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Burden of Proof and the Prima Facie Case: The Evolving History and its Applications in the WTO Jurisprudence

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BURDEN OF PROOF AND THE *PRIMA FACIE* CASE: THE EVOLVING HISTORY AND ITS APPLICATIONS IN THE WTO JURISPRUDENCE

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I. INTRODUCTION

The burden of proof is a procedural link between the facts submitted by parties and the ruling by the judicial body. The concept of burden of proof in international procedure is defined as "the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with the rules acceptable to, the tribunal."[1]

Why does it matter? In case of uncertainty, *i.e.* in case all the evidence and arguments remain in equipoise, the panel is to "give the benefit of the doubt" to the party who discharged its burden.[2] In other words, the rules on the burden of proof not only play a significant role in controversial cases where evidence is unclear, they also enable the panel to avoid the judicial pitfall of *non-liquet*.[3] For this reason, the rules on the burden of proof have prominence among practicing lawyers and judges.

In the absence of written rules in the General Agreement on Tariffs and Trade (GATT) and the WTO treaty, the rules on the burden of proof evolved remarkably from precedent, similar to the rule-

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[1] MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 30 (1996).

[2] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, ¶ 7.14, WT/DS152/R (Dec. 22, 1999); *see also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 211 (Cambridge Univ. Press) (2006).

[3] *See* JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW: CIVIL AND COMMON LAW APPROACHES WITH SPECIAL REFERENCE TO THE AMERICAN AND GERMAN LEGAL SYSTEMS 157-60 (1998); *See generally* JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 172 (2006). (defining the concept of *non liquet* as "a situation where a juridical body will simply, frankly, and explicitly decide not to decide an issue or case" and stating that "[i]t is not clear that a *non liquet* is totally inappropriate or forbidden in the WTO context, but there are those who feel that generally a judicial body should not be permitted that liberty.").

making approach in the common law system. The evolution of WTO DSS decisions in the previous decade exemplify the trend toward judge-made law, just as Article 3.8 of the Dispute Settlement Understanding (DSU) exemplified the "bottom-up approach."[4] It is now appropriate to review the history and current status of the rules regarding burden of proof.

II. THE BOTTOM-UP TRIAL AND ERROR HISTORY

The burden of proof rests upon the party who makes the claim (*actori incumbit probation*).[5] In practice, this is an oversimplification. While the burden of proof is often allocated to the claiming party, that burden is shifted in certain circumstances. This makes the rules confusing and somewhat murky.

Ironically, the efforts of the GATT and WTO to enhance the rule-based system created these complexities. Similar to domestic laws, the proper application of the burden proof has a significant impact on the substantive rights and obligations of the parties.[6] The Appellate Body of WTO DSS uses burden of proof rules as a "quasi-discretionary" tool to induce the defending party to comply with general obligations.[7] This is done by exempting the claimant from the ad-

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[4] JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 276 (2002) (concerning to the evolution of the need to establish nullification or impairment in GATT dispute settlement, it explained that "a system of case-by-case decision making gradually elaborated the sparse language of Article XXIII into a complex set of rules, which in time were ratified by inclusion in the DSU Article 3.8". In this regard, Professor Jackson labeled it as a "bottom up" approach which is quite different from the normal "top down" procedure in the international context). *See generally* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1228 (1994) available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf ("In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.").

[5] *See generally* KAZAZI, *supra* note 1, at 116 ("The logical and legal concept of *actori incumbit probation* has generally been accepted and applied by international tribunals.")

[6] *See* KOKOTT, *supra* note 3, at 22.

[7] Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?*, I J. INT'L ECON. L. 227, 227 (noting that "to such extent that they sometimes offer dispute settlement panels a welcome tool in deciding in favour of one or the other party," a tool is "particularly attractive to adjudicators"). Meanwhile, the interrelation between rules on the burden of proof and the effec-

ditional burden in order show the inconsistency with the exceptional rule.[8]

This burden shifting relates to the allocation of procedural power in the WTO DSS, because the power is based on the judicial system itself, rather than on the consent of Member countries. The question is whether member countries should accept such a duty imposed by an international institution.[9] This causes tension between the panel and the alleged party. Tension also arises between "predictability and security" and "rebalancing," two goals of international dispute settlement.[10] Such tensions create both risks and opportunities for WTO DSS. The need to balance and manage these tensions resulted in more sophisticated rules.

The primary objective of this section is to demonstrate the development of the rules on the burden of proof in WTO DSS and GATT proceedings over the last decade. As new fact situations arise, this development becomes a product of precedent.

A. Pre-History: GATT

The evolution of burden of proof in the GATT relates primarily to "nullification and impairment." Originally, under GATT Article XXIII, a breach of obligation was not enough to bring an action.[11] Proof of "nullification or impairment" should be added by the complaining party. This could be described as the "negotiation-oriented approach."[12] In response to such an awkward phrase, the GATT panels

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tive enforcement of substantive law has not yet been clearly explained under public international law. KOKOTT, *supra* note 3, at 22.

