研究成果

刘衡-PRIMA FACIE CASE IN WTO DISPUT

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PRIMA FACIE CASE IN WTO DISPUTE SETTLEMENT

——Comment also on Legal Effect of Reports of Panels and the Appellate Bo

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ABSTRACT

Prima facie case is provided in Article 3.8 of the Understanding on Rules and
es (DSU), and observed in lots of cases by different panels and the Appellate
he definition of prima facie case afforded by the Appellate Body and applicatio
o prima facie case discussed in WTO dispute settlement include the burden c
whether and when a prima facie case has been made, standard of proof of a
prima facie case. There are some agreements in some aspects vis-à-vis prim
mbiguous in other facets, to some extent, on the other hand. The article reviev
dy, illustrates the different roles which the parties and panels play, highlights
dence of the WTO, and displays its implications to understand the legal effect
d for the evolution of the WTO law.

KEYWORD

WTO Dispute Settlement; Prima Facie Case; Burden of Proof; Reports of Pane

Article 3.8 of the Understanding on Rules and Procedures Governing the Settl
ganization (WTO) provides that:

In cases where there is an infringement of the obligations assumed under a c
ma facie to constitute a case of nullification or impairment. This means that th
he rules has an adverse impact on other Members parties to that covered agr
Member against whom the complaint has been brought to rebut the charge.

This provision is deemed as an ‘emperor clause’ applicable to burden of p
dispute settlement mechanism, and introduced a ‘new’ concept which we

of the General Agreement on Tariffs and Trade (GATT) —— prima facie case. So far, Prima facie case was, according to an uncompleted statistics, specifica Panel’s reports in China – Measure Affecting Trading Rights and Distributic sual Entertainment Products circulated on 12 August and China – Measures ellectual Property Rights adopted on 20 March of this year, forty-six reports of p erved in India – Patent Protection for Pharmaceutical and Agricultural Chemic ormal operating of WTO dispute settlement mechanism. There are eight repc explored in 2008, and it is seemingly unprecedented.

However, what is the meaning of Prima facie case in WTO dispute settlemer respectively, in a Prima facie case? And how about does the existing situation ion can we get from the evolving process of Prima facie case in WTO dispute this article intends to answer.

In order to give these keys, the article is divided into seven parts. The first pa in general, and especially, the definition in WTO dispute settlement afforded by s the roles of the parties in a Prima facie case. Then, the third part observes th ourth and fifth parts discuss, respectively, the standard of proof of, and the pre er that, the sixth part will develop some arguments in relation to implications o volution of the WTO law. Finally, the seventh part provides the conclusions of th

I. THE MEANING OF PRIMA FACIE CASE

Prima facie case is a concept of law of evidence within Anglo – America lega dard of rational probability. It means that a factual assertion is not finally deter tion of evidence by plaintiff in most cases. According to the Black’s Law Dicti will establish a fact or sustain a judgment unless contradictory evidence is pro shment of a legally required rebuttable presumption’, or ‘2. A party’s prod nfer the fact at issue and rule in the party’s favor’. They are not difficult to g The first show of prima facie case in WTO dispute settlement was in the Appel ed at the end of 1997. However, the Appellate Body seemingly unintentionally r s report of EC – Hormones which was circulated at the same time as the App ed, it seemed that the Appellate Body desirously compensated this regret by r se, at the first instance. It reads as:

It is also well to remember that a prima facie case is one which, in the absence equires a panel, as a matter of law, to rule in favor of the complaining party pre

From a semantic and logic perspective, this definition appears to be a normal t criticize. Maybe, we will lose into the thick fog, however, if put it into the practi has been made must be subject to the refutation of the defending party. In othe the main, if not all, determinant of determining the establishment of a prima fa ishment of a prima facie case is prior to the refutation of the defending party ur n of the defending party may be taken into account to some extent, in some ca f view, it is better that the understandings in domestic law of evidence and exp he definition afforded by the Appellate Body. Nevertheless, the Appellate Body – Aircraft and Japan – Apples . It was also repeatedly invoked in Thailand – na – Publications and Audiovisual Products by different panels. Maybe, it is r facie case in practice.

