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The Precedent Setters: De Facto Stare Decisis in TWO Adjudication (Part Two of a Trilogy)

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Cover Page Footnote

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**THE PRECEDENT SETTERS: DE FACTO STARE
DECISIS IN WTO ADJUDICATION (PART TWO OF A
TRILOGY)**

RAJ BHALA*

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I know of no phase of our law so misunderstood as our system of precedent.

Karl N. Llewellyn, *THE COMMON LAW TRADITION* 62 (1960).

[A]ny concept of law that cannot felicitously accommodate among genuine propositions of law those that are precedent-based must be untenable.

D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* 531, 542 (D. Neil MacCormick & Robert S. Summers eds., 1997).

I. THE YOUNG BANYAN TREES

Abnegation of *stare decisis* in international trade law is foolish. The reality of World Trade Organization (WTO) Appellate Body adjudication is that *stare decisis* operates in a *de facto*, but still not *de jure*, sense. Yet we continue to believe in the myth that *stare decisis* does not operate in international law generally and international trade law in particular. We continue to speak the language of this myth, namely, of an ostensibly meaningful distinction between "binding" and "non-binding" precedent.¹ Thus, a monstrous disconnect persists between doctrine and reality.

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In the first article of this trilogy, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*,² I argued that this mischievous myth is borne of various sources, most notably International Court of Justice (ICJ) jurisprudence and the influence of the civil law tradition. I found these sources to be rather impure. Moreover, I contend we have been seduced by the *prima facie* simplicity of the distinction between "binding" and "non-binding" precedent, and thus, have failed to perceive a potentially more fruitful distinction. In truth, the language is exaggerated. "Binding" is too binding, precedents are adored, and the common law is an authoritarian mystery. "Non-binding" is not binding enough, precedents are avuncular, and common law is not even nominal. I urged, rather bluntly, that all holdings of the WTO Appellate Body are, in fact, binding. The question is whether the decisions create a *de facto* or *de jure* precedent.

A *de facto* precedent, like a *de jure* one, creates a presumption that it is to be followed unless a very good reason for a departure exists. In practice, both types of precedents are, indeed, normally followed. The critical difference between the two is that only a *de jure* precedent is followed as a matter of law, that is, as a result of an officially recognized or formal legal doctrine. A *de facto* precedent is followed because of a variety of extra-legal and quasi-legal factors

My dear friend and co-author of *World Trade Law*, Professor Kevin Kennedy of Michigan State University (Detroit College of Law) carefully reviewed an earlier draft of the trilogy, for which I am very grateful. I appreciate my Research Assistants, Ms. Kris Hansen and Ms. Preeti Kapoor of the George Washington Law School Class of 2000 and Ms. Mika Tanegashima de Tellez of the Class of 2002, for their indispensable help. Finally, I thank Mr. Herb Somers, George Washington University Foreign and International Law Librarian, for his indefatigable research support.

1. On occasion, the terminology is modified. For example, it has been suggested that while *stare decisis* is absent in world trade law (a restatement of the myth), dispute resolution outcomes in the pre-Uruguay Round General Agreement on Tariffs and Trade System, and the post-Uruguay Round WTO system, create "norms" - a public international law concept - for the case at hand and all similar cases. See Rutsel Silvestre J. Martha, *Precedent in World Trade Law*, 44 NETH. INT'L L. REV. 346, 372-75 (1997). This suggestion raises some important positivistic questions. What is a "norm"? How does a "norm" get created? What is the practical and legal effect of a "norm"? The suggestion also raises an important evaluative question. Does the concept of a "norm" provide an accurate depiction of what is really happening in multilateral trade adjudication? See generally, Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993) (arguing that forces external to states, exerted by and through international organizations like UNESCO, shape the choices that states make about organizational structure and innovation). In any event, whether the "binding" - "non-binding" distinction or some other terminology is used, the evasion of the term "*stare decisis*," and the consequent denial of its operation, is apparent enough.

2. 14 AM. U. INT'L L. REV. 845 (1999).

that include the custom or habit of the tribunal, the tribunal's sense of justice (particularly to treat like cases alike), the tribunal's need for efficiency (namely to avoid expending resources on "re-inventing the wheel"), and the tribunal's desire to act consistently with the expectations of both parties and non-parties. We can be neither all-inclusive nor too precise about this list of factors motivating *de facto* adherence to the past. But we can observe very clearly the almost routine citation to, application of, and differentiation among prior holdings in a way that makes the tribunal look just like an Anglo-American court. Accordingly, I argue that in the present context, the WTO Appellate Body behaves very much like a high court (or the highest court) in a common law jurisdiction.

My thesis in this second article of the trilogy is simple: a *de facto* doctrine of *stare decisis* operates in Appellate Body jurisprudence. The presence of this *de facto* doctrine is yet another reason I call the belief in the absence of *stare decisis* a "myth." Not only are the origins of the myth impure, as argued in Part One of the trilogy, but the language of the myth is highly problematic. It is far more. It is that in reality we observe something different from what we are taught to believe. Specifically, if we study *in seriatim* Appellate Body reports on particular procedural and substantive issues, then we see quite clearly a line of decisional authority on each such issue. In other words, we can observe the emergence of an international common law of procedure in WTO adjudication with respect to (1) burden of proof, (2) judicial economy, (3) standing, and (4) sufficiency of complaints. And, we can observe an emerging substantive common law on (1) the interpretation of Article XX of the General Agreement on Tariffs and Trade (GATT) (concerning general exceptions to GATT obligations), (2) like product determinations, and (3) the interpretation of GATT Article XIII (concerning tariff-rate quotas). By no means are these the only emerging lines of decisional authority. Rather, they are just a few young banyan trees in an increasingly engrossing landscape.

The branches of these wonderful Indian fig trees hang down and, in turn, root themselves. Each of the lines of decisional authority begins with an initial or "leading" case in which a *de facto* precedent is established, the trunk of our tree, as it were. This precedent then is carried through into or, like the banyan tree branches, takes root in progeny cases. Were there no *de facto stare decisis* in operation, then we would see something more akin to a few lone telephone poles with thin links to a few other uninviting poles. The picture is hardly so stark. To read Appellate Body reports at this early stage in the

history of the post-Uruguay Round multilateral dispute resolution system is to gaze at growth, development, and linkages. It is to feel vibrant inter-connections.

Even if the members of the WTO's Appellate Body wished our experience to be soporific or mechanical, they could not have had it that way. With respect to each procedural and substantive issue raised in the leading cases treated below, the members had no choice but to devise a rule, to plant the banyan tree, as it were. The issues before them were not covered clearly, or at all, by the applicable Uruguay Round agreements. Nor was there any prospect of the WTO Ministerial Conference or General Council stepping in quickly to resolve the legal dilemmas. The members were thrust into the role of, at least, interstitial legislators. Indeed, the cases discussed below raised issues of first impression. In adjudicating these cases, the Appellate Body members were, consciously or not, acting in accordance with a 1935 Report of the New York Law Revision Commission. The Commission observed that "[t]he common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power."³ That is, the members knew they had to settle the law.

To be sure, the banyan trees are young. We do not yet observe in Appellate Body jurisprudence, and we could not rightly expect to observe at this early stage the Janus-faced nature of *stare decisis*.⁴ Great Anglo-American writers on the doctrine have much to say on this point, and their advice is quite relevant to the Appellate Body. Nor do we yet observe a fully developed discourse on the variables affecting the normative force of precedent. Again, perhaps it is too early to expect this development. But some variables are worth considering even at this juncture, because such a discourse is coming. Older banyan trees are a never-ending source of life and wonderment. I have little doubt that the Appellate Body jurisprudence will, as it matures, provide us with interesting sights of precedents being rejected or modified, akin to branches not hanging down and taking root, but simply dropping off, and of precedents of differential persuasive power, akin to stronger versus weaker branches.

Tempting as it is, I ought not rush over to the banyan trees. It is better to advance my thesis that *de facto stare decisis* is alive and well

3. NEW YORK LAW REVISION COMMISSION REPORT 465 (1935).

4. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 74 (1930).

in the GATT-WTO system by dealing first with the proper approach to the trees. Thus, in Part II of this article, I discuss the methodology, namely, how we can identify the operation of a *de facto* doctrine of *stare decisis*.

In Parts III and IV, I shall move to look at the banyan trees and to lay out the case that the doctrine of *stare decisis* resonates through Appellate Body jurisprudence. The case rests on an exegesis of some leading Appellate Body reports and the linkages among them. Part III recounts the leading cases and their progeny concerning procedural issues, while Part IV highlights the lines of authority on substantive matters. (I should add that in bifurcating the case law in this manner, I do not mean to endorse a rigid distinction but rather to take advantage of a heuristic device.) Because the banyan trees are growing constantly, it is entirely possible (indeed, likely, given the constant issuance of new WTO decisions) that more progeny cases exist than those discussed below. But, that growth only reinforces the overall argument. That is, should it be observed with respect to an aspect of the discussion in Parts III or IV, "oh, you have not accounted for such-and-such a case, which just came out and relies on one of the leading cases you identified," my reaction can be only to smile, because the observer is making my point for me. In Part V, I shall discuss the Janus-faced nature of precedent and the variables that might affect the normative force of precedent. In that part, I shall review the wisdom of some classic and contemporary works on *stare decisis*, and explore the implications for the future work of the Appellate Body. I summarize the main points of the article in Part VI.

In the final article of the trilogy, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*,⁵ I shall argue that we would all be better off if we shifted the adjudicatory paradigms, from one of *de facto* to *de jure stare decisis*, i.e., if we agreed that Appellate Body reports are themselves a formal source of international trade law. By "better off" I mean that we would have cured, or nearly so, the monstrous disconnect between the myth that *stare decisis* does not exist in the GATT-WTO system on the one hand, and the actual practice of the Appellate Body on the other.

At the risk of self promotion, I might note another work being published contemporaneously with the present article. Even a glance at the Table of Contents above, and a cursory review of what

5. GEO. WASH. J. INT'L L. (forthcoming 2000).

follows below, reveals that the extraordinary EC – *Bananas* case is both a producer and consumer of several *de facto* precedents. The case necessarily plays a central role in Parts III and IV. But, to review the case's complexities in the text or through footnotes would consume far too much space. Thus, in a separate piece, *The Bananas War*,⁶ I endeavor to provide essential factual and legal information about the extraordinary EC – *Bananas* case and to reflect upon its wider implications. *The Bananas War* may be a convenience for readers unfamiliar with, or in need of a refresher on, the case, allowing readers to better appreciate its role in the emerging body of the international common law of trade. Indeed, *The Bananas War* grew out of the present article, reminding me of the lesson that sometimes it is necessary to write one article to solve another. At the very least, the present article, set within a trilogy, coupled with *The Bananas War*, is a testament to the considerable difficulty of writing an entirely self-contained article in international trade law nowadays. So numerous are the linkages, so deep are the complexities, and so vast is the landscape, that it is sheer folly to pretend that any one topic sits in splendid isolation.

II. THE METHODOLOGICAL PROBLEM

A. *What is the Problem?*

Stare decisis is impossible without transparency. It requires that adjudicators and disputing parties have ready access to reliable and accurate renditions of past decisions.⁷ The WTO is at least this transparent. Panel and Appellate Body reports are posted on the WTO's excellent website⁸ with some degree of alacrity, and may be downloaded with ease into WordPerfect or Word format (depending on the report).

Any careful reader of WTO Appellate Body and, indeed, Panel reports must be struck by the extensive citations to prior Panel and Appellate Body reports, as well as to prior adopted and unadopted

6. Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. (forthcoming issue 3, 2000).

7. See JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW (John H. Baker ed., 1989) (discussing the relationship in various countries between the evolution of the system of record-keeping of decisions and the development of case law); CARLETON KEMP ALLEN, LAW IN THE MAKING 297-98 (6th ed. 1958) (discussing the practical workings of precedents and stating that "[a] precedent is not a precedent unless it is accurately reported"). See generally MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 32-35 (1996) (discussing the importance of accessibility of opinions to the build up of law through precedents).

8. See <<http://www.wto.org>>.

GATT Panel reports.⁹ I confess to not yet having studied every GATT Panel report and every WTO Panel and Appellate Body report in exhaustive detail (a task that is becoming increasingly difficult given the steadily increasing volume of WTO reports). Still, I would venture to say that there are few if any such reports that do not cite a previous case, or distinguish the facts or issues at hand from the context and problems dealt with by ostensibly relevant previous cases.

Certainly, GATT-WTO adjudication remains text-driven. That is, the first source of law to which the Appellate Body must resort is the GATT or the Uruguay Round Agreement article in question. This fact means that the techniques of "statutory" construction used by the Appellate Body ought to come under increasing scrutiny. Indeed, in light of the emergence of a few articles on the relevance of the Vienna Convention on the Law of Treaties in WTO adjudication,¹⁰ one can envision the development of a body of literature on this topic akin to the literature in constitutional law on Supreme Court textualism.¹¹ But, where the disputed GATT or Uruguay Round Agreement provision is ambiguous, the Appellate Body resorts, with alacrity, to prior cases. The reader of their reports observes the same phenomenon whenever the Appellate Body seems uncertain of itself. Indeed, instances even appear where the disputed text is quite clear, yet reference is still made to a prior case.

In all of these instances, the reader of the report is, then, understandably perplexed. Obviously, if the text is clear, why "pile it on" with prior cases? If the text is ambiguous, given the supposed non-existence of *stare decisis*, why bother citing a previous case, or distinguishing a previous case? Is it simply to sound more authoritative to the disputing WTO Members? Is it a "reversal-minimizing device," *i.e.*, a way for a panel to reduce the risk that the Appellate Body will reverse the Panel's decision? Is it to provide intellectual (and psychological) comfort for the decision-makers in their own minds? If the myth is not that, then the Appellate Body must not beguile us into believing they have anything other than a very restrictive view of prior holdings. In other words, the Appellate

9. See generally Finnemore, *supra* note 1, at 353-56 (discussing the use of past GATT and WTO decisions).

10. See, e.g., David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 409-10 (1998) (discussing whether WTO rights and obligations change if agreements such as the Vienna Convention change).

11. See, e.g., STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 143, 146, 148-50, 180-81 (1996); Symposium, *Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1085 (1998).

Body proceedings must be seen as arbitrations in the sense of the effect of their outcomes, and the self-image of members must be one of arbitrators rendering one-shot, *ad hoc* decisions. Likewise, scholars must treat them and their reports as such through careful diction. No one ought to analogize what is happening to what transpires in Anglo-American courts, and the proposition that multilateral trade adjudication is increasingly Americanized ought to be dubbed a heresy.

I submit the WTO Appellate Body could not meet this challenge, and ought not even to try. In truth, the Members are increasingly American in the way they handle their past decisions. For all practical purposes, the reports of the Appellate Body do have a precedential effect on non-party Members in the future, they are a *binding* source of law for these parties, and taken together they represent an emerging body of common law for international trade. But, while WTO Members and observers consciously or unconsciously understand this practical reality, they have yet to acknowledge it openly as a theoretical matter. Thus, we cannot yet call what we observe a doctrine of "*de jure*" *stare decisis*. Following precedents remains a regularly observed behavior borne of extra-legal and quasi-legal factors, not of a legal mandate that prior holdings must be respected as a source of law. In brief, there is a disconnect between the law in action and the myth.

Advancing this thesis is, however, a methodological challenge. How can we know whether the Appellate Body is moved by a complex amalgam of extra-legal and quasi-legal factors that, in turn, give it a sense of obligation to follow its past holdings? Perhaps it is looking at them merely for guidance, or simply to cloak itself in the past so as to appear more credible to the parties to the dispute? Possibly, at any moment it might render a different – even radically different – decision from one in the past, and justify the new decision in part on the ground that *stare decisis* does not apply. In other words, by what means, can we find evidence of the operation of a doctrine of *de facto stare decisis*, that has no official overt advocates at the WTO and by definition is not a formal part of the law on multilateral trade dispute resolution?

B. *The First and Second Best Solutions*

The first best solution to the methodological problem, which would provide direct evidence to sort out these questions, would be

to ask the Appellate Body members themselves while they are in the act of deciding a case. This, of course, is not possible.¹² Even if it were, the members might deny the operation of a *de facto* doctrine of *stare decisis* and the concomitant creation of common law. Their denials could be met, however, with some skepticism insofar as these statements can be contrasted with the Appellate Body's actions. They may say one thing, but do quite another. The incongruity may be innocent, as members simply may be too close to their work to be aware consciously of what is happening. Alternatively, their denials might be calculated to avoid arousing the ire of the WTO Ministerial Conference and General Council, a separation of powers point to which I shall return in Part Three of this trilogy.

The second best solution, then, would be to interview the panelists and Appellate Body members after the fact and ask them why they cited what they cited. Given the much-complained about general lack of transparency in WTO adjudication,¹³ this is not feasible now. It is a hope for the future that the members will be more publicly available to share their jurisprudential views with the international legal community. What they do now is travel anonymously back and forth between their home countries and Geneva and, while at the WTO, work rather like a scholastic cabal, allowing only that their names appear at the bottom of their reports. Still, even this second best solution, if and when it becomes available, will suffer from some of the same problems as the best solution.

We are forced, therefore, to a third-best solution: read the reports and attempt to draw fair inferences from them about the use of prior decisions. Yet in this study, we can uncover what is really going on. In this regard, I find the conclusion of Mr. Palmeter and Professor Mavroidis too conservative.

The real question, therefore, is the extent to which panels and the Appellate Body itself will treat Appellate Body reports as authoritative. The answers

12. Interestingly, United States Supreme Court Justices recently provided a rare glimpse inside their views about the globalization of legal citation. In July 1998, a group of Supreme Court Justices visited the European Court of Justice (ECJ). In the words of Justice O'Connor, "[w]e certainly are going to be more inclined to look at decisions of that court [the ECJ] on substantive issues . . . and perhaps use them and cite them in future decisions." Justice Breyer added that "[l]awyers in America may cite an EU ruling to our court to further a point, and this increases the cross-fertilization of U.S.-EU legal ideas." Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24.

13. I shall discuss the problem of transparency in Part Three of the trilogy, *supra* note 5.

to these questions must await more experience; however, it is reasonable to presume that, absent unusual circumstances, panels will follow the decisions of the Appellate Body in much the same way that a lower court follows the decisions of a higher court. This is a mandatory practice in some legal systems. In others it occurs as a practical matter.¹⁴

Even at this early point in the life of the Appellate Body, we have that experience.

I agree with the succinct statement of Judge Mohamed Shahabuddeen of the ICJ: "one does not judge with eyes trained on the mountains of case law dominating, and sometimes intimidating, the common law world."¹⁵ A few small hills will do quite nicely. Thus, I shall not argue below that already we have long lines of *de facto* precedents that, due in part to their length, have overwhelming normative force. I shall, however, urge that we have some obvious leading cases followed by short lines of *de facto* precedent, and that these cases will not be overruled or modified with ease.

I might add that the Palmeter-Mavroidis presumption about panels following the Appellate Body, while reasonable, has not proven entirely true. In the report *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the Panel stated boldly that "[p]anels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same."¹⁶ To be sure, the Panel continued on to say it would not ignore prior rulings,

14. Palmeter & Mavroidis, *supra* note 10, at 404. Likewise, the observation of Shabtai Rosenne, concerning public international law and the ICJ, is not appropriate for international trade law and the WTO. He writes:

International law does not know the theory of the common law, that the law exists ready-made in the breasts of the judges, whose statements of what the law is constitutes in itself a binding precedent. Although the importance of judicial decisions, and more particularly those of the Permanent Court and the present Court, as evidence of a rule of international law is continually growing, international judicial decisions are still numerically sparse enough to make impossible any complete and satisfying philosophy of the method of employment of precedents.

3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996*, 1612 (3d ed. 1997) (emphasis added).

15. SHAHABUDEEN, *supra* note 7, at 14.

16. WTO Panel Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Aug 24, 1998, WTO Doc. WT/DS79/R, at 57, para. 7.30 [hereinafter *India-Patent Protection*, WTO Panel Report].

and indeed would work to ensure predictability in the multilateral trading system.¹⁷ Still, the Panel is rejecting the concept of vertical *stare decisis*, that is, the idea that a lower court is bound by the decisions of a higher court where both courts are in the same jurisdiction.

C. A Synthetic Approach

How, then, should we go about a quest for *de facto stare decisis*? One approach would be to examine the efforts expended by the Appellate Body on differentiating one case from another. As Judge Shahabuddeen correctly points out, "[t]he art of distinguishing is of course the trademark of a system of precedents."¹⁸ Thus, the hypothesis would be that the harder the Appellate Body tries to distinguish cases, the more likely it feels it is, in practice, bound by its prior decisions. After all, why else would it take pains to explain why a past decision is not relevant in the case at bar?

This methodology produces circumstantial evidence from which we must draw inferences about the Appellate Body operating in a *de facto stare decisis* regime. A more direct form of evidence may be obtained from a second methodology, namely, trusting the plain meaning of the language the Appellate Body uses to refer to, or deviate from, prior decisions. Thus, we could scour their reports for phraseology suggestive of *de facto stare decisis*. For example, the Appellate Body might, like the ICJ, say that it "draws" on, "sees no reason to depart from," "follows," or "adheres to" the rule established in a previous decision.¹⁹ Indeed, the Appellate Body has adopted Panel Reports stating that the Panel "recalled,"²⁰ "noted,"²¹

17. *See id.*

18. SHAHABUDEEN, *supra* note 7, at 16.

19. *See id.* at 17, 19-20.

20. This term is used by the panel in *United States - Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, WTO Doc. WT/DS2/R, at 30, para. 6.10; at 40, para. 6.40, reprinted in 35 I.L.M. 274 [hereinafter *United States - Reformulated Gas*, WTO Panel Report], and by the panel in *Japan - Taxes on Alcoholic Beverages*, July 11, 1996, WTO Doc. WT/DS8/R, WT/DS10/R, WT/DS11/R, at 99, para. 6.19 [hereinafter *Japan - Alcoholic Beverages*, WTO Panel Report]. The *United States - Reformulated Gas* and *Japan - Alcoholic Beverages* Panel Reports are also available on the WTO's website, <<http://www.wto.org>>, and are reprinted in vol. 1 of WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER, at 1 and 67, respectively.

21. This term is used by the panel in its report on *United States - Reformulated Gas*, WTO Panel Report, *supra* note 20, at 31, para. 6.11; at 33, para. 6.19, and in its report on *Japan - Alcoholic Beverages*, WTO Panel Report, *supra* note 20, at 96, para. 6.11.

“concur[red]”²² with the reasoning of, and “see[s] great force in”²³ the argument of, a previous opinion. The hypothesis tested by the second methodology is that the greater the force and frequency of the phraseology linking the present report to a past report, the more apparent it is that the Appellate Body, as a *de facto* matter, is bound by its prior holdings.

For two reasons, this methodology calls for a good deal of judgment. First, reasonable minds can differ on the force of some phraseology. For instance, while the words “follows” or “adheres to” obviously create a strong bond to the past, what about “recalls” or “notes”? Their plain meaning suggest a weaker link, though we must be sensitive to the international legal culture in which they are used, *i.e.*, a culture that tends to understate matters and employ less forceful diction. Second, with regard to frequency of use, how much is enough? Consider two extremes. In one report, the Appellate Body uses the phraseology of *stare decisis* ten times. In a second report, the Appellate Body never uses any such phraseology. However, in the second report, the Appellate Body simply cites another or other reports ten times after enunciating a point of law. Can we conclude the link to the past is stronger in the first report than in the second? Obviously not, for the Appellate Body may be so confident of the strength of the link in the second case that it feels it more than sufficient to list a citation like an Anglo-American court without any attendant verbiage.

In addition, both the circumstantial and direct methodologies suffer from a common defect. They are insufficiently dynamic in nature. We are called upon to examine individual Appellate Body reports in an *ad hoc* fashion. The reports do not necessarily flesh out the development of a line of authority over time. We do not, to return to our metaphor, develop an appreciation for the banyan trees in their full glory.

All of this is not to reject these methodologies, but rather to proceed with caution. Accordingly, a third methodology is required: tracing lines of *de facto* precedent. This strategy synthesizes the circumstantial and direct methodologies, cognizant of their

22. This term is used by the panel in *United States - Reformulated Gas*, WTO Panel Report, *supra* note 20, at 32, para. 6.14.

23. WTO Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Nov. 8, 1996, WTO Doc. WT/DS24/R, at 68, para. 7.12, *reprinted* in WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 285 [hereinafter *United States - Underwear*, WTO Panel Report]. This panel report is also available on the WTO's website, <<http://www.wto.org>>.

limitations, but asks an important additional question. Can we identify an important procedural or substantive issue resolved in an "initial" Appellate Body report that, when it recurs in subsequent cases, is decided in the same manner as in the initial report, or is distinguished carefully from the initial report? In other words, can we find a leading case, a parent, and its dutiful and/or wayward progeny? If so, then we have traced a line of *de facto* precedent, including any deviations from the line. To put it more dramatically, we have thereby identified the emergence of an international common law of trade with respect to the issue studied.

This proposed methodology is not particularly radical. The very straightforward concept of a "leading" case suggested by Professor Summers is being used, namely, a case that

establishes the law on a major point and is recognized for this. Courts and advocates cite such cases as dispositive, and may even cite them as the sole justification for the decision. If a "leading case" is in a party's favor, that party has a powerful advantage, both strategically and legally. Such a party has a better chance of negotiating a favorable settlement or prevailing in court. Further, a "leading case" guides courts and advocates by setting the parameters of the conflict and therefore makes for more expeditious resolution of disputes. A leading case also "radiates" influence outwards beyond its facts."²⁴

In other words, a leading case stands for some legal principle that, viewed in comparison with other cases, is seen to be central in the evolution of the common law. Additionally, given the myth about precedent in international trade law, it may take some time for a leading case to be recognized as such. Implicit in the concept of a leading case is a sort of timeless air surrounding the case. Obviously, we do not yet have the luxury of looking back over a century of Appellate Body adjudications, hence to some extent our identification of the leading cases is predictive in nature.

24. Robert S. Summers, *Precedent in the United States (New York State)*, in INTERPRETING PRECEDENTS 355, 389 (D. Neil MacCormick & Robert S. Summers eds. 1997). For another discussion of leading cases, see A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW (1995), addressing the leading case that stands for a legal doctrine central to the tradition of common law.

Nevertheless, we should not be deterred. The methodology suggested is what would be required if we were, for instance, to map out Supreme Court jurisprudence on an issue in a still-evolving area of the law. Put bluntly, and a bit condescendingly, it is what law professors expect of their students, and it is what partners expect of associates.

What is innovative about the methodology is the context of its use: the international trade realm enveloped by a belief that the doctrine of *stare decisis* simply does not operate therein. What may be arguable is the inference, or at least its strength: being able to trace lines means the Appellate Body actually operates in a *de facto stare decisis* realm. As with most inferences, alternatives may exist and reasonable minds may differ on the accuracy of the particular inference made.

Thus, the methodology for inferring the existence and operation of *de facto stare decisis* is to trace seven lines of decisional rules established by the Appellate Body, four on procedural issues and three on substantive issues, and show how that Body follows what it has established. I would go on to say that discerning these lines of precedent are not at all difficult, and any international trade law student, much less practitioner, could do so. I would also venture to say that they are not the only ones that could be traced now, and that as the banyan trees grow and multiply, many more such lines will become apparent. But, I must be candid about three potential shortcomings of the methodology.

The first shortcoming is that the methodology relies only on the work of the Appellate Body, not on Panel Reports. A more complete analysis would demonstrate how panels behave as if they are bound by Appellate Body reports, and deal with the *dictum* of the *India – Patent Protection* Panel mentioned earlier.²⁵ Such an analysis would, however, take up even more space than this lengthy piece. I am somewhat comforted by the likelihood that if the Appellate Body acts as if it is bound by its precedents, then *a fortiori* so will panels. Put differently, if there is “horizontal” *stare decisis* in a *de facto* sense (where a court at one level follows its decisions across time), then we ought to expect *de facto stare decisis* in a vertical sense (where a lower court follows a higher court). After all, in a system of precedent, would they not be akin to inferior courts that are supposed to follow the decisions of a higher court like the Appellate Body?

25. See *supra* note 16 and accompanying text.

The second and more serious shortcoming is that the methodology is sometimes biased in favor of finding only one of the two faces of *stare decisis*, namely, adherence to the past. Are WTO adjudicators capable of more than following their own internal system of "precedent"? Can they modify or deviate from the past, and thereby show an appreciation for the Janus-faced nature of *stare decisis*? In Part V.A, I shall explore this matter this matter.

A third concern is with the normative force of a lead Appellate Body report. Conceivably, some precedents exert a greater hold, and their grip persists for a longer time, than other precedents. Why this could be so is not captured by the methodology. Accordingly, in Part V.B, I shall take up this problem.

III. EMERGING PROCEDURAL COMMON LAW IN WTO ADJUDICATION

It is now time to take a look at the banyan trees growing in Geneva. In this and the next Part, I would like to focus on four important recent opinions of the Appellate Body, *United States – Wool Shirts*,²⁶ *EC – Bananas*,²⁷ *United States – Reformulated Gas*,²⁸ and *Japan –*

26. WTO Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, May 23, 1997, WTO Doc. WT/DS33/AB/R [hereinafter *United States – Wool Shirts*, WTO Appellate Body Report].

This and all other Appellate Body reports discussed herein are available in the WTO Dispute Settlement section of the WTO's web site, <<http://www.wto.org/wto/dispute/dispute.htm>>. Their status in terms of adoption by the WTO's Dispute Settlement Body (DSB), as well as the status of panel reports, also is set forth in this section of the web site, specifically at World Trade Organization, *Overview of the State-of-Play of WTO Disputes* (last modified Sept. 24, 1999, visited Oct. 11, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>. Both Appellate Body and panel reports are re-published later in, WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER. For example, the *United States – Wool Shirts* Appellate Body report is found at vol. 2, page 1 of this Reporter. Noted in the citations below, the re-publication is in the Reporter if it is available as of this writing.

Throughout this article, reference is made in the citations to paragraphs and pages of the Appellate Body reports as downloaded in the fall of 1998 and spring of 1999 from the WTO's website. The page numbers correspond to downloading on 8 1/2 x 11-inch paper.

27. WTO Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Sept. 25, 1997, WTO Doc. WT/DS27/AB/R, reprinted in 4 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 63 [hereinafter *EC – Bananas*, WTO Appellate Body Report].

