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Introduction

A significant number of cases coming before panels and the Appellate Body in World Trade Organization (WTO) dispute settlement proceedings raise issues concerning the burden of proof. I have argued that the burden of proof answers two questions intrinsic to adversarial litigation: first, which party must satisfy the decisionmaker on an issue once all the evidence has been adduced, and second, what standard of proof must the party fulfill?[1] The first question concerns the incidence of the burden of proof, the second question goes to the quantum of proof. WTO case law has mainly focused on the incidence of the burden of proof.[2] Commentary following the cases has sought to discern a coherent principle underlying the various answers the Appellate Body has given as to how the burden of proof is to be allocated when different provisions of the covered agreements[3] are at issue.[4] The commentary has not been complimentary, suggesting that the analysis the Appellate Body has adopted is neither consistent[5] nor sufficiently coherent.[6]

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1. David Unterhalter, *The Burden of Proof in WTO Dispute Settlement*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 543, 543-44 (Merit E. Janow et al. eds., 2008).

2. *See, e.g.*, Appellate Body Report, *European Community–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC–Hormones*].

3. The term "covered agreements" collectively refers to the Anti-Dumping Agreement, the Dispute Settlement Understanding, the SPS Agreement, and the Subsidy Agreement. *See* Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT'L L.J. 1 (2009).

4. *See, e.g.*, Michelle T. Grando, *Allocating the Burden of Proof in WTO Disputes: A Critical Analysis*, 9 J. INT'L ECON. L. 615 (2006).

5. *See id.* at 629 (asserting "allocation of the burden of proof has not followed a clear pattern").

In this article, I will attempt a more modest task than to distill a principle from these cases that both explains and justifies all that the Appellate Body has said on this subject. First, I set out the scheme articulated by the Appellate Body in terms of which it has allocated the burden of proof ("the typology"). Second, I consider the typology in light of the considerations that should be helpful in making decisions of this kind. Finally, I offer some suggestions as to how the incidence of the burden of proof might be determined.

I. The Typology

In *US–Wool Shirts and Blouses*,[7] the Appellate Body articulated a simple criterion to determine how to allocate the burden of proof: the burden rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[8] This proposition appears to be uncontroversial. It rests upon the common sense position that a party contracts the burden of proving those facts essential to its claim or defence.[9] But, as John Henry Wigmore observed, is there a general principle that determines "to what party's case a fact is essential?"[10] The answer given in common law jurisdictions is usually that this is a matter of substantive law, and the allocation of the burden of proof is ultimately determined by recourse to considerations of policy and fairness reflected in the decided cases.[11]

The Appellate Body has not done any better or worse than domestic courts in failing to find an overarching principle that determines the allocation of the burden of proof. Rather, the Appellate Body has developed a typology of claims and defences and has used this typology as a rule of allocation.

One may frame the Appellate Body's typology in the following way. A provision in the covered agreements that establishes an obligation upon a member is styled a "positive rule."[12] A complaining party that alleges a challenged measure to be inconsistent with such an obligation makes an affirmative claim and, consequently, must discharge the burden of proving this claim.[13] Certain provisions, however, do not establish obligations in themselves; rather they are exceptions to the obligations that constitute the positive rules. A party may invoke exceptions of this kind as an "affirmative defence," justifying the inconsistency of the measure with the primary

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6. *See id.* at 629-30.

7. Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter *US–Wool Shirts and Blouses*].

8. *Id.* at 14.

9. *Id.*

10. 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2486 (Chadbourn rev. 1981).

11. *See id.*

12. *US–Wool Shirts and Blouses*, *supra* note 7, at 14-16.

