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Genetically modified rules: the awkward rule–exception–right distinction in *EC–Biotech*

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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' does not actually exist; that the Article 2.2–5.1/5.7 SPS relationship should be more straightforwardly construed than the panel's analysis would suggest; and that the disorderly and incoherent outcome of the panel's analysis serves as a cautionary tale against excessive textualism in WTO dispute settlement.

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

Lewis Carroll, *A Tangled Tale* (1885)

1. Introduction

Arts. 2.2, 5.1, and 5.7 SPS are the WTO's basic rules allowing import restrictions due to human, animal or plant health, or life concerns. Their interrelationship raises questions of substantive law, science, and legitimacy. Yet the *EC–Biotech* panel's[1] analytical instrument in its 20-page discussion[2] of the Art. 2.2–5.1/5.7 relationship is technical: the arcane classification of WTO norms as '*Positive Rules*', '*Exceptions*', or '*Autonomous rights*'. This distinction stems from procedural burden-of-proof jurisprudence in which operative difficulties have already

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

2 See paras. 7.2923–7.3007.

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been noted,[3] if not fully deciphered. *EC–Biotech* confirms them, and shows how norm classification problems have 'cross-pollinated' into substantive law beyond burden-of-proof. Here I argue that the panel's distinction is emblematic of de-contextualization in the WTO,[4] that the category of 'autonomous rights' doesn't exist in WTO law and logic, and that the panel wrongly characterized and applied Arts. 2.2, 5.1, and 5.7 SPS.

2. A tangled (textual) tale: the Panel's Analysis of the Art. 2.2–5.1/5.7 SPS Relationship

Norm classification in *EC–Biotech* was a 'preliminary issue'[5] within the analysis of EC Member State safeguard measures restricting imports of certain genetically modified products.[6] The need to classify norms did not *arise* under burden-of-proof arguments, although the parties addressed them,[7] and the panel noted implications in this regard.[8] Rather, the central question was substantive: which SPS provision(s) apply when assessing the WTO-consistency of measures?[9] The complainants advocated Art. 2.2/5.1 review, requiring stringent risk assessment based on sufficient scientific evidence, with Art. 5.7 playing a subsidiary role as a defence.[10] The EC, however, argued that the safeguards were provisional measures to be assessed exclusively[11] under the more lenient terms of Art. 5.7, permitting provisional measures based on available pertinent information. Despite the considerable substantive implications, the parties' arguments soon aimed at tactical, procedural gains. For the EC, complainants had not presented an explicit Art. 5.7 violation claim, and so if the measures should be assessed only under Art. 5.7, the 'wrong provision' had been invoked.[12] The complainants naturally argued that Art. 5.7 was an 'exception' (so the initial burden-of-proof would be the respondent's).[13] In approaching Arts. 2.2–5.1/5.7, procedural arguments thus juxtaposed the substantive.

3 See Bartels (2003: 517) and Grando (2006).

4 See also Horn and Weiler (2005: 252); and Ortino (2006).

5 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'!

6 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).

7 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 Art. 5.7 applies'; para. 7.2959: 'Canada considers that it would be the member invoking Art. 5.7 that would have the initial burden of demonstrating a prima facie case'; and para. 7.2960: 'According to Argentina, it is up to the responding party to invoke a defence under Art. 5.7 and to meet the burden of establishing that defence.'

8 See para. 7.2976.

9 See paras. 7.2923 and 7.2949.

10 See paras. 7.2956–7.2960.

11 See, e.g., para. 7.2954.

12 See para. 7.2954.

13 According to WTO burden-of-proof jurisprudence as discussed in section 3 *infra*.

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Within this substantive-procedural hodgepodge the panel 'mutated' rule–exception–right terminology from procedural tool to substantive formula. It navigated the parties' competing references to burden-of-proof jurisprudence, while ignoring its main task: interpreting the substantive relationship between WTO rights and obligations in context. The result is a serpentine set of rationalizations that presents no unifying logic. The following observations condense and criticize the panel's analytical *method* as overly reliant on its idea of the rule–exception–right distinction.