Complaints were brought by the United States, Ecuador, Guatemala, Honduras, and Mexico, and virtually identical panel reports were issued with respect to each complaint. See WTO Doc. WT/DS27/R/USA (concerning the United States' complaint); WTO Doc. WT/DS27/R/ECU (concerning Ecuador's complaint), WTO Doc. WT/DS27/R/GTM (concerning Guatemala's complaint); WTO Doc. WT/DS27/R/HND (concerning Honduras' complaint); WTO Doc. WT/DS27/R/MEX (concerning Mexico's complaint). The panel reports in response to each complaint were adopted as modified by the Appellate Body on Sept. 25, 1997. The focus is only on the claims raised by the United States, the European Community's defenses relating to these claims, and the Appellate Body's rulings on these claims. For the

Alcoholic Beverages,²⁹ and the progeny spawned by these opinions. The thesis is simple. These four cases establish, in a rigorous manner,³⁰ rules of decision on important issues that the Appellate Body cites to and uses in subsequent cases. The net result is the emergence of an international common law on these issues. In this Part, I shall highlight the leading case and lines of decisional authority on four procedural issues: (1) the burden of proof, (2) the interpretation of Article 11 of the Uruguay Round *Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU)*,³¹ *i.e.*, judicial economy, (3) standing to bring a complaint, and (4) the interpretation of Article 6:2 of the *DSU, i.e.*, sufficiency of complaints. The leading case on the first two issues is *United States - Wool Shirts*, while on the latter two issues it is *EC - Bananas*. The synoptic table below summarizes the main points of the discussion in Part III. These leading cases, their issue, the *de facto* precedent, and the progeny are summarized in Chart 1 below. In Part IV, I shall turn to the emerging common law on a few important substantive issues, and Chart 2 in Part IV provides a summary of the discussion.

most part, the same claims are made by the co-complainants, as are the EC's defenses and Appellate Body's responses.

28. WTO Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WTO Doc. WT/DS2/AB/R, *reprinted in 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 45* [hereinafter *United States - Reformulated Gas*, WTO Appellate Body Report].

29. WTO Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, Nov. 1, 1996, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *reprinted in 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 183* [hereinafter *Japan - Alcoholic Beverages*, WTO Appellate Body Report].

30. The *de facto* Appellate Body precedents are established in a "rigorous" manner because of one justification offered for the purported lack of binding effect of pre-Uruguay Round GATT panel decisions. The justification is that the manner in which those reports were made, as well as the manner of their adoption, was insufficiently rigorous to entitle them to a binding effect on future controversies. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 263 (1993). The post-Uruguay Round dispute settlement mechanism provides a sufficiently rigorous formulation process that this justification no longer holds.

31. The official text of the *DSU*, which is Annex 2 to the *Agreement Establishing the World Trade Organization*, is published by the Office of the United States Trade Representative in *URUGUAY ROUND - FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994 (Marrakech, Morocco)* at 353-77 [hereinafter *URUGUAY ROUND - FINAL TEXTS*]. The *DSU* is *reprinted in* RAJ BHALA, *DOCUMENTS SUPPLEMENT - INTERNATIONAL TRADE LAW: CASES AND MATERIALS* 397-425 [hereinafter *DSU*].

**CHART 1:
EXAMPLES OF DE FACTO LINES OF PRECEDENT
ON PROCEDURAL ISSUES IN WTO ADJUDICATION, 1995-98
(issuance dates in parentheses)**

LEADING CASE	PRO- CEDURAL ISSUE	DE FACTO PRECEDENT CREATED BY LEADING CASE	LATER AP- PELLATE BODY REPORTS RELYING ON THE LEADING CASE (THE LINE OF DE FACTO PRECE- DENT)	LATER APPELLATE BODY REPORTS DEPARTING FROM THE LEADING CASE (DE- PARTURES FROM THE DE FACTO, LINE)
<i>United States - Wool Shirts (April 1997)</i>	Burden of proof.	Three steps: Complainant must present <i>prima facie</i> case; that case creates a rebuttable presumption that the complained measure is inconsistent with the applicable rule; the respondent must rebut the presumption.	<i>India - Patent Protection (December 1997)</i> , <i>EC - Beef Hormones (January 1998)</i> , <i>EC - Computer Equipment (June 1998)</i> .	No departures. Corollary added by <i>EC - Computer Equipment</i> that both importing and exporting Members have burden of proof on clarifying the scope of tariff concessions.

<p>United States - Wool Shirts (April 1997)</p>	<p>Judicial economy.</p>	<p>A panel need address only those claims that must be addressed to resolve the matter in dispute.</p>	<p><i>India - Patent Protection (December 1997), EC - Poultry Products (July 1998).</i></p>	<p>No departures. Corollary added by <i>EC - Poultry Products</i> that a panel need address only those arguments relating to a claim that must be addressed to resolve the claim.</p>
<p>EC - Bananas (September 1997)</p>	<p>Standing to bring a complaint.</p>	<p>There is no "legal interest" prerequisite. A complainant has discretion to determine whether bringing an action would be "fruitful."</p>	<p>Forecast: <i>A de facto</i> precedent in the making. Highly likely that holding will be relied upon in the future.</p>	<p>No departures.</p>

<i>EC - Bananas</i> (September 1997)	Sufficiency of a complaint.	A complaint is sufficient if it sets forth all of the claims of the complainant, which in turn establishes the panel's terms of reference and thereby its jurisdiction. A complaint need not state every argument relating to each claim.	<i>India - Patent Protection</i> (December 1997), <i>Argentina - Footwear</i> (March 1998), and <i>EC - Computer Equipment</i> (June 1998).	No departures.
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Given the myth of the absence of *stare decisis* from the GATT-WTO system explored and attacked in Part One of this trilogy, the Appellate Body is not legally obligated to rely on a prior ruling for the disposition of a subsequent case. But the Appellate Body does, and we cannot ignore what the Appellate Body does. Undoubtedly aware that it is a unifying element in a global economic system threatened by centrifugal legal forces, the Appellate Body has spawned five lines of *de facto* precedent on procedural and substantive issues. If we are witnessing a *de facto* system of precedent, why pay any more attention to the myth? Asked differently, if the distinction in the language of the myth between "binding" and "non-binding" "precedent" is rather fictional — or to be more diplomatic about it, more theoretical than real — why continue to speak this language?

I am compelled to add a caveat about the *EC - Bananas* case. This case itself is worthy of several articles, and undoubtedly several will be written. Already the case is very much a part of the fabric of the emerging common law of international trade. As discussed below, not only does *EC - Bananas* touch on the *United States - Wool Shirts* holding, but *EC - Bananas* also spawns precedents of its own on both procedural and substantive matters. To appreciate the case's part in

the fabric of emerging *de facto* body of precedents, an understanding of the facts and legal issues in the case is essential. However, *EC - Bananas* is uniquely complex, that is to say, it is perhaps the most complicated case in the history of multilateral trade dispute resolution. Even a synopsis of the main facts and legal issues would be too lengthy for this article. Therefore, only where essential for the textual discussion do I recount facts, and then only briefly, and only legal points essential to facilitate the discussion are mentioned in the text of the article. These brief treatments are sure to be insufficient for the reader unfamiliar with *EC - Bananas*, or desiring a thorough refresher. I have, therefore, provided a separate treatment of the case – its facts, legal aspects, and repercussions – in *The Bananas War*.³²

A. *The United States - Wool Shirts Case and its Progeny*

It is tempting to downplay the significance of the April 1997 Appellate Body report in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.³³ In terms of the substantive issues at stake, this case is hardly seductive. The United States had imposed restraints on imports of woven wool shirts and blouses from India pursuant to the transitional safeguard mechanism in the Uruguay Round Agreement on Textiles and Clothing (ATC). The ATC phases out the notorious global quota system established by the Multi-Fiber Agreement (MFA),³⁴ and itself will terminate when it completes this task.³⁵ India successfully challenged these restraints under Article 6:2-3 of the ATC. India prevailed on the ground that the United States, in contravention of these provisions, failed to demonstrate that serious damage, or actual threat thereof, to American producers had been caused by increased imports rather

32. Bhala, *The Bananas War*, *supra* note 6, and accompanying text.

33. For a detailed rendition of the facts, see the WTO Panel Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Jan 6, 1997, WTO Doc. WT/DS33/R, at 1-3, paras. 2.1-2.14; at 55-56, paras. 7.1-7.3, *reprinted in* 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 381, 383-86, 440-44 [hereinafter *United States - Wool Shirts*, WTO Panel Report].

34. See *Agreement on Textiles & Clothing*, art. 2:6-8, 13-15, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 31, at 153-56 [hereinafter ATC].

35. See *id.* art. 9, at 168. For a discussion of the *United States - Wool Shirts* case in the larger context of the MFA and ATC, see Xiaobing Tang, *The Integration of Textiles and Clothing into GATT and WTO Dispute Settlement*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION* 171 (James Cameron & Karen Campbell eds., 1998). For a discussion of the MFA and ATC, see RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS & U.S. LAW* §§ 12-4, 12-5, at 1216-1236 (1998).

than by other factors like changes in technology or consumer preference.³⁶

Not surprisingly, then, much of the discussion in the Appellate Body report concerns technical ATC matters. The substantive issues involve just one sector, textiles and apparel, and arise only if the ATC's safeguard provisions are invoked. Yet, the Appellate Body report contains holdings on two procedural issues, burden of proof and judicial economy, which have ramifications for the WTO adjudicatory system in general. Indeed, these holdings have already spawned lines of *de facto* precedent.

1. *Burden of Proof*

(a.) *The Wool Shirts Holding*

Does the complainant or respondent bear the burden of proof in WTO adjudication? The Uruguay Round negotiators did not address this fundamental issue in the *Agreement Establishing the World Trade Organization (WTO Agreement)*³⁷ or DSU. In retrospect, therefore, it could be only a matter of time before the Appellate Body would have to step in with an interstitial rule. The opportunity came in *United States - Wool Shirts*, in the context of Article 6:2 of the ATC. This Article establishes the right of an importing Member to implement a safeguard action if its textile or apparel producers are damaged by the phase-out of the MFA.

Safeguard action may be taken under this Article when, on the basis of a determination by a Member, *it is demonstrated* that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must *demonstrably* be caused by such increased quantities in total imports of that product and not by

36. See *United States - Wool Shirts*, WTO Panel Report, *supra* note 33, at 62-69, paras. 7.23-7.53; at 70, para. 8.1.

37. The official text of the *Agreement* is published in URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 9, and reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 81-92.

such other factors as technological changes or changes in consumer preference.³⁸

The highlighted language obviously does not answer the question "who must demonstrate" the elements set forth in Article 6:2. Our knowledge of how escape clause actions work in the United States suggests that the complainant, analogous to the petitioner in a domestic Section 201 action, bears this burden.³⁹ The suggestion is indeed reasonable, but it does not follow from Article 6:2.

In this case, India claimed the United States resorted to a transitional safeguard action. Was the burden then on India to prove its claim, or on the United States to justify its action? India argued that the burden ought to be on the Americans, because Article 6:1 of the ATC states that transitional safeguards "should be applied as sparingly as possible."⁴⁰ That is, they are exceptional, and the WTO Member invoking the exception should be required to prove it qualifies for the exception.⁴¹ The United States countered with a quasi-precedential argument: GATT practice had been for the complainant to present a *prima facie* case of violation, hence India had to show that the Americans were unreasonable in determining that increased woven wool shirt and blouse imports had caused "serious damage or actual threat thereof" to domestic producers.⁴²

The Appellate Body provided the answer.

[A] party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the ATC. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by

38. ATC, *supra* note 34, art. 6:2 (emphasis added) (footnote omitted).

39. The escape clause is set forth in Section 201 of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2251-2254. It is discussed by BHALA & KENNEDY, *supra* note 35, at ch. 9.

40. ATC, *supra* note 34, art. 6:1.

41. See United States - Wool Shirts, WTO Panel Report, *supra* note 33, at 9, paras. 5.2-5.3; Tang, *supra* note 35, at 196.

42. United States - Wool Shirts, WTO Panel Report, *supra* note 33, at 9-10, paras. 5.4-5.6; Tang, *supra* note 35, at 196.

the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States "violated the provisions of Articles 2 and 6 of the ATC."

In our view, the Panel did not err on this issue in this case.⁴³

Put succinctly, the Americans had won the battle, but lost the war. The Appellate Body stuck with GATT practice, as the United States had urged, yet still held India had met its burden.

Significantly, the *Wool Shirts* report itself makes extensive use of "precedent" in establishing what I am arguing is a *de facto* precedent. To support its conclusion on the burden of proof issue, the Appellate Body cites and discusses in a lengthy paragraph two adopted GATT Panel Reports.⁴⁴ It goes on to cite and discuss three more adopted GATT Panel Reports involving affirmative defenses under GATT Article XI:2,⁴⁵ and three adopted GATT Panel reports plus a WTO Panel report involving affirmative defenses under XX.⁴⁶ There can be no doubt as to why the Appellate Body uses these cases: it is buttressing its holding that the burden of proof lies with the

43. United States - Wool Shirts, WTO Appellate Body Report, *supra* note 26, at 16-17.

44. See *id.* at 19-20. The cases it cites are *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 75-75, paras. 5.2- 5.3 (1993) and *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, Oct. 4, 1994, GATT B.I.S.D. (41st Supp., vol. 1) at 131, para. 82; at 165, para. 124; at 176 (1997).

45. See *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 16. The cases it cites are *Japan - Restrictions on Imports of Certain Agricultural Products*, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 226-227, paras. 5.1.3.7 (1989); *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 124-125, para. 12.3 (1990); *Canada - Import Restrictions on Ice Cream and Yoghurt*, Dec. 5, 1989, GATT B.I.S.D. (36th Supp.) at 84-85 para. 59 (1990).

46. See *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 15. The WTO Panel Report it cites is *United States - Reformulated Gas*, WTO Panel Report, *supra* note 20, at para. 6.20. The GATT Panel Reports it cites are *Canada - Administration of Foreign Investment Review Act*, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 158, para. 5.2 (1984); *United States - Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 393, para. 5.27 (1990); *United States - Measures Affecting Alcoholic and Malt Beverages*, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 283 para. 5.43; at 287-88 para. 5.52 (1993).

complainant, *i.e.*, the complainant must make out a *prima facie* case, and that burden of proof of establishing an affirmative defense rests on the party asserting it. We would not, therefore, be wrong in seeing *United States - Wool Shirts* as both "precedential" and evidence of existing "precedent" on the burden of proof issue.⁴⁷

Equally significant, the Appellate Body stuck with more than pre-Uruguay Round practice. The burden of proof rule it was laying out was virtually a general principle of international law and a *jus cogens* (*i.e.*, a rule found in all legal systems), as it points out in sweeping language.

[W]e find it difficult . . . to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that *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 defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.*

In the context of the GATT 1994 and the WTO *Agreement*, 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.⁴⁸

47. Ironically, the *Wool Shirts* panel took note of the *Japan - Alcoholic Beverages* pronouncement that previous GATT Panel Reports are not binding, and thus concluded it was free to choose whether to follow their reasoning. See *United States - Wool Shirts*, WTO Panel Report, *supra* note 33, at 58-59, para. 7.15.

48. *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 14 (emphasis added).

Could there be a clearer, more well-grounded rule for future WTO litigants than this? There are three steps to be followed *in seriatim*. First, a complainant Member has the burden of proof to present a *prima facie* case. Second, if it does, then it creates a rebuttable presumption that the measure complained of is inconsistent with the applicable rule. Third, the burden shifts to the respondent Member to rebut the presumption. Could there be any serious doubt that panels and the Appellate Body would look to, indeed cite, *United States - Wool Shirts* for the three-step rule? It is not too optimistic to forecast that the bright-line rule is so eminently sensible a way to organize and analyze a case that it will very rapidly become a widely recognized part of the WTO's "common law" of procedure.

Already there is movement in that direction. The *United States - Wool Shirts* burden of proof rule has been cited in various subsequent cases. Most notably, the Appellate Body relies on the rule in its December 1997 report in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*,⁴⁹ in its January 1998 report in *EC Measures Concerning Meat and Meat Products (Hormones)*,⁵⁰ and in its June 1998 report in *European Communities - Customs Classifications of Certain Computer Equipment*.⁵¹ The first of these cases arose because of India's legal regime, or lack thereof, for protecting patents on pharmaceuticals, and on agricultural chemical products. The second case resulted from a bitter, decade-long dispute between the United States and European Community (EC) over the EC's import ban on beef treated with growth hormones, a treatment widely used on American cattle. The third case grew out of a dispute about the tariff treatment for local area network equipment and personal computers with multimedia capability. The fact that the *Wool Shirts* rule was applied to these very different disputes bespeaks its power as a *de facto* precedent.

The *Wool Shirts* burden of proof holding also is mentioned in an Appellate Body Report pre-dating *India - Patent Protection*. In *EC -*

49. WTO Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Jan. 16, 1998, WTO Doc. WT/DS50/AB/R, *reprinted in* 4 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 1 [hereinafter *India - Patent Protection*, WTO Appellate Body Report].

50. WTO Appellate Body Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, Feb. 13, 1998, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, *reprinted in* 4 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 275 [hereinafter *EC - Beef Hormones*, WTO Appellate Body Report].

51. WTO Appellate Body Report on *European Communities - Customs Classifications of Certain Computer Equipment*, June 5, 1998, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R [hereinafter *EC - Computer Equipment*, WTO Appellate Body Report].

Bananas, issued in September 1997, the European Community (EC)⁵² raised on appeal the argument that the Panel had “misapplied the standard of burden of proof affirmed by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.”⁵³ The discussion of the matter is brief, but it arises in yet another context, namely, the General Agreement on Trade in Services (GATS). I should think at the very least it is worth a brief digression, if for no other reason than the bitter controversy surrounding the EC - *Bananas* case and consequent world-wide interest in this case. Accordingly, I shall entertain this digression below following the discussion of *India - Patent Protection*, *EC - Beef Hormones*, and *EC - Computer Equipment*.

(b.) *Subsequent Use of the Wool Shirts Holding*

The legal and factual context of *India - Patent Protection* is easy to recount. Article 27:1 of the Uruguay Round *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement)⁵⁴ mandates that patents be available for any inventions in all fields of technology, as long as the product or process in question is new, inventive, and capable of industrial application. Article 27:1 also forbids discrimination based on the place of invention, field of technology, or whether the product is imported or locally produced.⁵⁵ Developing countries, however, are given special and differential treatment by TRIPS Article 65.⁵⁶ Article 65:2 gives them a five-year phase-in period: the member country can delay application of the TRIPS Agreement for up to five years following the entry into force of the WTO Agreement, i.e., until 1 January 2000.⁵⁷ Article 65:4 affords additional special and differential treatment.⁵⁸ If a developing country Member is obligated by the TRIPS Agreement to

52. Throughout this article, I employ the term “EC” in lieu of “EU,” even though “EU” is used nowadays, if the case being treated refers to the “EC.”

53. EC - *Bananas*, WTO Appellate Body Report, *supra* note 27, at 21, para. 53.

54. The official text of the *Agreement on Trade Related Aspects of Intellectual Property Rights*, which is Annex 1C to the *Agreement Establishing the World Trade Organization*, is published in URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 319. Article 27:1 is found at page 331 therein. The TRIPS Agreement is reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 359, and Article 27:1 is found at page 372 therein. [hereinafter TRIPS Agreement] Hereinafter, for convenience only the latter source shall be referred to.

55. *See id.*

56. *See* TRIPS Agreement, *supra* note 54, at 390-91.

57. *See id.* at 390.

58. *See id.*

extend patent protection to an area of technology it does not protect as of the date that the *Agreement* enters into force for that country, then it can delay the application of the *TRIPS* provisions on product patents to that area for an additional five years (*i.e.*, until 1 January 2005).⁵⁹

However, these “breaks” are subject to two important limitations set forth in Article 70:8-9 of the *TRIPS Agreement*.⁶⁰ First, paragraph 8(a) of that Article addresses a Member failing to make patent protection for pharmaceutical and agricultural chemical products available as of the date of the entry into force of the *WTO Agreement* (*i.e.*, as of 1 January 1995).⁶¹ This provision establishes a so-called “mailbox rule.” The Member must provide “a means” by which patents for these inventions can be filed, apply to those applications the criteria for patentability laid out in the *TRIPS Agreement*, and provide patent protection in accordance with the *TRIPS Agreement*. The mailbox rule assures an inventor seeking protection for its pharmaceutical or agricultural chemical product of three points.⁶² First, the inventor is entitled to file a patent application even though the Member has not yet revised its patent laws in accordance with the *TRIPS Agreement*. Second, the application will receive a filing and priority date in accordance with the submission of its application. Third, there is a sound legal basis to preserve novelty and priority as of the filing and priority dates. That is, the inventor need not worry its application will be rejected on the ground that on the filing or priority date pharmaceutical and agricultural chemical products were not patentable under the Member’s law.

The second limitation is contained in paragraph 9 of Article 70 of the *TRIPS Agreement*. This provision obligates Members to grant exclusive marketing rights to a pharmaceutical or agricultural chemical product that is the subject of a patent application. The provision implies that Members must have a mechanism ready for the grant of exclusive marketing rights at any time after the date of entry into force of the *WTO Agreement*.⁶³

59. *See id.*

60. *See id.* at 393-94.

61. *See id.* at 393.

62. *See India – Patent Protection*, WTO Appellate Body Report, *supra* note 49, at 17-18, para. 50 (quoting approvingly the panel report as to the meaning of *TRIPS* Article 70:8(a)).

63. *See id.* at 25-26, para. 77 (quoting approvingly the panel report as to the meaning of *TRIPS Agreement* Article 70:9).

The United States alleged India had breached these TRIPS obligations.⁶⁴ In general, contrary to Article 27, there was no way to protect pharmaceutical or agricultural chemical products. Specifically, contrary to Article 70:8, India had not provided “a means” to file patent applications for pharmaceutical and agricultural chemical products.⁶⁵ India had merely issued some administrative instructions that direct its Patent Office to store mailbox applications for future action.⁶⁶ The United States argued these instructions could not possibly survive a legal challenge under India’s Patents Act, which states that substances intended or capable of being used as a food, medicine, or drug cannot be patented, and that any application for a non-patentable invention must be refused.⁶⁷ In view of these mandatory statutory provisions, the administrative instructions were not a sound legal basis to preserve the novelty of inventions and priority of applications as of the relevant filing and priority dates.⁶⁸ Moreover, urged the United States, contrary to Article 70:9,⁶⁹ India had not established the legal availability and authority for a grant of exclusive marketing rights for these products.⁷⁰

The Panel accepted the American arguments. It recommended India establish a transitional regime for patent protection that conformed to these obligations.⁷¹ India appealed, *inter alia*, the Panel’s conclusions regarding its administrative instructions and lack of legal authority for exclusive marketing rights. On both of these substantive issues, India lost. The Appellate Body upheld the Panel’s conclusion that India had violated Article 70:8(a) of the TRIPS Agreement because it had not provided a “means” to adequately preserve novelty and priority with respect to patent applications for pharmaceutical and agricultural chemical products during the transition periods established by Article 65 of the TRIPS Agreement.⁷² The Appellate Body also upheld the Panel’s conclusion that India

64. See *id.* at 1, para. 1.

65. See *id.* at 2-3, para. 4.

66. See *id.* at 3, para. 4, at 20-21, para. 60.

67. See *id.* at 23-24, para. 69.

68. See *id.* at 23-24, paras. 69-70.

69. See TRIPS Agreement, *supra* note 54, at 393-94.

70. See India - Patent Protection, WTO Appellate Body Report, *supra* note 49, at 7-8, paras. 18-21, at 26 para. 78.

71. See *id.* at 1-2, para. 2.

72. See *id.* at 23-24, para. 69-71, at 31, para. 97(a).

had breached Article 70:9 by not providing for exclusive marketing rights.⁷³

India also raised an important procedural question on appeal, namely, the burden of proof. India urged that the Panel's interpretation of Article 70:8(a) violated principles governing the burden of proof.⁷⁴ The American response cited *Wool Shirts* to support its contention that the Panel correctly placed the burden of proof on the United States, and had not shifted that burden to India.⁷⁵ In particular, the Panel had not required India to prove its administrative instructions to patent offices were immune from challenge under the Indian Patents Act. Rather, the Panel found India failed to rebut evidence presented by the United States that it was likely that mailbox applications, and patents ultimately based on them, would be invalidated by such a challenge.

The Appellate Body handed the United States a clear victory on the point. It recited the Panel holding, which in turn relied squarely on *Wool Shirts*.

As the Appellate Body report on *Shirts and Blouses* points out, "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim." In this case, it is the United States that claims a violation by India of Article 70.8 of the TRIPS Agreement. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, . . . the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so (footnotes deleted).⁷⁶

The Appellate Body went still further.

73. See *id.* at 27, paras. 81-84, at 31, para. 97(b).

74. See *id.* at 4, para. 8.

75. See *id.* at 6, para. 16.

76. See *id.* at 24-25, para. 73 (citation omitted).

This statement of the Panel is a legally correct characterization of the approach to burden of proof that we set out in *United States - Shirts and Blouses*. However, it is not sufficient for a panel to enunciate the correct approach to burden of proof; a panel must also apply the burden of proof correctly. A careful reading of paragraphs 7.35 and 7.37 of the Panel Report reveals that the Panel has done so in this case. These paragraphs show that the United States put forward evidence and arguments that India's "administrative instructions" pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward rebuttal evidence and arguments. India misinterprets what the panel said about "reasonable doubts." The Panel did not require the United States merely to raise "reasonable doubts" before the burden shifted to India. Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that it had "reasonable doubts" that the "administrative instructions" would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court.⁷⁷

This language is more than a statement of how the burden of proof is to be allocated and applied in an intellectual property protection dispute.

It is a resolute declaration that (1) the Appellate Body had established in *Wool Shirts* a way to handle burden of proof issues, (2) the Appellate Body expected this method to be used, and (3) the Panel had indeed used the method properly this time. It is, moreover, a sufficiently detailed and forceful affirmation of *de facto* precedent in a context entirely different from safeguard actions against textile imports. Can there be any doubt the Appellate Body would use the same test if the issue were to arise again, regardless of the underlying factual predicate?

77. See *id.* at 25, para. 74 (emphasis original) (citation omitted).

That the answer must be "no" is clear from the Appellate Body report in *EC - Beef Hormones*.⁷⁸ The brief facts of the dispute are that on January 1, 1989, pursuant to a December 1985 EC Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action (the so-called "Hormone Directive"), the EC imposed a ban on imported beef and other meat products containing certain growth-promotion hormones. American exports were hard-hit, because growth hormones are additives widely used by American producers. The United States retaliated, imposing 100 percent tariffs on an array of European products. After bilateral negotiations and an interim agreement on May 3, 1989, concerning a *quid pro quo* reduction in retaliatory tariffs in exchange for assured market access for hormone-free beef, the forum shifted to the WTO.⁷⁹

The United States charged, *inter alia*, that the EC's ban violated the Uruguay Round *Agreement on Sanitary and Phytosanitary Standards (SPS Agreement)*.⁸⁰ The Panel agreed, saying that the EC's sanitary measures were not based on a risk assessment, thus violating Article 5:1 of the *SPS Agreement*.⁸¹ Because the measures were not based on existing international standards, and the EC provided no acceptable justification for deviating from these standards, the ban also ran afoul of Articles 3:1 and 3:3 of the *SPS Agreement*.⁸² The Panel found the EC's ban also violated Article 5:5 of the *SPS Agreement*.⁸³ The EC relied on arbitrary and unjustifiable distinctions in setting levels of sanitary protection it considered appropriate, hence the ban was discriminatory and a disguised restriction on international trade.

The EC did not accept the Panel's conclusions. In the EC's appeal, it claimed, *inter alia*, that the Panel had erred in its allocation

78. *EC - Beef Hormones*, WTO Appellate Body report, *supra* note 50.

79. *See id.* at 1-4, paras. 1-8; Raj Bhala, *August 1998 Letter Update for International Trade Law: Cases and Materials*, 1996 27-30 (July 1998) (mailed in August 1998 to all international transactions law professors at American law schools, and available from Lexis Law Publishing at 1-800-446-3410), and RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* 282-86 (1996). The above discussion is distilled from these sources.

80. The official text of the *Agreement* is set forth at URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 69 and is reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 137 [hereinafter *SPS Agreement*].

Canada also lodged a complaint, which was adjudicated by the same Panel with essentially the same result. The appeal was consolidated. *See EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 1, para. 1, at 4, paras. 7-8.

81. *See EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 3, para. 6.

82. *See id.*

83. *See id.*

of the burden of proof in three respects.⁸⁴ First, said the EC, the Panel was wrong to find that the general rule under the *SPS Agreement* was that the burden of proof rests with the Member imposing the disputed measure.⁸⁵ Second, the EC disagreed with the Panel's finding on Articles 3:1 and 3:3 of the *SPS Agreement*.⁸⁶ The Panel said that Article 3:1 contains a general obligation to base measures on international standards. Article 3:3 is an exception thereto, and the burden of proof lies with the WTO Member invoking the exception, *i.e.*, the respondent. Third, the EC claimed that the Panel was wrong to conclude that the United States had met its burden of presenting a *prima facie* case of inconsistency with Article 5:1 of the *SPS Agreement*.⁸⁷ The EC pointed out that the United States said it had conducted risk assessments for the growth

84. See *id.* at 4, para. 9.

Another principal procedural claim lodged by the EC on appeal was one concerning *DSU* Article 11. The EC charged that because the Panel had disregarded and distorted evidence with regard to MGA and five other hormones, the Panel had failed to make an objective assessment of the facts in contravention of *DSU* Article 11. See *id.* at 7, para. 17. The Appellate Body rejected the EC position that the Panel had failed in its *DSU* Article 11 obligation, though it agreed the Panel may have misinterpreted some evidence. See *id.* at 15, para. 40, at 47-53, paras. 131-145, at 93, para. 253(e). *DSU* Article 11 is discussed below in the context of judicial economy. See *infra* pt. III.A.3.

The final procedural claim raised on appeal by the EC, concerning the appropriate standard of review under the *SPS Agreement*, is a fascinating one. It is also beyond the scope of this article. The key discussion of it is contained in *EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 38-42, paras. 110-119.

85. See *EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 4-5, para. 10.

86. See *id.* at 5, para. 11.

Article 3:1 of the *SPS Agreement* states that "to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3."

SPS Agreement, *supra* note 80, at art. 3:1. Article 3:3 provides that:

[m]embers may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, 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.

Id., art. 3:3 (citation omitted).

87. See *EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 5, para. 12. Article 5:1 of the *SPS Agreement* says that "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." *SPS Agreement*, *supra* note 80, art 5:1.

hormone melengestrol acetate (MGA), but had refused to share the results, claiming they were proprietary and confidential. The EC said the Panel ought not to have condoned this failure to submit relevant evidence.