13. *Id.* at 14-16.

rule.[14] Here, the burden of proof is cast upon the party relying upon the affirmative defence.[15]

The Appellate Body has added to this framework a category of provisions that confer "autonomous rights." In a much cited passage in *EC–Hormones*, the Appellate Body reversed the panel's finding that a rule-exception relationship existed between Articles 3.1 and 3.3 of the SPS Agreement,[16] and characterized Article 3.3 as an autonomous right.[17] The Appellate Body articulated the matter this way:

> 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.[18]

Where a provision confers an autonomous right, the Appellate Body authorizes action outside of the scope of application of the positive rule.[19] In this situation, it is for the complaining party to bear the burden of proving that the respondent's measure is inconsistent with the respondent's autonomous right.[20] Although the term "autonomous right" has not always been used, the Appellate Body has understood provisions of this kind to exclude the application of positive rules and to confer rights on members to act outside of the strictures of such rules.[21]

Finally, the Appellate Body has observed that the distinction between an exception and an autonomous right may not always be evident. In *EC–Tariff Preferences*,[22] the Appellate Body found that Paragraph 1 of the Ena-

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14. *See id.* at 16.

15. *Id.* For examples of other cases where such affirmative defences were found, see Appellate Body Report, *Brazil–Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, ¶¶ 28, 37, 66, 79-81, WT/DS46/AB/RW (July 21, 2000) [hereinafter *Brazil–Aircraft*]; Appellate Body Report, *India–Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶¶ 121-136, WT/DS90/AB/R (Aug. 23, 1999) [hereinafter *India–Quantitative Restrictions*]; Appellate Body Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, ¶ 45, WT/DS34/AB/R (Oct. 22, 1999) [hereinafter *Turkey–Textile*]; Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 277-284, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US–Gambling*].

16. *EC–Hormones*, *supra* note 2, ¶ 104 (discussing the Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]).

17. *Id.*

18. *Id.*

19. *See* Appellate Body Report, *European Communities–Trade Description of Sardines*, ¶ 274, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC–Sardines*].

20. *See id.* ¶ 275.

21. *See, e.g.*, *id.*

22. Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004).

bling Clause was an exception to Article I:1 of the GATT 1994.[23] The Appellate Body then held that a complaining party challenging a measure taken pursuant to the Enabling Clause must identify the specific provisions with which the challenged measure fails to comply.[24] Only then does the respondent have the burden of proving that the measure was justified under the exception.[25]

II. The Typology and Concept of Rules

The Appellate Body has developed the typology discussed in the previous section as a way of classifying different provisions in the covered agreements and then using the classification to allocate the burden of proof. The issue that requires consideration is whether the classification is conceptually helpful in differentiating provisions in the covered agreements.

The law is replete with rules and exceptions. However, their ubiquity does not always render the relationship between a rule and an exception obvious. In the simple case where a rule imposes an obligation, the scope of the obligation may be clear and the party made subject to the rule will be required to observe the rule by acting or refraining from acting in a particular way. The rule determines what conduct is non-optional. Outside its scope of application, the rule has nothing to say and a party's conduct is permissible. In that sense, a rule demarcates conduct that is optional and non-optional. It would, however, be odd to say that what is permissible is always an exception to the rule. If the content of the obligation is clear, following a rule does not require a reminder that we are free to act without constraint outside the domain that the rule regulates.

Not all rules are of this simple kind. Sometimes a rule specifies the conditions for its application: under condition x, you are required to do y. If x does not hold, then one is free to act without being constrained by the rule. Again, the rule demarcates conduct that is non-optional and, here too, we would not generally describe the optional conduct as an exception to the rule.

Some rules specify conditions under which they do *not* apply: you are required to do y, unless condition z applies. A further rule might follow to account for the condition(s) under which the primary rule does not apply: you are required to do y, unless condition z applies, in which case, you are required to do p. The condition(s) under which the rule does not apply is often referred to as an exception. We speak in this way because, but for the specification of the condition of non-application, the conduct in question would have fallen under the rule and been rendered non-optional or (as in the case of the second example offered in this paragraph) the conduct would have been regulated under a different regime of obligations.

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23. *Id.* ¶ 90 (discussing General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994]).

24. *Id.* ¶¶ 101-102.

25. *See id.* ¶ 104.