First, in approaching Arts. 2.2–5.1/5.7, the panel took the role of taxonomist rather than legal interpreter. Adhering to parties' arguments, it modified the question of applicable law to read: 'Art. 5.7 of the SPS Agreement – right or exception from the "general obligation" under Art. 5.1?',[14] thus embracing the limited assertion of a relationship 'of exclusion, not exception'.[15] Yet it did not clarify why these narrow terms, derived from the rule–exception–right burden-of-proof jurisprudence,[16] establish the correct framework for analyzing the substantive relationship between provisional and definitive SPS measures. Second, in its taxonomical framework the panel assumed that 'autonomous rights' constitute a *separate* class of norms, distinct from both 'exceptions' and 'positive rules'.[17] Indeed, it presumed that any provision subjected to a textual litmus test (discussed below), will reveal itself as belonging to one of these categories.[18] For both procedure and substance, the panel found that Art. 5.7 'establishes a qualified right'. Third, in thus 'characterizing' Art. 5.7, the panel took a two-step approach, first analyzing the Art. 2.2–5.7 relationship, then the Art. 5.1–5.7 relationship. The necessity of this division is unclear. The AB has found that Arts. 2.2/5.1 should 'constantly be read together',[19] and has confirmed that Art. 5.1 may be viewed as 'a specific application of the basic obligations contained in Art. 2.2'.[20] The panel might have therefore regarded Arts. 2.2/5.1 as a single obligation, so that an analysis of their relationship to Art. 5.7 should have satisfied the panel's taxonomical effort. The bifurcated approach reflects the panel's geometrical understanding of provisions as two points between which a single line may be drawn; it raised its statutory sextant twice, to sight Arts. 2.2 and 5.1 separately in order to fix the position of Art. 5.7 as either 'right' or 'exception'.[21] For the panel, its

14 See para. 7.2949.

15 See para. 7.2949.

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

17 This assumption is shared by critics of the distinction's operation (Grando, 2006: 618, citing 'two different categories of rules' beyond obligations, and Bartels, 2003: 518).

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

19 See *EC–Hormones* at para. 180.

20 See *EC–Hormones* at para. 180.

21 The metaphor evokes Lennard (2005).

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provision-specific readings of Arts. 2.2 and 5.1 confirmed each other,[22] each identifying Art. 5.7 as a 'right'. Yet at no point did the panel form a coherent understanding of Arts. 2.2–5.1/5.7 from which the provisions' substantive relative applicability may emerge.

The panel thus chose a rigid construal of the rule–exception–right distinction as the definitive framework for scoping SPS provisions, and it is in this mindset that it turned to WTO jurisprudence for grounding. As its sextant, the panel relied primarily on what it called a 'general test',[23] derived from the AB's *EC–GSP* report, whereby:[24]

> 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 permissive provisions that are 'exceptions' from those that are 'rights'.[25] It first confirmed the template by checking if it fit the Art. 3.1/3.3 relationship,[26] which the AB had found establishes an 'autonomous right and *not* an exception'.[27] It then applied the template to Arts. 2.2–5.7, soon determining that Art. 5.7, too, is a 'right', and not an 'exception' from Art. 2.2.[28] 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' is merely a literal transduction of the question, whether the Art. 2.2–5.7 relationship is one of exclusion, not exception, whether Art. 2.2 is applicable if the measure is reviewed under Art. 5.7. This, it will be recalled, is the very question that the panel had asked itself to begin with. Yet the panel used this constituent element of the template it

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

23 See paras. 7.2966, 7.2968, 7.2969.

24 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).

25 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).

26 See para. 7.2964–7.2965, and addressing reservations submitted by Canada, paras. 7.2980–7.2983.

27 See *EC–Hormones* at para. 104.

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

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identified in *EC–GSP*[29] to proclaim that Art. 5.7 is a 'right', not an 'exception'. And it did so by resorting to convoluted textualism; its only justification for deeming Art. 2.2 inapplicable in the face of Art. 5.7 is that the language of Art. 2.2 ('*except* as provided for' in Art. 5.7) 'suggests' that it does not apply to Art. 5.7 measures.[30] Thus, the word 'except' was taken to imply not an '*except*ion' but an 'exclusion'. Indeed, the panel's textual logic is such that had the phrase 'except for …' not been included in Art. 2.2, it could not have characterized Art. 5.7 as a 'right', because the text would not 'suggest' that Art. 2.2 is inapplicable. Yet later, the panel noted the failure of *Japan–Agricultural Products II* to use the word 'exception' to depict Art. 5.7 (using 'exemption' instead), as support for its characterization of Art. 5.7 as a 'right'.[31] The root-word 'except', in presence and absence, was thus used by the panel to construct Art. 5.7 as 'right', not 'exception'.