The United States countered that the Appellate Body could not review the factual findings of the Panel absent a showing of improper influence or conflict of interest. The EC had adduced no evidence of these sinister influences. Predictably, as to the burden of proof, the United States contended the Panel had "gotten it right." Under Article 5:1 of the *SPS Agreement*, it was the Panel that had to determine whether the EC had based its import ban on a risk assessment. In this sense, whether the United States provided confidential information was not relevant. As for Article 3:3 of the *Agreement*, the United States invoked *Wool Shirts* to support its characterization of the rule and consequent allocation of burdens.⁸⁸ This provision was not a positive rule that created a general obligation. Rather, it was an affirmative defense. Hence, said the United States, the Panel was right to put the burden on the defending party.

The Appellate Body discussed the burden of proof issue and its *Wool Shirts* holding at length.⁸⁹ The Appellate body immediately claimed for this holding a status far beyond what we would expect in a *stare decisis*-free environment:

The Panel begins its analysis by setting out the general allocation of the burden of proof between the contending parties in any proceedings under the *SPS Agreement*. The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*,

88. See EC - Beef Hormones, WTO Appellate Body Report, *supra* note 50, at 15, para. 40.

89. See *id.* at 33-38, paras. 97-109.

which the Panel invokes *and which embodies a rule applicable in any adversarial proceedings*.⁹⁰

This paragraph is more than a nice summary of the *Wool Shirts* holding. It provides a remarkably forceful statement about the scope of application of the burden of proof the Appellate Body has created. Translated into blunt, common law terms, the Appellate Body is saying that “we created in *Wool Shirts* a burden of proof precedent to be followed in all WTO cases.”

In fact, the Appellate Body quickly became blunt, treating the Panel like a deviant lower common law court. The Appellate Body accused the Panel of paying “little more than lip-service” to the *Wool Shirts* holding.⁹¹ The Panel, as mentioned above, articulated a general rule for *SPS Agreement* issues whereby the evidentiary burden fell on the Member imposing an SPS measure. The Appellate Body reversed this general rule, saying it was “bereft of basis in the *SPS Agreement*.”⁹²

The Panel had based its rule in part on Article 5:8 of the *SPS Agreement*.⁹³ This provision concerns a case in which one Member that believes an SPS measure of another Member is not in conformity with international standards and constrains exports. The first Member can request an explanation of the reasons for the measure from the Member imposing it. The Appellate Body pointed out that Article 5:8 has nothing to do with burdens of proof.⁹⁴ It concerns a pre-dispute situation in which an exporting Member simply wants information. The information provided by the Member imposing the SPS measure may or may not make it possible for the exporting Member to proceed with a complaint and help it establish a *prima facie* case, as it must under *Wool Shirts*.

90. *Id.* at 34, para. 98 (emphasis added).

91. *Id.* at 34, para. 99.

92. *Id.* at 35, para. 102.

93. *See id.* at 34, para. 100. Article 5:8 states that:
[w]hen a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

SPS Agreement, supra note 80, art. 5:8.

94. *See EC - Beef Hormones, WTO Appellate Body Report, supra* note 50, at 35, para. 102.

The Panel had provided an additional basis for its new rule, namely, Article 3:2 of the *SPS Agreement*.⁹⁵ That provision establishes a presumption of consistency with the *Agreement* for any SPS measure that conforms to international standards. The tone of the Appellate Body's language is strict and direct. The Panel drew a reverse inference from this presumption: if a measure does not meet international standards, then the member imposing it must bear the burden of proof. Nonsense, "quite simply, a *non-sequitur*,"⁹⁶ said the Appellate Body. Article 3:2 creates an incentive to satisfy international standards. But, "[it] is clear . . . that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."⁹⁷ It is not difficult to read between the lines of the Appellate Body's reversal of the Panel's general burden of proof rule for *SPS Agreement* cases. The Appellate Body is calling the Panel incompetent, indeed, stupid.

The Appellate Body was equally unhappy with the Panel's rulings on the EC's contentions about Articles 3:1 and 3:3 of the *SPS Agreement*, and about Article 5:1 of the *SPS Agreement*. On both matters, the Panel had erred at law. The Panel had absolved the United States of the *Wool Shirts* requirement of establishing a *prima facie* case that the EC had violated (1) Article 3:3 by introducing a measure, the ban on hormone-treated beef, which resulted in a higher level of sanitary protection, but which lacked a scientific justification—and could not be squared with the rest of the Article 3:3 criteria, and (2) Article 5:1 by failing to base its import ban on a risk assessment. The Panel had put on the EC the burden of proving it complied with Articles 3:3 and 5:1 "without regard to whether or not the [United States] . . . had already established [its] . . . *prima facie* case. . ."⁹⁸

To be sure, the Panel thought it was doing what *Wool Shirts* commanded. The Panel understood itself to be saying that when a complainant provides a *prima facie* case that there is an international standard with respect to the measure in dispute, and that the

95. See *id.* at 35, para. 101. Article 3:2 provides that [s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." *SPS Agreement, supra* note 80, art. 3:2.

96. EC - Beef Hormones, WTO Appellate Body Report, *supra* note 50, at 35, para. 102.

97. *Id.* at 35, para. 102 (emphasis original).

98. *Id.* at 38, para. 108 (emphasis original).

measure is not based on this standard, the burden of proof shifts to the respondent. But, once again, the Panel based its finding on a reverse inference: Article 3:1 set up a general obligation, Article 3:3 created an exception, hence a member failing to satisfy the general obligation had to prove it fit within the exception.⁹⁹ Once again, the Appellate Body scolded the Panel for textual misinterpretation.¹⁰⁰ Once again, the Appellate Body lectured the Panel on what it should have done to comply with *Wool Shirts*.¹⁰¹

The Appellate Body rejected the Panel's characterization of the relationship between Articles 3:1 and 3:3 as one of general obligation and exception, respectively.¹⁰² Rather, Article 3:1 excludes from its scope of application situations covered by Article 3:3, namely, instances in which a Member opts for a higher level of sanitary or phytosanitary protection than would be achieved by a measure based on an international standard. That is, Article 3:3 creates an additional right for a Member to establish autonomously greater protection, provided the Member has a scientific justification for doing so and otherwise complies with the stated specifications. Therefore, intoned the Appellate Body, a complainant is not relieved of its burden of establishing a *prima facie* case of inconsistency with a provision of the *SPS Agreement* just because the disputed measure falls within the ambit of Article 3:3 instead of Article 3:1, or just because Article 3:3 is characterized as an "exception."¹⁰³ The burden stays with the complainant, and only if the complainant meets the burden will the onus of proving consistency with, for example, Article 3:3 shift to the respondent.

What is the *prima facie* case the complainant must make? *Wool Shirts* contained the answer. The Appellate Body reminded the Panel, the United States, the EC, and indeed the entire multilateral trading community, that it is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."¹⁰⁴ Thus, thundered the Appellate Body,

99. See *id.* at 37, para. 105.

100. See *id.* at 36-37, paras. 104-106.

101. See *id.* at 38, para. 109.

102. See *id.* at 36, para. 104.

103. See *id.*

104. *Id.* at 36, para. 104 (citing United States - Wool Shirts, WTO Panel Report).

[i]n accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States . . . had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel. . . . Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.¹⁰⁵

In sum, what we see in *EC – Beef Hormones* is a second progeny of *Wool Shirts*. It is hardly a progeny spawned dispassionately. The anger of the Appellate Body in defending vigorously its *Wool Shirts* burden of proof precedent is palpable.

The third progeny of *Wool Shirts*, *EC – Computer Equipment*, was a dispute of an entirely different nature from that of *India – Patent Protection* or *EC – Beef Hormones*. At stake were customs classifications, not intellectual property protection or human health standards. The factual and legal context is straightforward. The United States alleged a violation of GATT Article II:1,¹⁰⁶ which, of course, is the central pillar concerning tariff bindings. It complained that the EC's tariff treatment of local area network (LAN) equipment and personal computers (PCs) with multi-media capability was less favorable than that guaranteed by the EC's tariff schedule.¹⁰⁷ The Panel agreed the EC indeed had provided LAN and multimedia PC imports from the United States with less favorable treatment than set forth in the EC schedule, and thus recommended a change in tariff treatment of these items.¹⁰⁸

Among the several issues the EC raised on appeal was the burden of proof the Panel imposed on it. The Panel rejected the EC's assertion that during tariff negotiations, an exporting Member bears

105. *Id.* at 38, para. 109 (footnotes omitted).

106. See General Agreement on Tariffs and Trade art. II, § 1, 4 B.I.S.A. 3 (1969), reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 2 [hereinafter GATT].

107. See *EC – Computer Equipment*, WTO Appellate Body Report, *supra* note 51, at 1-2, para. 1.

108. See *id.* at 2, para. 2.

the burden of clarifying the exact composition of products that are the subject of proposed tariff concessions.¹⁰⁹ Why? The United States had developed legitimate expectations that the EC would continue to treat LAN equipment as automatic data-processing (ADP) machines for tariff purposes.¹¹⁰ After all, the EC (particularly the United Kingdom and Ireland, the largest export market for American LAN equipment) had classified the equipment as such during the Uruguay Round.¹¹¹ American exporters, satisfied with this treatment, did not object.¹¹² In turn, the United States did not bother to clarify the scope of the tariff concessions the EC made during the Uruguay Round on LAN equipment.¹¹³

Nonetheless, the EC argued the burden of clarification should be placed on the United States,¹¹⁴ but that the Panel - mistakenly, said the EC - placed it on the EC:

The European Communities submits that . . . the Panel has in fact created a newly invented rule on the burden of proof. According to this burden of proof, "the exporting Member [in this case, the United States] that could show the existence of *practices* on the current classification of individual shipments by some 'prevailing' customs authorities of a Member [here, the EC] would have proved its assertion that a tariff treatment was *agreed* in the Schedule, . . . irrespective of whether it has actually *proved* that the existence of the *agreement* on a certain tariff treatment was actually reflected in the text of the agreement (or of the agreed Schedule). The burden of clarifying the content of the Schedule is on the importing Member: as a result, that Member is to blame for any misunderstanding."¹¹⁵

The EC urged that the Panel's "shift" in the burden of proof from the complainant-exporter to the respondent-importer amounted to a new

109. See *id.* at 21, para. 51.

110. See *id.* at 38, para. 101 (quoting the Panel Report).

111. See *id.* at 38-39, paras. 101 (quoting the Panel Report).

112. See *id.* at 39, para. 101 (quoting the Panel Report).

113. See EC - Computer Equipment, WTO Appellate Body Report, *supra* note 51, at 38, para. 101 (quoting the panel report).

114. See *id.* at 39, para. 101 (quoting the Panel Report).

115. *Id.* at 12, para. 25 (emphasis original) (quoting the submission of the EC).

burden of proof rule in violation of the *United States – Wool Shirts* precedent.¹¹⁶ The new rule makes no sense, said the EC, because it allows the exporting Member to claim it has reached a tariff agreement with the importing Member without providing any supporting evidence relating to the words of the ostensible agreement. That is, the exporting Member can rely merely on evidence of the tariff treatment of individual shipments, current classification practices, and the like.¹¹⁷ It need not produce evidence about an agreement between the exporting and importing Members as to the meaning of a product term at issue – here “ADP equipment” – as that term is used in the importing Member’s schedule. How, the EC asked, could it in practice rebut an essentially unsubstantiated assertion by a complainant that is taken as proof that the EC had granted a tariff concession on the product at issue? Citing *Wool Shirts*, the EC said this shift was fundamentally at odds with the holding that the complainant make out a *prima facie* case to create a rebuttable presumption, at which point the burden properly shifts to the respondent.¹¹⁸

The United States countered that the Panel did nothing of the sort. Rather, the Panel faithfully interpreted and applied the *Wool Shirts* burden of proof precedent.¹¹⁹ The Panel first examined whether the United States had presented sufficient factual information to raise the presumption that its claim concerning the actual tariff treatment of LAN equipment during the Uruguay Round was true. Deciding that the claim was supported, the Panel put the burden on the EC to rebut the presumption, which the EC failed to do.¹²⁰ It is the EC, argued the United States, that is calling for a new burden of proof rule. If, as the EC believes, the Panel should have held that the United States ought to have clarified the treatment of LAN equipment during the negotiations, then the Panel would have imposed a new rule that would limit the scope of proof an exporting Member could bring forward. Specifically, instead of demonstrating the actual post-negotiations practice of the importing Member as proof, the exporting Member would be restricted to offering textual arguments about the meaning of the terms in the

116. See *id.* at 39, para. 102.

117. See *id.* at 21, para. 53.

118. See *id.* at 12, para. 26.

119. See EC – Computer Equipment, WTO Appellate Body Report, *supra* note 51, at 21, para. 51.

120. See *id.*

importing Member's tariff schedule.¹²¹ Moreover, the United States said, it offered the Panel evidence not only of the EC's tariff treatment of individual shipments and the EC's current classification practices, but also of the meaning of "ADP machines" as used in the EC's tariff schedule.¹²² In other words, the United States did provide the very textual evidence the EC demanded. The United States stressed it had never argued it could sustain its burden of proof without setting out the meaning of relevant tariff schedule terminology.¹²³

The Appellate Body's holding was not squarely in favor of either the EC or United States. It began by rejecting flatly the EC argument, stating that it did "not agree that the Panel has created and applied a new rule on the burden of proof."¹²⁴ It added immediately that "[t]he rules on the burden of proof are those which we clarified in *United States - Shirts and Blouses*."¹²⁵ However, the Appellate Body found the Panel erred in concluding the United States was not obligated to clarify the scope of the EC tariff concessions on LAN equipment.¹²⁶ "[A]ny clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties."¹²⁷ In other words, *Wool Shirts* provides the baseline burden of proof rule, but this rule has a corollary. As to the specific question of which party - exporting or importing Member - has the burden of clarifying the scope of a tariff concession, the answer is both Members.

Why the need for this corollary to the precedent, this modest addition to the international common law on burden of proof? Because, contrary to the Panel's suggestion, a tariff commitment is not an instrument solely in the hands of an importing member to suit its needs for protection.¹²⁸ Rather, tariff negotiations are a reciprocal process of give-and-take.¹²⁹ On the one hand, an importing Member

121. See *id.* at 21, para. 52.

122. See *id.*

123. See *id.*

124. *Id.* at 39, para. 103.

125. EC - Computer Equipment, WTO Appellate Body Report, *supra* note 51, at 39, para. 103.

126. See *id.* at 41, para. 110, at 42, para. 111(c).

127. *Id.* at 41, para. 110 (emphasis added).

128. See *id.* at 41, para. 108.

129. See *id.* at 41, para. 109.

defines its offer in a way to suit its needs.¹³⁰ On the other hand, an exporting Member ensures its rights are described in the importing Member's tariff schedule so as to guarantee its export interests.¹³¹ During the Uruguay Round negotiations, the period 15 February through 25 March 1994 was allocated for the purpose of verifying tariff schedules, so that all negotiation participants could check and control the scope and definition of tariff concessions.¹³² This period was provided on the theory that a tariff commitment, while made by one Member, represents a common agreement among all Members.¹³³

In sum, already we can discern a line of *de facto* precedent on the nature of burden of proof in WTO adjudication. *United States - Wool Shirts* is our starting point for the line, *India - Patent Protection* is the first progeny. It provides a resolute application of the *de facto* precedent in a new context. We see the *de facto* precedent at work in the very different context of our second progeny case, *EC - Beef Hormones*. The third progeny, *EC - Computer Equipment*, gives us not just a canned re-affirmation of that precedent, but also a small addition. It shows us growth, vibrancy, that is the application of a holding to a very different, indeed unique area - complex multilateral tariff negotiations. The EC and United States both pledged fidelity to *Wool Shirts*. Yet, each mistakenly thought the *de facto* precedent could be applied statically. The Appellate Body exercised its discretion - not unlike a common-law court - and told the parties that a corollary rule was needed. It is safe to bet that the *Wool Shirts* holding, along with the allocation of the burden of clarification of tariff concessions to all interested parties, are what every WTO Member and tribunal will rely on for the future.

Interestingly, the *Wool Shirts* precedent might give us still more. In that case, the Appellate Body acknowledged the inevitable ambiguity in answering the question "how much is enough?" It said: "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."¹³⁴ However, what the Appellate Body neglected to mention is

130. See *id.*

131. See *EC - Computer Equipment*, WTO Appellate Body Report, *supra* note 51, at 41, para. 109.

132. See *id.*

133. See *id.*

134. *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 14.

that over time a body of jurisprudence will build up on specific provisions of various agreements, such as Article 6:2 of the *Uruguay Round Agreement on Textiles and Clothing (ATC)*. We will have the experience of several complainants trying to make out a *prima facie* case, and several respondents trying to rebut the presumption of a violation, under these provisions. We will have, in other words, an international "common law" on what it takes - substantively - to successfully prosecute and defend a case under the provision that has been heavily litigated. In other words, *United States - Wool Shirts* may prove to yield the seed of *stare decisis* on how much evidence and persuasion it takes for the respective complainant and respondent burdens to be satisfied under Article 6:2 of the ATC.

There seems to be a hint of this grander possibility in *Wool Shirts* itself. The Appellate Body could not have ignored the fact that nearly simultaneously Costa Rica had brought a case against the United States under the ATC, *United States - Restrictions on Imports of Cotton and Man-made Fiber Underwear*.¹³⁵ Costa Rica alleged that American restrictions of imports of cotton and man-made fiber underwear from Costa Rica could not be justified under Article 6 of the ATC. The Panel sided with Costa Rica, finding that the United States had not demonstrated its underwear manufacturers were seriously damaged by, or actually threatened with serious damage from, the Costa Rican exports.¹³⁶ The finding was not contested on appeal.¹³⁷ It was an easy victory for Costa Rica. Information provided by the United States about sales, profits, investment, capacity utilization, and prices was insufficient and vague, and in some instances inaccurate (e.g., there was a discrepancy in employment data).¹³⁸ Information on the decline in domestic production of underwear only weakly supported the American claim that its industry was seriously damaged by the Costa Rican imports.¹³⁹ Perhaps more damning than the poor raw data was the cursory analysis of it by the United States.

135. See *United States - Underwear*, WTO Panel Report, *supra* note 23; WTO Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Feb. 25, 1997, WTO Doc. WT/DS24/AB/R, *reprinted in* 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 455 [hereinafter *United States - Underwear*, WTO Appellate Body Report].

136. See *United States - Underwear*, WTO Panel Report, *supra* note 23, at 83, para. 8.3.

137. See *United States - Underwear*, WTO Appellate Body Report, *supra* note 135, at paras. 3.1-3.3, 7.2.

138. See Tang, *supra* note 35, at 198.

139. See *id.*

In the *United States - Wool Shirts* case, part of India's argument mirrored that of Costa Rica: the American data, particularly the way they were collected and analyzed, "were so seriously flawed" that they "could not possibly demonstrate 'serious damage;'"¹⁴⁰ and the United States had not even tried to demonstrate a causal link between rising imports and declining domestic production.¹⁴¹ The United States countered that the ATC does not prescribe a specific methodology for data collection, and that it had provided enough evidence to prove causation and injury.¹⁴² Here again, the Panel found the American data to be vague and insufficient.¹⁴³ The Appellate Body, in upholding the Panel finding, cited to its opinion in *United States - Underwear* for the proposition that the "carefully drawn balance of rights"¹⁴⁴ in Article 6 of the ATC "must be respected."¹⁴⁵ This citation in *United States - Wool Shirts* could be the hint of the emergence of a body of substantive "precedent" on how much evidence is needed to satisfy Article 6:2 of the ATC. The two cases are thereby linked, and their teaching for any Member who might invoke the ATC's transitional safeguard mechanism is that the Appellate Body will not tolerate shabby statistics. Accurate data collected in accordance with a sound methodology and specific to the allegedly damaged or threatened injury is required.

2. A Brief Digression on Burden of Proof and EC - Bananas

As noted above, the *Wool Shirts* burden of proof holding was applied, albeit in a minor way, in the *EC - Bananas* case.¹⁴⁶ The EC argued the *Bananas* Panel had "misapplied the standard of burden of proof affirmed by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*."¹⁴⁷ The EC argued the Panel misapplied the standard - that in order to prove

140. *Id.*

141. See *United States - Underwear*, WTO Panel Report, *supra* note 23, paras. 5.150-5.151, 7.46; Tang, *supra* note 35, at 198.

142. See *United States - Underwear*, WTO Panel Report, *supra* note 23, paras. 5.101, 5.105-5.108, 7.25, 7.28-7.52; Tang, *supra* note 35, at 198.

143. See *United States - Underwear*, WTO Panel Report, *supra* note 23, paras. 7.25, 7.28-7.52, 8.3; Tang, *supra* note 35, at 198.

144. *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26; at 16 (quoting *United States - Underwear*, WTO Appellate Body Report, *supra* note 135, at 15).

145. *Id.* at 16.

146. See *EC - Bananas*, WTO Appellate Body Report, *supra* note 27, at 53, para. 129(o).

147. *Id.*, at 21, para. 53, at 89, para. 238.

its claim, a complainant must adduce evidence sufficient to raise a presumption that its claim is true - in three respects.

First, the EC was not happy with the way the Panel handled the American claim that the EC's preferential trading arrangement for bananas adversely impacted wholesale trade services supplied by companies from certain countries through a commercial presence in the EC. The United States charged the arrangement preferred companies from Europe, and from African, Caribbean, and Pacific (ACP) countries (*i.e.*, the beneficiary countries in the EC's trading arrangement) over companies from the United States and Latin America. Therefore, said the United States, the arrangement was inconsistent with the national treatment principle set forth in Article XVII of the General Agreement on Trade in Services (GATS).¹⁴⁸ It also was inconsistent with the EC's commitment in its Uruguay Round services schedule to provide unqualified national treatment to companies supplying wholesale trade services through a commercial presence. The United States also claimed the scheme violated the Most Favored Nation (MFN) principle contained in Article II of the GATS.

The American claim hinged on whether its companies (and companies in the co-complainant countries, Ecuador, Guatemala, Honduras, and Mexico), were supplying a "wholesale trade service" through a "commercial presence"¹⁴⁹ in the EC. That is, the national treatment and MFN obligations on which the United States based its GATS claim relied on these critical terms. Only if the activities of the aggrieved companies fell within the definitions would it be incumbent on the EC to respect the GATS obligations. To decide whether the term "commercial presence" was satisfied, the *Bananas* Panel had to look only to the broad language in GATS Article XXVIII:(d), which indicated that any type of business or professional establishment in the EC would qualify. However, it was not so easy for the Panel to define a "wholesale trade service." The Panel had to unpack a web of attendant definitions. For example, identifying a company as a supplier of "wholesale trade services" through a "commercial presence" implied the company was a "service

148. URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 283, and reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 325 (the official text of the GATS is Annex 1B to the *Agreement Establishing the World Trade Organization*) [hereinafter GATS].

149. Providing services through a "commercial presence" in the territory of another Member is the third mode of service supply mentioned in GATS Article 1:2, the other modes being cross-border supply, consumption abroad, and presence of natural persons. See GATS, *supra* note 148, art. 1:2.

supplier" under GATS Article XXVIII(g), that is, a "person that supplies a service."¹⁵⁰ In turn, under Article XXVIII(j), a "person" could be a "natural" or a "juridical person."¹⁵¹ Thus, the Panel wound up having to decide which banana wholesaling companies qualified as "juridical persons" of another Member under Article XXVIII(m)-(n). These two sub-paragraphs directed the Panel to see whether a company was "owned," "controlled" by, or "affiliated" with a juridical person of another Member.¹⁵²

As expected, the United States took an expansive approach to the meaning of "wholesale trade services." It urged that all activities associated with delivering bananas to the EC from abroad, and reselling them in the EC, constituted the supply of "wholesale trade services." Thus, for example, maintaining inventories, physically assembling goods, sorting, grading goods into large lots, breaking bulk, redistributing goods into smaller lots, refrigeration, and delivering goods - activities described in item number 622 of the United Nations Central Product Classification (CPC) System, which the EC had incorporated into its services schedule when making commitments on "wholesale trade services" during the Uruguay Round.

The *Bananas* Panel agreed with the American approach. Thus, for instance, the Panel decided Del Monte was a Mexican company, *i.e.*, a supplier of wholesale trade services from one of the complainant Members, because Del Monte was "owned" by Mexican "persons" at the time the WTO complaint was brought. Consequently, the Panel found that the EC's obligations under GATS Articles II and XVII covered the treatment of companies supplying wholesale trade services within the EC. On appeal the EC questioned the evidence to support this conclusion. The Panel had relied exclusively on a 1992 EC list of banana wholesaling companies established in the EC and owned by service suppliers from the complaining Members. This list, said the EC, gave no clear indications of ownership or control.

The second challenge the EC presented to the Appellate Body based on the *Wool Shirts* burden of proof holding concerned market shares. The Panel was called upon to ascertain market shares for wholesale services for bananas held by the respective companies engaged in the wholesale trade in bananas within the EC.

150. *See id.*

151. *See id.*

152. *See GATS, supra* note 148, art. XXVIII(m)-(n), at 346.

Accordingly, the Panel rendered various findings as to the market shares of suppliers from the complaining Members in comparison with the market shares of suppliers from the EC and ACP countries.

The EC, argued the Panel, did not follow the Appellate Body's *Wool Shirts* holding regarding burden of proof when deciding these market shares.¹⁵³ In particular, the Panel had ascribed market shares for the distribution of services on the basis of market shares for imports and production. Yet, said the EC, there was no proof that the shares in the services market corresponded to the shares in the imports and production market. Rather, the Panel simply presumed this to be so. The EC pointed out that the shares in the two markets would correspond only if (1) service providers supply their services for their own bananas, and not for bananas imported and produced by other companies, and (2) there is no independent market for services in bananas. The EC contended the Panel had made these assumptions without evidence.

The EC's third burden-of-proof challenge concerned the problem of identifying the category of operators that included (or directly represented) EC or ACP producers. This problem of identifying the nationality of operators arose in the context of eligibility for hurricane licenses (*i.e.*, special import licenses granted by the EC to certain firms to make up for devastation to banana crops caused by tropical storms). The *Bananas* Panel needed to identify producers who had suffered damage from hurricanes. The EC said that in doing so, the Panel posited the existence of two such classes without any proof: Category B operators, plus operators who include or represent EC or ACP producers. Here again, the EC alleged the Panel had misapplied the *Wool Shirts* holding.¹⁵⁴

In all three of these areas, the Appellate Body rejected the EC's challenge. The Appellate Body regarded the Panel's finding about Del Monte, the market shares of suppliers, and the nationality of operators, as findings of fact. Accordingly, it declined to rule on the EC's burden of proof argument.¹⁵⁵

The Appellate Body's firm position is striking. It suggests there are limits to its willingness to accept a burden-of-proof argument. If the argument relates to a panel's factual conclusions, then the Appellate Body will not – indeed, ought not and cannot – re-open the

153. See EC – Bananas, WTO Appellate Body Report, *supra* note 27, at 89, para. 238.

154. See *id.*

155. See *id.* at 89-90, para. 239.

matter. Only if the argument concerns a legal point does it stand a chance of moving the Appellate Body. The obvious question for future cases is how strictly the Appellate Body will differentiate conclusions of fact from conclusions of law. In many instances, it is not sophistry to argue a panel conclusion is a finding of "fact," or conversely that it is a finding of "law," because as any seasoned lawyer knows, the distinction between the two often is fuzzy. What is clear is that the more willing the Appellate Body is to regard a panel finding as a legal one, the greater the room for a *Wool Shirts* burden-of-proof argument.

3. Interpretation of DSU Article 11 (Judicial Economy)

(a.) *The Wool Shirts Holding*

Must a panel or the Appellate Body resolve all of the issues raised in a case, or may it decide only those issues necessary to dispose of the case? This problem is one typical of a common law system, as Charles Rembar suggests in *The Law of the Land*.

In general, our [Anglo-American] courts will not decide a broad issue when a narrow one will do. In part this reflects our adversary system: courts are to dispose of the dispute between the parties, not try to legislate. In part, *it is simply the wisest course in a precedential system: each case is different, and a grand statement of principle may sound perfect in the case before the court and foolish when the facts are altered just a bit.* So hold back the question whether trial by battle has entirely vanished from our law. We shall not have to reach that question if one of its exceptions shows that at any rate it is not available in the present case.¹⁵⁶

Conversely, if no doctrine of *stare decisis* - *de facto* or *de jure* - operates, then the problem is less grave, maybe even moot. By definition, there is no inter-temporal systemic interest in whether a case is decided by resolving all issues raised by the parties, or just a portion thereof. After all, no one is going to regard the outcome as much more than an arbitration-style result that is at best guidance for future bureaucratic proceedings. And yet, the problem of judicial

156. CHARLES REMBAR, *THE LAW OF THE LAND* 24-25 (1980) (emphasis added).

economy has arisen in the WTO forum – one supposedly free from *stare decisis* – and has been resolved by the Appellate Body in a way strongly reminiscent of a common law court.

That the Appellate Body had to step in is not a surprise. Nothing in the *WTO Agreement* deals with the problem. The nearest guidance in the *DSU* is set forth in Article 11:

The function of panels is to assist the DSB [Dispute Settlement Body] in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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 an conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. . . .¹⁵⁷

In *United States – Wool Shirts*, India inferred from Article 11 a right of a complainant to a ruling on each and every issue that the complainant raises in a case. The Panel held otherwise.

[W]e disagree and refer to the consistent GATT panel practice of judicial economy. India is entitled to have the dispute over the contested measure resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute.¹⁵⁸

The Appellate Body agreed with the Panel and, in so doing, relied extensively on prior GATT practice.¹⁵⁹

157. *DSU*, *supra* note 31, art. 11 (emphasis added).

158. *United States – Wool Shirts*, WTO Panel Report, *supra* note 33, para. 6.6.

159. See *United States – Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 17-20. See also Debra P. Steger & Susan M. Hainsworth, *New Directions in International Trade Law: WTO*

Reading between the lines of its report, the Appellate Body seems to be saying to India that the point is an embarrassingly obvious one. Using different language, the Appellate Body teaches that a common law rule of judicial economy pre-dates the entry into force of the DSU, and WTO Panels adjudicating under the DSU have followed this rule. To reinforce its point, the Appellate Body cites, by way of example, ten GATT Panel Reports adopted between 1983-1992,¹⁶⁰ plus two adopted WTO Panel reports.¹⁶¹

Nothing in this provision [Article 11 of the DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated [citations to 10 adopted GATT panel reports omitted]. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter [citation to two adopted WTO panel reports omitted].

....

... [T]he basic aim of dispute settlement in the WTO is to settle disputes. . .

[W]e do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving

Dispute Settlement, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION* 44-45 (James Cameron & Karen Campbell eds., 1998).

