



The Hebrew University of Jerusalem
Faculty of Law



International Law Forum
The Hebrew University of Jerusalem

Genetically Modified Rules:

The Awkward Rule-Exception-Right Distinction in *EC - Biotech*

Tomer Broude

Faculty of Law and Department of International Relations, Hebrew University of Jerusalem

For more details and contact information see:

<http://law.mscc.huji.ac.il/law1/newsite/segel/broude/index.html>

Research Paper No. 14-06
December 2006

December, 5, 2006

Published by the International Law Forum of the Hebrew
University of Jerusalem Law Faculty

Editor: Dr. Tomer Broude
Assistant Editor: Yonatan Arbel

To subscribe, free of charge, contact:
ssrn@savion.huji.ac.il

This paper can be downloaded free of charge from:
www.ssrn.com/abstractid=949623

Genetically Modified Rules: The Awkward Rule-Exception- Right Distinction in *EC-Biotech*

*Tomer Broude**

ABSTRACT

The arcane distinction between "rules", "exceptions" and "autonomous rights" has troubled WTO dispute settlement since its earliest days, primarily with respect to procedural burden-of-proof questions. Yet in its report, the *EC-Biotech* panel relied on a techno-textual understanding of this distinction to interpret the substantive applicability of Articles 2.2, 5.1 and 5.7 SPS – the WTO's fundamental rules on the degree of scientific certainty of risk required to allow a state to restrict imports of goods due to human, animal or plant health or life concerns. This article critiques the panel's approach on the backdrop of WTO jurisprudence and deontic logic, arguing that the norm-category of "autonomous rights" - as resorted to by the panel - does not actually exist; that the Article 2.2-5.1/5.7 SPS relationship should be more straightforwardly construed than the panel's convolutions would suggest; and that the disorderly and incoherent outcome of the panel's analysis of the questions involved serves as a cautionary tale against excessive textualism in WTO dispute settlement.

* Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; BA, LLB, Hebrew University of Jerusalem; SJD, University of Toronto.

TABLE OF CONTENTS

I.	Introduction.....	3
II.	The Panel's Analysis of the Article 2.2-5.1/5.7 SPS Relationship.....	4
	(1) The Relationship's Implications: A Substantive-Procedural Mix	4
	(2) <i>The Panel's Reliance on the Rule-Exception-Right Distinction</i>	6
	(3) <i>A Tangled (Textual) Tale: The Panel's Analysis – and Application</i>	8
III.	The Rule-Exception-Right Distinction in WTO Jurisprudence	12
	(1) <i>A Series of Unfortunate Interpretations</i>	12
	(2) <i>The Distinction's Genes(is): "Rules" and "Exceptions" in US-Wool Shirts</i>	13
	(3) <i>Mutant Rules? EC-Hormones and the Advent of "Autonomous Rights"</i>	14
	(4) <i>Outcrossing? The Distinction Farther Afield</i>	17
	(5) <i>The Distinction's Last Refuge? EC-GSP</i>	19
IV.	Restoring (Genetic) Order: Judicial Disposition, Logic and the Article 2.2-5.1/5.7 Relationship.....	21

"It's *perfectly* intelligible", the Captain said, in an offended tone, "to anyone that understands such things."

- Lewis Carroll, *A Tangled Tale*¹

I. Introduction

This article addresses the *EC-Biotech* Panel's² analysis of the legal relationship between three key provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) - Articles. 2.2., 5.1 and 5.7. These are the WTO's fundamental rules on the degree of scientific certainty of risk required to allow a state to restrict imports of goods due to human, animal or plant health or life concerns, on either definitive or provisional bases. As such these provisions form the core of the SPS Agreement, and their interrelationship raises essential questions of substantive law, public policy, advanced science and political legitimacy. Nevertheless, the instrument used by the panel in its 20-page analysis³ of the Article 2.2-5.1/5.7 SPS relationship is a technical legal construct: an arcane classification of WTO norms as either "*Positive rules establishing obligations in themselves*"; "*Exceptions*" / "*Affirmative Defenses*"; or "*Autonomous rights*".

The rule-exception-right distinction applied by the panel was derived from WTO jurisprudence relating to the procedural problem of allocating the burden-of-proof in dispute proceedings. Some of the significant operative legal problems raised by these cases have been previously noted and analyzed by WTO-observers,⁴ if not yet fully deciphered. The present article's reading of the *EC-Biotech* panel report not only confirms these concerns, but additionally demonstrates how the classification of norms and its associated difficulties have 'cross-pollinated' into substantive legal problems that transcend the burden-of-proof, such as the applicability of rules to challenged measures, and the violability of particular WTO provisions. The *EC-Biotech* panel's pursuit of the rule-exception-right distinction is

¹ London, 1885.

² See Panel Report, *EC-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R (29 September, 2006)(unappealed); all paragraph numbers below refer to this report, unless indicated otherwise.

³ See paras. 7.2923-7.3007.

⁴ See Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the EC's GSP Program", 6 *Journal of International Economic Law* 507 (2003), at 517, and most extensively, Michelle T. Grando, "Allocating the Burden of Proof in WTO Disputes: A Critical Analysis" 9 *Journal of International Economic Law* 615 (2006).

emblematic of the extent to which decontextualization risks permeating WTO dispute settlement.⁵

An appeal in *EC-Biotech* might have provided the Appellate Body (AB) with an opportunity to demystify the rule-exception-right terminology that its prior jurisprudence has elicited. Absent such an appeal, however, the goal of this article is to encourage increased simplicity in WTO jurisprudence through a critique of the *EC-Biotech* panel's flawed approach to the rule-exception-right distinction as a particular legal question. In a nutshell, I argue that the norm-category of "autonomous rights" - as resorted to by the panel - does not actually exist, as a matter of both WTO law and logic; that the Article 2.2-5.1/5.7 SPS relationship should be more straightforwardly construed than the panel's convolutions would suggest; and that the disorderly and incoherent outcome of the panel's analysis of the questions involved serves as a cautionary tale against excessive textualism in dispute settlement, however well intended.

II. The Panel's Analysis of the Article 2.2-5.1/5.7 SPS Relationship

(1) The Relationship's Implications: A Substantive-Procedural Mix

First, we must frame the distinction's role in the dispute. Norm classification was engaged by the *EC-Biotech* panel as a "preliminary issue"⁶ within its analysis of EC Member State safeguard measures restricting the importation of certain genetically modified products.⁷ Importantly, the need to classify norms did not *arise* under a burden-of-proof argument, although the parties also addressed the burden-of-proof,⁸ and the panel noted the

⁵ See also Henrik Horn and Joseph H.H. Weiler, "European Communities – Trade description of Sardines: Textualism and its Discontent", in H. Horn and P.C. Mavroidis (eds.), *The WTO Case Law of 2002* (Cambridge: Cambridge University Press, 2005) 248, at 252; and Federico Ortino, "Treaty Interpretation and the Appellate Body in *US-Gambling*: A Critique", 9 *Journal of International Economic Law* 117 (2006).

⁶ To the extent that an issue whose analysis begins on the 900th page of the report, on the 70th page of section devoted to EC Member State safeguard measures, can be deemed "preliminary"!

⁷ For an overview of the safeguard measures and the complaints relating to them, see paras. 7.2529-7.2544. *EC-Biotech* also dealt with complaints against a general EC Moratorium and certain product-specific measures (see section VII.B of the panel report).