[8] KOKOTT, *supra* note 3, at 22.

[9] JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 77 (1998).

[10] JACKSON, *supra* note 3, at 145-51 (listing twelve policy goals of international dispute settlement).

[11] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S 194 (Article XXIII provides that "[i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.").

[12] *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM.: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 109, 114 (2nd ed. 1997) [hereinafter JACKSON,

have gradually attenuated the effect of that expression. The panel of *Australia-Ammonium Sulphate* introduced the concept of "reasonable expectations."[13] Subsequently in *Uruguay-Recourse to Article XXIII*, the panel nullified the meaning of the phrase, holding that any "violation" of GATT would be considered a "prima facie nullification or impairment."[14] A 1987 panel report in the *US-Superfund* case stated that "the presumption had in practice operated as an irrefutable presumption."[15] Through incorporation of this view into DSU Article 3.8, the member countries confirmed these well-established practices of the GATT.[16]

B. The Evolving History in the WTO DSS

The evolution of burden of proof in the GATT mainly concerned "nullification and impairment," while the WTO panels and appellate reviews addressed the burden to prove "violation" in the context of two goals: stability, achieved by deferring precedent, and fairness, achieved by considering case specific facts.

The issue first arose in *US-Wool Shirts and Blouses*.[17] In this case, India insisted the burden shift in accordance with Article 6 of the Agreement on Textile and Clothing (ATC).[18] The Appellate Body refused to shift the burden accordingly. The Appellate Body did, however, set forth general rules regarding the burden of proof, stating, "it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[19] The question then becomes, what is an affirmative defense? The Appellate Body further stated, "several GATT 1947 and WTO panels have required such proof of a party in-

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LAW AND POLICY]; JACKSON, CONSTITUTION AND JURISPRUDENCE, *supra* note 9, at 66; JACKSON, SOVEREIGNTY, *supra* note 3, at 139 (stating that the use of ambiguous phrase "nullification or impairment" implies the reflection of sovereignty objection against complete rule-oriented system).

[13] Report of the Panel, *The Australian Subsidy on Ammonium Sulphate,* Annex ¶¶ 2-3, CP 4/39 (April, 3 1950), GATT B.I.S.D. (2d Supp.) at 188 (1950).

[14] Report of the Panel, *Uruguayan Recourse to Article XXIII, ¶* 15, L/1923 (Nov. 16, 1962), GATT B.I.S.D. (11th Supp.) at 95 (1962).

[15] Report of the Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, L/617 (June 17, 1987) GATT B.I.S.D. 34S/136 (1987).

[16] Meanwhile, the arguable discrepancy between the panel's decision in *US-Superfund* and DSU Article 3.8 still remains.

[17] Appellate Body Report, *United States – Measuring Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (May 23, 1997) [hereinafter *US – Wool Shirts and Blouses*].

[18] *Id.*

[19] *Id.*

voking a defence, such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1, [because] Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves."[20] Based on the words, "the members shall ensure" and the reverse presumption of Article 5.8, the Panel ruled that the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) allocates the "evidentiary burden [to] the Member imposing an SPS measure."[21] Additionally, the Panel ruled that, since "Article 3.3 provides an *exception* to the general obligation contained in Article 3.1," the burden to show that the measure is justified under Article 3.3 is on the respondent.[22] Considering that it would be difficult for a claimant to prove another nation's SPS measure violated provisions of the SPS agreement, it is obvious the Panel's decision was based on notions of fairness. The Appellate Body objected to the Panel's approach, instead distinguishing between the relation of a "general-exception" (GATT Article III and Article XX) and the relation of a mere "exclusion" (SPS Article 3.1 and Article 3.3).[23] Additionally, it stated that "the general rule [on the burden of proof] is not avoided by simply describing that same provision as an exception."[24] In this case, the Appellate Body played an important role. It further explained the criteria necessary to apply the special rule on the burden of proof and guarded the system against the immature and pragmatic interpretation by the Panel.

But are the rules clear enough? Although it was strongly debated in the recent *EC-Biotech* decision, the Appellate Body has yet to develop a concrete standard for distinguishing between an "exception" and a "right."[25] The previous decisions of the Appellate Body are disorderly. In *EC-Sardines*, the Appellate Body noted that the "circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4."[26] As with *EC-*

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[20] *Id.*

[21] Appellate Body Report, *United States – EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *US – Hormones*]. The original panel ruling was later overturned by the Appellate Body.

[22] *Id.*.

[23] *Id.* The distinction between "exception" and "exclusion" will be discussed further in part III.

[24] *Id.*

[25] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.2923-3007, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter *EC – Biotech*].

[26] Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 275, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC – Sardines*].