160. See *United States - Wool Shirts*, WTO Appellate Body Report, *supra* note 26, at 18 n. 27.

161. See *id.* at 18 n. 28.

a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.¹⁶²

It is quite fair to characterize the Appellate Body's words as a reaffirmation of a *de facto* precedent that has been floating about for some time. It is equally fair, and not inconsistent with the first characterization, to say the Appellate Body is clarifying the precedent in light of the DSU. The Appellate Body indicates to us that judicial economy is premised on more than the need to conserve judicial resources and dispose of matters efficiently. It is a principle of self-restraint. If WTO adjudicators were to decide every issue raised by a complainant, they would be "making" more law than they need to, rather than "finding" just enough law to settle a dispute. That is, they would blur the line between judicial and legislative functions that is drawn by Article 3:9 of the DSU and Article IX of the WTO Agreement (both of which are discussed in Part Three of the trilogy).¹⁶³ In turn, they would de-legitimize the dispute resolution process.

(b.) *Subsequent Use of the Wool Shirts Holding*

The *Wool Shirts* decision provides the kind of bright-line rule on which we would expect the Appellate Body to rely. The expectation is borne out in subsequent cases, particularly *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*,¹⁶⁴ and *European Communities - Measures Affecting the Importation of Certain Poultry Products*.¹⁶⁵

India - Patent Protection offers a succinct use and modest elaboration of the *Wool Shirts* precedent. As discussed in Part

162. *Id.* at 18-19 (second emphasis added).

163. *See id.* at 19-20.

164. *See India - Patent Protection*, WTO Appellate Body Report, *supra* note 49.

165. *See EC - Poultry Products*, WTO Appellate Body Report, July, 23, 1998, WTO. Doc. WT/DS69/AB/R [hereinafter EC - Poultry Products, WTO Appellate Body Report].

In *EC - Beef Hormones*, the Appellate Body touches on the topic, saying that it "agree[d] with the Panel's application of the notion of judicial economy." *EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 97, para. 250. The Appellate Body found in Article 5:6 of the SPS Agreement (which speaks of "technical and economic feasibility" with respect to the mandate that a measure not be more trade restrictive than necessary to achieve its appropriate level of protection) a reason "for adhering to the prudential dictates of the principle of judicial economy." *Id.* at 92, para. 251. However, because the Appellate Body did not expressly cite to *Wool Shirts*, I have not included *EC - Beef Hormones* as a progeny thereof on the judicial economy issue.

III.A.1.b above, India unsuccessfully appealed the Panel's conclusions regarding Articles 70:8-9 of the *TRIPS Agreement*, and failed to win its argument about burden of proof. However, India did prevail on one point, that the Panel had exceeded its authority under the *DSU* by ruling on a subsidiary claim made by the United States.¹⁶⁶ This claim arose under the *TRIPS Agreement*, Article 63, particularly paragraphs 1 and 2, which concern transparency.¹⁶⁷ The United States had made the claim to the Panel through oral submissions, and said India had ample opportunity to respond.¹⁶⁸ However, the United States had not included the Article 63 claim in its request for establishment of a panel, on which the panel's terms of reference were based.¹⁶⁹ It did not mention the claim in its first written submission to the Panel, and delayed in raising it in oral argument.¹⁷⁰

The Appellate Body quoted its holding from *Wool Shirts* that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."¹⁷¹ But, it clarified the meaning for the case at bar. What this holding connotes is that "a

166. See India - Patent Protection, WTO Appellate Body Report, *supra* note 49, at 5., para. 14.

167. These provisions state:

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO [the World Intellectual Property Organization] on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6 of the Paris Convention (1967).

TRIPS Agreement, *supra* note 54, art. 63:1-2.

168. See India - Patent Protection, WTO Appellate Body Report, *supra* note 49, at 8, para. 22.

169. See *id.* at 28, para. 86.

170. See *id.*

171. *Id.* at 28, para. 87.

panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties – *provided that those claims are within that panel's terms of reference.*"¹⁷² The American claim that India's patent protection rules breached the transparency requirements of Article 63 of the *TRIPS Agreement* had not come within those terms of reference. Quoting from its report in *EC – Bananas*,¹⁷³ and its earlier report in *Brazil – Measures Affecting Desiccated Coconut*,¹⁷⁴ the Appellate Body pointed out it had repeatedly stressed that a panel's terms of reference were of fundamental importance.¹⁷⁵ In effect, the terms established the subject matter jurisdiction of the panel, and thereby set the scope of the judicial economy rule. In turn, they defined the scope of the judicial economy rule.

It is fair to characterize this aspect of *India – Patent Protection* as illustrative of both the existence and development of the nascent common law of GATT-WTO procedure. We knew from *Wool Shirts* that a panel is free to choose which claims to adjudicate so as to resolve a dispute. But, we did not see an explicit connection between this principle of judicial economy and a panel's terms of reference. In *India – Patent Protection*, the Appellate Body draws the link, instructing that a panel's choice is confined to the universe of claims contained in its terms of reference. It hardly qualifies as a dramatic movement in international trade procedure, but it is a small indicator of dynamism nevertheless.

EC – Poultry Products provides us with a more involved example of the use of the *Wool Shirts* precedent than does *India – Patent Protection*. The plethora of issues at stake, coupled with the obtuse nature of the textual provisions involved, mean the *EC – Poultry Products* case is complicated, as many agriculture cases are for these reasons. Not surprisingly, therefore, the Appellate Body report

172. *Id.* (emphasis added).

173. *EC – Bananas*, WTO Appellate Body Report, *supra* note 27, at 58, para. 145. In this paragraph, the Appellate Body does not expressly invoke the *Wool Shirts* holding. But, later on in the Appellate Body's report in *EC – Bananas*, it does reference this holding. *See id.* at 78, para. 202 (observing that the Panel referred to *Wool Shirts* to justify the conclusion that, having found the EC's operator category and activity function rules breached GATT Article X, it was not necessary to address whether these rules also violated Article 1:3 of the Uruguay Round *Agreement on Import Licensing Procedures*).

174. WTO Appellate Body Report on *Brazil – Measures Affecting Desiccated Coconut*, Mar. 20, 1997, WTO Doc. WT/DS22/AB/R, at 22, *reprinted in* 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 473.

175. *See India – Patent Protection*, WTO Appellate Body Report, *supra* note 49, at 28, para. 87.

makes for difficult reading. Essentially, a dispute arose out of a 1994 bilateral agreement, known as the "Oilseeds Agreement," negotiated between Brazil and the EC concerning, *inter alia*, trade in poultry under the authority of GATT Article XXVIII.¹⁷⁶ The Oilseeds Agreement authorized the EC to impose a duty-free global annual tariff-rate quota of 15,500 tons for frozen poultry meat imports. All imports under the quota were subject to the presentation of an import license, though it was not necessary to show a license for an out-of-quota shipment. The tariff-rate quota was indicated in the EC tariff schedule, along with base duty rates for out-of-quota amounts. Also in its schedule, the EC reserved the right to impose a special safeguard action, in accordance with Article 5 of the Uruguay Round *Agreement on Agriculture*.¹⁷⁷ Such an action would result in an additional duty on out-of-quota imports, assuming the price of these imports fell below a trigger price pre-set and published by the EC. The import price would be measured as either a "representative price" (determined by taking into account third-country prices, "free-at-Community offer prices," and prices of imported products at various stages of marketing in the EC), or, at the request of the importer, the "cost, insurance, and freight" (CIF) price.

Brazil quarreled with a number of aspects of the way in which the EC implemented and administered the tariff-rate quota scheme. For example, Brazil argued the EC had violated GATT Articles II (concerning tariff bindings), III (concerning non-discriminatory treatment between imports and like domestic products), X (concerning transparency), and XIII (concerning the non-discriminatory administration of quantitative restrictions, discussed in Part IV.C below). On all these substantive points, the Panel ruled

176. GATT, *supra* note 106, art. XXVIII (concerning the modification of tariff schedules through negotiation and agreement by the WTO Members. The facts of the EC - Poultry Products case are summarized in paragraphs 1-4 of the Appellate Body Report, from which the above discussion is drawn. This Oilseeds Agreement was negotiated after the Contracting Parties had adopted a panel report, *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins* - the infamous EEC - Oilseeds case that threatened to derail a successful conclusion to the Uruguay Round. See GATT B.I.S.D. (37th Supp.) at 86 (1989-90) (adopted Jan. 25, 1990). In the wake of the case, the Contracting Parties authorized the EC to negotiate with interested parties under GATT Article XXVIII, and the EC did so with respect to Brazil and nine other parties. Thus, the Oilseeds Agreement referred to above, which is technically a set of Agreed Minutes signed on Jan. 31, 1994, is the outcome of the EC-Brazil bilateral negotiation. See EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 1-2, para. 2.)

177. URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 43, and reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 110.

against Brazil.¹⁷⁸ Brazil did, however, prevail at the Panel stage with respect to some of its arguments that the EC had not implemented the tariff-rate quota in accordance with the Uruguay Round *Agreement on Import Licensing Procedures*,¹⁷⁹ and with respect to its argument that the EC's definition of the CIF price had not complied with the *Agreement on Agriculture*. On appeal, Brazil raised a host of substantive issues, including whether a tariff-rate quota resulting from negotiations under GATT Article XXVIII must be administered in a non-discriminatory manner consistent with Article XIII (*i.e.*, whether the quota must be applied on an MFN basis).¹⁸⁰ For its part, the EC appealed the Panel's ruling that Article 5:1(b) of the *Agriculture Agreement* requires an import price to be the CIF price plus ordinary customs duties.¹⁸¹

Underlying much of the substantive debate in *EC - Poultry Products* is a significant difference in the way Brazil and the EC view the Oilseeds Agreement. To Brazil, the Agreement was a means for the EC to negotiate with Brazil separately from other frozen poultry meat exporters. Rather than pursue a strategy of compensating all exporters on a common, MFN basis, Brazil characterized the Agreement as a means for the EC to provide variable compensatory solutions, *i.e.*, different solutions for different Members.¹⁸² The Agreement, Brazil urged, embodied a country-specific package for Brazil, and did not contemplate that the tariff-rate quota share for Brazil should apply on an MFN basis. Thus, for instance, it was not necessary for Brazil's share in the duty-free global annual quota of 15,500 tons to be the same as that set forth in other bilateral agreements the EC might make with other WTO Members (*i.e.*, it was not necessary for shares to be allocated, as GATT Article XIII:2(d) would suggest, among Members with a substantial interest on the basis of proportions of imports into the EC during a previous representative period). Conversely, the EC - agreeing with the Panel's finding - did not believe anything in GATT Article XXVIII (concerning modification of tariff schedules), or, for that matter, the

178. See *EC - Poultry Products*, WTO Appellate Body Report, *supra* note 165, at 3, para. 4.

179. URUGUAY ROUND - FINAL TEXTS, *supra* note 31, at 221.

180. See *EC - Poultry Products*, WTO Appellate Body Report, *supra* note 165, at 1-7, paras. 1-15, at 27, para. 76. For a discussion of the other substantive issues Brazil appeals, namely, those concerning GATT Article X and the Agreement on Licensing, see *id.* at 2-9, paras. 16-21.

181. See *id.* at 16-19, para. 41-51, at 27, para. 76. The EC also appealed the Panel's reasoning on an issue pertaining to the relationship between the EC's tariff schedule and the Oilseeds Agreement. See *id.* at 15, paras. 38-40.

182. See *id.* at 5, para. 9.

Uruguay Round Agreement Establishing the WTO (WTO Agreement), and waived the MFN obligations of Articles I and XIII.¹⁸³

The different substantive characterizations of the Oilseeds Agreement obviously were motivated by conflicting trade interests. Brazil would benefit from a larger, non-MFN share of the EC's tariff-rate quota, as opposed to a smaller, MFN share. Likewise, allocation of shares to non-Members would reduce Brazil's slice of the in-quota amount. Conversely, the EC would benefit from adherence to the MFN principle, because Brazil would reach its in-quota limitation more quickly than if it had an "extra" amount. In turn, the EC could apply a protectionist safeguard measure under the *Agriculture Agreement* sooner rather than later. At the very least, the EC would garner the tariff revenue from over-quota shipments. Likewise, were the EC to allocate shares to non-Members, then Members like Brazil would be more likely to reach their reduced quota allotments more quickly than would otherwise occur.

These issues provide the substantive context for the key matter on which we should train our eye now, namely, Brazil's appeal of the way in which the Panel reached its conclusions. Brazil's advocacy of a procedural point went to the heart of the integrity of the WTO adjudicatory mechanism: the Panel acted inconsistently with DSU Article 11 by not examining some of Brazil's arguments. Brazil urged that the Panel, in reaching its various conclusions, failed to address two of its arguments that justified the non-MFN application of the tariff-rate quota scheme.¹⁸⁴

First, Brazil had argued that similarities between GATT Articles XXVIII and XXIV led Brazil to question why the MFN principle of GATT Article I must always apply to Article XXVIII, but not

183. See EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 11, paras. 27-28.

An additional argument Brazil offered on appeal, which, interestingly, relates to one of the many issues dealt with by the panel in EC - Bananas, concerned the allocation of shares in a tariff-rate quota to non-WTO Members. Is such allocation permissible, and if so, how must the allocation be made? We shall see this problem re-emerge in Part IV.C below. In brief, Brazil contended it is inconsistent with GATT Article XIII for the EC to allocate tariff-rate quota shares to non-WTO Members. See *id.* at 6-7, paras. 14-15. The EC countered Article XIII is nothing more than a positive obligation to provide MFN treatment to Members when allocating shares in a tariff-rate quota. However, said the EC, nothing in that Article or the WTO Agreement forbids allocation on an MFN basis to non-WTO Members. Simply put, Article XIII:2(d) only requires quota allocation among substantial supplying countries who are WTO Members in proportion to the total quantity or value of the imports of the products. It leaves to the importing Member decisions about whether to allocate shares to non-Member supplying countries at all, and if so, whether to allocate them on an MFN basis. See *id.* at 12-13, paras. 30-32.

184. See *id.* at 9-10, para. 23.

necessarily to Article XXIV. Brazil's logic? If the two Articles indeed are similar, and if Article XXIV (which concerns the formation of customs unions and free trade areas) is sometimes an exception to Article I, then so, therefore, must be Article XXVIII. Second, Brazil argued that Article XXVIII is flexible in nature. It permits bilateral agreements with respect to the modification of tariff concession, subject to the review of all WTO Members. If they do not object, which they will do if their trade interests are adversely affected, then such agreements may provide for country-specific tariff-rate quotas that do not satisfy the MFN principle. Because no Member objected to the Oilseeds Agreement, the departure from the MFN principle by that Agreement is permissible. The upshot according to Brazil was that by not addressing these two arguments, the Panel reached an erroneous substantive conclusion, namely (and at the risk of over-generalizing a bit), that the MFN principle is absolute when, in fact, there are exceptions for tariff-rate quota agreements.¹⁸⁵

The EC countered that the Panel was right not to bother with Brazil's arguments. As to the relationship between GATT Articles XXIV and XXVIII, this was a "side issue."¹⁸⁶ Article XXIV:4-5 envisions a departure from the MFN principle but only as a result of the formation of free trade areas and customs unions. The Oilseeds Agreement plainly does not contemplate such an ambitious undertaking. As to the purported flexibility of Article XXVIII, the EC replied Brazil had not shown a "concordant, common and consistent" practice of non-MFN application of tariff-rate quota agreements.¹⁸⁷

The Appellate Body was not overstating matters in characterizing the Brazilian allegation as "*very serious*."¹⁸⁸ It is a charge that the Panel had abused its discretion by not taking seriously certain arguments put before it.¹⁸⁹ This charge "goes to the *very core of the integrity* of the WTO dispute settlement process itself."¹⁹⁰ If the charge has merit, then how could Brazil - or any WTO member similarly situated in the future - feel confident it has had a full and fair hearing? Characterized thusly, the Appellate Body had to take

185. See *id.* at 6, para. 12, at 10, para. 25.

186. See *id.* at 14, para. 36.

187. See EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 14, para. 37.

188. *Id.* at 46, para. 133 (emphasis added).

189. See *id.* at 46, para. 133, at 47-48, para. 135.

190. *Id.* at 46-47, para. 133 (emphasis added).

pains to explain why it rejected Brazil's argument. *De facto* precedent lay at the heart of the explanation.

The Appellate Body began with a restatement of the requirement of DSU Article 11 that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case."¹⁹¹ It quoted from its report in *EC - Beef Hormones*,¹⁹² where it had considered what this language meant:

Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. ... The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an *egregious error that calls into question the good faith of the panel*. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.¹⁹³

Here, then, was a test for violation of DSU Article 11: an "egregious error" casting doubt on the "good faith" of the Panel.

191. DSU, *supra* note 31 and accompanying text, art. 11.

192. See *EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50.

193. *EC - Poultry Products*, WTO Appellate Body Report, *supra* note 165, at 46-47, para. 133 (emphasis added by Appellate Body) (*quoting EC - Beef Hormones*, WTO Appellate Body Report, *supra* note 50, at 49-50, para. 133).

Why did Brazil's argument not satisfy this test? The answer lay in the *United States - Wool Shirts* precedent. The Appellate Body reiterated its statement in the earlier case "that nothing in Article 11 'or in previous GATT experience *requires* a panel to examine *all* legal claims made by the complaining party,' and that '[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.'"¹⁹⁴ Brazil simply did not have a sufficiently persuasive basis for overcoming the strong presumption that the Panel had quite properly exercised its discretion in this regard.

But, the issue in *Wool Shirts* involved an alleged failure to address *claims*. In *EC - Poultry Products*, the allegation concerned failure to address *arguments*. The Panel had addressed Brazil's overall claim about the permissibility of a discriminatory tariff-rate quota regime, but it had not addressed two specific arguments relating to that claim - the link between GATT Articles XXVIII and XXIV, and the flexibility of Article XXIV. The Appellate Body was quick to recognize the difference:

Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU.¹⁹⁵

This critical passage shows the Appellate Body did not unthinkingly apply the *Wool Shirts* precedent to a new case. It extended slightly, in a deliberate manner, the precedent from claims in general to

194. *Id.* at 47, para. 135 (quoting WTO Doc. WT/DS33/AB/R at 18-19 (citation omitted)). The Appellate Body cited *Wool Shirts* again to support its conclusion that the Panel acted within its discretion to exercise judicial economy and not address an issue pertaining to Article 5.5 of the *Agreement on Agriculture*. *Id.* at 54, n. 92, para. 156

195. *Id.* at 47-48, para. 135.

arguments relating to claims. *Wool Shirts* teaches that it is not necessary to address every claim. *EC - Poultry Products* supplements the teaching by instructing that if a claim is addressed, it is not necessary to address every argument relating to that claim. A small evolution in the common law of international trade, but a movement forward nonetheless that bespeaks the Appellate Body's concern for a smooth fabric - a concern normally associated with a common law court, not a bureaucratic, arbitral-style tribunal.

B. *The EC - Bananas Case and its Progeny*¹⁹⁶

It would not be outlandish to predict that the annals of WTO jurisprudence will never contain a case more complicated and controversial than the *EC - Bananas* case.¹⁹⁷ The facts are intricate, dozens of issues are at stake, and as of this writing the United States and EC are trying to settle their trade war over the implementation of the Appellate Body report. Below, I shall concentrate on three issues. The first two issues are procedural, the requirements for standing to bring a complaint, and the interpretation of *DSU* Article 6:2 (concerning the sufficiency of a complaint). The third issue is substantive, involving the interpretation of GATT Article XIII (concerning the allocation of tariff-rate quotas), and is dealt with in Part IV.

My points, in brief, are (1) the holding of the Appellate Body as regards standing is quite likely to generate a line of *de facto* precedent in the future, and (2) the holdings of the Appellate Body on the sufficiency of a complaint and GATT Article XIII issues already have created clear streams of *de facto* precedent. I realize the first point is somewhat of a departure in logic from the overall structure of my present thesis - to discuss leading cases and their progeny and thereby illustrate the operation of a *de facto* doctrine of *stare decisis*. I justify this departure not simply because of the importance of the standing issue in the *Bananas* case, but also because the issue is

196. The reader may wish to refer to *The Bananas War*, *supra* note 6, for a discussion of the key facts and legal arguments of the *EC - Bananas* case. For additional treatments, see *Letter Update*, *supra* note 79, at 35-41; Joseph A. McMahon, *Going Bananas? - Dispute Resolution in Agriculture*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION* 128, 130-35, 138-145 (James Cameron & Karen Campbell eds., 1998) (containing a clear discussion not only of the case, but also of the overall context of GATT Articles XI:1-2 (the rule against quantitative restrictions, and the exception for import restrictions necessary to enforce certain governmental measures in agriculture) and XVI:3 (requiring that no export subsidy scheme result in a contracting party acquiring more than an equitable share of world trade), and of other agricultural disputes in GATT-WTO history).

197. See *EC - Bananas*, WTO Appellate Body Report, *supra* note 27.

important in every actual or potential dispute. It is about the right to be heard in the world's foremost adjudicatory body, and thus about the legitimacy of that body in the eyes of Member governments and the everyday citizens they represent.

1. *Standing to Bring a Complaint: A De Facto Precedent in the Making*

In addition to its noteworthy substantive holdings, one of which is discussed below in Part IV.C, the *EC - Bananas* decision provides us with important *de facto* procedural precedents on standing to bring a complaint and sufficiency of a complainant. They are discussed in turn below.

The Appellate Body considered the very plausible EC argument that the United States lacked standing to bring the case. The argument, articulated in the EC's emotive cry "not one banana," was plausible. The "United States has no actual or potential trade interest justifying its claim, since its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climactic and economic conditions in the United States."¹⁹⁸ The American rebuttal reflected the realities of global production. Whether bananas were imported by the EC from the customs territory of the United States was irrelevant. What mattered was whether American companies exported bananas to the EC, regardless of where they grew the bananas. In this case, the United States had a significant commercial interest because the ability of two American companies, Chiquita and Dole, to export bananas to the EC was adversely affected by the EC's anti-free market regime.¹⁹⁹

The American rebuttal was yet more plausible than the European arguments. The GATT-WTO regime would be a very unhelpful one indeed if it could be invoked to fight protectionism only after satisfying a territorial test for the movement of goods (or, for that matter, services). The EC's banana preference scheme, while directly impacting banana-growing countries, had a global reach because of the offshore corporate interests in those countries. The United States clearly was implying the EC exalted form over substance, whereas the United States demanded to be heard based on trading difficulties

198. *Id.* at 8, para. 17.

199. See WTO Panel Report on European Communities - Regime for the Importation, Sale, and Distribution of Bananas, May 22, 1997, WTO Doc. No. WT/DS27/R, at 9, paras. II.23-II.25, reprinted in 2 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 93 [hereinafter *EC - Bananas*, WTO Panel Report]; McMahon, *supra* note 196, at 140.

faced by American multinational corporations as a result of the banana preference scheme. Not surprisingly, therefore, the Appellate Body agreed with the United States.

The Appellate Body found that Article 3:3 of the *DSU* (concerning the importance of the prompt settlement of disputes)²⁰⁰ and Article 3:7 (cautioning Members to "exercise ... judgment" as to whether bringing a case would be "fruitful")²⁰¹ did not establish a prerequisite for a complaining party to have a "legal interest" before requesting a panel.²⁰² Such a prerequisite was not set forth expressly elsewhere in the *DSU* or the *WTO Agreement*, nor could it be implied in any other GATT-WTO agreement.²⁰³ Accordingly, the Appellate Body agreed that every WTO Member possesses a good deal of discretion as to whether to bring an action: "[t]he language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the *DSU* suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful.'"²⁰⁴ It is, in essence, a matter of self-regulation.²⁰⁵ Two points are particularly interesting about the Appellate Body's holding.

First, consider the way the Appellate Body went about handling the standing issue. It acknowledged that the participants in the case had referred to decisions by the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), that had dealt with whether under international law a complainant must have a "legal interest" to bring a case.²⁰⁶ The Appellate Body could have dismissed these references out of hand. It did not. It took the trouble to read and analyze them. It concluded it could not infer from these cases a general "legal interest" prerequisite in international law.

200. See *DSU*, *supra* note 31, at 398.

201. *Id.* at 399.

202. EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 55, para. 132.

203. See *id.* at 55, para. 132; Steger & Hainsworth, *supra* note 159, at 39-40.

204. EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 56, para. 135 (emphasis added).

205. See *id.*

206. On appeal, the EC referred to five such cases: (1) the *South West Africa Cases* (Second Phase), 1966 I.C.J. 4; (2) the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase), 1970 I.C.J. 4; (3) the *Mavrommatis Palestine Concessions Case*, 1925 P.C.I.J. (ser. A) No. 2, at 1; (4) the S.S. "Wimbeldon" case, 1923 P.C.I.J. (ser. A) No. 1, at 1; and (5) the *Case Concerning the Northern Cameroons*, 1963 I.C.J. 4. The appellate submission of the complainants referred to the *South West Africa Cases*. See EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 56 n. 66, para. 133. For the panel's treatment of the ICJ cases, See EC - Bananas, WTO Panel Report, *supra* note 199, at 309 n. 688, para. 7.50.

To what extent was the Appellate Body using the ICJ and PCIJ cases as precedent? Surely the answer must be to no extent at all. No one would contend that ICJ or PCIJ decisions are binding in WTO adjudication, especially given that they are not even "binding" in ICJ litigation.²⁰⁷ To the contrary, the purpose of their reference to the earlier cases was two-fold. First, the earlier decisions were guidance as to what a prudent standing requirement might be. Second, they might (but, in the end, did not) support the proposition that the source of a "legal interest" prerequisite is customary international law. Here, then, we have perhaps a rather uncommon example in which seeing the difference between "*de facto* precedent" and "guidance" is not too difficult. *De facto* precedent is binding as a result of an amalgam of extra-legal and quasi-legal forces. Guidance, the effect of a so-called "non-binding" precedent (a term to which I have published my objections²⁰⁸) is just that - a case to be used or discarded as the adjudicator sees fit, rather than a scepter to be wielded with authority. The ease with which we can see the distinction results from the lack of a relationship between the Appellate Body and the other tribunals, not necessarily from a lack of desire on the part of the Appellate Body to use the cases for something more than guidance.

However, the distinction reverts to its usual fuzzy state if we peek at the Panel report in the *EC - Bananas* case. The Panel justified its finding in favor of the United States on the question of standing in part on past GATT practice. It expressly cited for support the 1949 Working Party report on *Brazilian Internal Taxes*,²⁰⁹ the 1958 Panel report on *Italian Agricultural Machinery*,²¹⁰ and the 1990 Panel report on *Section 337 of the United States Tariff Act of 1930*.²¹¹ A nice demonstration of the commanding presence of the past, or mere advice from panels past?

207. I discuss this point extensively in Part One of the trilogy. See Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2, at pt. III.A.

208. See *id.* at pt. IV.

209. See *EC - Bananas*, WTO Panel Report, *supra* note 199, at 308, para. 7.50 (citing Working Party Report on *Brazilian Internal Taxes*, June 30, 1949, GATT B.I.S.D. II 181, at 185, para. 16).

210. See *EC - Bananas*, WTO Panel Report, *supra* note 199, at 308, para. 7.50 (citing WTO Panel Report on *Italian Discrimination Against Imported Agricultural Machinery*, Oct. 23, 1958, GATT, B.I.S.D. (7th Supp.) 60, at 64, para. 12 (1959)).

211. See *EC - Bananas*, WTO Panel Report, *supra* note 199, at 308, para. 7.5 (citing GATT B.I.S.D. (36th Supp.) 345, at 386-87, para. 5.11 (1988-89) (adopted Nov. 7, 1989)).

The second especially notable feature of the Appellate Body holding is its future value. Having concluded that no "legal interest" is prerequisite to bring a complaint to the WTO, is there much doubt this conclusion will not, in effect, bind future litigants? That is, would not a respondent have a difficult time indeed persuading a future panel or the Appellate Body that the EC argument is correct? We cannot say for sure because, as of this writing, no obvious progeny have emerged. But we can reliably forecast that the answer must be yes.

The Appellate Body provided the policy rationale for its finding on standing, namely, "with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."²¹² One commentator reinforces the rationale, offering that the Appellate Body's holding "must be correct"²¹³ because:

dispute settlement should not be limited to those countries which have an actual trade interest, and provision must be made for those countries who could become potential exporters, *especially developing countries*. Moreover, *all members of the WTO must share a common interest in ensuring that the rules of international trade are not only respected but also correctly implemented.*²¹⁴

Standing, in other words, is about the fairness and legitimacy of the WTO adjudicatory system. To impose standing requirements that are difficult to meet is to give the keys to that system to a few Members in extraordinary circumstances. The rest of the aggrieved Members, standing outside the gates, are sure to be upset at their relative deprivation of access, and will be correct in their reaction. Moreover, a more open adjudicatory system bears a direct, causal relationship to success in scaling back of trade barriers, deterring the erection of new impediments, and thus to increased global economic efficiency through free trade.

212. EC - Bananas, Appellate Body Report, *supra* note 27, at 56, para. 136 (quoting panel report at para. 7.50).

213. McMahon, *supra* note 196, at 141.

214. *Id.* (emphasis added).

Any respondent trying to resurrect the EC argument in a future case would have to argue this strong policy rationale no longer applies, or is less important than other policy considerations. That argument decays daily with increasing global economic integration. The respondent's best hope may be to point out that the WTO is ever-more overwhelmed with cases, so a tightening of standing requirements may help decrease litigation. A large number of frivolous suits may come to the court, suggesting the term "fruitful" and cautioning Members to self-police. Even here, however, the *EC - Bananas* Panel anticipated this problem, arguing that the cost of bringing cases usually will deter Members lacking an immediate trade interest from filing suit.²¹⁵ Additionally, the less litigious culture, still influential in many legal systems in comparison to the American system, might be a deterrence.

All of this suggests that a *de facto* precedent on the issue of standing is emerging. Indeed, no alternative for the WTO system exists, that to function in accordance with the policy rationale, the "no 'legal interest' prerequisite" holding must become a *de facto* precedent. It will be modified or reversed only if subsequent events warrant, such as the failure of the aforementioned deterrence mechanisms. To be sure, as a *de facto* precedent, respondents may be tempted in the future to resurrect the EC argument in unwarranted circumstances. Only as a *de jure* precedent could the holding play a strong gate-keeping role.