II. ESTABLISHING A PRIMA FACIE CASE —— INITIAL BURDEN OF THE COMF

The Appellate Body in its report in EC – Hormones indicated that:

The initial burden lies on the complaining party, which must establish a prima ade, the burden of proof moves to the defending party, ...

And, the Panel in Thailand – H-Beams noted the principles that the complain
espondent must effectively refute those claims. The Panel's statements was u
zed later. Furthermore, the Appellate Body in Canada – Dairy (Article 21.5 – N
[W]e have consistently held that, as a general matter, the burden of proof rests
must make out a prima facie case by presenting sufficient evidence to raise a
aining Member succeeds, the responding Member may then seek to rebut this
nce' accepted and applied in international proceedings.

In US – Gambling, the Appellate Body restated that:

The complaining party bears the burden of proving an inconsistency with spec
Where the complaining party has established its prima facie case, it is then for
To sum, as can be seen, establishing a prima facie case is an initial burden o
complaining party must bear, and also the prerequisite for moving forward the
d to or diminish this obligation of the complaining party, in spite of what attitud
tent, some disagreement occurred between the practical situation and the defi

Let us continue to look at case law. In US – Shrimp (Ecuador), the United Sta
ms which Ecuador made before the Panel. Ecuador considered that it can pro
did not agree with Ecuador who, in its report, said that:

Yet, the fact that the United States does not contest Ecuador's claims is not a
at Ecuador's claims are well-founded. Rather, we can only rule in favour of Ec
e a prima facie case.

The Panel also pointed out in its report in US – Stainless Steel that the fact th
contention does not discharge Mexico of its obligation to make a prima facie c
ador II) that it will consider the arguments and evidence presented by Ecuador
nt to establish a prima facie case even the European Communities has chose
e, in EC – Bananas (Article 21.5 – Ecuador II), the Panel stated that:

As in the case of the previous preliminary objection raised by the European C
the European Communities has made a prima facie case supporting its conte
exist, the Panel would turn to assessing whether the United States has succe
he European Communities. Alternatively, if the Panel found that the Europear
prima facie case that the complaint of the United States falls outside of the sco
reject this preliminary objection by the European Communities without further

Later on, the Panel continued to analyze in the same case that:

[T]he European Communities has chosen not to contest the United States' cla
arguments and evidence presented by the United States, in order to determin
a facie case of inconsistency with Article I of the GATT 1994. If this were deter
to assessing whether the European Communities has made a prima facie ca

Moreover, the similar analysis also took place in US – Continued Zeroing, in
[I]t is for the complaining Member to make a prima facie case with regard to a
the defendant to rebut such case. The United States does not contest the EC's
g in investigations. In our view, however, the US acknowledgement does not c
obligation to present a prima facie case regarding the alleged inconsistency w
ing in investigations. Regardless of the US acknowledgement, therefore, we h
e sufficient to make a prima facie case.

Accordingly, we conclude strongly in term of the above-mentioned cases that:
l burden of proof which the complainant shall bear, and the prerequisite for shi
ond, the defendant is entitled to choose whether or not to rebut this prima facie
it will not discharge the legal obligation of the complaining party to make out a
y did not or failed to refute it. Finally, consequently, the practices in WTO dispu
Body itself, are inconsistent with the definition afforded by the Appellate Body i

panels in several cases later on. Obviously, the main problem falls not on the
as far as I am concerned.

III. TO JUDGE THE ESTABLISHMENT OF A PRIMA FACIE CASE —— A PANEL

Article 11 of the DSU reads:

… [A] panel should make an objective assessment of the matter before it, incl
he case and the applicability of and conformity with the relevant covered agre
ssist the DSB in making the recommendations or in giving the rulings provide
This provision is the source and constitutional legal basis of a panel to enjoy l
ce regarding appreciation and evaluation of evidence in the context of WTO law
establishment of a prima facie case is a part of this exclusive competence of p
ellate Body and panels themselves.