Hormones, there is no "general rule-exception relationship between the first and the second parts of Article 2.4."[27] In contrast, in *EC-Tariff Preferences*, the Appellate Body considered the Enabling Clause to be an *exception* based on the use of the word "notwithstanding," stating that, "given the fundamental role of the Enabling Clause in the WTO system as well as its contents," a complaining party must "*identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent."[28] Some argue that, with regard to the application of the burden of proof, "the Appellate Body's conclusions are guided a bit by policy considerations."[29] In other words, "the Appellate Body may have chosen to apply the burden so as to give deference to (1) domestic sovereignty in the trade remedies and SPS/TBT contexts; and (2) developing countries and development policy."[30] In my opinion, however, the Appellate Body's allocation of the burden of proof is primarily guided by its desire to strike a balance between state sovereignty and the authority of the WTO DSS. In previous decisions, the Appellate Body considered "the importance of the provision" in addition to the classification of an "exception" to determine where the burden should lie. In this regard, it may be more appropriate to interpret the *EC-Tariff Preferences* decision as a failure to meet this second standard.

On the other hand, the rules on what constitutes a prima facie case are evolving. In earlier cases, the Appellate Body avoided establishing a clear-cut rule, stating that, "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case,"[31] and that, "the Panel's examination and weighing of the evidence submitted fall within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review."[32] As time progressed however, demands on the Appellate Body to establish a more precise rule increased. In the *US – Gambling* decision, the Panel made an important step toward the

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[27] *Id* at ¶ 275.

[28] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 106, 115, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC – Tariff Preferences*]. *See generally Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. 26S/203.

[29] Worldtradelaw.net Dispute Settlement Commentary, *EC-Biotech Products ("GMOs")*, at 83-86, www.worldtradelaw.net.

[30] *Id.*

[31] *US – Wool Shirts and Blouses*, supra note 17.

[32] Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, ¶ 161, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999) [hereinafter *Korea – Alcoholic Beverages*].

establishment of such a rule.[33] The Panel identified individual measures and laws not mentioned specifically in the submission, thus enabling Antigua to establish its *prima facie* case.[34] To some extent, the Panel acted in good faith in its consideration of procedural fairness. In light of such an obvious deviation however, the Appellate Body chastised the Panel and set forth a general rule that, "at a minimum, the evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."[35] Is this standard clear enough? What is "the challenged measure" relating to such claims?

III. SETTING THE FRAMEWORK: RULES ON THE BURDEN OF PROOF

A proper review of the challenges to the decision-making process of the panel requires a conceptual analytical framework. For this analysis, the subject is divided into two parts: 1) how the burden of proof should be allocated and 2) how the burden of proof should be discharged.

A. Level I: The Allocation of the Burden of Proof

The Panel must first decide who bears the burden of proof. Generally, the burden initially lies with the complaining party. The complaining party must either establish a *prima facie* case or show an inconsistency with a particular provision. Once a prima facie case is established, the burden of proof shifts to the defending party. The defending party must then refute the alleged inconsistency.[36] An issue arises when the complaining party brings a claim challenging provision "A" and provision "B" is invoked by the defending party as a justification for the measure. In this circumstance, who should bear the burden of proof regarding provision "B"?

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[33] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 20, 2005) [hereinafter *US – Measures Affecting the Cross-Border Supply*]. *See generally* Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (May 9, 2006) (addressing the requirements of a prima facie case).

[34] *US – Measures Affecting the Cross-Border Supply, supra* note 33, at ¶¶ 134-36.

[35] *Id.* at ¶ 141.

[36] *US – Hormones, supra* note 21, at ¶¶ 98-104.

1. Basic Principles

A previous study suggested two important principles regarding the burden of proof.[37] While these rules originate from the same general principle of international law, *actori incumbit probation*, they frequently conflict with one another.[38]

Principle 1: The complaining party must prove the alleged violation.

The burden of establishing a violation under Article XXIII:1(a) of the GATT is on the complaining party. Though it is seldom articulated, this principle is accepted by GATT and WTO DSS and has never been challenged by WTO Members.[39] Additionally, Article XXIII:1 of GATT and Article 6.2 of DSU imply that the complaining party initially bears the burden.[40] This principle is based on a presumption that WTO Members act in good faith and conform with WTO obligations.[41] The party challenging the other Member's action must rebut this presumption.

Principle 2: A party must meet necessary conditions to invoke an exception or affirmative defense.

There are circumstances in which the burden of proof shifts to the defending party; for instance, where the defending party invokes an exception or an affirmative defense. In this circumstance, the challenged measure is subjected to stricter scrutiny to ensure that it is permissive under the exceptional provision.[42]

While this rule has already been used in several GATT panels[43] and in an early WTO appellate review,[44] it was explicitly con-

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[37] Pauwelyn, *supra* note 7, at 237.

[38] *Id.*

[39] *US-Wool Shirts and Blouses*, *supra* note 17 ("A number of GATT 1947 panel reports contain language supporting the proposition that the burden of establishing a violation under Article XXIII:1(a) of the GATT 1947 was on the complaining party.").