2. Interpretation of DSU Article 6:2 (Sufficiency of Complaints)

(a.) *The EC - Bananas Holding*

The Appellate Body's holding on standing is a *de facto* precedent in the making. Its holding on the sufficiency of complaints already has become a *de facto* precedent. But, before examining the progeny, the holding must be clear. One of the very important issues the Appellate Body confronted in *EC - Bananas* concerned what in American civil procedure is known as "notice pleading" versus "fact pleading."²¹⁶ What are the requirements for a complaining

215. See *EC - Bananas*, WTO Panel Report, *supra* note 199, at 309, para. 7.51.

216. For example, under Rule 8(a) of the Federal Rules of Civil Procedure, federal courts use notice pleading. A short and plain statement of the claim is all that is required. That is, just enough to put the adverse party on notice of what they are being accused of is sufficient. In contrast, several states, such as California, require fact pleading. Such pleading requires a

Member's complaint? Article 6:2 of the DSU provides only a sketchy answer, saying that the complainant's request for a panel must be "in writing," "identify the specific measures [of the respondent] at issue," and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."²¹⁷

The EC argued the American complaint against it was "unacceptably vague,"²¹⁸ thus falling far short of meeting even these skeletal requirements. After all, the United States simply listed "the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements."²¹⁹ In other words, the EC demanded a list in which particular features of its banana import quota and licensing regime were linked directly to identified provisions of the GATT or a Uruguay Round agreement allegedly violated by these features. The United States had done nothing more than refer to the "banana regime"²²⁰ as the source of all the purported problems.

The United States offered two rebuttals. First, Article 6:2 did not require "a detailed exposition tying each specific measure to each provision of law to be claimed" as violated.²²¹ Second, the EC had ample notice of the claims against it during the consultation phase, *i.e.*, information the United States had provided during this phase could in effect "cure" any missing pieces from its complaint.²²²

The Appellate Body agreed with the United States. It felt the American list was enough, that it met the "*minimum standards*" of Article 6:2,²²³ and that the EC was confusing the fundamental distinction between a claim and an argument supporting a claim, and thus between a complaint and a brief.

more detailed discussion of the "who?," "what?," "when?," "where?," and possibly "how?" aspects of the claim.

217. DSU, *supra* note 31, art. 6.2.

218. McMahon, *supra* note 196, at 140. The EC's request for separate panel reports for each of the complaints filed - namely, by Ecuador, Guatemala, Honduras, Mexico, and the United States - was met. *Id.* at 140 n. 58. However, these reports are nearly identical, thus they and the complainants are treated as one. Citations below to the panel report are to the report responding to the American complaint.

219. Steger & Hainsworth, *supra* note 159, at 42.

220. McMahon, *supra* note 196, at 140.

221. EC - Bananas, WTO Panel Report, *supra* note 199, at 5-6, para. 2.13; *See also* McMahon, *supra* note 196, at 140.

222. *See* McMahon, *supra* note 196, at 140.

223. EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 57, para. 141.

[I]t [is] sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements . . . [T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.²²⁴

Certainly, a complaint must meet the minimum standards of Article 6:2 for two reasons: "first, it often forms the basis for the terms of reference of the Panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."²²⁵ These reasons caused the Appellate Body to reverse the Panel's conclusion that uncertainty as to whether a complaint satisfied Article 6:2 could be cleared up, or "cured," by a subsequent submission.²²⁶ But, assuming a complainant says enough to establish terms of reference and give notice, it need say no more at the outset.

In brief, the holding on the sufficiency of a complaint is that the minimum standards of Article 6:2 are minimal indeed. In the American civil procedure lingo, we would say that notice pleading suffices. A mere listing of the allegedly violated rules of international trade law, without detailed supporting arguments or an indication of which disputed measures relate to which legal provisions, suffices.

224. *Id.*

225. Steger & Hainsworth, *supra* note 159, at 42-43. See also EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 57, para. 142; EC - Bananas, WTO Panel Report, *supra* note 199, at 304, para. 7.35. Only in two instances did the Panel find that the DSU Article 6:2 requirement was not met. Ecuador's complaint did not list specific articles of the Uruguay Round Agreement on Agriculture, and all of the complainants failed to spell out their claim under Article 5 of the Uruguay Round Agreement on Trade-Related Investment Measures. Thus, the Panel did not consider these provisions. See McMahon, *supra* note 196, at 140.

226. EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 57-58, para. 143-44.

(b.) *Subsequent Use of the EC - Bananas Holding*

This holding is one of the most widely cited aspects of the Appellate Body report in *EC - Bananas*. The line of *de facto* precedent it has spawned is easily discernible. The line begins with the December 1997 Appellate Body Report in *India - Patent Protection*,²²⁷ and continues with its March 1998 Report *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*,²²⁸ and its June 1998 Report in *EC - Computer Equipment*.²²⁹

Each of these progeny cases adheres closely to, and is a resolute affirmation of, the teaching of *EC - Bananas* on specificity. In *India - Patent Protection*, the United States made a subsidiary claim under Article 63 of the *TRIPS Agreement*. The Panel found India had not complied with the first two paragraphs of the Article (discussed above in Part III.A.3.b).²³⁰ In other words, the United States contended India did not have a transparent regime for the protection of pharmaceutical and agricultural chemical products. To be sure, the United States did not include this claim in its request for the establishment of a panel. It seemed to have good reason not to: during consultations, India never disclosed the existence of "administrative instructions" for the filing of mailbox applications for pharmaceutical and agricultural chemical products.²³¹ Only when the United States saw India would rely on this defense did it feel compelled to make the claim that the administrative instructions failed the transparency criteria of Article 63.

India, however, cried foul. India invoked, *inter alia*, *DSU* Article 11 to support the proposition that a panel may make findings only on issues that have been submitted to it by the parties to the dispute.²³² India said that the *Patent Protection* Panel had exceeded its authority by ruling on the *TRIPS* Article 63 claim, after already accepting the principal Article 70:8 claim.²³³ After all, the United

227. *India - Patent Protection*, WTO Appellate Body Report, *supra* note 49.

228. WTO Appellate Body Report, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Apr. 22, 1998, WTO Doc. No. WT/DS56/AB/R, *reprinted in* 5 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 1 [hereinafter *Argentina - Footwear*, WTO Appellate Body Report].

229. *EC - Computer Equipment*, WTO Appellate Body Report, *supra* note 51.

230. *See India - Patent Protection*, WTO Appellate Body Report, *supra* note 49, at 31, para. 97(c).

231. *See id.* at 30, para. 93.

232. *See id.* at 5, para. 14, at 27, para. 85.

233. *See id.* The principal claim is discussed *supra* notes 57-74 and accompanying text.

States had failed to include an Article 63 claim in its request for the establishment of a panel. The United States did not even raise Article 63 as an alternative claim for the first time until later, namely, during its oral statement at the first substantive meeting of the parties with the Panel.²³⁴

India was making a powerful argument about notice and procedural due process. India appears not to have cited to the *EC - Bananas* specificity test at the Appellate Body level, a mistake we can attribute, perhaps, to an imperfect appreciation of the importance of this de facto precedent, or at least to sloppy legal research. The argument India was making was easily translated into *Bananas* specificity test terms: the way in which the United States injected its *TRIPS* Article 63 claim is precisely the nightmare for a defendant and panel that *Bananas* seeks to avoid - an afterthought that a defendant must scramble to rebut, if it can, that lies outside the panel's formal terms of reference.

Fortunately for India, the Appellate Body did the translation and called on *EC - Bananas* without hesitation to explain why it was ruling for India, that is, finding that the Panel erred in finding in favor of the United States on *TRIPS* Article 63. Quoting extensively from *EC - Bananas*, the Appellate Body explained the minimum standards it had meant to lay out for the sufficiency of a complaint. First, a panel's terms of reference, which set out the claims of the complainant party and thereby establish the panel's jurisdiction and the parameters of the case the respondent will have to address. Second, claims must be set out in a complaint: "a claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case."²³⁵ In contrast, every argument relating to a claim need not be specifically presented, as arguments tend to unfold in the first written submissions and rebuttal submissions. That is, it is sufficient for a complaint to list the agreements it alleges the respondent violated, without setting detailed arguments that link specific measures at issue to particular provisions in the agreements.²³⁶

The Appellate Body had no trouble applying these minimum standards to the *TRIPS* Article 63 and overruling the Panel.²³⁷ India

234. See *India - Patent Protection*, WTO Appellate Body Report, *supra* note 49, at 28, para. 86.

235. *Id.* at 29, para. 89.

236. See *id.* at 29-30, para. 91.

237. See *id.* at 31, para. 96, at 31, para. 97(c).

was correct in maintaining the Americans had fallen beneath the standards. Moreover, the United States had never identified a specific provision of an agreement that had been violated.²³⁸ The Appellate Body went still further. It rebuked the Panel for trying to modify the substantive provisions of the DSU.²³⁹ The DSU, specifically Article 7, explains that a panel's terms of reference establish its jurisdiction. No panel can exceed this jurisdiction by considering claims outside of its terms of reference. Reading between the lines, the Appellate Body was arguing in a consequentialist mode. If panels could arrogate to themselves whatever authority they saw fit, the legitimacy of the WTO adjudication would be compromised. Indeed, even if, as the United States said, India had not mentioned its "administrative instructions" defense during consultations, the need to keep a panel bound by its terms of reference was more important than allowing a complainant to adjust its claims.²⁴⁰ Besides, the Appellate Body seemed to say, before lodging a complaint, a Member ought to see a case from the other side and anticipate what the prospective respondent will say.

The second progeny of EC - *Bananas* on the specificity requirement, *Argentina - Footwear*, concerned Argentinian duties imposed on textile, apparel, and footwear.²⁴¹ The facts are straightforward and are a rather fun illustration of basic tariff mechanics. The United States claimed Argentina had imposed minimum specific duties in excess of its bound rate of 35 percent *ad valorem*. Argentina had indeed bound its 35 percent *ad valorem* rate in its Uruguay Round Schedule. But, it maintained a parallel regime of "Minimum Specific Import Duties" with regard to textiles, clothing, and footwear. Argentine customs authorities identified a representative international price for each tariff category of textile, apparel, and footwear products. For each category, they multiplied the representative price by the bound rate of 35 percent (or by the rate of less than 35 percent actually used for the category in question). The result was the minimum specific duty. The authorities compared this duty to another figure they calculated, namely, the result of multiplying the bound 35 percent *ad valorem* rate to the actual import price of the shipment in question. As

238. See *id.* at 29-30, para. 91.

239. See *id.* at 30, para. 92.

240. See *id.* at 30, para. 93.

241. See *Argentina - Footwear*, WTO Appellate Body Report, *supra* note 228, at 1-2, paras. 1-2.

between this result and the minimum specific duty, the authorities collected the higher of the two figures.

This practice resulted in a mathematical inevitability that got the Argentinians into trouble.²⁴² The *ad valorem* equivalent of a specific duty varies with the actual price of an imported product.²⁴³ In particular, for all imports at prices below the representative price, the *ad valorem* rate equivalent of the minimum specific duty exceeded the bound 35 percent rate. For all imports at prices above the representative price, the specific duty fell below 35 percent.

For example, suppose the Argentine authorities fix a representative price for a particular tariff class of shoes at \$100. Application of the bound rate of 35 percent yields a minimum specific duty of \$35 per pair of shoes. Suppose further that in one shipment of shoes, the actual import price is \$90, while in a second shipment it is \$110. For the first shipment, application of the 35 percent bound rate to the price of \$90 results in a tariff liability of \$31.50. Because this liability is smaller than the minimum specific duty of \$35, the Argentine customs authorities would collect the minimum specific duty. What is the *ad valorem* equivalent of this minimum specific duty? It is the ratio of the minimum specific duty to the price of the imported product. Accordingly, it is \$35 divided by \$90, or 38.89 percent. For the second shipment, application of the bound rate to the actual import price of \$110 means a tariff liability of \$38.50. This liability exceeds the minimum specific duty of \$35, so the Argentine authorities would collect \$38.50. What is the *ad valorem* equivalent of the minimum specific duty with respect to this shipment? Again, it is the ratio of the minimum specific duty to the price of the imported product.²⁴⁴ In other words, \$35 is divided by \$110, or 31.82 percent.

Clearly, for the first shipment, the *ad valorem* equivalent of 38.89 percent exceeds the bound rate of 35 percent. Indeed, the *ad valorem* equivalent of Argentina's minimum specific duty exceeded the bound rate whenever the actual import price was less than the

242. See *id.* at 17-18, paras. 49-53.

243. See *id.* at 17, para. 50.

244. The Appellate Body is technically imprecise when it says that the *ad valorem* equivalent of any specific duty is "the ratio of the absolute amount collected to the price of the imported product." *Id.* at 17, para. 50 (emphasis added). Instead of using the unclear verbal formulation "absolute amount collected," it would have been better to say "the specific duty," to indicate that the numerator of the formula is invariable. It is only the denominator, which contains the actual import price, that changes as this price changes from one shipment to the next.

representative price – it had to, because of the smaller term in the denominator. To put the point differently, as indicated, the Argentine tax authorities would collect the higher of two values – the minimum specific duty versus the 35 percent bound rate applied to the actual import price. In practice, therefore, they always collected the result of applying the bound rate to the actual import price whenever the actual import price was above the representative international price (the example of the \$110 per pair shipment). Conversely, they always collected the minimum specific import duty whenever the actual import price was below the representative price (the example of the \$90 per pair shipment). In the latter instance, it was mathematically inevitable that the *ad valorem* equivalent of the minimum specific duty would exceed the bound 35 percent duty, because that equivalent is calculated by dividing the minimum specific duty into the lower actual import price.

Here was the gravamen of the American complaint. Not surprisingly, the Panel sided with the United States. The Panel held that Argentina's minimum specific duty scheme violated GATT Article II, which concerns tariff bindings and non-discrimination as regards goods bound in a Schedule.²⁴⁵ Argentina appealed the Panel's Article II conclusions.²⁴⁶ While the Appellate Body rejected some of the Panel's rationales and developed its own, the Body upheld the Panel's conclusions.²⁴⁷

Argentina also tried, unsuccessfully, to argue that the Panel had breached DSU Article 11 by not making an objective assessment of the matter.²⁴⁸ On this point, the United States countered that Argentina's real concern was not whether the Panel had failed to discharge its duty under Article 11. Rather, the concern was whether

245. See *id.* at 2, para. 3. The panel also sided with the United States on a second claim. The United States took issue with Argentina's statistical tax of 3 percent *ad valorem*. See *id.* at 1-2, para. 2, at 22, para. 64. The tax related to the collection by its customs service of statistical information on imports and exports, supposedly covering the cost of providing a statistical service intended to provide a reliable data base for foreign trade operators. But, Argentina imposed it on imports from all sources other than MERCOSUR members (which are Argentina, Brazil, Paraguay, and Uruguay). Again, the panel found in favor of the United States, holding that the statistical tax was inconsistent with GATT Article VIII (which prohibits the taxation of imports for fiscal purposes). See *id.* at 2-3, para. 3, at 22, para. 64. Argentina did not appeal the merits of this holding, though it tried unsuccessfully to appeal the Panel's finding concerning the statistical tax and Argentina's obligations to the International Monetary Fund. See *id.* at 22-25, paras. 64-74, at 25, para. 75, at 28-29, paras. 82-86.

246. See *Argentina – Footwear*, WTO Appellate Body Report, *supra* note 228, at 3-5, paras. 5-13, at 6, paras. 15-16.

247. See *id.* at 13-25, paras. 39-74, at 30, para. 87(a)-(c).

248. See *id.* at 5-6, para. 14, at 6-7, para. 17, at 25-26, paras. 75-77.

the Panel had abused its discretion by accepting additional examples from the United States and thereby possibly denying Argentina fundamental fairness or due process.²⁴⁹ The Panel had accepted evidence submitted by the United States just two days before the second substantive meeting of the parties with the Panel, which was ten days after the expiry of the time limit for submitting rebuttals.²⁵⁰ The evidence was 90 invoices and customs documents concerning import transactions cleared manually by the Argentine customs service.²⁵¹ The evidence purported to illustrate specific cases in which Argentina had applied duties in excess of its 35 percent *ad valorem* tariff binding. The United States had blacked out some of the information in the documents, particularly that concerning product descriptions, provoking Argentina to argue it would be impossible to respond to the evidence not only because it was submitted late, but also because it was redacted.²⁵² Nonetheless, the Panel had given Argentina two weeks to reply.²⁵³

Predictably, the United States argued the Panel acted properly. The United States said it had submitted the additional examples to the Panel as part of a claim, the claim was within the Panel's terms of reference, and the examples were part of the natural process of progressively clarifying the positions of the parties.²⁵⁴ The United States denied Argentina was prejudiced by the evidence, and speculated its exclusion would not have altered the outcome of the case.

The Appellate Body bought the American argument. The Body held that the Panel had not abused its discretion, even though the Panel might have exercised its discretion differently.²⁵⁵ On what did the Appellate Body rely, in part, for its holding? Its own *EC - Bananas* precedent.

The heart of the issue the Argentinians were raising, suggested the Appellate Body, was due process. To be sure, the Appellate Body did not entertain a discussion of the specificity requirement. After all, Argentina's contention was not directly with the sufficiency

249. See *id.* at 9, para. 26.

250. See *id.* at 6-7, para. 17, at 27-28, paras. 75-77.

251. See *id.* at 25-26, paras. 75-77.

252. See *Argentina - Footwear*, WTO Appellate Body Report, *supra* note 228, at 26, para. 77, at 27-28, para. 80.

253. See *id.* at 26, para. 77.

254. See *id.* at 9, para. 26.

255. See *id.* at 28, para. 81.

of the American complaint, but rather with the sufficiency, in the sense of timeliness, of the supporting evidence. Nevertheless, the Appellate Body thought the same values were at stake, and rightly so.

The Appellate Body cited to its discussion of these values in *EC - Bananas*, as well as to its comparable discussion in *India - Patent Protection*.²⁵⁶ In these earlier cases, the Appellate Body had pointed out that panels would benefit from detailed, standard working procedures. Such procedures would ensure due process and fairness. In the current case, Argentina had asked for just that - a strict deadline for evidentiary submissions so that it could have a fighting chance to rebut the American complaint. While the Appellate Body shared the Argentinians' values, the Body did not feel they had been compromised. What we have, then, is a progeny of *EC - Bananas* in terms of the propagation of underlying values. The values, first articulated in one context, are now manifest in a closely related one.

In *EC - Computer Equipment*, the third progeny case, the Appellate Body applied its *Bananas* holding to determine whether two generic terms - "LAN equipment" and "PCs" - met the specificity requirement. The United States had used these terms in its complaint, but the EC charged they were too vague to identify the specific trade measure at issue.²⁵⁷ To the EC, the *Bananas* holding on specificity could not be divorced from the facts of the case. The reason the Appellate Body found the American complaint satisfied *DSU* Article 6:2 was that the United States had referred specifically to the EC regulation at issue, by place and date of publication.²⁵⁸ However, said the EC, the United States referred to one specific measure, which happened to be different from the measure on which all of the other actions the United States complained of were founded.²⁵⁹

The United States countered with its own version of the meaning of the *Bananas* holding. They argued that the holding stood for a simple "adequate" and "sufficient" test: if a complaint adequately identifies the measure at issue and provides sufficient notice to the

256. See *id.* at 27 n. 68, para. 79.

257. See *EC - Computer Equipment*, WTO Appellate Body Report, *supra* note 51, at 4, para. 64, at 24-25, paras. 60-64.

258. See *id.* at 4, para. 6.

259. See *id.* at 4, para. 6.

respondent of the measure, then the complaint meets the requirements of the *DSU*, specifically, Article 6:2.

The United States asserts that the Panel correctly followed the guidance of the Appellate Body decision in *European Communities - Bananas* in determining that the United States sufficiently identified the measures and products at issue. According to the United States, the meaning of the term "specific measures," as used in Article 6:2 of the *DSU*, was addressed in *European Communities - Bananas* where the panel found that the panel request complied with the requirements of Article 6.2 of the *DSU* because the measures contested by the complainants were "adequately identified," even though they were not listed explicitly. In the view of the United States, the panel and Appellate Body decisions in *European Communities - Bananas* "teach that the specificity requirement of Article 6.2 will be met if the responding party is provided sufficient notice and identification of the measure(s) at issue, even if those measures are not specifically identified.

...

[I]n the view of the United States, the European Communities has never had any basis to claim that it lacked sufficient information about the measures the United States sought to have modified at the time of the establishment of the panel. In applying the "adequate" or "sufficient" notice test of *European Communities - Bananas*, the United States submits that the European Communities had clear notice from the explicit terms used in the panel requests of the United States that the complaint concerned the application of higher tariffs for LAN equipment by customs authorities of Member States. . . .

...

The United States disagrees with the European Communities regarding the need for parties to exhaustively detail [*sic*] every conceivable sub-grouping of more broader categories of products which are detailed in a request for the establishment of a panel. In the view of the United States, the

appropriate standard to be applied to product coverage should be similar to that applied by the panel in *European Communities - Bananas* to the specificity of measures: whether the products are "sufficiently identified." According to the United States, applying the logic followed in *European Communities - Bananas*, such a test would be met if the complaining party identifies the general product grouping of the products concerned in terms of the ordinary meaning in a commercial context.²⁶⁰

The above-quoted passage bespeaks more than a difference of views between the United States and EC on how to read the *Bananas* case. What is so impressive is the confidence the United States placed in its reading. The United States mentions *EC - Bananas* with such frequency and force that it seems quite reasonable to infer that the United States regarded the prior holding as binding in all but name. "We have a rule on this," the United States is saying, "so follow it."

The Appellate Body agreed with the United States and upheld the Panel's finding that these descriptions properly identified the measure in controversy. In so doing, it quoted from its *Bananas* holding, reminding the EC that specificity is important for purposes of establishing the terms of reference of a panel and informing the respondent of the legal basis of the complaint.²⁶¹ "LAN equipment" and "PCs" are commercial terms readily understandable in the trade, in fact the United States and EC used the terms in the dispute settlement consultations that preceded the establishment of the *Computer Equipment* Panel. Thus, the EC hardly could claim its ability to defend itself was injured by a lack of knowledge of the measures at issue, that it somehow was denied due process.²⁶²

The Appellate Body seized the opportunity of the *EC - Computer Equipment* case to buttress the rationale in favor of the "adequate" and "sufficient" test of *EC - Bananas*. Grave consequences could result if the EC's argument on specificity of product definition were accepted.²⁶³ There would be long, drawn-out procedural battles at the early stage of nearly every case. That is, parties would fight over every product definition. In particular, a respondent would try to

260. *Id.* at 13-14, paras. 28-30.

261. *See id.* at 26, para. 69.

262. *See id.* at 26, para. 70.

263. *See id.* at 26-26, para. 71.

exclude each product a complainant may have identified by broader grouping, but perhaps not spelled out in sufficient detail. This result must be avoided, and affirming the American reading of *EC - Bananas* was the way to do so.²⁶⁴

IV. EMERGING SUBSTANTIVE COMMON LAW IN WTO ADJUDICATION

The argument of Part III, summarized in Chart 1 above, is that there is an emerging body of international common law on procedural issues in multilateral trade dispute resolution. There are, however, still more banyan trees growing in Geneva. There is an emerging body of common law on key substantive issues, and that is the argument laid out below. This body of law is summarized in Chart 2 below, and discussed thereafter. The leading cases, and substantive issues they cover, are (1) *United States - Reformulated Gas*, concerning the analytical application of GATT Article XX, (2) *Japan - Alcoholic Beverages*, regarding like product determinations, and (3) *EC - Bananas*, dealing with the interpretation of GATT Article XIII.

264. Indirectly, the Appellate Body also reaffirmed another aspect of its *EC - Bananas* specificity holding, albeit in *dicta*. The Appellate Body noted the present case was not one in which the United States had made an attempt to "cure" a faulty complaint, adding a product item in the course of panel proceedings. Thus, the *EC - Bananas* rule – namely that a claim not specified in the request for establishment of a panel cannot be cured by the complainant's subsequent argumentation (*e.g.*, the first written submission) – was not relevant. See *EC - Computer Equipment*, WTO Appellate Body Report, *supra* note 51, at 27, para. 71 n. 49.

**CHART 2:
EXAMPLES OF DE FACTO LINES OF PRECEDENT
ON SUBSTANTIVE ISSUES IN WTO ADJUDICATION, 1995-98
(issuance dates in parentheses)**

LEADING CASE	SUBSTANTIVE ISSUE	DE FACTO PRECEDENT CREATED BY LEADING CASE	LATER APPELLATE BODY REPORTS RELYING ON THE LEADING CASE (THE LINE OF DE FACTO PRECEDENT)	LATER APPELLATE BODY REPORTS DEPARTING FROM THE LEADING CASE (DEPARTURES FROM THE DE FACTO PRECEDENT)
<i>United States - Reformulated Gas</i> (April 1996)	Interpretation of GATT Article XX (General Exceptions)	In analyzing GATT Article XX:(b) and (g), first consider whether the measure complained of falls within one of the exceptions. If the measure qualifies for an exception, then consider whether it meets the criteria articulated in the <i>chapeau</i> to Article XX.	<i>United States - Shrimp</i> (October 1998).	No departures.

<i>Japan - Alcoholic Beverages (October 1996)</i>	"Like" product determinations, and determinations of "directly competitive or substitutable products," under GATT Article III:2.	Use a case-by-case analysis, examining a multiplicity of factors, to determine whether products are "like," and to determine whether they are "directly competitive or substitutes."	<i>Canada - Periodicals (June 1997), Korea - Alcoholic Beverages (January 1999).</i>	No departures. Corollary in <i>Korea - Alcoholic Beverages</i> that potential competition and data from third countries may be considered.
<i>EC - Bananas (September 1997)</i>	Interpretation of GATT Article XIII (tariff-rate quotas).	Shares in a tariff-rate quota must be allocated in a non-discriminatory fashion.	<i>EC - Poultry Products (July 1998).</i>	No departures. Corollary in <i>EC - Poultry Products</i> that calculation of shares in a tariff-rate quota must be based on total imports of the product in question, whether those imports originate from WTO Members or from non-Members.

I do not pretend that the discussion below is comprehensive, in other words, that by the end of Part IV we shall have gazed at every banyan tree. There are assuredly other *de facto* lines of precedent on substantive issues we could trace, just as there are further lines on procedural issues. But, the number of lines of precedent traced in

both spheres makes clear that a *de facto* doctrine of *stare decisis* is operating in the WTO.

I am compelled once again to add a caveat about the *EC - Bananas* case. There are clear progeny cases spawned by *United States - Reformulated Gas* and *Japan - Alcoholic Beverages* on the GATT Article XX and like product issues, respectively. Thus, when we think about these cases and their influence, the operation of a *de facto* doctrine of *stare decisis* is quite apparent. However, we do not yet have (as of this writing, anyway), significant progeny of *EC - Bananas* on the Article XIII issue. Nonetheless, as I did in Part III:B.1 above with respect to the *Bananas* case on the issue of standing to bring a complaint, I submit here that we have a *de facto* precedent in the making. I include it in the analysis for the same reason as before: my sense is that it is a powerful ruling which is sure to attract a following.

A. *The United States - Reformulated Gas Case and its Progeny*(Interpretation of GATT Article XX (General Exceptions))

1. *The Reformulated Gas Holding*

A line of *de facto* precedent in WTO adjudication of great interest to environmentalists, among others, is created by *United States - Reformulated Gas*,²⁶⁵ the very first Appellate Body report. The United States appealed its defeat at the panel stage. The Panel had held that gasoline regulations of the Environmental Protection Agency (EPA), implemented pursuant to the Clean Air Act (CAA),²⁶⁶ originally enacted in 1963, violated the national treatment principle of GATT Article III:4.²⁶⁷ The EPA promulgated the regulations at issue pursuant to a 1990 amendment to the CAA in which Congress directed the EPA to develop new rules on the composition and emissions effects of gasoline in order to improve the air quality of the

265. *United States - Reformulated Gas*, WTO Appellate Body Report, *supra* note 28, at 4-6, pt. I.B. For a detailed rendition of the facts, see *United States - Reformulated Gas*, WTO Panel Report, *supra* note 20, at 2-4, pt. 2; *Letter Update*, *supra* note 79, at 19-22. The discussion below is drawn from these portions of the Appellate Body and panel reports. I am abstracting from distinctions between the so-called "Simple Model" (an interim method of certification for the period 1 January 1995 to 1 January 1998), and the "Complex Model" (which was to take effect as of 1 January 1998). The Complex Model was not at issue in the case.

266. 42 U.S.C. § 7401-7671 (1997).

267. See *United States - Reformulated Gas*, WTO Appellate Body Report, *supra* note 28, at 6-8, pt. I.C.

most polluted areas of the United States.²⁶⁸ The new rules are aimed at reducing vehicle emissions of toxic air pollutants and ozone-forming volatile organic compounds.²⁶⁹

At the risk of slight oversimplification, the thrust of the CAA amendment and EPA's implementing regulations was that gasoline available for sale in the United States ought not to be any dirtier, and preferably cleaner, than gasoline sold in the United States in 1990.²⁷⁰ Put differently, the strategy was one of "non-degradation" from 1990. An additional normative premise of the statute was that special attention ought to be given to the nation's most polluted cities.²⁷¹

To accomplish these purposes, the new environmental regime bifurcated the American market for gasoline. The first part, which covered about 30 percent of the gasoline sold in the United States, consisted of the nine metropolitan areas with the worst summertime ozone pollution during 1987-89 (along with any other area that did not meet national ozone requirements added at the request of the governor of the relevant states).²⁷² In these so-called "non-attainment areas," only "reformulated" gasoline could be sold to consumers.²⁷³ The CAA amendment established specific compositional requirements for reformulated gasoline.²⁷⁴ For example, oxygen content could not be less than 2 percent by weight²⁷⁵, benzene content could not be less than 1 percent by volume²⁷⁶, and gasoline had to be free from heavy metals like lead and manganese.²⁷⁷ Similarly, sulphur, olefins, and T-90 qualities of gasoline had to be kept at or below their 1990 levels.²⁷⁸ It also fixed performance specifications for reformulated gasoline. For instance, a 15 percent reduction in emissions of volatile organic compounds and

268. 42 U.S.C. § 7545(k)(1) (1990); *see also* United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 4, pt. I.B (summarizing the amendment and regulations).

269. *See id.*

270. *See* 40 C.F.R. § 80.91 (1994).

271. *See* 42 U.S.C. § 7407 (1997).

272. *See* 40 C.F.R. § 80.70 (1994) (defining the covered areas); 42 U.S.C. § 7545(k) (defining the methods for states to "opt in" to the covered areas).

273. *See* 40 C.F.R. § 80.78 (1994); 42 U.S.C. § 7545(k)(5).

274. *See* 42 U.S.C. § 7545(k)(2).

275. *See id.* (k)(2)(B).

276. *See id.* (k)(2)(C).

277. *See id.* (k)(2)(D).