In Canada – Aircraft, Canada refused to provide some information to the Pan
not yet establish a prima facie case. There was a quite remarkable statement
which rebutted Canada and confirmed the exclusive function of panels in this r

[A] refusal to provide information requested on the basis that a prima facie ca
concerned believes that it is able to judge for itself whether the other party has
er is free to determine for itself whether a prima facie case or defence has bee
nce is necessarily vested in the panel under the DSU, and not in the Members

No parties to disputes challenge this exclusive competence of panels concern
case has been established, nor did other members, in practice. However, it b
e Body confirmed that evidence which a panel evaluated includes not only whi
which the defending party in order to perform the function of determining the e
ate Body said in its report in Canada – Aircraft the following:

[A] panel is vested with ample and extensive discretionary authority to determi
te and what information it needs [emphasized in original]. A panel may need s
r a responding Member has established its complaint or defence on a prima fa
mation sought in order to evaluate evidence already before it in the course of
ding Member, as the case may be, has established a prima facie case or defe

In Korea – Dairy, Korea alleged in plea that the Panel should have looked sol
plaining party (European Communities in this case) when judging whether or
omplaining party. The Appellate Body was not of a view the same as which Ko

[U]nder Article 11 of the DSU… a panel has the duty to examine and consider a
submitted by one or the other party, and to evaluate the relevance and probativ
on of the significance and weight properly pertaining to the evidence presente
ation of the probative value of all the evidence submitted by both parties consi

However, the Appellate Body seems to lower its tone in India – Quantitative R

We do not interpret the above statement as requiring a panel to conclude that
the views of the IMF or any other experts that it consults. Such consideration n
ima facie case has been made. Moreover, we do not find it objectionable that
her the United States had made a prima facie case, the responses of India to

Why did the Appellate Body change its attitude slightly? Because, one point m
determining a prima facie case is the evidence adduced by the complaining pa
hannels just are some kind of subsidiary evidence which may be considered,
ect that it was the Panel who made out a prima facie case for the complaining
e, the duty of a panel is not substituted for the complaining party to establish a
mation which collected in accordance with Article 13 of the DSU, and other pro
udge whether a prima facie case had been made on the basis of the evidence

e it is the exclusive competence of a panel to judge whether a prima facie cas

Japan argued, in Japan － Agricultural Products II, that it was unjust with resp
by the Panel. The Appellate Body admitted there are some undue practices of
d, and stated that:

Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that pane
wever, this authority cannot be used by a panel to rule in favour of a complaini
e case of inconsistency based on specific legal claims asserted by it. A panel
experts and from any other relevant source it chooses, pursuant to Article 13 o
he SPS Agreement, to help it to understand and evaluate the evidence submit
not to make the case for a complaining party…The Panel erred, however, whe
he basis for a finding of inconsistency with Article 5.6, since the United States
stency with Article 5.6 based on claims relating to the "determination of sorptic
The rule established in this case emphasized by the Appellate Body, in its rep
cie case must be based on "evidence and legal argument" put forward by t
Country Tubular Goods Sunset Reviews, the United States considered that M
aim at all, and it was the Panel who improperly made Mexico's prima facie cas
States alleged, the Panel invoked the Appellate Body's reports of earlier disp
ument submitted by Mexico to explain in detailed why it concluded that Mexico
im on its own and it did not made a prima facie case for Mexico.

As can be seen from the above mentioned case, the Panel also believed it is i
e parties to the dispute and it does not fall into its extensive authority, and do v
hority of a panel is exclusive and wide, nevertheless, it does not mean a reach
nd the Appellate Body all knew this point. In US － Customs Band Directives, I
with the requirement under Article 11 of the DSU that a panel make an objecti
e Panel made the prima facie case for the United States, in a manner inconsis
Body. The Appellate Body highlighted that "[i]t is well accepted that a panel ca
bears that burden". And it also held in US － Gambling that:

… nothing in the DSU limits the faculty of a panel freely to use arguments subr
wn legal reasoning—to support its own findings and conclusions on the matte
ch discretion only with respect to specific claims that are properly before it, for
within its jurisdiction. Moreover, when a panel rules on a claim in the absence
inconsistently with its obligations under Article 11 of the DSU.

IV. "PRIMA FACIE" —— STANDARD OF PROOF TO ESTABLISH A PRIMA F

As argued aforementioned, establishing a prima facie case is an initial burde
d to judge whether a prima facie case has been made falls into the exclusive c
a standard governing how to determine whether the complainant has discharg
en a prima facie case has been made. In effect, this standard is embodied in t
ma facie'.