[40] *See* Final Act, *supra* note 4

[41] Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 37, WT/DS27/ARB/ECU (Mar. 24, 2000).

[42] *See* Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, ¶ 74, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Jan. 17, 2003) [hereinafter *Canada – Dairy*] ("This reversal of usual rules obliges the responding Member to bear the consequences of any doubts concerning the evidence of export subsidization.").

[43] *See* Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, ¶¶ 5.43, 5.52, DS23/R (Mar. 16, 1992), GATT B.I.S.D. (39th Supp.) at 206

firmed by the Appellate Body in *US-Wool Shirts and Blouses* as the general rule on the burden of proof,[45] "falling back" on general principles of international law.[46] Although it sounds straightforward, the distinction between a normal provision and an affirmative defense is not airtight. In practice, the difference between the two provisions is blurred, causing debate over whether the disputed provision is actually an "affirmative defense."

2. *Cases: Three Patterns of Rulings*

The first principle regarding the burden of proof applies in the typical situation. Debate over the burden of proof mainly relates to the application of the second principle. There are three types of adjudications by the Appellate Body relating to such controversies.

(a) Type 1: "Affirmative Defence" – GATT Article XX, XI:2(c)(i)

The first type of adjudication involves a provision classified as an exception or affirmative defense. Early in Appellate Body precedent, Article XX and Article XI:2(c)(i) of GATT were classified as "limited exceptions" from obligations under certain provisions of GATT,

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(1992); Panel Report, *Canada – Import Restrictions on Ice Cream and Yoghurt*, ¶ 59, L/6568 (Sept. 27, 1989), GATT B.I.S.D. (36th Supp.) at 68 (1989); Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples*, Complaint by Chile, ¶ 12.3, L/6491 (Apr. 18, 1989), GATT B.I.S.D. (36th Supp.) at 93 (1989); Panel Report, *United States – Section 337 of the Tariff Act of 1930*, ¶ 5.27, L/6439 (Jan. 16 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989); Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, ¶ 5.1.3.7, L/6253 (Nov. 18, 1987), GATT B.I.S.D. (35th Supp.) at 163 (1988); Panel Report, *Canada – Administration of Foreign Investment Review Act*, ¶ 5.20, L/5504 (July 25, 1983), GATT B.I.S.D. (30th Supp.) at 140 (1984).

[44] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US – Gasoline*].

[45] *US – Wool Shirts and Blouses*, *supra* note 17 ("Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.").

[46] JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 202, 207-208 (2003) (noting that this kind of "fall-back" is the necessary consequence of WTO treaty being part of international law); *see also* MOJTABA KAZAZI, *supra* note 1, at 117; M.N. HOWARD, P. CRANE & D.A. HOCHBERG, PHIPSON ON EVIDENCE 52 (Sweet & Maxwell, 14th ed. 1990) ("The burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue.").

rather than positive rules establishing obligations.[47] The Appellate Body has never seriously questioned the nature of the provision as an exception, and has stated that they are "in the nature of affirmative defenses," and "the burden of establishing such a defense should rest on the party asserting it."[48] The appellate adjudications in *India-Quantitative Restrictions*, *Turkey-Textile*, and *US-FSC* concerned provisions classified as affirmative defenses.[49]

(b) Type 2: "Right" – SPS Article 3.3, TBT Article 2.4

The second type of adjudication occurs when the Appellate Body decides that a provision is an autonomous right. In this instance, the first burden of proof principle applies rather than an "exception" to other obligations. Since *US-Wool Shirts and Blouses* recognized burden shifting as a general principle, parties in WTO dispute settlements tend to raise this issue whenever the provision contains a suspicious expression.[50] Subsequent to *US-Wool Shirts and Blouses*, a number of Panel and Appellate Body reports have included a separate heading dealing specifically with the burden of proof.[51] In an effort to

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[47] *US – Wool Shirts and Blouses*, *supra* note 17; *US – Gasoline*, *supra* note 44; *see also* Pauwelyn, *supra* note 7, at 237.

[48] *US – Wool Shirts and Blouses*, *supra* note 17.

[49] Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 136, WT/DS90/AB/R, (Aug. 23, 1999) [hereinafter *India – Quantitative Restrictions*] ("[If] The complaining party has successfully established a prima facie case of inconsistency with Article XVIII. . .the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso."); Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 45, WT/DS34/AB/R (Oct. 22, 1999) (stating that a defense may be invoked under Article XXIV). It should be noted that this decision stated only the possibility of invoking as a defense without mentioning the burden shifting clearly. Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, ¶ 133, WT/DS108/AB/RW (Jan. 14, 2002).

[50] *See* Appellate Body Report, *US – Wool Shirts and Blouses*, *supra* note 17.