278. *See id.* (k)(10).

toxic air pollutants was required, and emissions of nitrogen oxides could not increase.²⁷⁹

The second part of the United States gasoline market was the rest of the country, *i.e.*, all areas other than non-attainment areas.²⁸⁰ "Conventional" gasoline could be sold only in this second part.²⁸¹ The statute, as amended, set forth non-degradation requirements not only for sulphur, olefins, and T-90, but also for all other gasoline qualities.²⁸²

Implementing the CAA mandate that reformulated and conventional gas be at least as clean as it was in 1990 was tricky. How could the EPA ascertain whether gasoline made available for sale today was dirtier than gas sold in 1990? That is, how would an individual refiner, blender, or importer tell whether it was complying with these compositional and performance specifications? The obvious answer, contained in the EPA's regulations, was to establish 1990 as a baseline year in terms of gasoline quality.²⁸³ Any company's gasoline of poorer quality than this baseline would be barred from sale. In addition, this mandate prevented a refiner, blender, or importer from "dumping" into conventional gasoline components that were restricted in reformulated gasoline and that caused environmentally harmful emissions.²⁸⁴

Accordingly, the EPA's regulations called upon each refiner, blender, and importer to establish an "individual refinery baseline."²⁸⁵ That baseline was to represent the quality of gasoline produced and sold by that company in 1990.²⁸⁶ In a general sense, therefore, the baseline was to be computed using data on the gasoline the company sold in 1990. By comparing actual emissions with the baseline, the EPA could ascertain compliance with the mandate.²⁸⁷ With respect to some refiners, blenders, or importers, however, there might be no adequate and reliable data regarding the composition of their 1990 gasoline. In such instances, the EPA would apply a statutory baseline, *i.e.*, one that the EPA itself had computed,

279. *See id.* (k)(3)(B).

280. *See* 42 U.S.C. § 7545(m)(6).

281. *See id.*

282. *See* 42 U.S.C. § 7545(k)(10).

283. *See* 40 C.F.R. § 80.91.

284. *See* 42 U.S.C. § 7545(k)(8)(A).

285. *See* 40 C.F.R. § 80.91(a).

286. *See id.*

287. *See id.*

which reflected average gasoline quality sold in the United States in 1990.²⁸⁸

How would an individual company calculate its baseline? The answer depended on the individual company. For two classes of refiners, the EPA offered a choice of three methodologies.²⁸⁹ First, American refiners could use these methodologies.²⁹⁰ Second, refiners that satisfied a so-called "75 percent rule" could use them.²⁹¹ This class consisted of importers of gasoline that also were foreign refined that had imported into the United States at least 75 percent (by volume) of the gasoline produced at its overseas refinery in 1990.²⁹² In effect, they were importers who sold the lion's share of their output to the United States.

What were the methodologies these two "chosen" companies could use? Under Method 1, a domestic refinery used its quality data and volume records concerning its 1990 gasoline.²⁹³ However, a domestic refinery might not have all the necessary data, in which case it would employ Method 2. Under this Method, a domestic refiner used alternative data (specifically, 1990 gasoline blendstock quality data, and 1990 blendstock production records).²⁹⁴ If even Method 2 data were unavailable, then a domestic refiner would have no choice but to turn to Method 3.²⁹⁵ That Method established a fallback alternative set of data (namely, post-1990 gasoline blendstock, or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition).²⁹⁶ In no event could a domestic refiner choose the statutory baseline.

Thus, American refiners and importers meeting the 75-percent rule were lucky in that they could avail themselves of the flexibility of this methodological scheme. Other companies were not so lucky. The EPA assigned to all other importers, and to all blenders, the statutory baseline unless they could establish their individual baseline using Method 1.²⁹⁷ Likewise, the EPA would assign the

288. *See id.* (c)(5).

289. *See id.* (c)(4).

290. *See id.* (b)(1)(i).

291. *See id.* (b)(4)(ii).

292. *See id.*

293. *See id.* (c)(1).

294. *See id.* (c)(2).

295. *See id.* (c)(3).

296. *See id.*

297. *See* 40 C.F.R. § 80.91(b)(4)(iii).

statutory baseline to an importer or blender lacking 1990 data.²⁹⁸ All refineries, domestic or foreign, that began operation after 1990, or which had operated in 1990 for less than six months, were required to use the statutory baseline.²⁹⁹

Plainly, the EPA regulation barred most importers from using Methods 2 or 3.³⁰⁰ More generally, the EPA proposed to gauge compliance by domestic refiners using their individual baselines, whereas it would measure compliance by importers against the statutory baseline.³⁰¹ Thus, for example, with respect to composition requirements for reformulated gasoline, the general mandate was that the gasoline sold could contain no more than the 1990 levels of pollutants such as sulphur, olefins, and T-90, and it had to satisfy the 1990 level parameters such as oxygen and benzene content.³⁰² Domestic refiners used their individual baselines for sulphur, olefins, and T-90.³⁰³ The EPA regulation did not permit importers of foreign gasoline to use individual baselines for these pollutants.³⁰⁴ Rather, they had to comply with a threshold set forth in the CAA, that is, a statutory baseline.

Venezuela and Brazil challenged the CAA amendment and EPA's implementing regulations, *inter alia*, on the ground that the rules for establishing baselines were inconsistent with the GATT national treatment principle contained in GATT Article III:4, and could not be justified under any of the general exceptions of Article XX.³⁰⁵ The United States defended the regulations under Article XX:(b), (d), and (g), which say:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the

298. *See id.*

299. *See id.* (b)(1)(ii).

300. *See id.* (b)(4).

301. *See id.*

302. *See id.* (c)(5).

303. *See id.* (b)(1).

304. *See id.* (b)(4).

305. *See* United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 6-10, pts. I.C and II.A-B.

adoption or enforcement by any contracting party of measures:

...

(b) *necessary* to protect human, animal or plant life or health;

...

(d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those *relating* to customs enforcement, the enforcement of monopolies . . . , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

...

(g) *relating to the conservation of exhaustible natural resources* if such measures are made effective in conjunction with restrictions on domestic production or consumption³⁰⁶

The Panel found in favor of the complainants. Imported and domestic gasoline were like products. But, because importers were subject to the statutory baseline, whereas domestic refiners could rely on individual baselines, imported gasoline was prevented from benefiting from as favorable sales conditions as were afforded to domestic gasoline.³⁰⁷ In other words, imported gas was treated less favorably than domestic gas, in violation of GATT Article III:4.³⁰⁸ The discrimination through differential baseline establishment methods for importers versus domestic refiners could not be justified as "necessary to protect human, animal or plant life or health" within the meaning of Article XX:(b). It could not be justified under Article XX:(g) as "necessary to secure compliance" with GATT-consistent laws.³⁰⁹ Finally, while clean air was an "exhaustible natural resource" within the meaning of Article XX:(g), the baseline establishment rules were not "relating to" its conservation.³¹⁰

306. GATT, *supra* note 106, art. XX(b), (d), (g) (emphasis added).

307. See United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 7, pt. I.C.

308. See *id.*

309. *Id.*

310. *Id.* at 7-8, pt. I.C.

Of critical importance for our purposes was the Panel's reasoning process: because the United States could not fit its case within subparagraphs (b), (d), or (g), there was no need for the Panel to see whether the American case satisfied the requirements of the *chapeau* to Article XX.³¹¹ By example, the Panel had devised an analytical methodology for Article XX cases: first see if the disputed measure meets the criteria of one of the specific exceptions set forth in a subparagraph and, if so, then see whether the measure passes muster under the *chapeau* to Article XX.

Not surprisingly, the United States was dissatisfied with the result, though it exercised restraint - or, better yet, understood the strength of its position - by choosing not to appeal the Panel's findings on Article III:4, Article XX:(b), and Article XX:(d), or the Panel's conclusion that clean air was an "exhaustible natural resource."³¹² Rather, the United States focused its appeal on the Panel's Article XX:(g) conclusion, and the Panel's overall interpretation of Article XX.³¹³ The Appellate Body upheld the Panel's "bottom line," but not its rationale.

The Appellate Body found the Panel drew the wrong conclusion under GATT Article XX:(g),³¹⁴ and then mistakenly thought the requirements of the *chapeau* to Article XX were irrelevant to the case.³¹⁵ The United States was correct - its rules for establishing baselines did satisfy the requirements of Article XX:(g). The problem was that they could not pass muster under the *chapeau* to Article XX. The correct way to judge the matter, according to the Appellate Body, was to apply a two-step procedure.³¹⁶ First, ask whether the

311. See *id.* at 8, pt. I.C.

312. United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 9, pt. II.A.

313. See *id.*

314. See *id.* at 26, pt. V (conclusion (a)).

315. See *id.* (conclusion (b)).

316. The clearest statement of the two-step methodology comes at the start of part IV of the Appellate Body's report:

Having concluded, in the preceding section, that the baseline establishment rules . . . fall within the terms of Article XX(g), we come to the question of whether those rules also meet the requirements of the *chapeau* of Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*

disputed measure fits within one of the exceptions specifically listed in the sub-paragraphs to Article XX. If the answer to this inquiry is negative, then the case may be concluded immediately, because the measure cannot be justified under any of the exceptions. If the answer is affirmative, then the measure is provisionally justified, but a second-level inquiry is needed: does the measure meet the requirements of the *chapeau* to Article XX. That is, does it constitute "arbitrary or unjustifiable discrimination," or is it a "disguised restriction on trade"?³¹⁷ If the measure is discriminatory or restrictive, then it is inconsistent with Article XX. If not, then it is justified.

What the Appellate Body was doing - consciously or not - was remarkable. It was teaching the world trading community that in any Article XX case, there exists a matrix of possibilities and a precise way to go about selecting the right possibility for the case at bar:

STEP 1:

Does the disputed measure fit within one of the sub-paragraphs of Article XX?

Yes
(Provisional justification)

No
(No provisional justification)

STEP 2:

Does the disputed measure meet the requirements of the *chapeau* of Article XX?

Yes Measure is justified.
No need for Step 2.

Measure is not justified.

No Measure is not justified.
No need for Step 2.

Measure is not justified.

The Appellate Body was unhappy with the Panel's inability to appreciate this matrix, which after all betrayed the Panel's lack of understanding of how the sub-paragraphs and *chapeau* of Article XX

Id. at 20, pt. IV (emphasis added).

317. *Id.* at 21-23, pt. IV.

work in tandem.³¹⁸ In other words, the Appellate Body report is a testament to the Panel's cascade of errors.

The Panel erroneously answered the first question in the negative, finding the American rules for establishing baselines were only incidentally or inadvertently aimed at the conservation of clean air in the United States.³¹⁹ The Panel seemed to interpret the term "relating to" in sub-paragraph (g) as meaning "primarily aimed at,"³²⁰ an interpretation the Appellate Body left intact after considerable discussion.³²¹ But, said the Appellate Body, the American rules for establishing baselines were "primarily aimed at" the conservation of exhaustible natural resources.³²² Why? Because they were designed to implement the non-degradation strategy of the CAA, as amended, and its implementing regulations. "Without baselines of some kind," the aim of stabilizing and preventing further deterioration from the level of air pollution prevailing in 1990 would be "substantially frustrated."³²³

Because the Panel goofed on the first question, it failed to pursue the second inquiry. The Appellate Body concluded, again after a careful review, that the baseline establishment rules were unjustifiably discriminatory and a disguised trade restriction.³²⁴ Therefore, they were inconsistent with the *chapeau* of Article XX.³²⁵ After all, the United States could have imposed statutory baselines without differentiation as between domestic and imported gasoline, or it could have made individual baselines an option for foreign as well as domestic refiners.³²⁶ As to the latter possibility, the Appellate

318. The Appellate Body's discussion also highlighted the panel's failure to see how Articles III:4 and XX work in tandem. See United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 14-15, pt. III.B.

319. See *id.* at 14, 17, pt. III.B.

320. *Id.* at 13-14, pt. III.B; See also Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION 75 (James Cameron & Karen Campbell eds., 1998) (discussing the panel report).

321. See United States - Reformulated Gas, WTO Appellate Body Report, *supra* note 28, at 17, pt. III.B.

322. See *id.*

323. *Id.* The Appellate Body continued on to explain why the other requirement of GATT Article XX:(g), namely that the disputed measure be made effective in conjunction with restrictions on domestic production or consumption, was satisfied. See *id.* at 18-20.

324. See *id.* at 26-27, pt. V; see also Petersmann, *supra* note 320, at 91 (discussing the Appellate Body report).

325. See *id.* at 26, pt. V (conclusion (c)).

326. See *id.* at 23, pt. IV.

Body did not find persuasive the American argument that there were too many verification and enforcement difficulties to give foreign refiners this option.³²⁷ Still another alternative, which the United States had failed to pursue, was a cooperative arrangement with Venezuela and Brazil.³²⁸ Any one of these ways of implementing the CAA's mandate would have been non-discriminatory and unrestrictive.

What are we to make of *United States - Reformulated Gas*? I submit it is nothing short of a *de facto* precedent on the substantive interpretation and application of Article XX in any case in which this provision is implicated. Indeed, in retrospect it ought to have been obvious by April 1996, when the Appellate Body issued its report, that its holding would find widespread application. After all, the controversial 1991 and 1994 unadopted GATT Panel reports in *United States - Restrictions on Imports of Tuna*,³²⁹ were just two of many harbingers of disputes surrounding environmental measures and their effects on trade. What might have been harder to predict is just how fast *Reformulated Gas* would be applied. Within two years, in *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body found itself presented with another problematic American environmental measure. It was time to call its *de facto* precedent into service.

2. Subsequent Use of the Reformulated Gas Holding

In *United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States-Shrimp)*,³³⁰ a WTO Panel was again confronted with the problem of interpreting and applying GATT Article XX. Pursuant to the Endangered Species Act of 1973³³¹, the United States promulgated a regulation in 1987, and amended it in 1990, which required all American shrimp trawling vessels to use approved Turtle Excluder Devices (TEDs) in areas where it was likely that the

327. See *id.* at 23-24, pt. IV.

328. See *id.* at 24-25, pt. IV.

329. United States - Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) 155 (1991-92) (not adopted); United States - Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) (not adopted).

330. WTO Appellate Body Report on United States - Import Prohibition of Certain Shrimp and Shrimp Products, Nov. 6, 1998, WTO Doc. WT/DS58/AB/R [hereinafter United States - Shrimp, WTO Appellate Body Report]. For a detailed rendition of the facts, see *id.* at 2-5, paras. 2-6, and *Letter Update*, *supra* note 79, at 46-50. The brief account of the facts in the text is drawn from these sources.

331. 16 U.S.C. §§ 1531-1544 (1997).

vessels would interact with the endangered sea turtles.³³² Congress passed a statute that essentially forced the same obligation on foreign shrimp trawlers.³³³

This move led to the donnybrook. Under the new statute, shrimp harvested in a manner that may adversely affect sea turtles was banned from importation.³³⁴ To simplify the facts a bit, only if the United States certified that a particular country's shrimp trawlers used TEDs could shrimp from that country be imported.³³⁵ Predictably, many developing countries saw the move as an unwarranted extraterritorial application of American environmental standards, one that would raise their costs and thus reduce or eliminate their comparative advantage vis-a-vis the American shrimp industry. Several Asian nations, including India, Malaysia, Pakistan, and Thailand, challenged the ban.

The United States invoked the exceptions in sub-paragraph (b) of Article XX for measures "necessary to protect human, animal or plant life or health," and the exception in sub-paragraph (g) for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."³³⁶ How, if at all, would the *United States-Shrimp* Panel handle the *United States - Reformulated Gas* case?

On the one hand, the Panel could read it narrowly, and thereby ignore it on the ground that it dealt with a different sub-paragraph of Article XX (i.e., (g) instead of (b)). The Panel could, furthermore, grasp the fig leaf that the *Reformulated Gas* report had no *stare decisis* effect. On the other hand, the previous Appellate Body report dealt with a similar problem, the same GATT Article (namely, XX), and one of the same sub-paragraphs of that Article (namely, (g)). All of this suggested that following the decision rule might be a good idea. The *United States- Shrimp* Panel seized the middle ground: it reached the same result, but by a different analytical process.

The Panel held that the American import ban could not be justified under Article XX.³³⁷ The Panel kept one eye trained on the

332. See 50 C.F.R. § 223.206(d)(2).

333. See Conservation of Sea Turtles: Importation of Shrimp, Pub. L. No. 101-162, tit. IV, § 609, 103 Stat. 1037 (1989).

334. See *id.* (b)(1).

335. See *id.* (b)(2).

336. GATT, *supra* note 106, art. XX:(b), (g) (emphasis added).

337. See *United States - Shrimp*, Appellate Body Report, *supra* note 330, at 5, para. 7.

Appellate Body's report in *Reformulated Gas*, or at least thought it was doing so. Based in part on that report, the Panel reasoned that analysis of an Article XX defense should proceed in one and possibly two steps.³³⁸

[T]he Panel disregarded the sequence of steps essential for carrying out such an analysis [*i.e.*, one under Article XX]. The panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau." If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)."³³⁹

In brief, the *United States-Shrimp* Panel had deliberately inverted the steps set out in *Reformulated Gas*. First, it must be asked whether the controversial measure satisfies the terms of the *chapeau* of Article XX. Specifically, the measure had better not be an "arbitrary or unjustifiable discrimination," or a "disguised restriction on trade."³⁴⁰ If the measure did not pass muster under the *chapeau*, then it must be held to be inconsistent with GATT and there was no need to proceed to the second step. If, however, it satisfied the *chapeau*, then the adjudicator must consider whether the measure fit within one of the exceptions listed in the sub-paragraphs to Article XX. Only if it did could the measure be justified under this Article.

How could the Panel possibly justify its brazen disregard for the Appellate Body's analytical methodology? It wrote:

As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the

338. See *id.* at 42-43, paras. 116-117.

339. *Id.* at 43, paras. 117.

340. *Id.* at 39-41, para.112.

conditions contained in the chapeau. However, *as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX.*³⁴¹

Quite justifiably, the United States appealed the Panel's Article XX:(g) finding.³⁴² And, not surprisingly, the *United States-Shrimp* Appellate Body fumed at the Panel's reasoning, though it agreed with the end result.

Quoting generously from its report in *United States - Reformulated Gas*, the Appellate Body highlighted the critical language that the Panel had disregarded: "*The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*"³⁴³ But, the Appellate Body did not stop here. It castigated - in thinly veiled terms - the Panel for deliberately inverting the two-step test.

The sequence of steps . . . in the analysis of a claim of justification under Article XX reflects, *not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.* The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate." We do not agree.³⁴⁴

Thus, the Appellate Body dubbed the Panel's work an "error in legal interpretation" and, accordingly, reversed its findings.³⁴⁵ Applying

341. *Id.* at 43, para. 117 (quoting paragraph 7.28 of the panel report (emphasis added by the Appellate Body)).

342. *See id.* at 6-12, paras. 10-28. The United States invoked Article XX:(b) only if and to the extent that its defense that its measure in question fell outside the scope of Article XX:(g). *See id.* at 55, para. 146. As explained below, the Appellate Body agreed the measure fell within sub-paragraph (g), hence sub-paragraph (b) was not at issue on appeal.

343. *Id.* at 44, para. 118 (quoting its report in *United States - Reformulated Gas* (emphasis added by the Appellate Body).) The full paragraph in which this sentence appears is quoted *supra* note 316.

344. *Id.* at 44, para. 119 (emphasis added).

345. *See id.* at 45, para. 122.

United States - Reformulated Gas, the Appellate Body completed the legal analysis itself.³⁴⁶ First, it concluded that the American statute in dispute fell within the protective ambit of Article XX:(g) because (1) sea turtles are "exhaustible natural resources,"³⁴⁷ (2) the statute was a measure "relating" to the conservation of these resources,³⁴⁸ and (3) the statute was made effective in conjunction with restrictions on the domestic harvesting of shrimp.³⁴⁹ However, the Appellate Body found the United States failed the second step of the two-step test: the statute could not pass muster under the *chapeau* of Article XX, because it was both arbitrarily and unjustifiably discriminatory vis-a-vis the trade of other WTO Members.³⁵⁰

What are we to make of the way in which the Appellate Body dealt with its *Reformulated Gas* holding in the *United States-Shrimp* case? I submit that the Appellate Body was announcing to the international trade community that the Panel had intentionally taken liberties with the *de facto Reformulated Gas* precedent without providing any good reason for modifying this precedent by inverting the steps. The obvious question is why should the Appellate Body care about the inversion if, indeed, there is no *stare decisis* in WTO adjudication? Both the Panel and Appellate Body agreed on the "bottom line" that the American shrimp import ban was unjustified, so why bother with how the Panel reached this result?

We need neither speculate nor mine through discursive prose. From a few critical paragraphs in the Appellate Body report, it is quite apparent that two factors stirred it to act. First, the Appellate Body said it is impossible to ascertain whether a disputed measure constitutes "arbitrary or unjustifiable discrimination" under the *chapeau* to Article XX without knowing the specific exemption at play.

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific

346. See *United States - Shrimp*, WTO Appellate Body Report, *supra* note 330, at 45-46, para. 123.

347. See *id.* at 46-51, paras. 125-34.

348. See *id.* at 51-54, paras. 135-42.

349. See *id.* at 54-55, paras. 143-45.

350. See *id.* at 55-76, paras. 146-86.

exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the application of a measure "in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail" or "a *disguised restriction* on international trade." When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. *What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination," or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures.* The standard of "arbitrary discrimination," for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labor.³⁵¹

In brief, the key terms of the *chapeau* escape definition in the abstract. The sub-paragraphs provide the context an adjudicator needs for their application, hence the logic of analyzing a disputed measure under the relevant sub-paragraph before proceeding back to the *chapeau*.

Second, the Panel's erroneous inversion of the *Reformulated Gas* test threatened to emasculate the sub-paragraphs of Article XX.

The consequences of the interpretative approach adopted by the Panel are apparent in its findings. . . . The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because [it] . . . conditions access to the domestic shrimp market . . . on the adoption by exporting countries of certain conservation policies prescribed by the United States.

351. *Id.* at 44, para. 120 (first and last emphasis added).

It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy . . . unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. *It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.*³⁵²

In essence, in applying the *chapeau* standards first, the Panel condemned the American measure because of its extraterritorial effect on exporters. But, every measure that implicated Article XX had this effect and would be rejected under the *chapeau*. The whole point of Article XX is to try to delineate the reasonable from the ridiculous in the universe of extraterritorial measures, not to bar them *in toto*.

While these two explicit reasons are quite sufficient to answer the question "why should the Appellate Body care?," I think we can uncover yet two more considerations. First, there is a consequentialist point, namely, the matter of consistency in future Article XX jurisprudence. The Appellate Body appears to fear, and rightly so, that future panels would use the same wrongly-inverted version of the *Reformulated Gas* two-step test. In so doing, they might reach different substantive conclusions with regards to similar fact patterns. Worse yet, if left undisturbed, then the inverted version might spawn a succession of decisions on Article XX issues with which the Appellate Body would be forced to contend. Better to nip the problem in the bud, and maintain the integrity of the

352. *Id.* at 44-45, para. 121 (final emphasis added).

Reformulated Gas test now. This consideration translates effortlessly into *stare decisis* lingo. The Appellate Body wanted *Reformulated Gas* to have a *stare decisis* effect, and feared the *United States-Shrimp* Panel holding would vitiate this effect and create a discordant new *de facto* precedent.

Second, there is the matter of power as between panels and the Appellate Body. The *United States-Shrimp* Panel report was a *volte-face* in comparison with the Appellate Body holding in *Reformulated Gas*. We could hardly expect the Appellate Body in *United States-Shrimp* to take an insouciant attitude toward its *Reformulated Gas* holding. No panel could be left free to invent tests out of whole cloth:

The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States [*i.e.*, Article XX:(b) and (g)].³⁵³

Thus, we should hardly be surprised by the "tough talk" from the Appellate Body in the above quotations. Like an Anglo-American common law appellate court, the Appellate Body needed to show who is in charge.

B. *The Japan - Alcoholic Beverages Case and Its Progeny (Like Product Determinations)*

1. *The Japan - Alcoholic Beverages Holding*

The Appellate Body's October 1996 report in *Japan - Taxes on Alcoholic Beverages*³⁵⁴ is a *de facto* precedent in spite of itself. The case involved the consistency of Japan's liquor taxes with the national treatment principle of GATT Article III:2. The Appellate Body found the Japanese tax scheme was, indeed, discriminatory. In so doing, it refused any *stare decisis* effect to pre-Uruguay Round GATT Panel reports adopted by the Contracting Parties. The denial is worth repeating.

353. *United States - Shrimp*, WTO Appellate Body Report, *supra* note 330, at 44, para. 121.

354. See *Japan - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 29.

Although GATT 1947 panel reports were adopted by decisions of the Contracting Parties, a decision to adopt a panel report did not under GATT 1947 constitute agreement by the Contracting Parties on the legal reasoning in that panel report. The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report. We do not believe that the Contracting Parties, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. . . .

.....

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. *They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.*³⁵⁵

In Part One of the trilogy, I argued that this statement, which is part of the mythology about *stare decisis* and international trade law, was thoroughly unreliable and logically problematic as evidence that the doctrine of *stare decisis* does not operate in GATT-WTO jurisprudence.³⁵⁶ Here, in Part Two of the trilogy, I want to highlight the great irony in this statement. It is a fact that the Appellate Body report in *Japan - Alcoholic Beverages* yields at least one very

355. *Id.* at 13-14 (emphasis added) (footnotes omitted).

356. See Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2, at pt. II.C.

memorable *de facto* precedent: the methodology for a like product determination.³⁵⁷

Under Japan's Liquor Tax Law, certain imported alcoholic beverages - such as brandy, cognac, genever, gin, liqueurs, rum, vodka, whiskey, and other spirits- were subject to an internal tax.³⁵⁸ However, domestically produced *shochu* (a distilled white spirit) was subject to a much-reduced tax. For example, the tax on *shochu* was between one-fourth and one-seventh of the tax on imported brandy and whiskey, and two-thirds of the tax on imported rum and vodka. While this difference set the stage for an obvious discrimination claim, to succeed it was necessary to prove the imported and domestic beverages were, indeed, like products (or, at least, competitive or substitute products).

Not surprisingly, the complainants - the United States, EC, and Canada - claimed the Japanese tax scheme violated Article III:2, which states:³⁵⁹

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to *like* domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.³⁶⁰

357. I say "at least one" deliberately, because it may be possible to detect a second line of decisional authority emanating from *United States - Reformulated Gas* and this report. To assist in the interpretation of GATT Article III, the Appellate Body refers to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. See *Japan - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 29, at 10-12. In subsequent cases, both reports are cited for guidance on treaty interpretation. See, e.g., *United States - Underwear*, WTO Appellate Body Report, *supra* note 135, at 15-16 and n. 24.

358. For a discussion of the facts, see *Letter Update*, *supra* note 79, at 22-23. The Appellate Body report does not recount the facts, but a detailed treatment may be found in WTO Panel Report on *Japan - Alcoholic Beverages*, *supra* note 20, at 2-5, paras. 2.1-2.4. Indeed, because the Appellate Body report contains so little about the panel report, in order to fill various gaps I am compelled to depart here from my usual practice in this trilogy of looking only to Appellate Body reports.

359. I am amalgamating the arguments of the three co-complainants and relying on *Japan - Alcoholic Beverages*, WTO Panel Report, *supra* note 20, at 15-18, paras. 4.12-4.19.

360. GATT, *supra* note 106, art. III:2 (emphasis added) (footnote omitted). As for Article III:1, referenced in sub-paragraph 2, it states:

Related to this provision is an important Interpretative Note, *Ad Article III*, paragraph 2 of which states that

[a] tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not similarly taxed.³⁶¹

The complainants claimed a violation of both the first and second sentences of Article III:2. Contrary to the first sentence, the Japanese applied different tax rates to like products. Contrary to the second sentence, the tax distorted the relative prices of imports and *shochu*, and consequently distorted consumer choice between these categories of alcoholic beverages.

However, the complainants - indeed, anyone in the complainants' position trying to make out claims under the first and second sentences of GATT Article III:2 - faced a threshold problem associated with each claim. With regards to the first sentence, were imported spirits and *shochu* "like products"? If not, then there could be no violation of this sentence, because the sentence expressly refers to "like domestic products." Regarding the second sentence, were imported spirits and *shochu* "directly competitive and substitutable products"? If not, this sentence was inapplicable, because the relevant Interpretative Note expressly refers to "directly competitive and substitutable products." In brief, only if *shochu* was a "like" or "directly competitive and substitutable product" would the complainants qualify for the protection of the national treatment principle of Article III:2.

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT, *supra* note 106, art. III:2 (emphasis added) (footnote omitted).

361. GATT Interpretative Note, *Ad Article III*, para. 2, reprinted in DOCUMENTS SUPPLEMENT, *supra* note 31, at 7.

The obvious questions for the Panel then were the meaning of these critical threshold terms. Japan countered the complainants' thrust by arguing imported spirits were not like products, nor were they directly competitive or substitutable. Thus, neither the first nor the second sentence of GATT Article III:2 was applicable. Japan advocated a highly restrictive definition of "like" product, namely, one that was more-or-less the same product. Japan's fallback position was that even if *shochu* were a competitive or substitutable product, there was no violation of Article III:2, at least not of the second sentence. Why? Because the Liquor Tax law was not designed to protect domestic production.³⁶² This pure-hearted motivation was relevant because the second sentence of Article III:2 references Article III:1 which, in turn, frowned upon internal taxes applied so as to afford domestic production.³⁶³

The Panel rejected Japan's restrictive approach to defining a "like" product. It took a flexible, eclectic approach to defining both a "like" product and a "directly competitive or substitutable product."³⁶⁴ The Panel determined that these terms could not have one precise, uniform, or absolute definition.³⁶⁵ Rather, the terms had to be interpreted on a case-by-case basis.³⁶⁶ In other words, the meaning of "likeness" and "directly competitive or substitutable" depended dearly on the context in which these terms were used in a particular provision of the GATT or a Uruguay Round agreement. The Panel did not mean to imply its approach was formless. It felt confident that the very nature of the term "like" meant that "like products" need not be identical in all respects, though they ought to have essentially the same physical characteristics and end uses.³⁶⁷ "Directly competitive or substitutable products" need not even physically resemble one another, though they ought to have common end uses as illustrated by elasticities of substitution.³⁶⁸ The Panel also felt confident pointing out that "like products" are a narrower class of products than "directly competitive or substitutable

362. See Japan - Alcoholic Beverages, WTO Panel Report, *supra* note 20, at 97-99, paras. 6.15-6.17.

363. See *supra* note 360.

364. Japan - Alcoholic Beverages, WTO Panel Report, *supra* note 20, at 101, para. 6.22.

365. See *id.* at 100-101, paras. 6.20-6.22.

366. See *id.* at 100-101, paras. 6.21-6.22.

367. See *id.* at 112, para. 6.21, at 100-101, para. 6.22.

368. *Id.* at 101, para. 6.22.

products," because the first and second sentences, coupled with the Interpretative Note, differentiate between these two classes.³⁶⁹

In the end, the Panel ruled that *shochu* is a "like" domestic product vis-a-vis vodka, and that Japan's tax scheme violated the first sentence of Article III:2 by taxing the latter in excess of the former.³⁷⁰ The Panel also concluded that *shochu*, brandy, genever, gin, liqueurs, rum, and whisky were "directly competitive or substitutable products."³⁷¹ On this basis, the Panel concluded Japan had violated the second sentence of Article III:2, as the dissimilar treatment of *shochu* and these imports afforded domestic protection to *shochu* producers.³⁷²

The Appellate Body agreed with the Panel's conclusion that the definition of a "like product" was narrower than the definition of a "directly competitive or substitutable product."³⁷³ It expressly endorsed the Panel's case-by-case approach to determining whether products are "like." Indeed, in a not-so-subtle call to precedent, the Appellate Body said this approach was grounded on GATT practice. The Report of the Working Party on *Border Tax Adjustments* had set out the basic approach in 1970:

[T]he interpretation of the term ["like or similar products"] should be examined on a *case-by-case basis*. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.³⁷⁴

The Appellate Body's message is easily translated into our terms: there was a *de facto* precedent established by a Working Party almost

369. *Id.* at 100-101, paras. 6.21-6.22. In other words, all "like" products are "directly competitive or substitutable products," but the converse is not true. See *id.* at 101, para. 6.22.