In subsequently applying the *EC–GSP* template to the Art. 5.1–5.7 relationship, the panel's textual entanglements were even more pronounced. In order to characterize Art. 5.7 as a *right*,[32] the panel relied most literally on part of the *Australia–Salmon* panel report depicting Art. 5.7 as an *exception*[33] (establishing Art. 5.7 as a permissive provision in relation to Art. 5.1).[34] But then, since there is no explicit textual cross-referencing between Art. 5.1 and Art. 5.7 that clearly 'suggests' the inapplicability of one in the face of the other[35] (such as the word 'except'), the panel had no choice but to approach an analysis of the substantive distinction between Arts. 5.1 and 5.7 – namely, the existence or non-existence of scientific evidence sufficient for a risk assessment under Art. 5.1. Only here, at the end of its analysis of the Art. 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,[36] 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 Art. 2.2–5.1/5.7 relationship should suffice to demonstrate how its reliance on the rule–exception–right distinction

29 The panel divides the template into three: (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 the other is not applicable (paras. 7.2985–7.2986, 7.2994, and 7.2995).

30 See para. 7.2969 (emphasis added); the panel cites Art. 3.1, using 'except' with respect to Art. 3.3.

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

32 See para. 7.2986.

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

34 The panel was conscious of this contradiction, finding it 'less than clear' that the *Australia–Salmon* panel 'conceived of Art. 5.7 as an exception in the nature of an affirmative defence' (para. 7.2986).

35 See para. 7.2995, second sentence.

36 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.'

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drove it into dire, inconsistent, straits. A few words about the way the panel later stumbled on the basis of its characterization of Art. 5.7 as a 'right'[37] seem inevitable, though. This finding would seem to have comported with the EC's initial argument, that the Art. 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 Art. 5.7. And, indeed, the panel placed the burden-of-proof on the complainant, with respect to Art. 5.7 as well as Art. 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 insufficient',[38] 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 Art. 5.7' – in which case a complaint under Art. 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.[39] This ignored more difficult questions, e.g. whether a measure maintained *in*consistently with Art. 5.7 despite its applicability, is not a violation of that provision, rather than Art. 5.1.[40]

Finally, when it came to resolving the applicability of Arts. 2.2, 5.1 and 5.7 – the fundamental 'preliminary' question before it – the panel had no qualms about discarding its painstaking analysis, finding that 'in the specific circumstances of this case, the critical legal issue' is consistency with Art. 5.1, not Art. 5.7.[41] The panel's subsequent order of analysis is to examine each safeguard's consistency with Art. 5.1, only then with Art. 5.7, distinctly like a classical rule–exception construct.[42] Perversely, the panel agreed with the EC that Art. 5.7 is not an 'exception', but then followed the complainants' order of analysis.[43] The panel sought support in *Japan–Agricultural Products II* and *Japan–Apples*[44] – a bruised reed to trust upon: in both cases, the panels (and AB) examined Art. 2.2 consistency first, then the application of Art. 5.7 as part of Art. 2.2 obligations, only then turning to Art. 5.1.

37 See para. 7.2969.
38 E.g., with respect to Austria's safeguard on T25 Maize, see para. 7.3260.
39 Para. 7.3004 (emphasis added).
40 As per the EC's argument (para. 7.2955).
41 Para. 7.3006.
42 Compare *EC–GSP* panel, para. 7.45.
43 See para. 7.2922.
44 AB report, *Japan–Measures Affecting the Importation of Apples*, WT/DS245/AB/R (26 November 2003).

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3. The rule–exception–right distinction in WTO jurisprudence: genes(is) and outcrossing

With this critical reading in mind, let us revisit the rule–exception–right distinction's prior record. It has no statutory basis, explicit or otherwise,[45] and its sources in general international law have never been adequately traced.[46] It was not identified or reasoned at any single point in time. Rather, its contours, as drawn by the *EC–Biotech* panel, evolved piecemeal through many disputes while allocating the burden-of-proof. Rereading relevant milestones of this judicial narrative[47] suggests that the *EC–Biotech* panel's framework misinterprets earlier WTO decisions. The distinction was never taxonomized so rigidly; substance and procedure were never so confused; and, 'autonomous rights' never constituted a separate category of norms.