[51] *See, e.g. EC – Tariff Preferences*, *supra* note 28; *EC – Sardines*, *supra* note 26; Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (Mar. 12, 2001); *India – Quantitative Restrictions*, *supra* note 49; Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999); Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (June 21, 1999); Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999); *Korea – Alcoholic Beverages*, *supra* note 32; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998); *EC – Hormones*, *supra* note 21.

limit the application of the burden shifting rule, the Appellate Body has struggled to distinguish certain quasi-exceptional provisions stating such provisions are, "fundamental part of rights and obligations of WTO members," and are not in the nature of an affirmative defense.[52] Three cases where the Appellate Body reversed the Panel's decision on burden shifting demonstrate the Appellate Body's resistance to apply the second principle[53].

(c) Type 3: "Special Rule" – AG Article 10.3

Another type of adjudication exists where a provision of a WTO Agreement expressly provides that the burden of proof is shifted to the defending party. Strictly speaking, this does not relate to the rules on burden of proof. Rather, it is simply the interpretation and application of the treaty itself. For example, Article 10.3 of the Agreement on Agriculture [hereinafter AG] provides a special rule for proof of export subsidies.[54] According to the Appellate Body, this provision allocates the burden of proof to both parties, assigning a quantitative aspect to the complaining Member and an export subsidization aspect to the responding Member.[55] Where the exports exceed the required quantities, "the complaining Member is relieved of its burden to establish a prima facie case of export subsidization."[56]

3. Key Issue: "Exception" or "Right"

When there is a claim under one WTO provision and the defending party invokes a second provision as a justification for the measure, the key issue is whether the second provision is an exception or an autonomous right. It is well established "customary GATT/WTO practice" that the party invoking the exception carries the burden of

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[52] For example, although Article 3.1 of SPS Agreement contains the phrase of "except as otherwise provided for in this Agreement, and in particular in paragraph 3", the Appellate Body stated that the relationship between Article 3.1 and Article 3.3 is not a "general rule-exception." *See EC – Hormones*, *supra* note 21, at ¶104.

[53] *See EC – Tariff Preferences*, *supra* note 28, at ¶¶ 104-125; *EC – Sardines*, *supra* note 26, at ¶¶ 269-283; *EC – Hormones*, *supra* note 21, at ¶¶ 97-109.

[54] AG Article 10.3 provides that: "[a]ny Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question." *See EC – Sardines*, *supra* note 26, at ¶ 104.

[55] Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶¶ 644-645, WT/DS267/AB/R (March 21, 2005) [hereinafter *US – Upland Cotton*]; *Canada – Dairy*, *supra* note 42, at ¶¶ 55-77.

[56] *US – Upland Cotton*, *supra* note 55; *Canada – Dairy*, *supra* note 42, at ¶¶ 55-77.

proof.[57] However, many provisions that may be considered exceptions should instead be viewed as rights. What standards should be used to distinguish between an exception and a right?

First of all, the relationship between the two provisions is critical. A provision is not merely a positive rule establishing rights and obligations. Rather, it can be an exception to the obligations set forth in other provisions. For this purpose, the Appellate Body distinguished between exclusion and exception.[58] Even though SPS Article 3.1 contained the term "except," the Appellate Body held that, "different from the relationship between Articles I or III and Article XX of the GATT 1994, 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."[59] Unfortunately, such a distinction is "not always. . .evident and readily applicable."[60] In *EC-Tariff Preferences*, the Appellate Body held that, where one of the provisions: 1) permits behavior that would be otherwise inconsistent with an obligation in another provision, or 2) refers to another provision, the complaining party bears the burden of proving that a measure is inconsistent only where one of the provisions suggests that the obligation is not applicable.[61]

In addition to the above standard, the Appellate Body considers the "carefully negotiated balance of rights and obligations."[62] Generally, when an exception clause is invoked by the defending party as a defense, the burden is shifted to the defending party. However, the simple characterization of a provision as an exception is not dispositive of burden of proof issues and, therefore, the Appellate Body considers additional factors, such as the basic flow of logic. The Appellate Body has emphasized the importance of the provision in deciding whether to shift the burden.[63]

When a provision meets the first standard of exception, can the judge deny the burden shift based on additional considerations? The Appellate Body's decision in *EC – Tariff Preferences*, demonstrates the possibility of such a denial.[64] In this report, the Appellate Body also

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[57] *See US – Wool Shirts and Blouses*, *supra* note 17.

[58] *EC – Hormones*, *supra* note 21, at ¶ 104.

[59] *Id.*

[60] *EC – Tariff Preferences*, *supra* note 28, at ¶ 88.

[61] *Id.*

[62] *US – Wool Shirts and Blouses*, *supra* note 17.

[63] *Id.*; *see also EC – Tariff Preferences*, *supra* note 28 at ¶¶ 110-115; *EC – Hormones*, *supra* note 21, at ¶ 104; *EC – Sardines*, *supra* note 26, at ¶ 271.