⁸ See para. 7.2957: "...the United States is not arguing in this dispute that the responding party has the burden-of-proof to show that Article 5.7 applies to a particular SPS measure."; para. 7.2959: "Canada considers that it would be the member invoking Article 5.7 that would have the initial burden of demonstrating a prima facie

implications of its analysis in this regard.⁹ Rather, the central question was of substantive law: which SPS provision(s) should apply for the purpose of assessing the WTO-consistency of the safeguard measures?¹⁰ The complainants generally argued that the measures should be reviewed under the terms of Articles 2.2 and 5.1, requiring a fulfillment of the stringent requirements of risk assessment based on sufficient scientific evidence, with Article 5.7 playing a subsidiary role as a defence, should the EC succeed in establishing its multiple conditions.¹¹ The EC argued instead, that the safeguards were provisional measures that should be assessed exclusively¹² under the circumstantially more lenient terms of Article 5.7, permitting provisional measures based on available pertinent information, without recourse to Article 5.1, either because the measures were, quite simply, "provisionally adopted",¹³ or for the more principled reason that they were adopted in compliance with Article 5.7 as an "autonomous right".¹⁴

Despite these considerable substantive implications, in their arguments, the parties soon aimed at tactical, procedural gains. From the EC's side, since no complainant had presented an explicit claim of violation under Article 5.7, a finding that the measures should be assessed only under Article 5.7 rather than Article 5.1 could imply that the complainants had invoked the "wrong provision",¹⁵ and that the complainants had not brought their claims properly. The complainants, on their part, naturally chose to argue that Article 5.7 was an "exception", if only because the initial burden-of-proof would then be the respondent's, in accordance with accepted GATT/WTO burden-of-proof jurisprudence.¹⁶ Thus, in approaching the Article 2.2-5.1/5.7 relationship, procedural arguments juxtaposed the substantive, presenting the panel, from the outset, with a hybrid problem, a mixture of legal questions posing as one.

case"; and para. 7.2960: "According to Argentina, it is up to the responding party to invoke a defence under Article 5.7 and to meet the burden of establishing that defence".

⁹ See para. 7.2976.

¹⁰ See paras. 7.2923 and 7.2949.

¹¹ See paras. 7.2956-7.2960.

¹² See, e.g., para. 7.2954.

¹³ See para. 7.2930.

¹⁴ See para. 7.2952.

¹⁵ See para. 7.2954.

¹⁶ As discussed in section 3.1 *infra*.

(2) The Panel's Reliance on the Rule-Exception-Right Distinction

It is perhaps this hodgepodge of substantive and procedural arguments that caused the *EC-Biotech* panel to 'mutate' the rule-exception-right terminology from an auxiliary procedural tool related to allocating the burden-of-proof, to a formula for determining the application of substantive rules. The panel's discussion is an attempt to navigate the parties' competing references to burden-of-proof jurisprudence, all the while ignoring the main task before it, that is, the interpretation of the substantive relationship between WTO rights and obligations in context. The result is an almost serpentine series of rationalizations from which it is difficult to extract a unifying logic. For present purposes, the following observations shall serve to condense and implicitly criticize the panel's *method* of analysis as excessively reliant on its conception of the rule-exception right distinction.

First, in approaching the Article 2.2-5.1/5.7 relationship, the panel assumed the role of taxonomist rather than legal interpreter. Adhering to the parties' arguments, the panel modified the real question - of applicable law - to read thus: "Article 5.7 of the SPS Agreement - right or exception from the 'general obligation' under Article 5.1?".¹⁷ It thus embraced the parties' limited focus on the EC's assertion that the Article 5.1-5.7 relationship was "one of exclusion, not exception".¹⁸ However, the panel did not clarify why it considered that these narrow terms – clearly derived from and restricted to the rule-exception-right vocabulary in burden-of-proof jurisprudence¹⁹ - constitute the proper framework for analyzing the substantive relationship between provisional and definitive SPS measures and the assessment of their WTO-consistency.

Second, within its taxonomical framework the panel assumed that "autonomous rights" constitute a *separate* class of norms, distinct somehow from both "exceptions" and "positive rules".²⁰ Indeed, the panel seemed to presume that any provision, if subjected to the litmus test of certain textual formulas (discussed further below), will reveal itself as belonging to one of these categories (or in the panel's phrase, will be "characterized" as

¹⁷ See para 7.2949.

¹⁸ See para 7.2949.

¹⁹ Starting with AB Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (16 January, 1998)(*EC-Hormones*).

²⁰ This assumption is not unique to the panel and appears to be shared by critics of the operation of the distinction (see, Grando *supra* note 4 at 618 (referring to "two different categories of rules", beyond rules establishing obligations), and Bartels *supra* note 4 at 518.

such).²¹ Ultimately, the panel determined that Article 5.7 "establishes a qualified right",²² evidently for both procedural and substantive purposes.

Third, in thus "characterizing" Article 5.7, the panel adopted a two-step approach, first analyzing the Article 2.2-5.7 relationship, only then the Article 5.1-5.7 relationship. It is not clear why this division and duplication was necessary. As the panel itself noted elsewhere,²³ the AB had previously cautioned that Articles 2.2 and 5.7 should "constantly be read together".²⁴ Indeed, as mentioned towards the end of the panel's analysis,²⁵ the AB had also confirmed that Article 5.1 may be viewed as "a specific application of the basic obligations contained in Article 2.2".²⁶ The panel might have therefore regarded, for example, Articles 2.2 and 5.1 as forming a single obligation, so that an analysis of the relationship between Articles 2.2/5.1, on one hand, and Article 5.7, on the other hand, might have satisfied the panel's taxonomical effort. Moreover, the bifurcated approach adopted in practice reflects the panel's almost geometrical understanding of the inter-relationship between provisions as two points between which a single, straight line can be drawn; the panel raised its statutory sextant twice, to sight Articles 2.2 and 5.1 separately, in order to correctly fix the position of Article 5.7 as either "right" or "exception".²⁷ For the panel, its provision-specific readings – vis-à-vis Articles 2.2 and 5.1 – confirm each other,²⁸ each one identifying Article 5.7 as a "right". Yet, at no point does the panel step back to try and form a coherent, holistic understanding and orientation of the Article 2.2-5.1/5.7 relationship, from which a substantive answer to the question of the provisions' relative applicability may be gleaned.

²¹ See, e.g., paras. 7.2964, 7.2976, 7.2998,

²² See para. 7.3003; it is difficult to understand, given the panel's overall literal approach, why it chose to stray from the term "autonomous right" employed in previous cases. One possible explanation, revolving on alternative meaning of the word "autonomous", is suggested below (text accompanying note 77, discussing the AB's meaning of the term in *EC-Hormones*). Moreover, it does not appear that in this phrase the panel intended to establish a *new* category of norms.

²³ See para. 7.1439.

²⁴ See *EC-Hormones* at para. 180.

²⁵ See para. 7.2996.

²⁶ See *EC-Hormones* at para. 180.

²⁷ The metaphor evokes Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements", 5(1) *Journal of International Economic Law* 17 (2005).

²⁸ And indeed *must* confirm each other – see para. 7.3000, in which the panel explains that the Article 5.1-5.7 relationship must be the same as the Article 2.2-5.7 relationship, otherwise, the burden-of-proof relating to Article 5.7 would be inconsistent, and complaining parties could "unilaterally determine" the burden by choosing under which provision (Article 2.2 or 5.1) to file a complaint – allowing a procedural argument to determine substance.