Finally, a rule may not specify the conditions for its application, and if the content of the rule is not clear (or even if it is clear), the rule must be read in light of its purpose. Here, those who follow the rule must interpret the rule so as to decide whether a particular situation is indeed covered by it. We may conclude that the rule was not intended to apply to the situation, even though the rule does not explicitly say so. Alternatively, we may say that this situation is an exception to the rule, as when an act of God prevents me from discharging my duty to honour my bargain.

This account by no means exhausts the many ways in which rules may be cast. However, the different rules described above permit a number of more general observations. First, whether or not a rule defines the scope of its application, the rule functions to demarcate optional and non-optional conduct or to differentiate types of non-optional conduct. Second, if a rule defines the scope of its application or non-application, then the rule is articulating a feature of all rulemaking, which is that a rule has a particular domain. That domain is limited by the content of the rule and its proper interpretation, as well as by any express conditions under which the rule applies. Third, although a rule can only be understood by comprehending what it regulates and what it does not, we generally tend to think of exceptions not as describing what conduct the general rule does not reach, but rather as a follow-up, adding specific rules which set out—expressly or tacitly—the conditions under which the general rule does not apply. Thus, it would be odd to say that walking my dog in the park is an exception to the general rule which requires everyone to file an income tax return. It is not an exception. The rule requiring everyone to file income tax returns simply has nothing to do with my walking the dog in the park. By contrast, if a rule says all persons must file an income tax return, save those who earn less than $10,000 per year, it makes sense to say that low income individuals are an exception to the general rule that everyone must file a tax return.

If we consider further the class of rules that may be said to carve out an exception, such rules specify those instances in which the rule will generally apply and those instances in which it will not. The rule, in effect, is made up of two rules: a primary rule that formulates an obligation and requires its general observance, and a secondary rule that specifies the conditions under which the primary rule does not apply.

The secondary rule may be formulated in different ways. As we have observed, the secondary rule may simply state that a limited class of persons is not burdened by the obligation of the primary rule. But the secondary rule may also specify a more complex condition under which the primary rule does not apply and may attach different obligations to a party, even if the condition for the non-application of the primary rule is met. A secondary rule may also be framed so as to permit an election by a party to be bound by a separate regime of obligations. Stated more formally, the primary rule stipulates that all persons must do x (or refrain from doing x). One variant of the secondary rule (Variant 1) could state that under condition y, x no longer applies, and you are then required to do

z. A second variant of the secondary rule (Variant 2) could state that under conditions specified by *y*, persons *may elect* not to do *x* and rather do *z*.

Variant 2 has a distinctive feature. While Variant 1 specifies objective conditions under which the obligation in the primary rule does not apply, Variant 2 permits persons to elect to avoid the obligation specified in the primary rule, provided that they satisfy certain conditions, which may include carrying out other obligations.

Both Variant 1 and Variant 2 set out conditions under which the obligation of general application will not apply. What sets the primary rule in Variant 2 apart is the stipulation that an election to act in a certain way together with the satisfaction of various conditions allows for the non-application of the obligation of the general primary rule. A person who qualifies to make such an election creates an exception to the application of the general rule. But, the point of such an election is not to justify or excuse compliance with the obligation of general application. Rather, it is to permit different conduct subject to a distinct regime of regulation and obligation.

The Appellate Body has adopted the language of "autonomous rights" to characterize those provisions of the covered agreements where a member may elect to opt out of one regime of obligations and engage in conduct, otherwise impermissible, that is then subjected to a different regime of obligations.[26] The member's election renders the primary rule inapplicable, provided the member meets the requirements of the secondary rule.[27] The notion of autonomous rights may not be altogether clear in that it suggests an unqualified freedom to avoid a general obligation. That is not so. At best, it is an election to assume one set of obligations in place of another.