First, there were only rules and exceptions. In *US–Wool Shirts*, faced with a burden-of-proof argument,[48] the AB opined in a much-quoted passage based on previous GATT/WTO jurisprudence,[49] that: 'Arts. 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 defence*.'[50] Yet the AB offered no universal guidance towards determining the 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 Arts. XX and XI:(2)(c)(i) GATT as 'exceptions', but was far less clear on the provision at issue, Art. 6 of the Agreement on Textiles and Clothing (ATC). The AB placed the burden of proving that US measures were inconsistent with Art. 6 ATC on India, the complainant, noting that GATT Reports relating to exceptions were not 'relevant in this case'. It did not, however, classify Art. 6 ATC as a

45 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 Art. 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.

46 The allocation of burden-of-proof to rules and exceptions may be 'a general principle of law' (panel report, *US–Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (8 November 1996)), but this says nothing of the way exceptions are identified; the substantive legal implications of classifying a provision; or the existence of 'autonomous rights' as a separate category.

47 I will not provide a comprehensive survey of the disputes in which the rule–exception–right distinction played a role, however minor. In the interest of brevity, 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 in both cases recourse to the rule–exception–right distinction is cursory or implicit, and cannot reflect significantly on the analysis of *EC–Biotech*.

48 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.

49 For a survey of GATT cases, see Martha (1997, fn. 113); see also GATT Reports in fn. 23 of *US–Wool Shirts*. Indeed, the rule–exception concept was imported from EC case-law on Arts. 28/30 EC (*ex* Arts. 30/36 EC) by early, EC-trained GATT jurists; this is a story to be told elsewhere.

50 *US–Wool Shirts* at p. 16 (emphasis added).

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'positive rule', or find that it was *not* an 'exception',[51] and, indeed, it did not establish a generally applicable relationship between Arts. 2/6 ATC, saying that these provisions reflect a 'carefully drawn balance of rights and obligations'.[52] This is hardly a bright-line normative distinction.[53] It is far from clear that the AB envisioned a rigid norm-classification determinative of the burden-of-proof, let alone of more substantive legal issues.[54]

In *EC–Hormones*, the panel considered Art. 3.3 SPS to be an exception to the Art. 3.1 obligation to base SPS measures on international standards, and that the burden of proving Art. 3.3 compliance (and hence with Art. 5 risk assessment) was on the party defending its SPS measure. The AB rejected this, finding instead that Arts. 3.1/3.3 don't hold a rule–exception relationship.[55] In explaining why Art. 3.3 was not an 'exception', the AB offered the following, oft-repeated language:

> Art. 3.1 of the SPS Agreement *simply excludes from its scope of application the kinds of situations* covered by Art. 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. Art. 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.[56]

The probative burden regarding Art. 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

51 This failure is particularly telling on the backdrop of *US–Underwear*, where the panel had found Art. 6 ATC to constitute an *exception* to Art. 2 ATC, allocating the burden-of-proof to the respondent; this was not appealed by the US in the subsequent appeal whose 'narrowness' was noted by the AB (WT/DS24/AB/R (10 February 1997, p. 15)). Notably, Art. 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*.

52 *US–Wool Shirts* at p. 16.

53 It has even been argued that in this dispute the AB was *rejecting* the application of the rule–exception approach (not consolidating it), while the reasons for not treating Art. 6 ATC as an exception are 'unconvincing' (Tan, 1998).

54 It is also noteworthy that the AB did not, in *US–Wool Shirts*, consider the possibility that Art. 6 ATC was neither rule nor exception, but rather a 'right' – an alternative that might have enjoyed some textual basis, given that Art. 6.1 ATC leaves it to Members to decide 'whether or not they wish to retain *the right* to use the provisions of this Art.' (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'.

55 For some discussion, see Hurst (1998); and Grando (2006: 635).

56 *EC–Hormones* at para. 104, reiterated at para. 172 (emphasis added).