(3) A Tangled (Textual) Tale: The Panel's Analysis – and Application

The panel thus chose a rigid construal of the rule-exception-right distinction as the definitive analytical framework for scoping the applicability of different SPS provisions to the EC Member State safeguard measures, and it is in this mindset that it turned to previous WTO jurisprudence for grounding. As its guide, its sextant, the panel relied primarily on what it called a "general test",²⁹ derived from the AB's *EC-GSP* report, whereby:³⁰

"In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party..."

The panel adopted this passage as a textual template for distinguishing between permissive provisions that are "exceptions" from those that are "rights".³¹ The panel first confirmed the accuracy of the template by checking if it fits the relationship between Article 3.1 and Article 3.3 SPS,³² which the AB had previously found "is an autonomous right and

²⁹ See paras. 7.2966, 7.2968, 7.2969.

³⁰ Referring to para. 88 of AB report, *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April, 2004) (emphasis in original).

³¹ Although it acknowledged that the AB in *EC-GSP* did not explicitly note that permissive provisions conforming to its statement's terms would be recognized as "rights" (see fn. 1826); as I argue below, the AB did not in fact intend this passage to constitute a definitive test of normative distinction (see section 3.1 *infra*).

³² See para. 7.2964-7.2965, and addressing certain reservations submitted by Canada, paras. 7.2980-7.2983.

not an exception".³³ It then applied this template to Articles 2.2-5.7, soon determining that Article 5.7, too, is a "right", and not an "exception" from Article 2.2.³⁴

However, in this deployment of *EC-GSP*, the panel begged its own question. The requirement that "one of the provisions suggests that the obligation is not applicable" to the measure, is merely a literal transduction of the question, whether the Article 2.2-5.7 relationship is one of exclusion, not exception, whether Article 2.2 obligations are applicable if the measure is reviewed under Article 5.7. This, it will be recalled, is the very question that the panel had asked itself to begin with.³⁵ Yet the panel used this constituent element of the template it identified in *EC-GSP*³⁶ to proclaim that Article 5.7 is a "right", not an "exception". And it did so by resorting to convoluted textualism; its only justification for deeming Article 2.2 inapplicable in the face of Article 5.7 is the observation that the language of Article 2.2 ("*except* as provided for" in Article 5.7) "suggests" that the Article 2.2 obligations do not apply to Article 5.7 measures.³⁷ Thus, the very word "except" was taken by the panel to imply not an "*exceptio*n" but an "exclusion". Indeed, the panel's textual logic (*ad absurdum*) is such that had the phrase "except for..." not been included in Article 2.2, it seems that it could not have characterized Article 5.7 as a "right", because then no segment of the text would "suggest" that Article 2.2 is inapplicable. Yet later, the panel noted the failure of the *Japan-Agricultural Products II* panel to use the word "exception" to depict Article 5.7 (preferring instead the word "exemption"), as support for its own characterization of the provision as a "right".³⁸ The root-word "except", in both presence and absence, was therefore used by the panel to construct Article 5.7 as a "right", not an "exception".

In subsequently applying the *EC-GSP*-derived template to the Article 5.1-5.7 relationship, the panel's textual entanglements were even more pronounced. At one point,³⁹

³³ See *EC-Hormones*, para. 104.

³⁴ Para. 7.2969. But note that prior to this *EC-GSP*-based analysis, the panel had already taken for granted that Article 5.7 establishes a "right", in the context of the EC's argument that Article 5.7 applies because the Member State measures were "provisionally adopted"; see para. 7.2939.

³⁵ See note 18 *supra*.

³⁶ In its analysis, the panel clearly breaks down the *EC-GSP* template into three constituent elements: (a) permission in certain circumstances by one provision of what would otherwise be prohibited by another; (b) one of the provisions refers to the other; and (c) one of the provisions suggests that the other is not applicable (see paras. 7.2985-7.2986, 7.2994 and 7.2995).

³⁷ See Para. 7.2969 (emphasis added); in support, the panel cites the language of Article 3.1, that also uses the word "except" with respect to Article 3.3.

³⁸ See para. 7.2972, referring to AB report, *Japan-Measures Affecting Agricultural Products*, WT/DS76/AB/R (22 February, 1999) at para. 80.

³⁹ See para. 7.2986.

in order to characterize Article 5.7 as a *right*, the panel relied most literally on a passage in the *Australia–Salmon* panel report depicting Article 5.7 as an *exception*⁴⁰ (and so, for the panel's purposes, establishing Article 5.7 as a permissive provision in relation to Article 5.1).⁴¹ But then, since there is no explicit textual cross-referencing between Article 5.1 and Article 5.7 that clearly "suggests" the inapplicability of one in the face of the other⁴² (such as the word "except"), the panel had no choice but to draw near an analysis of the substantive distinction between Articles 5.1 and 5.7 – namely, the existence or non-existence of scientific evidence sufficient for a risk assessment under Article 5.1. Only here, at the end of its analysis of the Article 2.2-5.1/5.7 relationship, did the panel briefly touch upon substance, relating, on a logical basis, to the parties' intentions in obligating themselves,⁴³ thus breaking from its strictly literalist approach and rule-exception-right triangulation. This is more than a minor methodological inconsistency, but a failure of literalism *sans paroles*.

This reading of the panel's analysis of the Article 2.2-5.1/5.7 relationship should suffice to demonstrate how its reliance on the rule-exception-right distinction drove it into dire, inconsistent, straits. A few words about the way the panel later stumbled on the basis of its characterization of Article 5.7 as a "right"⁴⁴ seem inevitable, though. This finding would seem to have comported with the EC's initial argument, that the Article 2.2-5.1/5.7 relationship is one of exclusion, not exception, implying that procedurally, the burden of proving an inconsistency with the conditions attached to this right should be on the complainant; that the complainant's had invoked the "wrong" provision; and that substantively, the Member State measures should be assessed only under Article 5.7. And indeed, the panel placed the burden-of-proof on the complainant, with respect to Article 5.7 as well as Article 5.1 – ostensibly a concession to the EC; but this procedural finding's effect on the report's outcome was negligible in real terms, because the panel later generally found that the EC's internal evaluation's of the Member State safeguards "established a presumption" that the safeguards' were imposed "where relevant scientific evidence was not

⁴⁰ See panel report, *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/R (12 June, 1998), para. 8.57.

⁴¹ The panel was self-conscious of this contradiction and stated that it is "less than clear" that the *Australia-Salmon* panel "conceived of Article 5.7 as an exception in the nature of an affirmative defence" (para. 7.2986).

⁴² See para. 7.2995, second sentence.

⁴³ See para. 7.2995, seventh sentence: "We find it unreasonable to assume that Members would accept, even in principle, an obligation with which they cannot comply".