The Appellate Body gave a clear, detailed and complete analysis relating to h
in US － Gambling. There, the United States alleged Antigua failed to make ou
e XVI of the General Agreement for Trade in Services (GATS), with respect to t
hen the Appellate Body made the following statement, which needs to be quot

The complaining party bears the burden of proving an inconsistency with spec
panel errs when it rules on a claim for which the complaining party has failed t
must be based on "evidence and legal argument" put forward by the compl
of the claim. A complaining party may not simply submit evidence and expect t
sistency. Nor may a complaining party simply allege facts without relating the
sufficiency of panel requests under Article 6.2 of the DSU…The evidence and
fore, must be sufficient to identify the challenged measure and its basic import

ation contained therein, and explain the basis for the claimed inconsistency of
e focused on Article XVI:2 of the GATS and, in particular, its sub-paragraphs (a
required to make its prima facie case by first alleging that the United States ha
its GATS Schedule; and, secondly, by identifying, with supporting evidence, h
e "limitations" falling within Article XVI:2(a) or XVI:2(c). … In its written submis
nited States had "made a full commitment [in its GATS Schedule] to the cross-
s" along with references to the relevant sector of that Schedule. This assertion
ntigua's prima facie case under Article XVI:2. As to the second requirement o
ub-paragraphs (a) and (c) of Article XVI:2, as regards individual laws rather tha
d written submission to the Panel… Antigua submitted the texts of these statu
…As a result, in our view, Antigua's arguments and evidence were sufficient to
prima facie case of their inconsistency with sub-paragraphs (a) and (c) of Artic
de no mention of them in the course of its argument that the United States acts
none of Antigua's submissions to the Panel was the way in which these meas
have made it apparent to the Panel and to the United States that an inconsiste
pect to these measures. Thus, we see no basis on which we can conclude tha
laws with Article XVI and thereby established a prima facie case of inconsisten
To prima facie case, although the quotation is a quite bit longer, the statemen
ited to how to judge a prima facie case has been made. It laid down some gui
keep the same shoulders as which of the statement by the Appellate Body in U
rule of burden of proof in the context of WTO law of evidence. Maybe, it is a ne
ase in WTO dispute settlement. Let us hear what the Appellate Body said in its
Mexico argued, in Mexico – Anti-Dumping Measures on Rice, the United Stat
o claims, because the United States did not present sufficient evidence to prov
ned the United States claims and evidence submitted according to the rules a
and concluded that the United States sufficiently identified the challenged mea
legal obligations; and explained how, in its view, those measures fail to compl
es had met the standard for a prima facie case, as that standard was set out i
The Appellate Body further clarified in US – Zeroing (EC), and treated the rule
imum standard of establishing a prima facie case. In this case, the United Sta
uropean Communities had made a prima facie case, then appealed. The App
ether the European Communities established a prima facie case, they need to
European Communities submitted to the Panel in relation to this claim. It addi
At a minimum, the European Communities' evidence and arguments must ha
measure and its basic import, identify the relevant WTO provision and obligati
he claimed inconsistency of the measure with that provision." [emphasis ad
In briefly, as can be seen evidently, the 'prima facie' standard of proof enco
lenged measure; second, identify the relevant WTO provision and obligation c
or the claimed inconsistency of the measure with that provision, albeit the expl
urd or unreasonable. Indeed, they are consistent with the evidentiary requirem
ures of WTO under Article 6.2 of the DSU.

Of course, these are normal situations, and some more 'prima facie' situa
l, the classical statement which set out the general rule governing burden of pr
Shirts and Blouses that '[p]recisely how much and precisely what kind of evi
umption will necessarily vary from measure to measure, provision to provisior
hment of a prima facie case.

In US – Oil Country Tubular Goods Sunset Reviews, in my point of view, the A
what they did in US – Carbon Steel, 'that the obligation to make out a prima
mply by submitting the text of the measure or, particularly where the text may b

arly simple situation occurred in China – Intellectual Property Rights, the Unit
Law of China is inconsistent with Article 5(1) of the Berne Convention (1971),
nly evidence that the United States has offered is the text of Article 4(1) of the C
to bear the burden of proof of this as such claim. The Panel recalled the follow
US – Corrosion-Resistant Steel Sunset Review:

"When a measure is challenged 'as such', the starting point for an analy
ning and content of the measure are clear on its face, then the consistency of
basis alone. If, however, the meaning or content of the measure is not evident
...."