370. Japan - Alcoholic Beverages, WTO Appellate Body Report, *supra* note 29, at 2.

371. *Id.*

372. See *id.*

373. See *id.* at 20, 27.

374. *Id.* at 19-20 (quoting Working Party Report on *Border Tax Adjustments*, GATT B.I.S.D. (18th Supp.) at 97, para. 18 (1970-71) (emphasis added)).

thirty years earlier, it had been followed in almost all adopted GATT Panel reports since then,³⁷⁵ the precedent still made sense, and the Panel was right to follow it.

The Appellate Body agreed with the Panel's substantive conclusions: that *shochu* was a "like" domestic product in comparison with vodka, that *shochu* and the other imports were "directly competitive or substitutable products," and that Japan had run afoul of the first and second sentences of Article III:2.³⁷⁶ Like the Panel, it showed no patience for Japan's argument, made in the context of the second sentence, that the tax scheme was not designed to protect domestic *shochu* producers. Intent, intoned the Appellate Body, is irrelevant to the analysis - and for good reason.³⁷⁷ Who can imagine panels sorting through the many reasons national legislators and regulators have for what they do, and weigh the relative significance of those reasons?³⁷⁸ The Appellate Body might well have added that even if this were imaginable, the problems of proof, and of the differing natures of legislative and history records in different countries, might be insurmountable. But, to the critical threshold issues of definition, the Appellate Body added three of its own touches.

First, regarding claims under the first sentence of GATT Article III:1, the Appellate Body rebuked the Panel for calling like product determinations "arbitrary."³⁷⁹ The more accurate characterization was that they involved "individual, discretionary judgment."³⁸⁰ What was needed in each case was a careful weighing of various criteria, and indeed the Appellate Body left the Panel's work in this area largely undisturbed. The Appellate Body just did not like the Panel's suggestion that the reasoning process was thoroughly random and uncertain.

Second, seemingly inspired by the Muses, the Appellate Body developed a metaphor for like product determinations - an accordion:

No one approach to exercising judgment will be appropriate for all cases. The criteria in *Border Tax*

375. *See id.* at 19.

376. *See id.* at 31.

377. *See id.* at 20.

378. *See* Japan - Alcoholic Beverages, WTO Appellate Body Report, *supra* note 29, at 20.

379. *See id.* at 20.

380. *Id.*

*Adjustments should be examined, but there can be no one precise and absolute definition of what is "like." The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed [sic].*³⁸¹

Perhaps the Muses were not as generous to the Appellate Body as they might have been. Nonetheless, the effort to underscore the flexible nature of the business, and leave the international trade bar with a memorable rule, is worth applauding.

Third, the Appellate Body created an algorithm to be applied to any claim of violation of the second sentence of Article III:2. It was necessary to ask whether

- (1) the imported products and the domestic products are "*directly competitive or substitutable products*" which are in competition with each other;
- (2) the directly competitive or substitutable imported and domestic products are "*not similarly taxed*"; and
- (3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is "*applied ... so as to afford protection to domestic production.*"³⁸²

Only if the answer to all three inquiries is "yes" would there be a violation of the second sentence. Obviously for our purposes, the first of these questions is of the keenest interest. The Appellate Body held that, as with a like product determination, it was impossible to lay out an absolute, bright-line test. The inquiry necessarily was a case-by-case one.³⁸³ The Panel had acted entirely appropriately in

381. *Id.* (emphasis added).

382. *Id.* at 24 (emphasis original).

383. *See id.* at 25.

looking to physical characteristics, common end-uses, tariff classifications, and, significantly, competition within the market place.³⁸⁴ The Appellate Body also ruled it permissible to examine the cross-price elasticity of substitution as one means of examining competition in the relevant markets.³⁸⁵ Which among these various criteria was likely to be decisive in determining whether two products are directly competitive or substitutable? The Panel held, and the Appellate Body agreed, that common end-use as evidenced by elasticities of substitution was of prime significance.³⁸⁶

In sum, *Japan - Alcoholic Beverages* is the leading case on how to go about defining "like domestic product" and "directly competitive or substitutable product" in the context of GATT Article III:2. The *de facto* precedent set is that a case-by-case analysis is to be used. A panoply of factors, most notably common end-use measured by appropriate elasticities, are to be examined. The holding is very far away from being wooden, but it is hardly entirely open-ended. It calls for the exercise of adjudicatory discretion, and provides parameters to constrain that discretion. It is, therefore, exactly the kind of holding we might have expected to endure and see applied over and over again. In turn, its very appeal as a *de facto* precedent make the Appellate Body's effort at squelching expectations of a *stare*

384. See *id.* at 27; see also *id.* at 20-21 (concerning tariff classification as "a helpful sign of product similarity" and a criterion for determining like products).

In pointing out that tariff classifications can be used as guidance to identify whether products are alike, the Appellate Body was invoking a well-known customs law concept, used in the context of rules of origin, that a change in tariff heading - a tariff shift - might suggest products are not alike. However, the Appellate Body wisely distinguished between tariff classification nomenclature and tariff bindings. The latter may include broad ranges of products which are patently not alike. Thus, the Appellate Body corrected the panel for not differentiating between nomenclature and bindings submitted in schedules of concessions. See *id.* at 22.

In agreeing that tariff classifications can be useful in determining whether products are "like" (or, for that matter, "directly competitive and substitutable"), the Appellate Body also took heed of a point the Panel had made in its report. The point was that a parallel ought to be drawn in the way the term "like product" is interpreted in GATT Articles III:2 and II so that a WTO Member does not frustrate the effect of a tariff concession granted under Article II by means of an internal tax that is the subject of Article III. See *Japan - Alcoholic Beverages*, WTO Panel Report, *supra* note 20, at 100, para. 6.21. After all, the purpose of Article III is to provide equality of competitive conditions for imported products in relation to domestic products once the imports have been cleared through customs. Otherwise, indirect protection could be given to domestic products, thereby vitiating any Article II tariff concession. See *Japan - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 29, at 15. However, the Appellate Body went even further than the Panel, pointing out that the sheltering scope of Article III is not limited to products that are the subject of Article II tariff bindings. See *id.* at 16.

385. See *Japan - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 29, at 25.

386. See *id.*

decisis effect acutely ironic. In fact, very soon, the burden of history would be obvious.

2. Subsequent Use of the Japan – Alcoholic Beverages Holding

The June 1997 Appellate Body report in *Canada – Certain Measures Concerning Periodicals (Canada – Magazines)*,³⁸⁷ and its January 1999 report in *Korea – Taxes on Alcoholic Beverages (Korea – Alcoholic Beverages)*,³⁸⁸ are obvious progeny of *Japan – Alcoholic Beverages* on the issue of like product determinations. How could we reasonably expect the later reports not to be anchored by the first report? After all, the key GATT provision at issue in *Canada – Magazines* and *Korea – Alcoholic Beverages*, as in *Japan – Alcoholic Beverages*, is Article III:2. For the Appellate Body to ignore its own leading case would be nothing short of preposterous.

In both cases, the facts are straightforward, and only a cursory account is needed to appreciate that *stare decisis* must have been at work in a *de facto* sense. In *Canada – Magazines*, the Canadian government enacted legislation imposing an 80 percent excise tax on the advertising revenues of split-run editions³⁸⁹ of foreign magazines.³⁹⁰ The tax, assessed on a per-issue basis, was borne not by the advertiser, but by the publisher, or in the absence of a

387. WTO Appellate Body Report on *Canada – Magazines*, July 30, 1997, WTO Doc. WT/DS31/AB/R, reprinted in 3 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 1 [hereinafter *Canada – Magazines*, WTO Appellate Body Report].

388. WTO Appellate Body Report on *Korea – Alcoholic Beverages*, Feb. 17, 1999, WTO Doc. WT/DS75/AB/R [hereinafter *Korea – Alcoholic Beverages*, WTO Appellate Body Report]. The initial complaint was brought by the EC in April 1997, and followed by a complaint by the United States in May of that year. The panel and Appellate Body reports cover both complaints.

389. A split-run edition is one produced by a foreign publisher especially for the Canadian market. The edition contains advertisements directed at the Canadian market, as well as a few extra pages for Canadian editorial content. However, most of the editorial content remains foreign. Obviously, among "foreign" publishers, the Canadians were concerned primarily with American behemoths. See *infra* note 390.

390. For accounts of the facts in *Canada – Magazines*, see *Letter Update*, *supra* note 79, at 52-54 and World Trade Organization, *Overview of the State-of-Play of WTO Disputes*, at 24-25 (last modified Apr. 19, 1999, visited Oct. 11, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>. The discussion above is distilled from these sources. The Appellate Body report provides no factual background, but there is a detailed discussion in WTO Panel Report on *Canada – Certain Measures Concerning Periodicals*, Mar. 14, 1997, WTO Doc. WT/DS31/R, at 2-7, paras. 2.1-2.19, reprinted in 2 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 17 [hereinafter *Canada – Magazines*, WTO Panel Report]. My treatment of this case omits the GATS and postal subsidy issues, which are not relevant (yet, anyway!) to my point about the operation of *de facto stare decisis*.

publisher resident in Canada, the distributor.³⁹¹ Canada added an anti-avoidance provision to its tax code to make sure a foreign publisher could not deduct from Canadian taxable income the advertising expenses the publisher incurred in its split-run edition. Neither the excise tax nor the anti-avoidance measure applied to Canadian periodicals, or to regular editions of foreign magazines distributed in Canada. Of course, Canada unsuccessfully tried to make much of the fact that these measures were applicable to a domestic publisher with a split-run edition containing foreign content and Canadian advertising.

Canada's controversial tax complemented an import ban it had maintained for over 30 years.³⁹² Canada prohibited the importation of split-run magazines, though some split-runs produced in Canada were grand-fathered. Interestingly, one of the factors catalyzing the dispute was Time-Warner's plans to transmit electronically a split-run edition for the Canadian market of *Sports Illustrated*, thereby circumventing the prohibition on physical imports. Ruling on a complaint brought by the United States, a WTO Panel agreed with the United States that the Canadian excise tax measure violated the national treatment obligation of GATT Article III:2. The Appellate Body upheld, with some modification, the Panel's finding of a violation of the second sentence of this provision.³⁹³

The facts of *Korea - Alcoholic Beverages* resemble to those in *Japan - Alcoholic Beverages* - sufficiently so that even a diehard civil lawyer would admit the *Korea* case is at the very least a candidate for express application of the rule laid out in the *Japan* case.³⁹⁴ Under its Liquor Tax Law, Korea imposed an *ad valorem* tax on imported distilled alcoholic beverages (e.g., brandy, cognac, gin, liqueurs, rum, tequila, vodka, and whiskey) in a dissimilar manner from the way it taxed a domestic alcoholic beverage, *soju* (a traditional Korean drink).³⁹⁵

391. See *Canada - Magazines*, WTO Appellate Body Report, *supra* note 387, at 17.

392. See *id.* at 11, 19.

393. See *id.* at 33-34 (findings (a), (c)).

394. For a more detailed discussion of the facts in *Korea - Alcoholic Beverages*, see the Appellate Body report, *supra* note 388, at 1-2, paras. 1-2, and World Trade Organization, *Overview of the State-of-Play of WTO Disputes*, at 4 (last modified Apr. 19, 1999, visited Oct 11, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>. The discussion above is distilled from these sources.

395. Likewise, under Korea's Education Tax Law, Korea imposed a surtax on the same of most distilled spirits, with the rate of surtax being a percentage of the liquor tax rate applied to the spirit in question. See *Korea - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 388, at 1.

Specifically, the tax burden was lower on *soju* than on the imports. A WTO Panel ruled *soju* was directly competitive or substitutable with these imported products. It said Korea violated GATT Article III:2, because the tax differential was more than *de minimis*, and was applied so as to afford protection to domestic production. The Appellate Body upheld all of the Panel's findings.³⁹⁶

The key point that I wish to stress is that in both *Canada - Magazines* and *Korea - Alcoholic Beverages*, the Appellate Body put into action its like product analysis from *Japan - Alcoholic Beverages*. In the *Magazines* case, Canada argued its legislation had not violated the first sentence of GATT Article III:2. Canada asserted that the Panel's finding that imported split-run periodicals and Canadian non-split run periodicals were "like" products was erroneous.³⁹⁷ The finding was based not on evidence before the Panel, but on a speculative hypothesis drawn from hypothetical examples.³⁹⁸ Saying that there were no imported split-run periodicals in Canada due to Canada's import prohibition of these products, the Panel had compared two imported "Canadian" editions.³⁹⁹ In Canada's judgment, what the Panel ought to have done is to compare an imported product, that is, a split-run edition, with a domestic product, namely, a non-split run edition. Canada said there were certain split-run magazines produced in Canada that had been grand-fathered under Canada's import ban, and these editions provided an accurate representation of the content and properties of a split-run edition published by a non-Canadian parent magazine company.⁴⁰⁰ Canada also argued that the Panel had neglected to compare products which could be marketed simultaneously in Canada.⁴⁰¹ The upshot? Expressly citing *Japan - Alcoholic Beverages*, Canada urged that the Panel had not adopted the narrow construction or case-by-case approach "required by the Appellate Body Report."⁴⁰² A case-by-case approach would have entailed an analysis of the specific properties of the magazines in the Canadian

396. See *id.* at 50, para. 169.

397. See *Canada - Magazines*, WTO Appellate Body Report, *supra* note 387, at 4-5.

398. For this reason, Canada also alleged the panel had violated DSU Article 11 by failing to make an objective assessment of the facts of the case. See *id.*

399. See *id.*

400. See *id.*

401. See *id.*

402. *Id.* (emphasis added).

context.⁴⁰³ For its part, the United States expressly cited *Japan - Alcoholic Beverages* to reinforce its position that imported split-run periodicals are "like" domestic non-split run periodicals.⁴⁰⁴

Similarly, Canada argued it had not violated the second sentence of GATT Article III:2. In no way were imported split-run and domestic non-split-run periodicals "directly competitive or substitutable products according to the criteria in *Japan - Alcoholic Beverages*."⁴⁰⁵ Why not? The content was too specific and readers assiduously search for this specific content. Hence, as information vehicles, these two types of magazines are not interchangeable.⁴⁰⁶ To underscore the difference, readers typically buy multiple magazines.⁴⁰⁷ The United States had an easy rebuttal: the very existence of the tax was proof of competition for advertisements and, therefore, readership between the two types of periodicals.⁴⁰⁸ No company would place an advertisement in an imported split-run magazine instead of a domestic non-split run magazine unless that company thought the ad would reach the same readers.⁴⁰⁹

Whereas the Panel had found Canada's excise tax violated both the first and second sentences of GATT Article III:2, the Appellate Body found a violation of only the latter sentence. This difference is significant, because in it we can see just how much the like product test created in *Japan - Alcoholic Beverages* meant to the Appellate Body. Regarding the first sentence, the Appellate Body approved of the Panel's articulation of the test for a "like" product. How could it not, for the Panel faithfully recited the *Japan - Alcoholic Beverages* test?

[T]he Panel correctly enunciated, in theory, the legal test for determining "like products" in the context of Article III:2, first sentence, as established in the Appellate Body Report in *Japan - Alcoholic Beverages*. We also agree with the second point made by the Panel. As Article III:2, first sentence, normally requires a comparison between imported products and like domestic products, and as there were no imports of

403. See *id.*

404. See *id.* at 11-12.

405. *Id.* at 6 (emphasis added).

406. See *Canada - Magazines*, WTO Appellate Body Report, *supra* note 387, at 6, 27-28.

407. See *id.* at 6.

408. See *id.* at 24.

409. See *id.*

split-run editions of periodicals because of the import prohibition in [Canada's] Tariff Code 9958, which the Panel found (and Canada did not contest on appeal) to be inconsistent with the provisions of Article XI of the GATT 1994, hypothetical imports of split-run periodicals have to be considered. As the Panel recognized, the proper test is that a determination of "like products" for the purposes of Article III:2, first sentence, *must be construed narrowly, on a case-by-case basis*, by examining relevant factors including:

- (i) the product's *end-uses* in a given market;
- (ii) consumers' *tastes and habits*; and
- (iii) the product's *properties, nature and quality*.⁴¹⁰

The difficulty lay with the Panel's less-than-faithful application of the *Japan - Alcoholic Beverages* test.

The Panel had before it split-run and domestic non-split run periodicals. For example, Canada had presented the Panel with copies of *Time* (the U.S. edition), *Time Canada* (a split-run edition apparently falling under the grandfather exception to the import prohibition, but actually produced in Canada), and *MacLean's* (a domestic news magazine), with a view to having the Panel compare the latter two periodicals.⁴¹¹ The Panel did not, however, examine this evidence. Rather, it concluded that imported split-run and domestic non-split run periodicals "can" be "like products" on the basis of a single hypothetical example.⁴¹² It constructed the hypothetical using a Canadian-owned magazine, *Harrowsmith Country Life*, and compared two editions of this single magazine. Yet, both of the editions were imported, and neither of them could have been in the Canadian market at the same time.⁴¹³

410. *Id.* at 19 (emphasis added) (footnotes omitted).

411. *See id.* at 20; Canada - Magazines, WTO Panel Report, *supra* note 390, at 24-25, paras. 3.70-3.7. In the context of its discussion of whether imported split-run periodicals are "directly competitive or substitutable" with domestic non-split-run periodicals, the Appellate Body admitted *Time Canada* is not actually imported. However, it hastened to add that this fact "does not affect at all our appreciation of the competitive relationship." Canada - Magazines, WTO Appellate Body Report, *supra* note 387, at 30. The Appellate Body did not make much of the fact in deciding whether the two types of periodicals were "like" products, possibly because (as discussed below) it found the panel had so thoroughly botched the like product analysis that this fact was irrelevant. *See id.* at 20 n. 38.

412. Canada - Magazines, WTO Appellate Body Report, *supra* note 387, at 20.

413. *See id.*

Not surprisingly, the Appellate Body called this example "incorrect," characterized the Panel's discussion surrounding it as "inapposite," and accused the Panel of having "leapt" to the conclusion that imported split-run and domestic non-split-run periodicals can be like products.⁴¹⁴ Barely concealing its frustration with the Panel's work, the Appellate Body said it was not at all obvious how the Panel could reason it had "sufficient grounds" to find the two products actually were like products, given the erroneous example that, by the Panel's own words, had led the Panel to conclude merely that they "can" be like products.⁴¹⁵ Thus, because of the Panel's improper legal reasoning resting upon an inadequate factual analysis, the Appellate Body overturned the Panel's conclusion that imported split-run periodicals and domestic non-split-run periodicals were like products.⁴¹⁶ In turn, because the products were not alike, there could be no violation of the first sentence of Article III:2.⁴¹⁷

Now, can it seriously be maintained that the Appellate Body went to these lengths, but at the same time thought - consciously or subconsciously - that its *Japan - Alcoholic Beverages* like product test was nothing more than mere guidance for subsequent cases? In *Canada - Magazines*, we are watching the Appellate Body scold the Panel for one of two actions: either the Panel paid lip service to a *de facto* precedent, or it was incompetent in handling this precedent. In effect, the Appellate Body is saying "do not believe it is not enough to articulate a test correctly, and then proceed to mis-apply it by concocting one of your own approaches to suit the moment." The words of its report bespeak a determination - conscious or otherwise - to enforce its *de facto* case law in the interests of developing a consistent, coherent, and legitimate body of jurisprudence on the first sentence of Article III:2. Indeed, the Appellate Body went on to quote and paraphrase generously from *Japan - Alcoholic Beverages* on the question of whether Canada had violated the second sentence of Article III:2.⁴¹⁸ It applied the case-by-case analysis, with an emphasis on competition in the relevant markets, called for in its earlier report to show that imported split-run and domestic non-split run

414. *Id.*

415. *Id.*

416. *See id.* at 21.

417. *See id.* at 21, 33 (finding (b)).

418. *See id.* at 23-29.

periodicals were “directly competitive or substitutable” products.⁴¹⁹ Because the excise tax was so high – 80 percent – it clearly had a protectionist effect (indeed, the evidence existed to show its design was protectionist), and thus it ran afoul of the second sentence of Article III:2.⁴²⁰

The ineluctable semblance between the Appellate Body and a common law appellate court is just as evident in *Korea – Alcoholic Beverages* as in *Canada – Magazines*. A key issue on appeal in the Korea case was whether its liquor tax was consistent with the second sentence of GATT Article III:2. Korea argued that at some level, all products are competitive.⁴²¹ If an unqualified minimum threshold were enough to render products “directly competitive or substitutable products,” then Article III:2 would become an “unbridled instrument of tax harmonization and deregulation.”⁴²² The question is whether imported products are “directly” competitive or substitutable with the domestic product under consideration. In answering yes, *i.e.*, finding that imported alcoholic beverages and *soju* were like or directly competitive, Korea said the Panel committed four grave errors.

First, the Panel based its conclusion in part on the potential for competition between these products in the near future, not on extant competitive relations.⁴²³ In Korea’s view, the Panel was speculating about what consumers might do, not focusing on what they actually do.⁴²⁴ Second, the Panel examined the “nature” of competition, thereby adding a “vague and subjective criterion” to the determination of whether products are directly competitive or substitutable.⁴²⁵ Third, the Panel also looked at evidence from other markets, such as Japan, thereby assuming without foundation that the Korean market was becoming like the other markets.⁴²⁶ Fourth, by grouping products in a Procrustean manner, the Panel improperly defined the comparison to be made. For example, Korea charged that the Panel had grouped distilled *soju* and diluted *soju* together,

419. *See id.* at 23.

420. *See id.* at 28.

421. *Korea – Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 388, at 3, para. 4.

422. *Id.*

423. *See id.* at 3-4, paras. 5-6.

424. *See id.* at 3-4, para. 6.

425. *Id.* at 4, para. 10.

426. *See id.* at 5, para. 11.

and then compared them with all imported distilled spirits, which the Panel had wrongly lumped together.⁴²⁷ The problem, said Korea, was that not all of the constituents of each grouping were alike. Certain beverages that the Panel had put in the same group for comparative purposes were not physically identical, were produced in different ways by different manufacturers using different materials, had different tastes, were used differently, and were marketed and sold in different ways through distinct distribution channels at very different prices subject to different tax rates.⁴²⁸ The bottom line? The Panel had "'trivialized' actual consumer perceptions which are at the heart of the 'directly competitive or substitutable standard.'"⁴²⁹ What the Panel should have done, argued Korea, is juxtapose each individual imported drink with each domestic drink, *i.e.*, engage in a product-by-product comparison.

The complainants, the EC and the United States, disputed Korea's points. The EC pointed out that Korea wrongly assumed the phrase "directly competitive or substitutable" had to be interpreted strictly.⁴³⁰ In fact, the phrase is designed to connote a broad notion that would include potential competition and evidence from other markets. To be sure, said the EC, the Panel had found an existing, direct competition relationship between *soju* and imported spirits.⁴³¹ Still, the Panel was right to examine potential competition, which is an important factor that the drafters of GATT did not exclude from consideration because they did not limit Article III:2 or *Ad Article III* with the word "actual." Indeed, the EC argued potential competition *is* competition.⁴³² As to the grouping of products, the EC challenged Korea to show that its suggested product-by-product algorithm would lead to a different legal conclusion.⁴³³ The implication was that grouping products was a reasonable and convenient methodology for analytical purposes only with no effect on the

427. See Korea - Alcoholic Beverages, WTO Appellate Body Report, *supra* note 388, at 6, para. 14. As the Appellate Body later explained, the panel had not, in fact, grouped diluted and distilled *soju* together. See *id.* at 42, para. 145.

428. See *id.* at 5, para. 13; see also *id.* at 8-12, paras. 21-38.

429. See *id.* at 6, para. 15.

430. See *id.* at 14, para. 42; see generally *id.* at 17-20, paras. 55-67 (reviewing the EC's arguments on product characteristics, end uses, distribution channels, prices, and the treatment of tequila).

431. See *id.* at 14, para. 43.

432. See *id.* at 14, para. 44.

433. See *id.* at 15, para. 48, at 16, para. 50.

outcome. The American response to Korea's points mirrored that of the EC,⁴³⁴ the key difference being that the United States expressly cited *Japan - Alcoholic Beverages* for support.⁴³⁵

The Appellate Body accepted the arguments of the EC and the United States, and upheld the Panel's work in all respects. Quoting from and citing generously to *Japan - Alcoholic Beverages*, the Appellate Body stressed the flexibility of the case-by-case approach.⁴³⁶ Declining to take a "static view" of the phrase "directly competitive or substitutable,"⁴³⁷ it held this phrase does not bar a Panel from examining latent consumer demand (*i.e.*, potential competition) when assessing a possible competitive relationship between imported and domestic products under the second sentence of GATT Article III:2.⁴³⁸ After all, "[c]ompetition in the market place is a dynamic, evolving process,"⁴³⁹ and, absent protectionist measures, consumer preferences will shift among domestic and imported goods.⁴⁴⁰ Thus, it is entirely appropriate to examine potential competition: the phrase "directly competitive or substitutable" suggests that a "competitive relationship ... is *not* to be analyzed *exclusively* by reference to *current* consumer preferences."⁴⁴¹ Again invoking its report in *Japan - Alcoholic Beverages*, the Appellate Body pointed out that cross-price elasticities are one means of assessing latent demand. They predict the shift in demand that would result from a change in the price of a product caused by a change in the relative tax burden on domestic versus imported products.⁴⁴² Continuing with this approach, the Appellate Body found nothing wrong with examining evidence on the nature (*i.e.*, quality) of competition,⁴⁴³ or evidence from other markets,⁴⁴⁴ or in grouping products for comparative purposes in a manner that does

434. See *Korea - Alcoholic Beverages*, WTO Appellate Body Report, *supra* note 388, at 21-23, paras. 70-80.

435. See *id.* at 21, para. 71.

436. See *id.* at 29-42, paras. 103-145.

437. See *id.* at 34-35, para. 120.

438. See *id.* at 36, para. 124.

439. *Id.* at 32-33, para. 114.

440. See *id.* at 34-35, para. 120.

441. *Id.* at 32-33, para. 114 (emphasis in original).

442. See *id.* at 35, para. 121.

443. See *id.* at 38, paras. 132-34.

444. See *id.* at 38-39, paras. 135-38.

not disregard individual product characteristics or alter the outcome of a case.⁴⁴⁵

In sum, *Korea - Alcoholic Beverages* is a reaffirmation of the approach articulated in *Japan - Alcoholic Beverages* to testing whether products are "directly competitive or substitutable" for purposes of the second sentence of GATT Article III:2. But, in *Korea - Alcoholic Beverages*, the Appellate Body does more than just apply its *de facto* case law. The above discussion should suggest that the Appellate Body consciously contributes in a small but important way to the emerging body of *de facto* common law. It clarifies that "actual" competition is not the only relevant form of competition, and that the market of the respondent is not the only relevant market. The Appellate Body adds a corollary to its extant doctrine, namely, that it is right and logical for a panel to examine potential competition, and to consider data from other markets.

Reading between the lines of the Appellate Body Report, to conclude products are "directly competitive or substitutable" solely on the basis of potential competition would probably be going too far. Certainly, it would be invalid to situate such a finding on data from third countries. But, a modest degree of actual competition, buttressed by a potential for more competition, certainly is a solid foundation.⁴⁴⁶ The foundation can be reinforced with third-country data. Just how far can this corollary be extended? We cannot say without more case law development, which, given the prominence of Article III:2, seems assured. In other words, we can look forward not just to the continued vitality of the *Japan - Alcoholic Beverages* holding, but also to future cases that push the edges of this holding still further, and thereby provide more parameters for the case-by-case approach.

3. A Word on the EC - Bananas Treatment of Japan - Alcoholic Beverages

I would be remiss in winding up the above treatment of *Japan - Alcoholic Beverages* and its progeny if I did not mention the interesting discussion of the *Japan - Alcoholic Beverages* decision that is buried in the EC - Bananas Appellate Body report. The discussion arises in the context of the Appellate Body's treatment of hurricane licenses issued by the EC for bananas from third-countries and non-

445. See *id.* at 41-42, paras. 142-45.

446. See *id.* at 36, para. 124.

traditional ACP sources.⁴⁴⁷ The EC issued these licenses to compensate for losses associated with tropical storm damage to banana crops. The licenses allowed for additional shipments of third-country and non-traditional ACP bananas at the lower in-quota tariff rate. However, the EC issued the licenses only to EC and ACP operators, not to operators from third countries. Hence, an operator had an incentive to purchase bananas of EC origin and market those bananas within the EC in order to qualify as an EC producer and, thereby, become eligible for hurricane licenses.

The Appellate Body upheld the Panel's conclusion that this incentive violated the national treatment provision of GATT Article III:4. However, it corrected the Panel on an important interpretative issue.⁴⁴⁸ The Panel, relying on the Appellate Body report in *Japan - Alcoholic Beverages*, had linked Article III:4 back to Article III:1, saying that the latter provision set forth a general principle that informed the rest of Article III. What was the principle? A WTO Member must not apply an internal measure so as to afford protection to domestic production. The Appellate Body lectured that the Panel had misunderstood *Japan - Alcoholic Beverages*. That case arose in the context of Article III:2, and what the Appellate Body had tried to do was distinguish the first and second sentences of this provision in terms of their relationship to Article III:1.

Specifically, the first sentence of Article III:2 does not refer to Article III:1. Therefore, there is no need to show that an internal measure protects domestic production in order to make a claim based on this sentence. Simply proving the requirements set forth in the sentence suffices. In contrast, the second sentence of Article III:2 does reference Article III:1. Accordingly, a claim based on the second sentence of Article III:2 will be successful only if the requirements of that sentence, and protection to domestic production, is proven.