⁴⁴ See para. 7.2969.

insufficient",⁴⁵ thus baldly shifting the burden to the EC, to prove otherwise. On the question of the proper basis of the complaint, the panel half-sidestepped the issue, apologetically referring only to a situation in which an SPS measure was adopted and "maintained *consistently* with the cumulative requirements of Article 5.7" – in which case a complaint under Article 5.1 "could not succeed" – and so "in such a case" it would be inaccurate to say that the complainant's had invoked the "wrong" provision.⁴⁶ This ignored more difficult questions, such as whether a measure maintained *inconsistently* with Article 5.7 despite its applicability, should not be considered a violation of that provision, rather than Article 5.1⁴⁷

And finally, when it came to resolving the relative applicability of Article 2.2, 5.1 and 5.7, i.e., which provision(s) apply to the safeguard measures - the fundamental "preliminary" question before it – the panel ultimately had no qualms about discarding its entire painstaking rule-exception-right analysis, finding simply that "in the specific circumstances of this case, the critical legal issue" is consistency with Article 5.1, not 5.7.⁴⁸ The panel's subsequent order of analysis is to examine each safeguard's consistency with Article 5.1, only then with Article 5.7. A detailed justification for this approach is advanced,⁴⁹ but the result is distinctly similar to a classical rule-exception construct.⁵⁰ The perversity is clear when one considers that the panel agreed with the EC that Article 5.7 is not an "exception", but then followed the order of analysis advocated by the complainants.⁵¹ The panel sought support for this order of analysis in *Japan-Agricultural Products II* and *Japan-Apples*⁵² - a bruised reed to trust upon, though: in both these cases, the panels (as upheld by the AB) examined Article 2.2 consistency first, then the application of Article 5.7 as part of Article 2.2 obligations, only then turning to Article 5.1 "risk assessment" obligations, where relevant.

⁴⁵ E.g., with respect to Austria's safeguard on T25 Maize, *see* para. 7.3260.

⁴⁶ Para. 7.3004 (emphasis added).

⁴⁷ As per the EC's argument (para. 7.2955).

⁴⁸ Para. 7.3006.

⁴⁹ Para. 7.3007.

⁵⁰ Compare *EC-GSP* panel, para. 7.45.

⁵¹ See para.7.2922.

⁵² AB report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R (26 November, 2003).

III. The Rule-Exception-Right Distinction in WTO Jurisprudence

(1) A Series of Unfortunate Interpretations

On the backdrop of this critical reading of the *EC-Biotech*'s analysis, I turn now to reexamine its jurisprudential sources, to see how it relates to the WTO's prior record of the rule-exception-right distinction. The rule-exception-right classification has no statutory basis in the WTO Agreements, explicit or otherwise,⁵³ and its sources in general international law have never been adequately traced.⁵⁴ It was not identified or reasoned in the abstract by a panel or by the AB at any single point in time. Rather, the distinction's contours – at least as drawn by the *EC-Biotech* panel – evolved, piecemeal, over the course of several disputes, mainly in the process of allocating the burden-of-proof in specific situations. Rereading relevant milestones of this judicial narrative⁵⁵ suggests that the *EC-Biotech* panel's framework is merely a misinterpretation of earlier WTO decisions. In spite of the *EC-Biotech* panel's textual toeholds, the distinction was never intended to be taxonomized so rigidly; substance and procedure were never so confused; and indeed, "autonomous rights" were never constituted as a separate category of norms.

⁵³ In *US–Wool Shirts and Blouses* (AB report, *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April, 1997), at p. 13) the AB explicitly discounted recourse to Article 3.8 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) even for the purpose of supporting a simpler rule-exception distinction.

⁵⁴ Although the different allocation of the burden-of-proof to rules and exceptions has been called "a general principle of law" (see Panel in *US–Underwear* (panel report, *US-Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (8 November, 1996)), this says nothing about the method for identifying exceptions; the substantive legal implications of classifying a provision one way or another; or of the existence of "autonomous rights" as a separate category.

⁵⁵ This section is not intended to provide a comprehensive survey of the disputes in which the rule-exception-right distinction played some sort of role, however minor. Notably, in the interest of space, I omit discussion of *Turkey-Textiles* (AB report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October, 1999)) and *Japan-Apples* – although an examination of these reports might support this article's analysis; in both cases recourse to the rule-exception-right distinction is either cursory or implicit, and cannot be said to reflect significantly on the analysis in *EC-Biotech*.

(2) *The Distinction's Genes(is): "Rules" and "Exceptions" in US-Wool Shirts*

In the beginning there were rules and exceptions. In *US-Wool Shirts*, faced with a burden-of-proof argument,⁵⁶ the AB opined in a much-quoted passage based on previous GATT/WTO jurisprudence,⁵⁷ that:

"Articles XX and XI:(2)(c)(i) [GATT] are *limited exceptions* from obligations under certain other provisions of the GATT 1994, *not positive rules establishing obligations in themselves*. They are in the nature of *affirmative defences*." (emphasis added)⁵⁸

Yet the AB offered no universal guidance towards determining the exceptional defensive "nature" of certain WTO provisions. Did it really mean to identify a specific category of rules and establish (or consolidate) a taxonomy of norms? In the face of prior rulings, the AB was decisive in labeling Articles XX and XI:(2)(c)(i) GATT as "exceptions", but was far less clear on the provision at issue, Article 6 of the Agreement on Textiles and Clothing (ATC). The AB placed the burden of proving that US measures were inconsistent with Article 6 ATC on India, the complainant, noting that GATT Reports relating to exceptions were not "relevant in this case". Yet the AB did not explicitly classify Article 6 ATC as a "positive rule", or definitively find that it was *not* an "exception",⁵⁹ and indeed, in its reasoning the AB did not establish any generally applicable relationship between Articles 2 and 6 ATC, saying only that these provisions reflect a "carefully drawn balance of rights and

⁵⁶ Mention of *US-Wool Shirts* is conspicuous by its absence in the *EC-Biotech* panel report, as if confirming that the panel was faced with a substantive question, not a burden-of-proof question.

⁵⁷ For a survey of GATT jurisprudence, see Rustel S.J. Martha, "Presumptions and Burden-of-proof in World Trade Law", 14 *Journal of International Arbitration* 67 (1997) at footnote 113; *see also* GATT Reports noted in footnote 23 of *US-Wool Shirts*.

⁵⁸ *US-Wool Shirts*, p. 16; the AB continued by stating that "It is only reasonable that the burden of establishing such a defence should rest on the party asserting it was confronted"; this suggests that the burden follows the claim, not some inherent nature of the clause, but since this article is not focused on the burden-of-proof, I shall not pursue this line of thinking.

⁵⁹ This failure is particularly telling on the backdrop of a previous/concurrent WTO dispute, *US-Underwear*, in which the panel had found Article 6 ATC to constitute an *exception* to Article 2 ATC, allocating the burden-of-proof to the respondent, the US; this point was not appealed by the US in the subsequent appeal whose "narrowness" was explicitly noted by the AB (WT/DS24/AB/R (10 February, 1997), p. 15). Notably, Article 6 was included in Costa Rica's claims against the US in this dispute, as it was in India's claims in *US-Wool Shirts*.

obligations of Members".⁶⁰ This hardly seems like the application of a bright-line normative distinction.⁶¹ It is far from clear that the AB at all envisioned a rigid classification of norms that would be determinative of the burden-of-proof relating to each norm, let alone of other more substantive legal issues.⁶²

(3) Mutant Rules? EC-Hormones and the Advent of "Autonomous Rights"

In *EC-Hormones*, a dispute whose influence is clearly discernable in *EC-Biotech*, the panel considered Article 3.3 SPS an exception to the Article 3.1 obligation to base SPS measures on international standards, and that the burden of proving compliance with Article 3.3 (and derivatively – with the risk assessment requirements of Article 5) was on the party defending its SPS measure. The AB rejected this, finding instead that Articles 3.1/3.3 do not maintain a rule-exception relationship.⁶³ In explaining why Article 3.3 was not an "exception" to Article 3.1, the AB offered the following, oft-repeated language:

“Article 3.1 of the SPS Agreement *simply excludes from its scope of application the kinds of situations* covered by Article 3.3 of that Agreement, that is, where a Member has *projected for itself* a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the *autonomous right* of a Member to establish such higher level of protection, provided that that Member *complies* with certain requirements in promulgating SPS measures to achieve that level.”⁶⁴

⁶⁰ US-Wool Shirts, p. 16.

