws of other regulatory bodies may be incorporated as covered agreement of WTO. Existing covered agreements may be enriched further incorporating evidentiary matters of complex nature to bridge the gap of DSU.
4. Remand power of AB is essential. Or AB may be given the authority to consider the unattended evidence by Panel.
5. Third parties may be given the chance to bring evidences having additive value.

Annexes

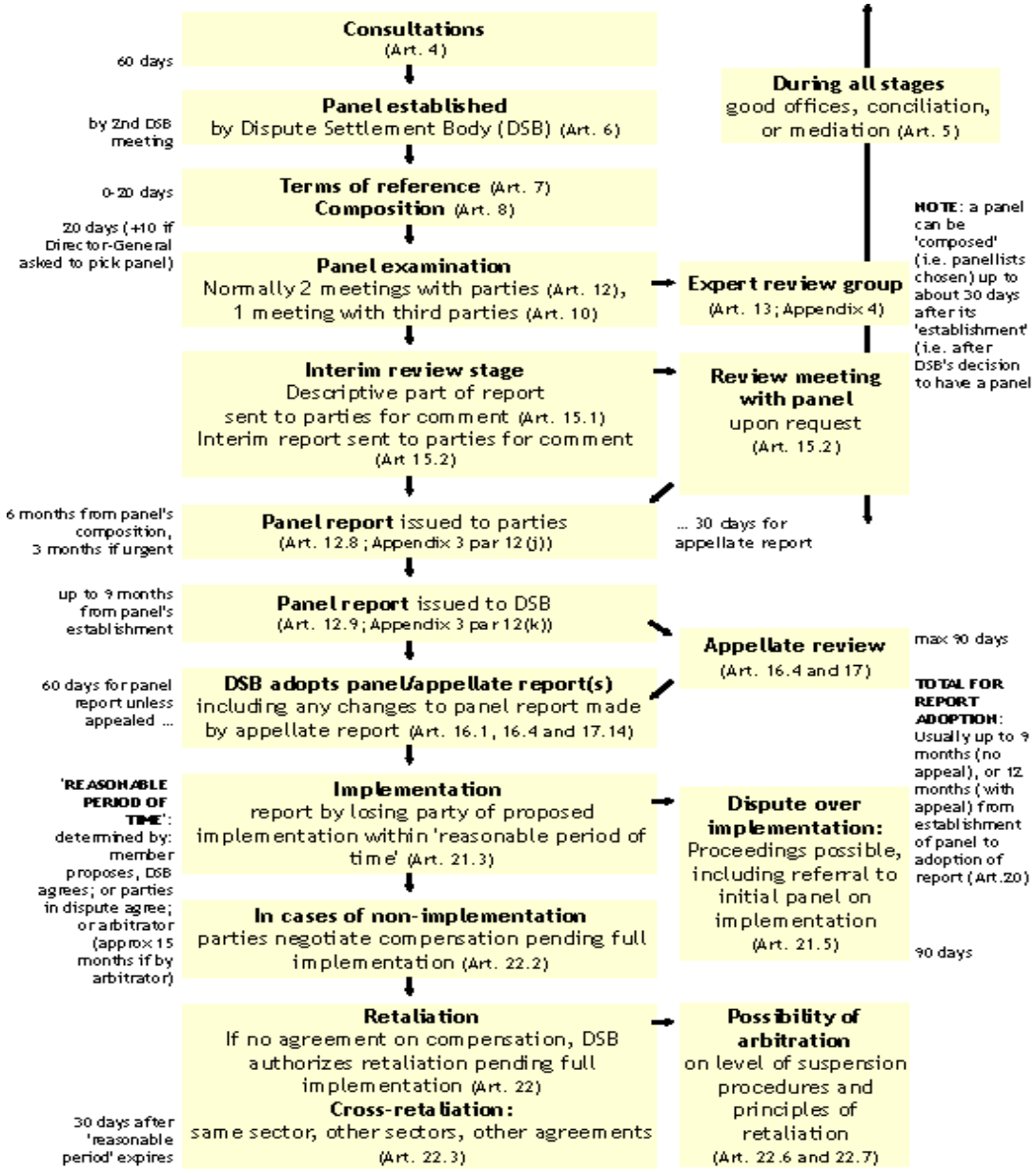
Annex I: Time limit for settling a dispute up to adoption of AB report[91]

Issues	Time Prescribed	Comment
Consultations, Meditation	60 days	1 year without Appeal
Setting up Panel and appointment of Panelists	45 Days	
Final Panel report to disputed parties	6 months	
Final Panel Report to WTO members	3 weeks	
DSB adopts report (no appeal)	60 days	
Appeal Report	60-90 days	1 year 3 months with Appeal
DSB adopts appeal report	30 days	

[91] http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, date of visiting 30/09/2008

Annex II: WTO Dispute Settlement Process

Broadly dispute settlement system of WTO has four major steps; namely-consultation, panel proceedings, appellate review and implementation and enforcement. The whole process is shown in the following chart[92]



[92] Source- www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm, visited on 16/09/2008.

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