III. The Typology and Provisions in the Covered Agreements

The Appellate Body has classified provisions of the covered agreements according to a typology of positive rules, affirmative defences, and autonomous rights. The application of the typology has, in part, reflected an interpretative concern for the text of the provisions. The use of the word "exception," however, has not always been dispositive, and rightly so; a rule may be formulated to demarcate the scope of its application with or without reliance upon a formal reference to an exception.

In *US–Wool Shirts and Blouses*, the Appellate Body classified Article XX and Article XI:2(c)(i) of the GATT 1994 as limited exceptions.[28] Other provisions that have been found to be affirmative defences include the proviso to Article XVIII:11 of the GATT 1994 regarding balance of payments,[29]

26. *See, e.g.*, *EC–Hormones*, *supra* note 2, ¶¶ 104, 172.
27. *See id.*
28. *US–Wool Shirts and Blouses*, *supra* note 7, at 14-16.
29. *See India–Quantitative Restrictions*, *supra* note 15, ¶¶ 132-136.

item (k) in the Illustrative List of Export Subsidies of the SCM Agreement[30] regarding certain export credits,[31] Article XXIV of the GATT 1994 regarding customs unions and free trade areas,[32] and Article XIV of the General Agreement on Trade in Services[33] (GATS).[34]

In *EC–Hormones*, the Appellate Body interpreted Article 3.3 of the SPS Agreement to be an autonomous right and not an exception to Article 3.1.[35] In *EC–Sardines*, the Appellate Body considered Article 2.4 of the Agreement on Technical Barriers to Trade[36] (TBT Agreement) to be conceptually similar and found that there was no rule-exception relationship between the first and second parts of Article 2.4.[37] Additionally in *Brazil–Aircraft*, the Appellate Body held that Article 27.2(b) of the SCM Agreement rendered the prohibition in Article 3.1(a) inapplicable to a developing country, provided that such members comply with the provisions of Article 27.4.[38]

Therefore, the typology is well entrenched in Appellate Body decision-making. But what does the typology differentiate? Contrast Article XX of the GATT 1994 with Article 3.3 of the SPS Agreement. Article XX states that subject to a prohibition against arbitrary or unjustifiable discrimination, nothing in the GATT shall be construed to prevent the adoption or enforcement of enumerated measures, such as measures necessary to protect human, animal, or plant life or health.[39] Under Articles 3.1 and 3.3 of the SPS Agreement, members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations (international norms) where they exist, except that a member may introduce measures resulting in a higher level of protection than those based on the international norms under certain conditions.[40]

At a formal level, Article XX of the GATT 1994 and Article 3.3 of the SPS Agreement both allow a member to take measures that would otherwise infringe upon a regime of obligations of general application. Both provisions permit, but do not require, a member to deviate from the general obligations; in this sense, the measure the member takes is elective. But that election to deviate comes with obligatory consequences. In Article XX, the elective measures may not be "applied in a manner which would

30. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14.

31. *See Brazil–Aircraft*, *supra* note 15, ¶¶ 79-81.

32. *See Turkey–Textile*, *supra* note 15, ¶ 45.

33. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

34. *See US–Gambling*, *supra* note 15, ¶¶ 277-284.

35. *EC–Hormones*, *supra* note 2, ¶ 104.

36. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

37. *EC–Sardines*, *supra* note 19, ¶ 275.

38. *Brazil–Aircraft*, *supra* note 15, ¶¶ 139-140.

39. GATT 1994 art. XX.

40. SPS Agreement arts. 3.1, 3.3.

constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[41] Article 3.3 of the SPS Agreement allows a member to adopt a higher level of protection, but only if there is a scientific justification for it or if a member determines the higher level of protection is appropriate under the disciplines of assessment set out in Article 5.[42] The structure of the two provisions is much the same, yet their characterization under the typology of the Appellate Body is different.