⁶¹ It has even been argued that in this dispute the AB was *rejecting* the application of the rule-exception approach (rather than consolidating it), while the reasons for not treating Article 6 ATC as an exception are "unconvincing"; See Pei-San Tan, *Shirts and Blouses: United States Measures Affecting Imports of Woven Shirts and Blouses*, 9(1) *European Journal of International Law* 182 (1998).

⁶² It is also noteworthy that the AB did not, in *US-Wool Shirts*, consider the possibility that Article 6 ATC was neither rule nor exception, but rather a "right" – an alternative that might have enjoyed some textual basis, given that Article 6.1 ATC leaves it to Members to decide "whether or not they wish to retain *the right* to use the provisions of this Article" (emphasis added); But see US arguments in *US-Wool Shirts*, at p. 8: "The United States argues that India also ignores the fact that, in addition to "obligations", WTO Members also have "rights", and that many, if not most, of what would be considered "exceptions" under India's taxonomy are more properly viewed as rights".

⁶³ For some discussion, see David R. Hurst, Decisions of the Appellate Body of the WTO – Hormones: European Communities – Measures Affecting Meat and Meat Products, 9(1) *European Journal of International Law* 182 (1998); and Grando, *supra* note 4 at 635.

⁶⁴ *EC-Hormones*, para. 104, reiterated at para. 172) (emphases added).

The probative burden regarding Article 3.3 was duly allocated to the complainants, but more importantly for present purposes, the norm-category of "autonomous rights" was textually born, establishing the impression that there are three categories of norms among WTO rules, along with what seems like a legal definition distinguishing "autonomous rights" from "exceptions" – provisions that another provision "simply excludes" from its scope of application.

Despite the eminently quotable passage, did the AB really intend to establish a new category of norms - "autonomous rights" - to which special rules might apply in dispute settlement? If one observes how the AB actually applied the law in *EC-Hormones*, it clearly did not, for in practice it regarded Article 3.3 as a provision that in the proper context of Article 5 SPS establishes *obligations* of a standing at least equivalent to those of Article 3.1. Articles 3.1 and 3.3 act as separate, alternative rules governing different situations: the former applies to SPS measures "based on" international standards, the latter applies to measures resulting "in a higher level" of protection.⁶⁵ The burden of proving an inconsistency with *either* provision rests in *any* case on the complainant who claims that one of them has not been complied with by the respondent. In terms of norm classification, both provisions are *obligations*,⁶⁶ the scope of whose application is mutually exclusive. In another, virtually uncited segment of *EC-Hormones* the AB states outright:

"the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with *the obligations* assumed by the European Communities under *each* Article of the SPS Agreement addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5" (emphases added).⁶⁷

⁶⁵ Similarly, see Hurst *supra* note 64.

⁶⁶ At the same time, both Articles 3.1 and 3.3 may be considered as "rights", since Article 3.1 (or any other provision of the GATT or SPS) does not obligate WTO Members to adopt SPS measures at all. This logical duality of rules will be dealt with in section 4 *infra*.

⁶⁷ Note, however, that in *EC-Hormones*, the panel and AB were not faced with the additional complication posed in subsequent cases when the complainant did not invoke the provisions whose classification was at issue – the US, for example, explicitly claimed that the EC measures were not justified by Article 3.3 (para. III.2, *EC-Hormones*, US Panel Report), and even claimed that the measures were not justified as "provisional measures" under Article 5.7 SPS, while the EC preferred to cite, unsuccessfully, the "Precautionary Principle",

The AB thus clearly treated Article 3.3 SPS as an "obligation" and even referred to it as such. Supporting this understanding is the fact that the AB, having found that the EC measures were inconsistent with Article 5.1, and hence, with Article 3.3, did not derive from this a violation of Article 3.1, indeed reversing the panel's finding of such a violation.⁶⁸ In substance, the AB found that Articles 3.1 and 3.3 are independent "positive rules", each of which may be violated under its own terms (and cannot be violated contemporaneously by the same measure). Which of them applies to a given situation depends on the watershed question, whether the challenged measure is "based on" an international standard or not – a question of substantive interpretation, not procedure. The AB did not intend – and did not need – to create a new class of norms; but the powerful textual legacy of *EC-Hormones* is the phrase "autonomous rights", suggesting a distinct class of norms, setting the stage for future complication.⁶⁹

What, however, was actually meant by the AB in its use of the term "autonomous right"? In general legal parlance, "autonomous" right usually refers to the autonomy of the right-holder – that the right is an expression or an extension of the autonomy of the bearer of the right.⁷⁰ This is likely what the AB intended by using the phrases "autonomous right of a Member..." and "projected *for itself*" (emphases added) – referring to the element of choice that exists in Article 3.3 (and in "the kinds of situations" it covers), between international standards and higher ones. Indeed, in *EC-Biotech*, Canada correctly pointed out that this aspect of "free choice" is absent in Article 5.7, whose application depends on a more objective or exogenous condition (if not purely so) – the absence of sufficient scientific evidence.⁷¹ But Canada overshot in arguing on this basis that Article 5.7 was an exception

making only grudging reference to Article 5.7 SPS (see Para. IV.239, US Panel Report). This situation was virtually reversed in *EC-Biotech*, with the US making no claim under Article 5.7, which was invoked by the EC.

⁶⁸ See Paras. 209 and 253(h).

⁶⁹ In *EC-Sardines* (AB report, *EC-Trade Description of Sardines*, WT/DS231/AB/R (26 September, 2002)), the AB confirmed its Article *EC-Hormones* 3.1-3.3 analysis and applied it by analogy to the relationship between different segments of Article 2.4 TBT. For lack of space this later case cannot be dealt with in more detail. However, it bears mention that the "permissive" segment of Article 2.4 TBT was not characterized by the AB as an "autonomous right".

⁷⁰ See, e.g., reference to the "autonomous right of choice", in US jurisprudence with respect to abortion (e.g., *DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, et al., PETITIONERS v. LEROY CARHART*); and to an "autonomous right of residence" in EC Council Directive 2003/86/EC on the Right to Family Reunification, O.J. L251/12, 3.10.2003, referring to a right of residence that is held by an individual autonomously, without dependence on a sponsor.

⁷¹ Para. 7.2982.

and that any recourse to the Article 3.1-3.3 relationship as discussed in *EC-Hormones* would be "inappropriate".⁷² At the same time the EC was insisting that Article 5.7 was an "autonomous right", not an exception.⁷³ Thus, both complainant and respondent integrated the "autonomy" of the right into the provision's classification.