[64] *EC – Tariff Preferences*, *supra* note 28 ("The Enabling Clause plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical 'exception' or 'defense' in the

introduced the concept of due process to attain the goal of rebalancing and posed the differences between the two standards.[65]

4. Implications

The precedent established in *US – Wool Shirts and Blouses* has been followed by the Appellate Body. It is firmly established that the party invoking an affirmative claim or defense bears the burden of proof in the WTO jurisprudence.[66] Thus, the burden is shifted to the defending party when it invokes an exception clause as an affirmative defense. However, burden shifting is limited to the pure exception clause, where the provision cannot be alleged as a violation itself because it does not *per se* provide the right to Member countries. Even use of term "except" does not necessarily imply an exception or affirmative defense.

Even with an exception, the judicial bodies may a place a certain amount of the burden of proof upon the complaining party. Despite GATT precedent, the Appellate Body is hesitant to permit such derogations as they may cause instability in the rules and the reallocation of power.

B. Level II: The Establishment of a Prima Facie *Case*

At the second stage, the panel decides whether the party discharged its burden of proof. The question at this level is somewhat different from the first level. Suppose "0" is a totally irrelevant fact and "10" is irrebuttable evidence. In order to discharge the burden of proof, what degree of evidence is required? Is "4" sufficient? On the other hand, considering that the "anchor numbers" were chosen at random, what kind of rules are necessary to let the judiciary members of WTO DSS produce a predictable and secure pattern to expel any doubt of arbitrariness, without any support from written rules?[67] Additionally, how should the judge balance the demand of "predictability" with the need for procedural "fairness?"[68] This section will explore the answers to these questions.

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style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases.").

[65] *Id.*

[66] MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 39 (2003).

[67] *See* Charles M. Yablon, *A Theory of Presumption*, 2 LAW, PROBABILITY & RISK 227, 232 (2003) (suggesting that the perceived importance of burden-shifting rules may cause decision makers to focus (or 'anchor') on one factor in a multi-factored decision).

[68] *See EC – Hormones*, *supra* note 21, at ¶ 133 ("A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a

1. The Degree of the Burden: "Sufficient Evidence"

The basic notion in the *EC-Hormones* decision was that "only after such a *prima facie* determination had been made by the panel may the *onus* be shifted."[69] The Greek term of *"prima facie,"* or "at first appearance," means, "the evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts."[70] How much evidence will be "sufficient" to establish such a *prima facie* case? As explained in *US-Wool Shirts and Blouses*, this "will necessarily vary from measure to measure, provision to provision, and case to case."[71] Does this imply there is no fixed rule on the degree of evidence or is there a general standard for parties to keep in mind when in dispute? Suppose that the alleged discrimination exists in fact, but the claiming party does not have full access to effective evidence due to the control of information by the defending party.[72] How can the party escape the procedural insufficiency?

First, it would be insufficient merely to file an entire piece of legislation and expect a panel to conduct discovery on its own. As the Appellate Body elaborated in the *US-Gambling* case, "the evidence and arguments underlying a prima facie case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."[73]

Second, the scope of the burden of proof is limited to issues of fact. However, it is generally the duty of the court to know and apply the law.[74] In *EC-Tariff Preferences, the* Appellate Body clarified that, "consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause."[75]

The rules on the requirements for establishing a *prima facie* case are less developed than the allocation of the burden of the proof.

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greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdiction is known as due process of law or natural justice.").

[69] *Id.* at ¶ 109.

[70] *See* Georg Nils Herlitz, *The Meaning of the Term "Prima Facie"*, 55 LA. L. REV. 391, 392, 395 (1994).

[71] *US - Wool Shirts and Blouses*, *supra* note 17, at 11.

[72] *See generally* J. C. Thomas & David Palmeter, *The Need for Due Process in WTO Proceedings*, 31 J. WORLD TRADE 45 (1997).

[73] *US - Measures Affecting the Cross-Border Supply*, *supra* note 33, at ¶ 141.

[74] *See* KAZAZI, *supra* note 1, at 42.

[75] *EC - Tariff Preferences*, *supra* note 28, at ¶ 105 (emphasis added).

Thus, objections to the panel's decisions on the *prima facie* case often occurred under Article 11 of the DSU.[76] The above general disciplines play an important role in such disputes, as a minimum standard to assess the legitimacy of the panel's decision.

2. The Scope of the Panel's Discretion

Shifting the angle from the parties to a panel, to what extent may a panel exercise this tool of presumption? Basically, a panel will balance all evidence on record and decide whether the party bearing the original burden of proof has convinced it of the validity of its claims. In the absence of effective refutation by the defending party, a panel is required, "as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[77]

Suppose the complaining party submitted the fact "3" which seems slightly insufficient to be a *prima facie* case, but the affirmative finding is necessary to hamper the prevalence of such an alleged discriminatory measure. Considering there is no distinct standard of sufficient evidence, can a panel make use of this procedural device for its policy goal? On the other hand, suppose an injured developing country brings a claim against a developed country with unsophisticated and unspecified written submissions due to the lack of knowledge and resources. Can the panel repair such procedural errors in good faith?