Therefore, either the typology rests upon a distinction without a difference or the typology seeks to capture a difference that is not reflected in the formal or structural features of an exception. As previously discussed, an exception is a specific kind of rule that provides for conditions under which an obligation of general application does not apply. While there is considerable flexibility in the framing of those conditions, the conceptual linkage is hard to escape because the conditions always reference the primary obligation. The fact that a member can elect to take a measure that is subject to different obligations does not make that elected measure something other than an exception to the member's existence. Hence, the typology cannot rest on the formal or structural characteristics of rules and exceptions.

IV. The Typology Reconsidered

The typology may be understood in a different way. Rather than using the typology as a formal means by which to characterize provisions in the covered agreements, it may be more helpful to consider the typology as a way to reason about the allocation of the burden of proof.

The consideration of costs is one principle by reference to which the burden of proof may be allocated. First, there are costs associated with erroneous rulings. There are two types of error of this kind: to rule that a measure is inconsistent with the covered agreements when it is, in fact, consistent (a Type I error), and to rule that a measure is consistent with the covered agreements when it is in fact inconsistent (a Type II error). The relative costs of these two types of error in relation to a specific provision of the covered agreements are not always easy to assess. Nor is it clear which type of error is more likely to be made. Second, there are direct costs that accrue to members who engage the dispute settlement system. Although we might justifiably wish to minimize these costs and use the burden of proof to do so, we are confronted by quite considerable deficits of information in determining the costs, the risk of their occurrence, and the utility of an allocation of the burden of proof to minimize social loss. Professor Bruce Hay has acknowledged that a basis for allocating the burden is that the plaintiff's claim is less likely to be meritorious (where other

41. GATT 1994 art. XX.

42. SPS Agreement arts. 3.1, 3.3.

costs might not burden one party more than another).[43] It is hard, however, to make that judgment of probabilities for the kinds of claims made in dispute settlement proceedings. For example, it is difficult to determine if a member based its measure on an assessment of risk under Article 5 of the SPS Agreement.[44]

Because it is difficult to assess relative costs, we may proceed cautiously and assert that even if the social costs cannot be shown to burden one party more than another, the member who disturbs the status quo and potentially triggers a risk of error should bear the burden of establishing a breach of the covered agreements. The typology utilizes this reasoning to allocate the burden of proof to the complainant who alleges that a measure taken by a member is inconsistent with its obligations under the covered agreements. Some information as to relevant costs, particularly the costs of error, often will support a prudential allocation of this kind. Because the SPS Agreement touches upon issues of human health, we would likely be more inclined to take the risk of a Type II error rather than a Type I error. Thus, the allocation of the burden of proof to the complainant may be warranted.

The principles relevant to the allocation of the burden of proof should not, however, be reduced to a cost calculus. Just as the use of presumptions in law is not based on a single justification, the allocation of the burden of proof will yield to different considerations. I have argued elsewhere that "legal regimes use presumptions for different reasons: to abbreviate chains of reasoning, to give expression to important values, and sometimes simply as a pragmatic way of providing an answer under conditions of uncertainty."[45] The same is true of the factors that determine the allocation of the burden of proof. Various provisions of the covered agreements, invoked in different procedural settings and at different stages of the dispute settlement process, may allow for a range of reasoning that is not captured by the prudential justification ventured above—not even by a cost calculus, if it can be done. Thus, we do not have recourse to a mechanistic rule of allocation, lest we oust from the reckoning relevant reasons.

One class of reasons that may be available to allocate the burden of proof is the relationship in law between unlawful conduct and grounds of justification or excuse that either renders the conduct lawful or otherwise excludes liability. In criminal law, self-defence justifies an assault; in contract law, supervening impossibility of performance allows a party to break a promise. There is, however, an ongoing controversy in different fields of law as to how to properly understand these matters. Does a defendant's invocation of self-defence negate an element of the offence of assault, or

43. *See* Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 677 (1997) (noting that a departure from the general rule allocating the burden to the plaintiff may be justified where the plaintiff likely has a meritorious claim).

44. *See* Ryan David Thomas, Note, *Where's the Beef? Mad Cows and the Blight of the SPS Agreement*, 32 VAND. J. TRANSNAT'L L. 487, 505 (1999) (describing factors involved in a risk assessment under the SPS Agreement); *see also* SPS Agreement art. 5.1.