Moreover, a literalist approach bent on finding a neat taxonomy of norms, distinguishing between "exceptions" and "rights", would read into the phrase "autonomous rights" another meaning, that would refer to the autonomy of the *right*, not the right-holder – i.e., that the provision, *because* its scope of application has been *excluded*, not because of the right-holder's choice, is an "autonomous", self-standing permissive norm, which unlike an "exception", is not dependent upon the existence of an opposing obligation or prohibition.⁷⁴ It seems that at least the *EC-Biotech* panel adopted this understanding, allowing it to discard Canada's arguments;⁷⁵ and yet, the panel was likely aware of the ambiguity of the term "autonomous", because in its own conclusion it eschewed it, reserving the term "*qualified right*" for Article 5.7.⁷⁶

(4) Outcrossing? The Distinction Farther Afield

Japan-Agricultural Products II was referred to at some length by the *EC-Biotech* Panel, because it specifically addressed Articles 2.2, 5.1 and 5.7 SPS.⁷⁷ In this dispute, to simplify, the US cited violations of Articles 2.2 and 5.1, and Japan, as respondent, invoked *inter alia* the "provisional measures" clause, Article 5.7. Arguments were made regarding the burden-of-proof, but neither Panel nor AB concerned themselves with precisely classifying Article 5.7 as either "exception" or "right". The "qualified exemption" language was used by the AB not taxonomically but rather in the process of substantively interpreting Article 2.2 – the logic being, that because Article 5.7 applies where "sufficient scientific evidence" is absent, an "overly broad and flexible interpretation" of the sufficient evidence requirement "would

⁷² Para. 7.2958.

⁷³ Para. 7.2952.

⁷⁴ As explained in section 4 *infra*, this is logically impossible; permissive norms have no normative meaning that is independent of an obligation that they negate.

⁷⁵ Para. 7.2983.

⁷⁶ Para. 7.2974.

⁷⁷ In its textual approach, the panel was concerned with the AB's use of the word "exemption"; yet the panel manipulated the phrase to support of its finding that Article 5.7 is a "right" (see *supra*).

render Article 5.7 meaningless".⁷⁸ Moreover, examining the way the panel and the AB applied Article 5.7 itself as well as the burden-of-proof in its respect, it seems clear that both treated the provision as an *obligation*. In the panel's analysis, Article 5.7 is a specification of obligations under Article 2.2, complementary to Article 5.1.⁷⁹ Even though it was Japan, the respondent, who had invoked Article 5.7, the initial burden of proving its violation was placed on the complainant, the US.⁸⁰ Thus, the panel and AB discarded the textual baggage of *EC-Hormones*: obligations are simply obligations, not "autonomous rights".

In *Brazil-Aircraft*,⁸¹ the panel faced burden-of-proof arguments relating to the relationship between the export subsidy prohibition under Article 3.1(a) SCM, on one hand, and the special and differential treatment provisions under Article 27 SCM, on the other. Canada, the complainant, argued that the latter constituted an "exception", and that the burden was on Brazil, the respondent. Brazil disputed this, arguing instead that Article 3.1(a) SCM did not apply to it, as a developing country complying with the conditions of Article 27 SCM. In analyzing the relationship, the panel (later upheld by the AB)⁸² engaged in a relatively contextual examination of the respective provisions whose method is diametrically opposed to the taxonomical approach of the *EC-Biotech* panel.⁸³ The panel did not ask whether Article 27 is a "right" or "exception", but rather more specifically asked itself whether Article 27.4 SCM is "an element of the claim of inconsistency with Article 3.1(a)", in the light of "the relevant text of the Agreement in its context, and in light of the object and purpose of the SCM Agreement".⁸⁴ It considered that Canada, to succeed in its claims under Article 3.1(a) SCM, would need to demonstrate that the provision applies to the respondent in the particular situation,⁸⁵ and so would need to show that Article 27 does *not* apply to Brazil because its conditions had not been met. Although it noted that Article 27.2(b) "recognizes the autonomous right" of certain developing countries to maintain export

⁷⁸ See *Japan-Agricultural Products II*, para. 80.

⁷⁹ See paras. 8.15 and 8.27, *Japan-Agricultural Products II*, panel report; the AB is less explicit in this regard, but provides a contextual analysis of Articles 2.2-5.1/5.7 that is harmonious with that of the panel (see AB report, paras. 72-91).

⁸⁰ *Ibid.*, paras. 8.13 and 8.58; this issue was not appealed.

⁸¹ *Brazil-Export Financing Programme for Aircraft*, Panel Report, WT/DS46/R (14 April, 1999); AB Report, WT/DS46/ABR (2 August, 1999).

⁸² *Brazil-Aircraft*, panel report, paras. 7.39-7.57; AB report paras. 137-141.

⁸³ It is indeed odd that the *EC-Biotech* panel did not consider *Brazil-Aircraft* pertinent to its rule-exception-right analysis (it is not mentioned by the panel at all); all the more so, given that one of the *Brazil-Aircraft* panelists, Prof. Akio Shimizo, served in *EC-Biotech* as well.

⁸⁴ Paras. 7.48-7.49.

⁸⁵ Paras. 7.50 and 7.56.

subsidies⁸⁶ - and certainly the use of the word "autonomous" here is appropriate, because it refers to the right-holder's freedom to exert its right at will - the panel characterized Article 27.4 as establishing *obligations* to "be considered in conjunction with Article 3.1(a) of the SCM Agreement in order to establish a claim of violation of that provision".⁸⁷ In short, the panel did not resort to "autonomous rights" as a third norm-category, but rather regarded the provision in question as an obligation that is both alternative in its application and contextually related to the general obligations of Article 3.1(a) SCM.

(5) The Distinction's Last Refuge? EC-GSP

Finally, while the impact of *EC-GSP* on the *EC-Biotech* panel's internal inconsistencies has already been described,⁸⁸ what remains is to revisit *EC-GSP* itself to observe whether it supports the *EC-Biotech* panel's understanding of the rule-exception-right distinction, and establishes a textual template for distinguishing between "rights" and "exceptions". In *EC-GSP*, the characterization of the relationship between Article I:1 GATT and the Enabling Clause arose as a burden-of-proof question and was accompanied by the tactical argument that the complainant had not made a proper claim, having not claimed a violation of the Enabling Clause.⁸⁹ However, even more than in *EC-Biotech*, the procedural question was associated with a far-reaching substantive implication, namely, do the Most-Favoured-Nation obligations of Article I:1 GATT continue to apply to measures permitted under the Enabling Clause (hence preventing discrimination among GSP beneficiaries), or do they simply dissolve as a result of the Enabling Clause?⁹⁰ Notably, for our purposes, the *EC-GSP* panel understood the underlying question as a binary one (the Enabling Clause is either "rule", or "exception"), to be answered in a contextual and purposive manner.⁹¹ On this basis it found that the Enabling Clause is an "exception", and that the burden-of-proof rests on the respondent, yet MFN obligations continue to apply where there is no inconsistency

⁸⁶ Para. 7.54.

⁸⁷ Para. 7.55.

⁸⁸ Section 2.3 *supra*.

⁸⁹ *EC-GSP* panel, paras. 7.21-7.22; AB para. 85.

⁹⁰ *Ibid.*, paras. 7.43-7.46.