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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 Art. 3.3 as a provision that in the proper context of Art. 5 SPS establishes *obligations* of a standing at least equivalent to those of Art. 3.1. Arts. 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.[57] 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*,[58] the scope of whose application is mutually exclusive. In another, virtually uncited segment of *EC–Hormones* the AB states outright that 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* Art. of the SPS Agreement addressed by the Panel, i.e., Arts. *3.1, 3.3*, 5.1, and 5.5.[59]

The AB thus treated Art. 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 Art. 5.1, and, hence, with Art. 3.3, did not derive from this a violation of Art. 3.1, indeed reversing the panel's finding of violation.[60] In substance, the AB found that Arts. 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 set of norms; but the powerful textual legacy of *EC–Hormones* is the phrase 'autonomous rights', suggesting a distinct normative class, setting the stage for future complication.[61]

57 Similarly, see Hurst (1998).

58 At the same time, both Arts. 3.1 and 3.3 may be considered as 'rights', since Art. 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*.

59 Emphases added; but in *EC–Hormones*, the panel/AB were not faced with the additional complication posed in other cases when the complainant did not invoke the provisions whose classification was at issue. The US explicitly claimed that the EC measures were not justified by Art. 3.3 (para. III.2, *EC–Hormones*, US panel report), and even claimed that the measures were not justified as 'provisional measures' under Art. 5.7 SPS, while the EC preferred to cite, unsuccessfully, the 'Precautionary Principle', with little reference to Art. 5.7 SPS (para. IV.239, US panel report). This was reversed In *EC–Biotech*: the US made no claim under Art. 5.7, which was invoked by the EC.

60 See paras. 209 and 253(h).

61 In *EC–Sardines* (AB report, *EC–Trade Description of Sardines*, WT/DS231/AB/R (26 September 2002)), the AB confirmed its Art. *EC–Hormones* 3.1–3.3 analysis and applied it by analogy to the

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What did the AB actually mean by 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.[62] 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 Art. 3.3 (and in 'the kinds of situations' it covers), between international standards and higher ones. In *EC–Biotech*, Canada correctly pointed out that this aspect of 'free choice' is absent in Art. 5.7, whose application depends on an objective or exogenous condition – the absence of sufficient scientific evidence.[63] But Canada overshot in arguing on this basis that Art. 5.7 was an exception and that any recourse to the Art. 3.1–3.3 relationship as discussed in *EC–Hormones* would be 'inappropriate'.[64] At the same time the EC was insisting that Art. 5.7 was an 'autonomous right', not an exception.[65] 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.[66] It seems that at least the *EC–Biotech* panel adopted this understanding, allowing it to discard Canada's arguments;[67] and yet, the panel was likely aware of the ambiguity of the term 'autonomous', because in its own conclusion it eschewed it, using instead the term '*qualified* right' for Art. 5.7.[68]

Another relevant case, *Japan–Agricultural Products II* was referred to by the *EC–Biotech* Panel because it specifically addressed Arts. 2.2, 5.1, and 5.7 SPS.[69] In this dispute, to simplify, the US cited violations of Arts. 2.2 and 5.1, and Japan, as

relationship between different segments of Art. 2.4 TBT. The 'permissive' segment of Art. 2.4 TBT was not, however, characterized by the AB as an 'autonomous right'.

62 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.

63 Para. 7.2982.

64 Para. 7.2958.

65 Para. 7.2952.

66 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.

67 Para. 7.2983.

68 Para. 7.2974.

69 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 its finding that Art. 5.7 is a 'right' (see *supra*).

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respondent, invoked the 'provisional measures' clause, Art. 5.7. Arguments were made on the burden-of-proof, but neither Panel nor AB were concerned with classifying Art. 5.7 as either 'exception' or 'right'. The 'qualified exemption' language was used by the AB not taxonomically but rather in substantively interpreting Art. 2.2 – the logic being, that because Art. 5.7 applies where 'sufficient scientific evidence' is absent, an 'overly broad and flexible interpretation' of the sufficiency requirement 'would render Art. 5.7 meaningless'.[70] Examining the way the panel/AB applied Art. 5.7 itself as well as the burden-of-proof, it seems clear that both treated the provision as an *obligation*. To the panel, Art. 5.7 is a specification of obligations under Art. 2.2, complementary to Art. 5.1.[71] Even though Japan, the respondent, had invoked Art. 5.7, the initial burden of proving its violation was placed on the complainant, the US.[72] Thus, the panel and AB discarded the textual baggage of *EC–Hormones*: obligations are obligations, not 'autonomous rights'.