In the present case, the Panel's review of the Copyright Law, in particular Artic
sufficiently clear to conclude that the United States has made a prima facie ca
uation regarding establishment of a prima facie case in practice, as of date, a
hereof.

V. PRELIMINARY FINDING OF PRIMA FACIE CASE

The other important issue regarding prima facie case is, since establishing a
e prerequisite of shifting the burden of proof to the responding party, does it n
shment of a prima facie case in the process of dispute resolution?

This issue put forward firstly by India in India – Quantitative Restrictions. In th
that the Panel did not analyze whether the United States has made a prima fac
the International Monetary Fund (IMF) and moved the burden of proof to India.
ot required to make an explicit statement that a prima facie case has been ma
he basis of India' contention, it regards 'a panel must evaluate and make a
as established a prima facie case of a violation' as a 'threshold matter',
ence of its own case or defence. However, the Appellate Body was not of the s
'[w]e found no provision in the DSU or in the Agreement on Safeguards that
hether the complainant has established a prima facie case of violation before
nt's defence and evidence." The Appellate Body further emphasized in Tha
s not required to make a separate and specific finding, in each and every insta
respect of a particular claim, or that a party has rebutted a prima facie case."
do not give a clear attitude on whether and/or when a prima facie case has be
gained almost full support from the Appellate Body.

Absolutely, the practices and legal analyses of panels and the Appellate Body
e defending party 'shall be up to the Member against whom the complaint ha
ear its burden of proof? If there is no explicit statement or the relevant analysis
r and/or when a prima facie case has been made, although the requirement is
e preliminary finding in this regard. Undoubtedly, these practices are disagree
which related to a prima facie case. In law, it is reasonable to regard making
as a 'threshold matter' to proceed to the proceedings like the point Korea h

VI. IMPLICATIONS OF THE DEVELOPMENT OF PRIMA FACIE CASE ON THE E

Looking at the evolving process and existing situation of prima facie case in th
doctrine of stare decisis or precedent is very important within the WTO jurispru
and function which it played were beyond which the fundamental legal theory o
expressly mention provision of Article 3.8 of the DSU when it referred to prima
but the general statement governing the burden of proof indicated in US – Wo
the related parts of the reports in earlier disputes always were quoted as evid
sing prima facie case in any case, completely regardless of the simple presu
heories, such as introduction to the general principles, internal and external m

eless do not consider panels and the Appellate Body only invoked them. Usua
earlier parts without any explanation and articulation, it seems that a mountai
n the form of arbitrary and unjustifiable arguments. Obviously, at minimum lev
e issues with respect to jurisprudence of the WTO that the spirit of stare decis
though panels and the Appellate Body often prudently avoid to use the words
s provisions in general international law and restrictions of jurisprudence of th
conflict of different legal systems. Absolutely, we may say that it is helpful to ke
ute settlement that panels and the Appellate Body do like this on the one hand.
ons and statements of panels and the Appellate Body are not consistent and
mes irrational in a special case, on the other hand. We may figure out this poi
of and the preliminary finding about prima facie case herein.

Actually, the process of evolution of prima facie case within the WTO law repre
m pushes up the development of the WTO law: first, a panel or the Appellate B
ic law or created a new concept, then clarified it in the other case. At that mom
y did not intrigue sufficient attentions of the parties to the disputes and other m
iscussing or referring to the concept occasionally in a term. Then they may sta
ses in some stage, as the case may be. The basic means exploited is always
disputes when it needs to prove something, including a case or cases in this
bers of the WTO may seem to wake up, even with the feeling of be deceived, h
time because of so many cases have discussed them (precedent), just try to a

Let me track back the history which of prima facie case entered into the GATT/
exist in the legal texts of the GATT 1947, and the expression of prima facie occ
the first time. It was the first display in the legal instruments of the GATT wher
ation, Dispute Settlement and Surveillance adopted in 1979 used the express
and reinforced this expression put forward in the report of 1962. Later on, in 1