⁹¹ *EC-GSP* panel, paras. 7.23 ("in order to identify whether [the Enabling Clause] is a positive rule establishing obligations or an exception, it is necessary to examine its legal function in the context of the GATT 1994 as a whole") and 7.32.

between the provisions.⁹² The AB, too, looked at the contextual relationship between Article I:1 and the Enabling Clause,⁹³ and then looked "to the object and purpose of the WTO Agreement and the Enabling Clause to clarify whether the Enabling Clause *was intended to operate as an exception* to Article I:1".⁹⁴ The AB thus disposed of an EC argument whereby "exceptions are provisions that allow measures that pursue objectives other than the WTO Agreement's own objectives".⁹⁵ In so doing, it employed language that clearly distinguishes the substantive analysis of rules and their relationships from the procedural classification for burden-of-proof purposes:

"The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, *a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law ... Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause.*"⁹⁶

This stands in stark contrast to the textual template fervently pursued by the *EC-Biotech* panel,⁹⁷ and it is on *this* basis, not a techno-textualist one, that the AB confirmed the *EC-GSP* panel's characterization of the Enabling Clause as an "exception" to Article I:1 GATT (as well as the concurrent application of the provisions), and placed the burden-of-proof on the EC's shoulders.⁹⁸ On appeal, the potential characterization of the Enabling Clause as an "autonomous right" was negligible in *EC-GSP*, raised only by Panama as a third-party.⁹⁹ The formulaic passage in the *EC-GSP* AB report – the *EC-Biotech*'s decisive reference – was

⁹² *EC-GSP* panel, para. 7.53.

⁹³ *EC-GSP* AB, para. 89-90.

⁹⁴ *Ibid.*, para. 91 (emphasis added).

⁹⁵ *Ibid.*, para. 93.

⁹⁶ *Ibid.*, para. 98.

⁹⁷ Text following note 30 *supra*.

⁹⁸ *Ibid.*, paras. 102 *et seq.*.

⁹⁹ *Ibid.*, paras. 64 *et seq.*.

merely an attempt to generalize previous findings on the burden-of-proof, *obiter dicta* mistaken for *ratio decidendi*.¹⁰⁰

The above analysis reveals several gaps between the *EC-Biotech* panel's use of the rule-exception-distinction and pre-existing WTO jurisprudence: the term "autonomous rights", although used in certain WTO cases, was not designated as a separate category of norms; the distinction was never construed as inflexibly, taxonomically, as it was by the panel; and it was previously employed for procedural purposes, not for substantive interpretation. In these respects, the panel's method of analyzing the Article 2.2-5.1/5.7 relationship is simply wrong, as a matter of WTO law.

IV. Restoring (Genetic) Order: Judicial Disposition, Logic and the Article 2.2-5.1/5.7 Relationship

Nevertheless, it must be said that the *EC-Biotech* panel report is not a freak ruling in the WTO. Rather, it is an extension and exaggeration of familiar currents in WTO judicial practice. The incongruities of the panel's analysis are confounding, but they are ingenuous, for they are not entirely figments of the panel's creativity. They are founded upon overly literal and fragmentary readings of prior jurisprudence. As such, the panel's analysis is, so to speak, the WTO's folly, taking literalism to new extremes. Where it is the substantive and contextual interpretation of WTO rules that should be determinative of their procedural treatment, obscure textualism has distorted the way rules and their interactions are interpreted, beyond recognition or straightforward comprehension. In the universe of international law, substantive legal questions relating to the relationship between obligations, derogations, exceptions and permissions are not unique to the WTO. Yet it seems inconceivable that a tribunal would apply a procedural-textual template – to the exclusion of other methods of interpretation - to divine the extent of public emergency derogations from international human rights norms,¹⁰¹ or the scope of applicability of international

¹⁰⁰ On the sidelines, it should be recalled that the AB in *EC-GSP* introduced, as a "special approach" (para. 312), the idea of placing the responsibility to raise the "exception" upon the complainant's shoulders, while retaining the burden-of-proof with the respondent (para. 321). This is an unusual finding, but it does not detract from the criticism of the rule-exception-right distinction presented here.

¹⁰¹ As per. e.g., Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights or Article 2 of the

humanitarian law in non-international armed conflicts.¹⁰² In contrast, regardless of the report's results, the *EC-Biotech* panel found it judicially acceptable to resort to a rigid and literal path in addressing a substantive legal relationship that is arguably no less important for human welfare. This should disconcert anyone concerned with the efficacy, transparency, reflexivity and indeed the legitimacy of the WTO and its dispute settlement system.

There is, however, more to be learned in relation to this discussion. In closing, I will make two additional points.

The first stems from logic, validating and generalizing the jurisprudential analysis above. The prism of deontic logic – the logic of obligation and permission – supports the intuition that distinguishing between "rules", "exceptions" and "rights", "exemptions", "autonomous rights" and "conditional rights", on a purely textual basis, is both futile and false. Permissive norms, however phrased, can all be understood as functionally equivalent to "exceptions":

“Telling me what I am permitted to do provides no guide to conduct unless the permission is taken as an exception to a norm of obligation (which may be the general maxim that what is not permitted is prohibited). Norms of permission have the normative function only of indicating, within some system, what are the exceptions from the norms of the obligation of the system ... I know of no permissive legal rule which is not logically an exemption modifying some prohibition, and interpretable as the negation of an obligation”¹⁰³

Thus, the very idea of "autonomous rights" as self-standing permissive rules distinguishable from "exceptions" has no logical or normative utility. Furthermore, permissive norms are intimately connected to contingent obligations, making even the distinction between "rights" or "exceptions" and "obligations" a difficult one. Von Wright,

Convention against Torture. For discussion of these derogations, see Cordula Droege, "International Humanitarian Law and Human Rights Law: A Legal Framework for Complementarity", *Israel Law Review* (2007)(forthcoming)

¹⁰² A hotly contested issue resting, *inter alia*, on the interpretation of "common" Article 3 of the Geneva Conventions.

¹⁰³ Alf Ross. *Directives and Norms*, Routledge and Kegan Paul., London, 1968, at pp. 120-22.

the deontic school's founder,¹⁰⁴ distinguished between "weak permissions" and "strong permissions":¹⁰⁵ "An act will be said to be permitted in the weak sense if it is not forbidden; and it will be said to be permitted in the strong sense if it is not forbidden but subject to norm". Many, if not most, WTO rules may thus be understood as "strong permissions" rather than "pure" "obligations". The entire SPS construct permits states to adopt SPS measures, "subject to norm", and as such its provisions are "strong permissions", rather than obligations – after all, the adoption of SPS measures is not mandatory. Indeed, the entire SPS agreement is a detailed "exception" to the GATT, a super-strong permissive complex of rules - recall that the SPS Preamble states that it is intended "to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, *in particular the provisions of Article XX(b)*" (emphasis added), and under Article 2.4, a measure to which the SPS agreement applies (in that it satisfies the definition of an SPS measure) and which complies with the provisions of the SPS agreement, is presumed to comply with the GATT in the same sense.¹⁰⁶

So, most – if not all - WTO "permissions" may be seen as either rights or exceptions to obligations, themselves including a contingent obligatory component. Taking a step further, however, deontic logic shows us that in textual terms, the same prescriptive results may be reached exclusively on the basis of obligatory semantics, without the use of *any* distinctively permissive language:

"...the use of permissions does not seem to be unavoidable. There could be no need to use them to derogate an obligation. At first sight, to express the derogation of an existing obligation could be sufficient to substitute it with a more complex conditional obligation. This obligation would rule out the exceptional circumstances specified in the permissions which should derogate it."¹⁰⁷

¹⁰⁴ Georg H. von Wright, *Deontic Logic*, 6 *Mind* 1 (1951).