In *Brazil–Aircraft*,[73] the panel faced burden-of-proof arguments relating to the export subsidy prohibition under Art. 3.1(a) SCM, on the one hand, and the special and differential treatment provisions under Art. 27 SCM, on the other. Canada, the complainant, argued that the latter were an 'exception' and that the burden was on Brazil. Brazil disputed this, arguing instead that Art. 3.1(a) SCM did not apply to it, as a developing country complying with the conditions of Art. 27 SCM. The panel (as upheld by the AB)[74] engaged in a relatively contextual examination of the respective provisions, methodologically diametrically opposed to the taxonomical approach in *EC–Biotech*[75] The panel did not ask whether Art. 27 is a 'right' or 'exception', but rather more specifically asked itself whether Art. 27.4 SCM is 'an element of the claim of inconsistency with Art. 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'.[76] It considered that Canada, to succeed in its claims under Art. 3.1(a) SCM, would need to demonstrate that the provision applies to the respondent in the particular situation,[77] and so would need to show that Art. 27 does *not* apply to Brazil because its conditions had not been met. Although it noted that Art. 27.2(b) 'recognizes the autonomous right' of certain developing countries to maintain export subsidies[78] – and certainly the use of the

70 See *Japan–Agricultural Products II* at para. 80.

71 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 Arts. 2.2–5.1/5.7 that is harmonious with that of the panel (see AB report, at paras. 72–91).

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

73 *Brazil–Export Financing Programme for Aircraft*, panel report, WT/DS46/R (14 April 1999); AB Report, WT/DS46/ABR (2 August 1999).

74 *Brazil–Aircraft*, panel report at paras. 7.39–7.57; AB report at paras. 137–141.

75 Oddly, the *EC–Biotech* panel did not consider *Brazil–Aircraft* pertinent (it is not mentioned by the panel); all the more so, given that one *Brazil–Aircraft* panelist served in *EC–Biotech* as well.

76 Paras. 7.48–7.49.

77 Paras. 7.50 and 7.56.

78 Para. 7.54.

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word 'autonomous' here is appropriate, because it refers to the right-holder's freedom to exert its right at will – the panel characterized Art. 27.4 as establishing *obligations* to 'be considered in conjunction with Art. 3.1(a) of the SCM Agreement in order to establish a claim of violation of that provision'.[79] In short, the panel did not resort to 'autonomous rights' as a third norm-category, but regarded the provision as an obligation that is both alternative in its application and contextually related to the obligations of Art. 3.1(a) SCM.

Finally, while the impact of *EC–GSP* on the *EC–Biotech* panel's inconsistencies is clear,[80] what remains is to review *EC–GSP* to see whether it supports the *EC–Biotech* panel's understanding, establishing a textual template for 'rights' and 'exceptions'. In *EC–GSP*, the characterization of the Art. I:1 GATT/Enabling Clause relationship 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.[81] However, even more than in *EC–Biotech*, the procedural question was tied to a far-reaching substantive one: do the MFN obligations of Art. I:1 GATT continue to apply to measures permitted under the Enabling Clause (hence preventing discrimination among GSP beneficiaries), or do they dissolve as a result of the Enabling Clause?[82] Notably, 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.[83] On this basis, it deemed the Enabling Clause an 'exception', and found that the burden-of-proof rests on the respondent, yet MFN obligations continue to apply where there is no inconsistency between the provisions.[84] The AB, too, examined the contextual relationship between Art. I:1 and the Enabling Clause,[85] 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 Art. I:1'.[86] The AB thus disposed of an argument whereby 'exceptions are provisions that allow measures that pursue objectives' other than the WTO's.[87] 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

79 Para. 7.55.
80 Section 2 *supra*.
81 *EC–GSP* panel at paras. 7.21–7.22; AB at para. 85.
82 Ibid. at paras. 7.43–7.46.
83 Ibid. at paras. 7.23 (to identify the Enabling Clause as a positive rule establishing obligations or an exception, 'it is necessary to examine its legal function' in GATT context) and 7.32.
84 Ibid. at para. 7.53.
85 *EC–GSP* AB at paras. 89–90.
86 Ibid. at para. 91 (emphasis added).
87 Ibid. at para. 93.