45. Unterhalter, *supra* note 1, at 545.

does it operate as a justification that stands apart from the offence's definitional requirements? The latter construction is often referred to as an affirmative defence, a term which has important consequences in criminal law because the prosecution is not required to disprove an affirmative defence beyond a reasonable doubt.[46]

The concept of an affirmative defence warrants closer consideration because it is utilized in the typology of the Appellate Body to differentiate provisions that are not positive rules.[47] Just as criminal law has found it difficult to determine a principled basis upon which to distinguish whether an issue forms part of the definition of an offence or constitutes a separate justification, so too the typology constructs the categories "positive rule" and "affirmative defence," but the application of these categories is sometimes opaque.

It is not possible to determine whether a provision is a positive rule or an affirmative defence simply by analyzing the text of the provision in question. The language of the provision is seldom self-declaring. Nor should great reliance be placed upon an argument that characterizes a provision on the basis that relevant evidence is peculiarly within the knowledge of one member rather than another. Quite often, in entirely uncontroversial matters, one party must prove a thing supposedly better known by that party's adversary, yet the burden of proof does not shift.[48] As Glanville Williams pointed out in the criminal law context, peculiar knowledge would require a defendant, instead of the prosecution, to prove a lack of mens rea[49]—a conclusion that seems aberrant. Determining how provisions in the covered agreements stand in relation to one another better captures the difference between a positive rule and an affirmative defence. This distinction should be looked at not as a formal matter of rulemaking, but rather by reference to the regulatory purpose underlying the rules.

No principle is more fundamental under the covered agreements than the principle of non-discrimination captured by the obligations of Most-Favoured-Nation Treatment in Article I:1 of the GATT 1994.[50] Yet, other conflicting principles may be so compelling as to justify a departure from adherence to the principle of non-discrimination. The Appellate Body found this to be so with respect to Article XX of the GATT 1994 in *US–Wool Shirts and Blouses*.[51] Public morals and human health are values that may compete and conflict with the principle of non-discrimination embod-

46. Patterson v. New York, 432 U.S. 197, 210 (1977).

47. *See* Grando, *supra* note 4, at 625.

48. *See* Petko D. Kantchevski, Note, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 BYU INT'L L. & MGMT. REV. 79, 129-30 (2006).

49. Glanville Williams, *The Logic of "Exceptions"*, 47 CAMBRIDGE L.J. 261, 267-68 (1988).

50. *See* GATT 1994 art. I:1; *see also* WORLD TRADE ORG., UNDERSTANDING THE WTO 10 (4th ed. 2008).

51. *See US–Wool Shirts and Blouses*, *supra* note 7, at 14-16.

ied in the GATT trading system.[52] A measure may thus be discriminatory and breach the obligations of Article I:1, but there may be a separate basis for condoning such non-compliance in special circumstances where a different and conflicting principle holds sway. A member who would justify an otherwise unlawful measure by recourse to a principle of human health, for example, may do so within the scheme of Article XX.[53] To escape the ordinary consequences of violating its obligation of non-discrimination, however, a member must bear the onus of proof.[54] Through this reasoning, we recognize that the measure breaches the obligation of non-discrimination and note that the invocation of the exception does not diminish that breach; rather the exception condones the breach in the face of proof that the measure is required for another purpose, which the agreement allows.