¹⁰⁵ Georg H. von Wright, *Norm and Action: A Logical Inquiry*, Routledge and Kegan Paul, London, 1963, p. 68.

¹⁰⁶ For extensive analysis of the GATT-SPS relationship, see Christiane R. Conrad, "The EC-Biotech Dispute and Applicability of the SPS Agreement: Are the Panel's Findings Built on Shaky Ground?", elsewhere in this issue; and Gabrielle Marceau and Joel P. Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade", 36 *Journal of World Trade* 811 (2002).

¹⁰⁷ Guido Boella and Lendert van der Torre, "Permissions and obligations in hierarchical normative systems," in *Proc. of ICAIL 03*. Edinburgh: AMC Press 109 (2003).

Thus, for example, had the need to allow for providing developing countries with trade preferences been accepted at the time that the original Article I GATT was drafted, we might have encountered the GSP as a negative condition for the application of MFN treatment within the GATT text itself – a "more complex conditional obligation" - and not as a separate document (the Enabling Clause), extensively derogating from MFN.

Without exhausting the insights of deontic logic, the textual structure of interrelationships between provisions therefore seems to tell us little about either their substantive relationship or their classification for burden-of-proof purposes, since the same normative results can be achieved through different textual formulations. This confirms the finding that the substantive relationship between provisions is too important to be left to text alone, or as the *EC-GSP* panel put it, "Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law"". ¹⁰⁸ This approach should also apply to the characterization of rules for the purpose of allocating the burden-of-proof. Most WTO norms are obligations, contingent or otherwise, and so by default, any claim of violation should rest on evidence produced by the complainant. ¹⁰⁹ Exceptions are, put simply, exceptional. Finding that a particular provision is an "exception" for burden-of-proof purposes should rely on an interpretation that characterizes that provision, in its context and in the circumstances of the case, as having been "intended to operate"¹¹⁰ as an "exception" or "affirmative defence", rather than an obligation, to be proven by the respondent and not the complainant. This does not necessarily mean that the same provision cannot function, in other circumstances, and for substantive purposes, as a "positive rule establishing an obligation". ¹¹¹

¹⁰⁸ See text accompanying note 97 *supra*.

¹⁰⁹ In at least this sense, the present article's analysis, if applied to the burden-of-proof aspect of the rule-exception-right distinction, would support Grando's conclusions whereby "the burden should be allocated in most cases to the complainant", albeit for different reasons (Grando *supra* note 4 at 655).

¹¹⁰ In the terms posed by the *EC-GSP* panel (text accompanying note 94 *supra*).

¹¹¹ For example, while the AB in *Turkey-Textiles* (*supra* note 55 at fn. 13) referred to literature characterizing Article XXIV GATT as an "exception" that may be invoked as a "possible" defence to a finding of inconsistency with other GATT obligations, there seems to be no reason to exclude the possibility that Article XXIV may itself give rise to positive yet conditional obligations – as a permissive rule whose exercise is subject to norm. For a contrary view, see Gabrielle Marceau and Cornelis Reiman, "When and How is a Regional trade Agreement Compatible with the WTO?", 28(3) *Legal Issues of Economic Integration* 297 (2001) at 313. A full discussion of this point and its implications transcends the scope of this article.

The second, final, point, relates to this discussion's implications for the Article 2.2-5.1/5.7 relationship itself, and I will present it most briefly. This article has not really been about SPS substance, risk assessment, scientific evidence or GMOs. By focusing on method, I am perhaps as culpable for decontextualization as the panel. This fault cannot be entirely cured here, but it seems necessary to at least trace the way the panel might have (or should have) considered the Article 2.2-5.1/5.7 relationship.

The panel might have considered Article 5.7 in the comprehensive context of both Articles 2.2 and 5.1, and not attempted to bifurcate its analysis. It might have noted that these provisions establish a "carefully drawn balance of rights and obligations", the purpose of which is the protection of human, animal or plant life, or health in a manner constituting arbitrary or unjustifiable discrimination between WTO Members or a disguised restriction on international trade.¹¹² It might have noted that to this end, the complex of Articles 2.2, 5.1 and 5.7 recognizes two distinct situations – one, where there exists scientific evidence sufficient to establish an SPS measure on risk assessment; the second, where scientific evidence is insufficient for this purpose.¹¹³ It might then have conceived of Articles 5.1 and 5.7 as complementary, each constituting a "specific application"¹¹⁴ of Article 2.2, or put differently, that each Article constitutes is "an element of a claim of inconsistency"¹¹⁵ with Article 2.2. It might then have considered Articles 5.1 and 5.7 as alternative obligations, and that a violation of each must be examined in order to properly assess the complainant's claim regarding Article 2.2. On the procedural plane, the panel might then have found that the complainants had not invoked the "wrong" provision, because they had claimed a violation of Article 2.2, indirectly implicating an inconsistency with either Article 5.1 or Article 5.7. It might then have asked whether there is any reason to consider that Article 5.7 was "intended to operate"¹¹⁶ as an "exception" for burden-of-proof purposes. If no such reason were identified, it could then proceed in the order of analysis previously followed in SPS

¹¹² SPS Preamble, first paragraph.

¹¹³ Indeed, when rejecting the EC argument that the "demarcation line" between Articles 5.1 and 5.7 is the distinction between provisional and definitive measures (paras. 7.2939-7.2948), the panel made several statements implying that the applicability of Article 5.7 vs. Article 5.1 is determined by the sufficiency of scientific evidence. However, this contextual insight is not evident in the later passages, when the panel examines Article 5.7 as "right" or "exception".

¹¹⁴ As per *EC-Hormones* para. 180.

¹¹⁵ As per *Brazil-Aircraft*, paras. 7.48-7.49.

¹¹⁶ As per *EC-GSP* AB, para. 91.

disputes:¹¹⁷ examining first consistency with Article 2.2, then the application of Article 5.7 as part of Article 2.2 obligations, and finally turning to Article 5.1 "risk assessment" obligations, where necessary.

And of course, the panel might have done so in a more concise, consistent and accessible way.¹¹⁸ Absent an appeal, however, much of the outcome of *EC-Biotech* will, unfortunately, remain intelligible only "to anyone that understands such things".¹¹⁹

¹¹⁷ *Japan-Agricultural Products II* and *Japan-Apples* (see *supra* text accompanying note 52).

¹¹⁸ The incoherence of the panel's analysis is such, that at the interim review stage, Canada revealed an inconsistency between the panel's reasoning on the application of articles 5.1 and 5.7, on one hand, and its conclusions, on the other hand, whereby the EC safeguard measures are inconsistent with both Articles 5.1 and 5.7 (see para. 7.3930, WT/DS291,292,293/INTERIM and para. 6.174 of the final panel report). Consequently, the panel revised its findings in this respect, omitting reference to an inconsistency with Article 5.7 (see paras. 6.174-5 and 7.399 of the final report). Moreover, this was not merely a textual error; it reflects the panel's *de facto* treatment of Article 5.7 as an exception, in spite of its conclusion that it is a "right" (see *supra* text accompanying note 50).

¹¹⁹ *Supra* note 1.