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> 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 Enabling Clause.[88]

This stands in stark contrast to the textual template pursued in *EC–Biotech*[89] and it is on *this* basis, not a techno-textual one, that the AB confirmed the *EC–GSP* characterization of the Enabling Clause as an 'exception' to Art. I:1 GATT, placing the burden-of-proof on the EC.[90] The formulaic passage in *EC–GSP – EC–Biotech*'s decisive reference – was but an attempt to generalize previous findings on the burden-of-proof, *obiter dicta* mistaken for *ratio decidendi*.[91] This analysis reveals several gaps between the panel's use of the rule–exception–distinction and preexisting jurisprudence: the term 'autonomous rights' used in certain WTO cases was not designated as a separate norm-category; the distinction was never construed as inflexibly, taxonomically, as it was in *EC–Biotech*; and it was previously employed for procedure, not for substantive interpretation. In these senses, the panel's method of analyzing the Art. 2.2–5.1/5.7 relationship is simply wrong, as a matter of WTO law.

4. Restoring (genetic) order: logic and the Art. 2.2–5.1/5.7 relationship

The *EC–Biotech* panel report is not a freak ruling; it is an exaggeration of familiar currents in WTO judicial practice. Its incongruities are confounding but ingenuous, based on fragmentary literal readings of prior jurisprudence. They are the WTO's folly, taking literalism to new extremes. Where substantive, contextual interpretation of rules should determine their treatment, obscure textualism has distorted the way their interactions are interpreted. In international law, substantive questions on obligations and permissions are not unique to the WTO, but it is unlikely that a tribunal would apply a procedural-textual template to divine emergency derogations from international human rights,[92] or the applicability of humanitarian law in non-international armed conflicts.[93] Yet, the *EC–Biotech*

88 Ibid. at para. 98.

89 See note 29 *supra*.

90 Ibid. at paras. 102 *et seq*. Indeed, on appeal, the potential characterization of the Enabling Clause as an 'autonomous right' was negligible, raised only by Panama as a third-party (ibid., paras. 64 *et seq*.).

91 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.

92 As per, e.g., Art. 4 of the International Covenant on Civil and Political Rights, Art. 15 of the European Convention on Human Rights, Art. 27 of the American Convention on Human Rights or Art. 2 of the Convention against Torture. For discussion of these derogations, see Droege (2007).

93 A contested issue relating to the interpretation of common Art. 3 of the Geneva Conventions.

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panel resorted to a rigid, literal path in addressing a substantive legal relationship that is arguably no less important for human welfare. This should trouble anyone concerned with the efficacy, reflexivity, and legitimacy of the WTO and its dispute settlement system.

In closing, I will suggest how order may be restored in this area, turning to a logic that validates the analysis above, then to SPS substance. 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 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 … 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.[94]

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, the deontic school's founder,[95] distinguished between 'weak permissions' and 'strong permissions':[96] '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 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 Art. XX(b)*' (emphasis added), and under Art. 2.4 SPS, 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.[97]

94 Ross (1968: 120–122).
95 Von Wright (1951).
96 Von Wright (1963: 68).
97 For analysis of the GATT–SPS relationship, see Marceau and Trachtman (2002).

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So, most WTO 'permissions' may be seen as rights or exceptions to obligations, themselves including a contingent obligation. Furthermore, deontic logic shows us that, textually, the same prescriptive results are attainable exclusively through obligatory semantics, without the use of *any* distinctively permissive language:

> the use of permissions does not seem to be unavoidable. [N]o 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.[98]

The textual structuring of provisions tells us little about either their substantive relationship or their burden-of-proof classification; the same normative results can be achieved through different textual formulations. This confirms that the substantive relationship between provisions cannot be left to text, 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'.[99] Most WTO norms are obligations, contingent or otherwise, and so by default, any claim of violation should rest on evidence produced by the complainant.[100] Exceptions are, put simply, exceptional. A provision is an 'exception' for burden-of-proof purposes on the basis of an interpretation that characterizes that provision, in its context and circumstances, as 'intended to operate'[101] as an 'exception' or 'affirmative defence', to be proven by the respondent, not the complainant. This does not mean that the same provision cannot function, in other circumstances, and substantively, as a 'positive rule establishing an obligation'.[102]