We may contrast this kind of reasoning with the analysis applicable to Article 3.1 and Article 3.3 of the SPS Agreement.[55] Article 3.3 permits a member to impose sanitary or phytosanitary measures that are objectively more stringent and that result in higher levels of protection than those achieved by measures based on international standards, as required by Article 3.1.[56] There is a consistent thread that runs between Article 3.1 and Article 3.3. Together, they create an international baseline standard that all members must meet, and they provide members with the option of putting in place measures that meet a higher standard under certain conditions. A measure taken under Article 3.3 is not justified by recourse to an independent principle that conflicts with the purposes underlying Article 3.1 or any other provision of the SPS Agreement.[57] Therefore, a member has a choice as to which standards to apply, but by choosing a higher standard than the international baseline, the member is not excused from compliance with all of the requirements of the international standard. Reasoning in this way supports the view that Article 3.3 is not an affirmative defence to a failure to fully comply with Article 3.1. Article 3.3 simply sets out an alternative regime of obligations. Or, to put the matter differently, Article 3.3 frames positive rules that may be followed as an alternative to the positive rules set out in Article 3.1.

The interplay between these provisions, then, does not suggest that autonomous rights are distinct bundles of independent rights. Rather, the language of autonomous rights emphasizes that provisions may be inter-

52. *See* GATT 1994 arts. XX(b), XX(d) (listing public morals and human health as general exceptions to other articles in the GATT).

53. *See id.* art. I:1; *see also* Elvira Cortez, Comment, *Total Recall on Chinese Imports: Pursuing an End to Unsafe Health and Safety Standards Through Article XX of GATT*, 23 AM. U. INT'L L. REV. 915, 926 (2008) (noting that a party can only claim an Article XX exception after a WTO panel determines there has been a violation of the GATT).

54. *See* Grando, *supra* note 4, at 618 (stating that the burden of proof lies on the party trying to invoke an exception to the GATT).

55. *See* SPS Agreement arts. 3.1, 3.3.

56. *See id.*

57. *See id.* art. 3.3 (noting that "all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement").

linked so as to offer a choice between obligations (or regimes of obligations). However, the selection of one set of obligations over another is *not* a justification of a measure that would otherwise be unlawful.

Where a provision, upon proper analysis, permits a member to justify a measure that would otherwise be inconsistent with its obligations, there is good reason to depart from the prudential rule of allocation and therefore place the burden of proving that an obligation has been breached upon the complainant. Justification, by its very nature, is predicated upon proof—actual or prospective—of such a breach having taken place; for justification is only required where there is something to justify. Once the complainant has discharged its burden of proof, then it is for the member who seeks to be excused of the ordinary consequences of breach to prove the justification for the breach. Put differently, the member invoking the justification would now alter a new equilibrium established by the complainant's proof of breach, and to do so, the member must show that it was justified in taking the measure that it did.

Understood in this way, the typology is simply a shorthand way of referring to different kinds of reasoning as to how provisions in the covered agreements should be understood. The typology should be understood for what it is—a heuristic device. Ultimately, we want to interpret the provisions in a manner that provides a basis for the allocation of the burden of proof.

One approach to allocating the burden of proof in a case in which a member seeks to justify a measure that is otherwise unlawful would be to first require proof that an unlawful act occurred. This approach is consistent with the primary rule of allocation which requires the member who claims that a measure is inconsistent with the requirements of the covered agreements to prove inconsistency. Thus, when a member raises justification as an affirmative defence, it bears the burden of proof only if its adversary first satisfies the burden of proving the member's act was actually unlawful.

Conclusion

The allocation of the burden of proof is not responsive to reductionist reasoning. The formal features of the relationship between rules and exceptions do not provide a clear basis to develop a general rule regarding the allocation of the burden of proof. Narrow textual analysis does not provide an answer either. Rather, the allocation is responsive to more wide-ranging reasoning.

The typology of the Appellate Body is shorthand for certain kinds of reasoning about the allocation of the burden of proof. So understood, the typology of the Appellate Body serves not so much to determine when a provision captures a rule-exception relationship, because this relationship is a feature of rules that, with varying degrees of specificity, determines the basis of their application. An exception is but a specific variant that commands a particular application of the rule so as to permit conduct that

would otherwise be prohibited under the rule's general application. Rather, the typology is intended to capture the distinction between a rule that allows a party to justify its failure to observe an obligation of general application and a rule that permits a party to engage in conduct which is regulated under an alternative scheme of regulation.