It is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings. Thus, the panel's examination and weighing of the evidence submitted fall "outside the scope of appellate review"[78] based on Article 17.6 of DSU.[79] The Appellate Body, however, did not leave this discretion unbridled. In *EC-Hormones* and many subsequent cases, the Appellate Body clarified that "the consistency or inconsistency" with the requirements of DSU Article 11 is a "legal characterization issue," which "would fall within the scope of appellate review."[80]

The evolution is not satisfactory yet; nevertheless, the trend is to render more discretion to the adjudicators, which would go beyond the consent of Members in the Uruguay Round.

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[76] Article 11 of the DSU provides that: ". . . a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . ." Final Act, *supra* note 5.

[77] *EC – Hormones*, *supra* note 21, at ¶ 104. *See generally*, *US – Wool Shirts and Blouses*, *supra* note 17, at 14.

[78] *Korea – Alcoholic Beverages*, *supra* note 32, at ¶ 161.

[79] Article 17.6 of the DSU states, "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

[80] *EC – Hormones*, *supra* note 21, at ¶ 132.

IV. CASE APPLICATION: *EC-BIOTHECH*

In previous sections, I discussed the evolving rules on the burden of proof, formed the two-level framework, and spotted key issues. In this section, I will try to apply these findings to the most recent case, *EC-Biotech*, which provides a vivid description of how the panel exercises its tool.[81]

A. Case Brief

In September 2006, the Panel released the bulky but highly qualified report on the EC's GMO moratorium and safeguard measures, which was carefully crafted, extremely analytical, and very well reasoned.[82]

In this case, the US brought the claim on the EC's safeguard measures under Article 5.1 of the SPS Agreement[83], whereas EC argued that since the challenged safeguards are provisional measures consistent with Article 5.7,[84] the US has the burden of establishing a prima facie case of inconsistency with Article 5.7. Thus, the issue was whether the successful claim brought under Article 5.1 could be accepted as a *prima facie* case to the measures under Article 5.7.

Concerning the allocation of the burden, it was critical to decide whether Article 5.7 was an "affirmative defence." The Panel thoroughly examined whether the relationship between Article 5.1 and Article 5.7 was a "general-exception" or "exclusion (qualified right),"

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[81] *EC – Biotech, supra* note 25.

[82] This case was brought by the United States and Canada alleging that a number of EC member States maintain national marketing and import bans on biotech products even though those products have already been approved by the EC for import and marketing in the EC.

[83] *Article 5.1 of the SPS Agreement provides:* "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." The WTO Agreement on the Application of Sanitary and Phystosanitary Measures , Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1a, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125 (1994)[hereinafter SPS], *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

[84] *Article 5.7 of the SPS Agreement provides:* "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time." SPS Art. 5.7.

and concluded that Article 5.7 was a "qualified right" rather than an "exception," requiring the claiming party to establish a *prima facie* case.[85]

When addressing whether the complaining parties have met their burden of establishing a *prima facie* case of inconsistency with Article 5.7 in respect of the relevant safeguard measures, the Panel stated that: "in the specific circumstances of this case, the critical legal issue in our view is whether the relevant safeguard measures meet the requirements set out in the text of Article 5.1, not whether they are consistent with Article 5.7."[86] The Panel held that the claiming parties established the *prima facie* case of inconsistency with Article 5.7.

The European Union announced that it would not appeal.[87] However, this does not necessarily mean that the Panel's decision was without error. The following section examines the decision from a critical perspective.

B. Case Analysis in a Critical Perspective

It might be inappropriate to make an immature criticism on the fine-tuned masterpiece, but I believe a sound criticism will furnish a stepping stone for the evolution. Two questions arise: whether the Panel reached a logically proper conclusion ("legal analysis"), and whether this decision properly balanced the goals of WTO DSS ("political analysis").

1. Legal Analysis

The Panel's reasoning is legally well-supported but somewhat distorted. For this analysis, I split the Panel's holding into two parts: the allocation of the burden of proof (Level I) and the issue of whether the complaining party established the *prima facie* case under Article 5.7 (Level II).

On 'Level I', the main question was who should bear the burden to prove the inconsistency of the measure with Article 5.7. The term "except" in Article 5.1 triggers the suspicion that Article 5.7 might be interpreted as an "exception." Also, the previous Panel of *Japan-Apple*[88] recognized Article 5.7 as an "exception," which was not discussed in the appellate review. On the contrary, the Appellate Body has reversed the Panel's progressive holdings on similar provi-

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[85] *Panel Report, EC – Biotech*, supra note 105, at ¶ 7.2976.

[86] *Id.* at ¶ 7.3006.