What does this imply for Arts. 2.2–5.1/5.7? I have focused on interpretative *method*, with dispute settlement in mind, and so I may be as culpable for decontextualization as the panel, but I will now briefly trace how the panel should have applied Arts. 2.2–5.1/5.7, in my view. The panel should have considered Art. 5.7 in the context of both Arts. 2.2 and 5.1 and not bifurcated the analysis. It should have noted that the provisions establish a 'carefully drawn balance of rights and

98 Boella and van der Torre (2003). Thus, for example, had developing countries' trade preferences been accepted when Art. I GATT was drafted, GSP would have been a negative condition for MFN application within GATT – a 'more complex conditional obligation' – and not a separate document (the Enabling Clause) derogating from MFN.

99 See text accompanying note 88 *supra*.

100 In at least this sense, this article's analysis, 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, 2006: 655).

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

102 For example, while the AB in *Turkey–Textiles* (supra note 55 at fn. 13) referred to literature characterizing Art. XXIV GATT as a defensive 'exception', Art. XXIV may itself give rise to positive yet conditional obligations – a permissive rule subject to norm. For a contrary view, see Marceau and Reiman (2001: 313).

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obligations' recognizing two distinct situations: one, where there exists scientific evidence sufficient to base an SPS measure on risk assessment (whether risk assessment has been conducted, and whether the measure has been 'based on' it); the second, where scientific evidence is insufficient for this purpose.[103] It ought then have conceived Arts. 5.1 and 5.7 as complementary and alternative obligations, each a separate 'specific application'[104] of Art. 2.2, 'an element of a claim of inconsistency'.[105] The panel should have found that the complainants had not invoked the 'wrong' provision, having claimed an Art. 2.2 violation implicating either Art. 5.1 or Art. 5.7. It should then have asked whether Art. 5.7 was 'intended to operate'[106] as an 'exception' for procedural burden-of-proof purposes. It would then order the analysis as in previous SPS disputes:[107] Art. 2.2, then Art. 5.7, only then Art. 5.1.

Would this have altered *EC–Biotech*'s result? On the case's facts – probably not; but the order of analysis would change, making the sufficiency of evidence pivotal, with significant prescriptive implications for state conduct and SPS disputes. The panel's order of analysis – Art. 5.1, then Art. 5.7 – allows it to derive the sufficiency of evidence that precludes Art. 5.7 measures, from risk assessments upon which the measures were not 'based', in a highly problematic manner. The objective question of sufficiency of evidence, a crucial substantive element of Art. 2.2, is never properly examined. Indeed, Art. 5.7 becomes redundant, because the panel examines whether any Art. 5.1 risk assessment was conducted (or not), simply assuming that scientific evidence was sufficient for this purpose. In such circumstances, the same measures could not possibly be subsequently justified by Art. 5.7, whose relevance depends on the *in*sufficiency of evidence. This is judicial tenterhooking, reversing the rational connection between scientific evidence and risk assessment. By bypassing the sufficiency of evidence question, this mistaken approach neutralizes the Art. 5.7 role in stimulating research for new information. As per the panel, it seems that a pre-existing risk assessment (whether based on 'sufficient evidence' or not) cannot be trumped by new information suggesting risks but requiring additional research that might justify a provisional Art. 5.7 measure. Undoubtedly, the panel's legacy is therefore difficult in not only procedural but also substantive terms. Much of the *EC–Biotech* outcome will be intelligible only 'to anyone that understands such things'.[108]

103 Indeed, when rejecting the EC argument that the 'demarcation line' between Arts. 5.1 and 5.7 is the distinction between provisional and definitive measures (paras. 7.2939–7.2948), the panel implied that it is the sufficiency of scientific evidence, instead. However, this contextual insight is absent in later passages, when the panel examines Art. 5.7 as 'right' or 'exception'.

104 As per *EC–Hormones* at para. 180.

105 As per *Brazil–Aircraft* at paras. 7.48–7.49.

106 As per *EC–GSP* AB at para. 91.

107 *Japan–Agricultural Products II* and *Japan–Apples* (see *supra* text accompanying note 44).

108 See epigraph *supra*.

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