[87] *EU Decides Against WTO GMO Panel Appeal, U.S. Presses for Approvals*, INSIDE US TRADE, Nov. 24, 2006.

[88] *Panel Report, Japan – Measures Affecting the Importation of Apples*, WT/DS245/R July 15, 2003, upheld by Appellate Body Report, WT/DS245/AB/R (Nov. 26, 2003).

sions in *EC-Hormones* (SPS Article 3.3) and *EC-Sardines* (TBT Article 2.4). The adjudication of the Panel in this case manifests complete deference to the precedents made by the Appellate Body. The Panel examined previous rulings of the Appellate Body, including *EC-Hormones*, *Japan-Agricultural Product II*, *EC-Sardines*, *Japan-Apple* and *EC-Tariff Preferences*.[89] Then, the Panel decided not to admit the "exception." The Panel was justified in reversing the decision in *Japan-Apple*.

On "Level II", however, the Panel seems to have made ill use of its discretion. The Panel *de facto* unjustly exempted the complaining parties from the burden of proof regarding the Article 5.7 violation, stating that a measure under Article 5.7 would be a breach of Article 5.1 where it does not fulfill the requirements of Article 5.7. More interestingly, the Panel held that, based on the existence of several risk assessment reports of European Commission, the US and Argentina "established a presumption that Austria's safeguard measure was imposed in respect of a situation where relevant scientific evidence was not insufficient", and conferred the burden of rebutting this presumption to the EC.[90]

2. *Political Analysis*

The pre-existing perception and political consideration of the Panel seem to have prevailed over the strict application of the rules. The challenged measures are of two kinds: moratoriums and safeguards. More interestingly, procedural issues were the critical threshold in both claims: measure and "*prima facie* case." Since the Panel rejected moratorium claims by reason of measure, it might be difficult to deny safeguards claims based on other procedural reasons.

The Panel of *EC-Biotech* struggled to balance the tension between deferring to the words of the higher tribunal (the goal of "predictability") and exercising its discretion to reflect the policy object (the goal of "rebalancing"). The key issue was whether the complaining party could justify the claim to establish a *prima facie* case of Article 5.1 to the measures based on Article 5.7, where the relationship between Article 5.1 and 5.7 is not a "general-exception." Considering the Appellate Body has shown strong resistance to extend the rule of burden shifting, the Panel could not make a pragmatic decision on the issue of "Level I." But, in "Level II," since there is no fixed standard of the degree of evidence, the Panel could reflect its policy goal without deviating from the precedent of the Appellate Body by justifying the insufficient *prima facie* case.

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[89] Panel Report, *EC-Biotech*, *supra* note 29, at ¶¶ 7.2962-2997.

[90] Id. at ¶ 7.3273

V. CONCLUSION

The burden of proof rests upon the party who makes the claim (*actori incumbit probation*). In case of an affirmative defense, that burden will be shifted to the defending party. It sounds so simple, but in a real dispute, this shift is very controversial since it grants great advantages to the claimant. This "quasi-discretionary tool" is a two-edged sword, which can be both an effective device to enhance implementation and a factor threatening to ruin the judicial system, depending on how it is used. In this regard, nation states tend to formulate the written rules or well-established doctrines on the burden shift.

The WTO DSS does not have written rules on that subject. However, that does not mean that there are no rules on the burden of proof. Astonishingly, the judicial system of WTO has taken on a life of its own, by creating precedent on the burden of proof. Such evolution is not new, but is expanding quickly. In an era where the amendment of treaty looks gloomy, this "gap-filling" or "bottom-up" rule-making by the judicial bodies carries a prime significant meaning to Member countries, as well as the WTO DSS.

This evolution has not occurred in vacuum or in disorder. The Appellate Body drew a meager concept from general principle of international law. It then reinforced the rules carefully and gradually, reflecting divergent alternative views arising from the tensions between the sovereignty and the judicial discretion, as well as between the goal of predictability and the goal of fairness. In such a process of trial and error, we can detect a strong use of precedent, which would create a significant impact on the traditional concept of international law.

As a matter of policy, three implications may arise. First, the questions on the burden of proof remain open-ended such that results are determined on a case-by-case basis, in response to factually diverse inquires. In such circumstances, reliance on prior decisions is necessary in minimizing the possible deterioration of the disciplines and to ensure that the rules develop objectively, rather than becoming subject to the whims of individuals. Second, the power of decision-making owned by judicial bodies of WTO DSS should be carefully exercised. In certain instances, the Panels and Appellate Body have to take the "role of a prophet" and seek to forecast how these rules will evolve. Thus, they should be aware of their important role when producing the ruling. The Panel's decision in *EC-Biotech* must be criticized carefully because it generated a legal ambiguity and confusion of the rules, rather than simply evolving the current rule-based system. Finally, the evolving rules on burden of proof demonstrate the dynamic nature of WTO law, which is an example of constitutional thinking.