Having recounted in *EC - Bananas* this *Japan - Alcoholic Beverages* distinction, the Appellate Body declared that the rationale behind the distinction was equally applicable to the hurricane license issue.⁴⁴⁹ Article III:4 did not expressly refer to Article III:1. Therefore, the *Bananas* Panel was wrong in reasoning that an Article III:4 claim mandated a separate determination under Article III:1 to determine

447. See *EC - Bananas*, WTO Appellate Body Report, *supra* note 27, at 81-82, paras. 212-216.

448. See *id.*

449. See *id.* at 82, para. 216.

whether the measure complained of afforded protection to a domestic product.

I do not mean to suggest that the Appellate Body's lecture in *EC - Bananas* makes this case a progeny of *Japan - Alcoholic Beverages*. At the very least, however, the lecture underscores the importance the Appellate Body attaches to its prior holdings, and in particular, to the way they are interpreted. After all, failure to "get it right" at the panel stage, coupled with a failure to correct panel mistakes at the Appellate Body stage, could lead to inconsistencies and injustices, and even a line of errant decisions. To be sure, the Appellate Body may be partly to blame for the necessity of the lecture. Its language in *Japan - Alcoholic Beverages* on the relationship between Article III:2 and III:4 was insufficiently precise to avoid a misunderstanding. But that is a matter of more careful opinion writing, a good idea indeed, but not my key point here.

Of importance is that in an environment truly free of *stare decisis*, we should not expect to see the Appellate Body going out of its way to give lectures on doctrine. Because the Appellate Body cares enough to do so, we must ask why it behaves like something more than an arbitration panel. I submit the answer is rather plain. The Appellate Body knows, whether it admits it or not, that it is operating in a *de facto stare decisis* regime. It is trying to ensure the case law it generates is consistent.

C. *The EC - Bananas Case and its Progeny: Another De Facto Precedent in the Making - Application of GATT Article XIII (Tariff Rate Quotas)*⁴⁵⁰

One of the many *de facto* precedents on substantive WTO law that *EC - Bananas* may prove to spawn concerns the administration of tariff quotas under GATT Article XIII:1-2. These paragraphs state:

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, *unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.*

450. See *supra* note 196.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions:

....

(d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.⁴⁵¹

In brief and general terms, the heart of the claims made by the United States (and its four co-complainants Ecuador, Guatemala, Honduras, and Mexico) in the *Bananas* case was that the EC tariff-rate quotas associated with the preferential trading arrangement for ACP countries were discriminatory in violation of time-honored MFN and national treatment principles.

The arrangement, associated with the Lome Convention and authorized by a waiver, known as the "Lome Waiver," granted by the GATT Contracting Parties and extended by the WTO General Council, assisted former European colonial countries in the ACP

451. GATT, *supra* note 106, art. XIII (emphasis added) (footnote omitted).

regions.⁴⁵² The EC granted bananas from ACP supplying countries, particularly twelve such countries (known as "traditional" ACP countries) preferred access to the EC market, essentially through two strategies. First, the EC reserved on a country-specific basis large in-quota shares of a tariff-rate quota for bananas originating in these countries.⁴⁵³ The EC granted duty-free treatment for in-quota shipments. The shares for bananas from non-traditional ACP countries, and for third countries, were far less generous. With respect to many exporting countries outside of the traditional ACP suppliers, the EC set aside no country-specific shares. Second, the EC's byzantine procedures for awarding banana import licenses effectively assured companies from Europe and the ACP a significant amount of licenses to import bananas from third countries and non-traditional ACP countries.⁴⁵⁴ That is, for the purpose of determining entitlements of individual companies engaged in the production, importation, or ripening of bananas to import third-country and non-traditional ACP bananas, the EC created a complex categorization system in which companies were placed in so-called "operator" categories.⁴⁵⁵ Then, the EC further classified the companies according to the activities in the banana market in which they engaged. These procedures favored European and ACP suppliers.

The United States (and its co-complainants) urged that the two strategies went too far in preferring traditional ACP supplying countries at the expense of third-country (principally, Latin American) suppliers, and in preferring European and ACP firms over third-country (principally, American and Latin) firms. This discrimination allegedly violated the MFN and national treatment

452. The Waiver was granted by the Contracting Parties on Dec. 9, 1994 at the request of the EC and 49 ACP countries that also were GATT contracting parties. The Waiver excuses the EC from certain of its GATT obligation with respect to its Lome Convention obligations. The key paragraph of the Waiver states:

Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the General Agreement [on Tariffs and Trade] [*i.e.*, the most-favored nation clause] shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lome Convention, without being required to extend the same preferential treatment to like products of any other contracting party.

EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 65, para. 164. The Waiver did not initially last until 2000, but on October 14, 1996, the WTO General Council agreed to extend it until February 29, 2000. *See id.*

453. *See id.*

454. *See id.*

455. *See id.*

provisions of Articles I and III of GATT, and of Articles II and XVII of the GATS. The Americans also alleged violations of GATT Article XIII. This claim rested on the fact that the EC put banana exporting countries into four categories:

- (1) ACP countries that are members of the Lome Convention. This category included twelve traditional banana-supplying ACP countries, as well as non-traditional suppliers from the ACP.
- (2) Non-ACP countries with a "substantial interest" in supplying bananas to the EC, namely, Colombia, Costa Rica, Nicaragua, and Venezuela.
- (3) Countries that are members of the Banana Framework Agreement (BFA) countries, namely, Costa Rica, Guatemala, Nicaragua, and Venezuela.
- (4) Non-ACP supplying countries without any such "substantial interest," *i.e.*, non-traditional, Latin American supplying countries such as Ecuador, Honduras, and Mexico.⁴⁵⁶

As mentioned above, under the EC's preferential scheme, bananas from twelve traditional ACP supplying countries were subject to a very generous quota that assured these bananas continued duty-free access to the EC market. Hence, the traditional supplier position of these producers was guaranteed. Similarly, the EC determined that countries listed in the second category had a "substantial interest" in supplying bananas to Europe and, therefore, qualified for special arrangements. Indeed, the EC concluded a separate arrangement, the BFA, with Costa Rica, Guatemala, Nicaragua, and Venezuela - thus leading to the third category. (In the end, the BFA clearly did not satisfy Guatemala, because it wound up joining the United States as a complainant). In contrast, the EC deemed non-ACP countries to lack a "substantial interest" - which just happened to be the countries where the American giants, Chiquita and Dole, had substantial plantations. The EC subjected bananas from these sources to a terribly low tariff-rate quota levels. In fact, the in-quota amounts were below the level of imports by the EC from those countries since 1988.⁴⁵⁷ Not surprisingly, three of the countries in

456. *Id.*

457. See McMahon, *supra* note 196, at 139, 141-42.

this category, Ecuador, Honduras, and Mexico, joined the United States as complainants.

The central defense about GATT Article XIII raised by the EC on appeal concerned the relationship between paragraphs 1 and 2(d) of this Article.⁴⁵⁸ The EC contended the plain language of Article XIII:2(d) prescribed rules about the allocation of tariff-rate quota shares only with respect to Members having a "substantial interest" in supplying the product concerned. Accordingly, the EC was free to allocate tariff quota shares to some, but not necessarily all, Members lacking a substantial interest.⁴⁵⁹ Likewise, the EC argued Article XIII did not forbid it from using a combined method to allocate shares in a tariff-rate quota - that is, to allocate shares in part by agreement and in part unilaterally - with Members not having a "substantial interest."⁴⁶⁰

In upholding the Panel report, the Appellate Body agreed with the United States (and its co-complainants) that the EC had committed two faults. First, the EC erred in identifying countries with a "substantial interest."⁴⁶¹ As the Panel report indicated, the EC had determined only Colombia and Costa Rica had a "substantial interest," because during 1989-91 only they held a share of the EC banana market in excess of ten percent (the benchmark accepted, by way of analogy, for GATT Article XXVIII issues concerning modification of tariff schedules).⁴⁶² Yet, thereafter, during the negotiations for the BFA, the EC determined Nicaragua and Venezuela also had a "substantial interest" in supplying the EC banana market. The latter determination was stunning, because in 1989-91, Nicaragua's average share was 1.7 percent, and Venezuela's share was zero. The Panel resisted setting a precise import share,

458. The EC also argued that the tariff-rate quota re-allocation rules for BFA countries did not violate Article XIII. See EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 13, para. 22. Under these rules, a portion of a tariff quota share not used by a BFA country to which the share previously had been allocated could, at the joint request of the BFA countries, be re-allocated to other BFA countries. It was impermissible to re-allocate an unused portion to a banana-supplying country that was not party to the BFA. The Appellate Body, like the panel, found that the exclusion of non-BFA countries from eligibility for quota re-allocation violated the Article XIII:1 non-discrimination principle, and the mandate in the chapeau of Article XIII:2 that allocations approach as closely as possible the shares in the distribution of trade that would exist in the absence of a quota scheme. See *id.* at 10, para. 22, at 64-65, para. 163.

459. See *id.* at 10-11, para. 22.

460. See *id.*

461. See *id.* at 63-64, paras. 159-62. The Appellate Body does not actually make this point as directly as I suggest. But, it is implicit in the discussion, and it is the foundation for the finding that the EC erred in the second respect.

462. See EC - Bananas, WTO Panel Report, *supra* note 199, at 319, para. 7.85.

such as ten percent, to determine whether a WTO Member has a "substantial interest." It said this matter must be determined on a case-by-case basis. But, the Panel held - and the Appellate Body accepted this holding - that while it was reasonable for the EC to conclude Colombia and Costa Rica had a "substantial interest," it was not reasonable for the EC to identify Nicaragua and Venezuela as having a "substantial interest."⁴⁶³ The import share statistics made clear they did not.

The second fault followed from the first. Nicaragua and Venezuela, along with other countries like Guatemala, had no "substantial interest" in supplying bananas to the EC market. Yet, for purposes of GATT Article XIII:2(d), the EC did not treat countries lacking a "substantial interest" equitably. Rather, it preferred some over others. In particular, among these countries, the EC allocated tariff-rate quota shares only to Nicaragua and Venezuela.⁴⁶⁴ Guatemala and the other countries were put in an "others" category.⁴⁶⁵ The Appellate Body intoned that

*allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is "similarly" restricted.*⁴⁶⁶

We are told, then, that Article XIII:1 trumps Article XIII:2(d), or put differently, that the latter is subject to the former.

This statement furnishes exactly the kind of rule likely to serve as a *de facto* precedent. It gives us a "bright line" rule. It bars any

463. *Id.*

464. *See id.* at 320-321, paras. 7.89-7.90.

465. *See* EC - Bananas, WTO Appellate Body Report, *supra* note 27, at 13, para. 22.

466. *Id.*, at 64, para. 161 (emphasis supplied).

Member that sponsors a preferential trading arrangement from "cherry-picking" among exporting countries. The rule, therefore, is of great importance not just to the sponsors, but also to all developing countries. Its relevance goes still further, because it bars any quota scheme, whether or not associated with a Lome Convention-type scheme, from being discriminatory against "the little guy."

This candidate for "precedent," however, has a wart. What is the supporting rationale? What we have from the Appellate Body is an assertion without justification. Surely the Appellate Body is a bit too confident when it states "it is clear" that Article XIII:2(d) is subject to the non-discrimination principle of Article XIII:1. Nothing in either provision mandates this outcome. Article XIII:1 does not contain phraseology like "Except for import restriction cases covered by paragraph 2(d) of this Article...". Nor does Article XIII:2(d) have language such as "Subject to the limitation set forth in paragraph 1 of this Article...". Indeed a tension is created between the two provisions whenever a Member discriminates in the application of import restrictions among countries that do not have a "substantial interest" in the imported product. Such tensions are a *raison d'être* for adjudicators, and the precedents they create are a means of managing these tensions.

The irony is that without too much more work the Appellate Body could have emboldened its "precedential" holding. It could have reminded us that the non-discrimination principle is a pillar of the GATT-WTO system, enshrined most famously in GATT Articles I:1 and III.⁴⁶⁷ Exceptions to the non-discrimination principle indeed exist.⁴⁶⁸ But, they ought to have a good rationale behind them, because each exception is a rip in the fabric of a liberalized trading system, an added tilt to the global trade playing field. Each exception is also an affront to the dignity of every WTO Member, because it means some are less important than others, and some can be targeted for less equal treatment than others. Today's shooter may be tomorrow's target.

These points naturally lead us to expect the Appellate Body to apply faithfully its *EC - Bananas* holding on GATT Article XIII. The exportation is borne out in *EC - Poultry Products* (many of whose

467. See GATT, *supra* note 106, arts. I:1 and III.

468. See, e.g., BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS, *supra* note 79, at 199-224, 295-98 (discussing exceptions to the MFN principle, as well as the general exceptions in GATT Article XX).

facts I recounted in Part III.A.3.b above). This progeny of the *Bananas* case raised a key Article XIII issue.⁴⁶⁹ In the context of the administration of the EC's duty-free tariff-rate quota for frozen poultry meat, was the Panel correct in its interpretation of Article XIII with respect to the rights and obligations of WTO Members in relation to non-Members?⁴⁷⁰ The Panel had ruled that Article XIII does not require Members to include nor exclude non-Members when calculating country-specific shares of a tariff-rate quota.⁴⁷¹ Brazil appealed.

Brazil's core thesis was that the MFN principle contained in GATT Articles I and XIII did not necessarily apply to tariff-rate quotas that result from compensation negotiations engaged in under the auspices of Article XXVIII. Brazil identified the purpose of the Oilseeds Agreement between it and the EC as compensation to Brazil for the modification of the EC's concessions on oilseeds. That is, the Agreement reflected the withdrawal of a concession on one product coupled with the offering of compensation in another product; hence Brazil was entitled to benefit exclusively from the Agreement. Brazil reasoned that for compensation to be appropriate, it necessarily involves specificity, which, in turn, results in a departure from non-discrimination principles.⁴⁷²

Advancing this thesis required Brazil to attack the way in which the EC calculated the shares in its allocation of its tariff-rate quota, and simultaneously to challenge the Panel's interpretation of GATT Article XIII. Brazil contended the EC should have excluded any non-WTO Member supplying country from the calculation.⁴⁷³ As to the allocation of shares in the tariff-rate quota, it was clear the EC had granted shares to non-Members. However, it had not done so on a country-specific basis. Rather, it gave country-specific shares to WTO Members, and created an "others" category for non-Members.

469. See *supra* pt. III.A.3.b (discussing the Article XIII issue). Also at issue was whether the panel had been correct in finding that the EC's tariff-rate quota for frozen poultry meat was not exclusively for the benefit of Brazil, and that there had been no agreement between the EC and Brazil on the allocation of the tariff-rate quota within the meaning of GATT Article XIII:2(d). See EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 27, para. 76(b). This issue did not implicate the *Bananas* holding, hence I do not discuss it above.

470. EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 27, para. 76(d).

471. See EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 36, para. 103.

472. See *id.* at 35, para. 100.

473. See *id.* at 12, para. 31.

The EC allocated one share to the non-Members. Brazil questioned any share allocation to non-Members, even through this generic category.⁴⁷⁴

Brazil was motivated by self-interest (discussed in Part III.A.3.b above), but it also had a textual basis for its argument. It read GATT Article XIII:2 and XIII:2(d) to restrict the allocation of quota shares to Members. The key text (quoted earlier) concerned "all suppliers other than Members with a substantial interest in supplying the product."⁴⁷⁵ Brazil said this reference was to suppliers that are Members, but which lack a substantial supplying interest.⁴⁷⁶ The Panel, however, thought the reference was to non-Members, and thus did not preclude the trade of non-Members from being included in the calculation of tariff-rate quota shares. Brazil dubbed the Panel's interpretation an unwarranted expansion of the wording of GATT Article XIII.⁴⁷⁷ Brazil admitted the possibility that the inclusion of non-Members' trade was necessary to achieve the purpose of Article XIII, namely, an approximation of the shares of trade in the absence of a quantitative restriction (i.e., the minimization of trade distortion).⁴⁷⁸ Yet, Brazil argued, to include the trade of non-Members would be to treat them like Members, and thereby violate the *WTO Agreement* (in that countries must affirmatively join the WTO to realize membership benefits).

The EC immediately pointed out Brazil's self-interest: if Brazil's appeal were granted, then Brazil would benefit from an increase in its share of the tariff-rate quota. After all, the trade of non-Members would have to be excluded from the calculation of Brazil's (and all other Members') shares, and no share would be allocated to non-Members. Therefore, the "others" category into which the EC had put all non-Members would have to be eliminated, and Brazil (and the other Members) would pick up the pieces of this category.

The EC happily trotted out the *Bananas* Appellate Body report to support the proposition that the Article XIII principle of non-discrimination applies strictly when calculating and allocating shares of a tariff-rate quota, including to WTO Members not having a substantial interest.⁴⁷⁹ (Given the controversy in *Bananas* over the

474. See *id.* at 38, para. 107.

475. EC - Poultry Products, WTO Appellate Body Report, *supra* note 165, at 7, para. 14.

476. See *id.*

477. See *id.* at 37, para. 104.

478. See *id.* at 7, para. 15, at 36-37, para. 103.

479. See *id.* at 12, para. 30.

EC's allocation of shares to Members lacking a substantial interest, the EC's use of the precedent was somewhat ironic, but good lawyering nevertheless.) With respect to the calculation of shares, the EC said it was right to compute Brazil's tariff-rate quota share (and that of all other countries) on the basis of the total quantity of imports, including those from non-Members. By doing so, the EC conformed with the policy of Article XIII of aiming at a pattern of trade that approximates the pattern in the absence of a tariff-rate quota.

Regarding the allocation of shares, the EC inferred from the text of Article XIII:2(d) that (1) a tariff-rate quota must be allocated among "supplying countries," but that (2) the rights and obligations associated with the allocation among "supplying countries" with a "substantial interest" apply only to GATT contracting parties, *i.e.*, WTO Members.⁴⁸⁰ In other words, said the EC, only substantial supplying countries that are WTO Members are entitled to participate in a country-specific distribution of shares in a tariff-rate quota. That is why the EC put all non-Members into an "others" category and allocated a share of its tariff-rate quota to this category. In turn, when the EC assigned a share of the tariff-rate quota to all substantially interested Members, including Brazil, the EC gave Brazil the best possible and legally sound treatment concerning frozen poultry meat. In brief, the EC said it acted in accordance with the teaching of *Bananas*. Finally, as to the inclusion, albeit in a generic "others" category, of non-Members in the allocation - a matter not at issue in the *Bananas* case - the EC argued that while it was obliged to treat on an MFN basis any Member with respect to advantages granted even to a non-Member, it was not forbidden from providing market access to non-Members on an MFN basis.⁴⁸¹

The Appellate Body affirmed the Panel's conclusion that a tariff-rate quota must be administered in a non-discriminatory fashion,⁴⁸² thereby condoning the EC's method of calculating and allocating tariff-rate quota shares. Why? Citing *EC - Bananas*, the Appellate Body pointed out that a "Member may yield rights, but not diminish" its own obligations unilaterally.⁴⁸³ One such obligation is GATT Article XIII. Thus, a Member cannot insert into its tariff

480. See *id.* at 12-13, para. 32.

481. See *EC - Poultry Products*, WTO Appellate Body Report, *supra* note 165, at 12, para. 31.

482. See *id.* at 36, para. 102, t 60, para. 172(b).

483. *Id.* at 35, para. 98.

Schedule a tariff-rate quota violating Article XIII. The Appellate Body wisely pointed out this rule had its roots in a pre-Uruguay Round Panel report adopted in 1989: *United States - Restrictions on Imports of Sugar*.⁴⁸⁴

What about the matter of including non-Members in the calculation of tariff-rate quota shares allocated to Members? The Appellate Body held the EC had not violated GATT Article XIII by allocating tariff-rate quota shares to non-Members.⁴⁸⁵ It noted the Panel's finding was actually quite narrow, namely that the trade of non-Members may be taken into account in the calculation of shares in a tariff-rate quota.⁴⁸⁶ It went on to uphold that finding, stating unequivocally that "[w]e agree with the Panel that the calculation of shares must be based on the total imports of the product in question - *whether those imports originate from Members or non-Members*."⁴⁸⁷ Otherwise, the mandate of the *chapeau* of Article XIII:2 - to "aim at a distribution of trade . . . approaching as closely as possible the shares which the various [Members] might be expected to obtain in the absence of"⁴⁸⁸ the quantitative restriction - could not be followed.⁴⁸⁹ As for Brazil's point that the EC ought not to have allocated any share to the non-Member "others" category, the Appellate Body stated simply that the Panel had not reached a legal conclusion on this point, hence there was no need for the Appellate Body to render a determination.⁴⁹⁰

Thus, we see two dimensions to this progeny of EC - *Bananas*. First, in EC - *Poultry Products* the Appellate Body reaffirms its *Bananas* holding concerning the non-discrimination mandate of GATT Article XIII in the allocation of tariff-rate quotas. But, the Appellate Body then goes a step further, adding a corollary. It upholds the right of an importing Member to include non-Members in the calculation of country-specific tariff-rate quota allocations. We have then, yet another example of evolution in rule-making, of a *de facto* body of common law of international trade that is very much alive.

484. *See id.*

485. *See id.* at 38, para. 108, at 60, para. 172(d).

486. *See id.* at 37, para. 105.

487. *Id.* (emphasis added).

488. GATT, *supra* note 106, art. XIII:2.

489. *See* EC - *Poultry Products*, WTO Appellate Body Report, *supra* note 165, at 37, para.106.

490. *See id.* at 38, para. 107.

V. TWO CHALLENGES AHEAD

Heretofore, I have advanced the argument through induction. By tracing several distinct lines of decisional authority in assorted WTO Appellate Body reports, I have sought to demonstrate a more general point, namely, the operation of a *de facto* doctrine of *stare decisis*. The demonstration having been made, there is no sense in "piling it on" by adding yet more leading and progeny cases (though there surely are some, and likely to be more in the future). Thus, it is tempting to leave matters to rest, and let the reader decide for herself if the inference I am drawing is reasonable.

I should think it is best to resist this temptation. There are important issues, growing out of the argument, which concern the future work of the Appellate Body. They are not to be missed. If, indeed, my point about the emergence of a body of *de facto* common law on procedural and substantive aspects of international trade is accepted (even for the sake of argument), then it behooves us to inquire where the Appellate Body ought to go from here.

One approach to this question is to assume the *de facto stare decisis* regime in which the Appellate Body now operates can be changed. In the final part of the trilogy, *The Power of the Past: De Jure Stare Decisis and WTO Adjudication (Part Three of a Trilogy)*,⁴⁹¹ I shall make this assumption. My argument there shall be that the Appellate Body ought to go to a *de jure stare decisis* regime, and that the WTO Members should make the requisite amendments to the *WTO Agreement* and *DSU* to shift paradigms. In the remainder of this article, however, I remain within the confines of the existing parameters. That is, I address the question under the assumption that the *de facto stare decisis* regime remains in place. Nothing on the agenda of the WTO - particularly with respect to its review of the *DSU*, the Seattle Ministerial Conference meeting at the end of 1999, and a possible Millennium Round - suggests a paradigm shift. So, the discussion that follows exists within a quite realistic context.

But, I would like to change my methodology from induction to deduction. That is, I would like to attempt to deduce a few points about Appellate Body adjudication from grand propositions about *stare decisis*. There are a variety of potential intra-disciplinary sources for these grand propositions, including legal classics that discuss *stare decisis* such as Karl Llewellyn's 1960 work, *The Common Law*

491. Bhala, *Toward De Jure Stare Decisis*, *supra* note 5.

Tradition,⁴⁹² his 1930 favorite *The Bramble Bush*,⁴⁹³ and Henry Hart and Albert Sack's *The Legal Process*, originally published in 1958.⁴⁹⁴ These classics also can be supplemented by various law review articles on English legal history, jurisprudence, and even a few American Supreme Court cases that have appeared over the last half-century or so. Given the *de facto stare decisis* regime and this deductive methodology, the question of where the Appellate Body ought to go from here can be put more precisely: What future challenges, if any, does the Anglo-American theory of *stare decisis* pose for the operation of the *de facto* doctrine of *stare decisis* in Appellate Body adjudication?

My answer is quite straightforward. Among the many teachings we receive from the classics and supplements thereto, two are particularly noteworthy. First, as Llewellyn tells us in *The Bramble Bush*, *stare decisis* is "Janus-faced."⁴⁹⁵ The lines of *de facto* precedent identified in Parts III and IV above highlight just one of these faces, namely, adherence to prior holdings. But, the larger the body of international common law of trade that the Appellate Body develops, the more obvious the second visage - departures and modifications from prior holdings - will be.

Second, various factors bear on the normative force (*i.e.*, the justifications, which are not necessarily value-free) of a precedent.⁴⁹⁶ While a prior holding may bind in a *de facto* sense, the Appellate Body members will find its soundness, its discursive justification, stronger or weaker depending on an array of variables. Obviously, I do not seek to resurrect the distinction between "binding" and "non-binding" precedent that I criticized at length in Part One of this trilogy.⁴⁹⁷ Nor am I suggesting that, aside from the basic difference concerning a legal obligation to follow precedent, the normative factors affecting the binding force of precedent in a *de jure stare decisis* regime are materially different from those in a *de facto* regime. Rather, I want to acknowledge the reality that some precedents (be

492. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

493. LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 4.

494. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

495. LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 4, at 74.

496. See generally Summers, *supra* note 24, at 355 (discussing some of these factors); *infra* pt. V.B (discussing the persuasiveness of precedent).

497. See Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2, at pt. IV.

they *de facto* or *de jure* ones, but in the present context, *de facto* ones) exert a stronger effect, for a longer period of time, on the minds of adjudicators than others.

These two teachings suggest key challenges for the Appellate Body that resemble, in some respects, the challenges faced by an Anglo-American common law court. First, how rigid will the Appellate Body be, and how rigid ought it to be, in adhering to its *de facto* precedents? Second, what factors ensure that a *de facto* precedent will have a stronger and more lasting effect? The teachings and challenges they pose are discussed in turn below.

A. The Janus-Faced Nature of Precedent

1. The Teaching

Given the official denials about the existence of *stare decisis* in the international legal system, both public and trade, the logic of an inquiry into the nature of precedent might perplex many international lawyers, both in practice and the academy. After all, the results would be moot in the present context if the denials are to be believed, and in any event are the results not already understood? To the question "what is precedent?," surely the most common response of international lawyers would be "precedent is about following the same or a higher court in the same or similar circumstances, *n'est-ce pas?*"⁴⁹⁸ Further, most international lawyers

498. For example, this conventional wisdom is embedded in one of Professor Jackson's comments on the question of precedent in WTO dispute settlement.

Some might argue not only that GATT practice suggests an interpretation that there is an obligation to obey the results of the dispute settlement process, but that an adopted panel report would have a "precedent effect," and thus would operate with a legal and moral obligation on non-disputant Contracting Parties. There are several problems with this idea, however. First, under international law generally, it is considered that dispute settlement procedures or tribunal opinions or decisions do not have a "*stare decisis*" effect. *In addition, there are several specific instances in the GATT jurisprudence where panels have consciously decided to depart from the results of a prior panel, and the panel seems to think that it is within its power to do so.*

JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION* 83 (1998) (emphasis added). As explained below, adhering to precedent is only one of the two faces of the doctrine of *stare decisis*. The mere fact that GATT panels have departed from holdings of other GATT panels actually may reinforce the argument *stare decisis* operated in fact in GATT adjudication. This is particularly so, given that in the pre-Uruguay Round system, panels were in a horizontal relationship with one another, in contrast to the post-Uruguay Round system, in which panels are in a vertical relationship with the Appellate Body. As I explained in Part One of the trilogy, it is also particularly so if the panels take pains to distinguish their cases from one another. See Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2, at pt. II.A-C. That behavior (not unlike the reasoning process of English appellate courts) suggests the panelists feel the obligatory force of prior rulings.

probably would agree that a (if not the) dominant concern associated with precedent is the strengthening of a rule-based system:

[E]very departure from the rules carries some risks. It causes respect for the rule system itself to be weakened. It makes it easier in the next hard case to depart from the rules. If rules are viewed as one tool for ordering or improving human affairs, then weakening a rule system tends to reduce the utility of that tool in all its contexts.⁴⁹⁹

This orthodoxy is not wrong. It is just incomplete.

Stare decisis is a far richer and subtler concept than is sometimes understood.⁵⁰⁰ It is not a jurisprudential odyssey in search of ideal moral justice that necessitates flexibility in interpreting and applying precedents. It is more earthy than that. But, to say flexibility results from law being just politics in a different arena, or from courts being moved largely by consequentialist arguments, is for me too cynical. The simple fact is that prior pronouncements cannot be adhered to in a rigid or unquestioning manner, otherwise the common law would not evolve to meet changing times and circumstances.

As to the remark that tribunal opinions do not have a *stare decisis* effect under international law, which Professor Jackson supports by reference to Ian Brownlie's *Principles of Public International Law* (4th ed. 1990) at 21 and Article 59 of the ICJ Statute, *see id.* at 83 n. 68, I would call attention to the discussion of the matter in Part One of the trilogy. *See Bhala, The Myth About Stare Decisis and International Trade Law, supra* note 2, at pt. II.A. Moreover, as Professor Brownlie himself observes regarding the (supposed) lack of binding precedent, the ICJ has "[i]n its practice ... not treated earlier decisions in such a narrow spirit," and the Court "*strives nevertheless to maintain judicial consistency.*" IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 21 (4th ed. 1990) (emphasis added).

Curiously, Professor Jackson concludes that "a strict 'precedent effect' or *stare decisis* is not operating," but that "there clearly is a de facto precedential effect operating, albeit not strictly." JACKSON, *supra* note 498. Because of the use of the modifier "de facto," I think this statement points in the right direction. However, the statement also poses difficulties. First, the statement seems to contradict the initial argument, quoted above, that there is no precedential effect in the dispute settlement process. Second, it is uncertain whether the statement represents a material change from the observations of Professor Jackson that I assessed in Part One of the trilogy. *See Bhala, The Myth About Stare Decisis and International Trade Law, supra* note 2, at pt. II.B. Third, unfortunately this statement is neither preceded nor followed by an elaboration of a theory of *de facto* versus *de jure* *stare decisis* (or any other conceptual model). What is required, I think, is a clear analysis of linkages among post-Uruguay Round adjudicatory outcomes, and a fresh consideration of the normative arguments about the theoretical and practical functions of precedent in the multilateral dispute resolution system.

499. JACKSON, *supra* note 498, at 109.

500. *See, e.g.,* Higby v. Mahoney, 48 N.Y.2d 15, 22 (N.Y. 1979) (stating that "[s]tare decisis, to its credit, is a far more subtle and flexible concept than some of those who would give it slavish adherence suggest.").

As Sir Carleton Kemp Allen puts it in the 1958 edition of his classic of English legal history, *Law in the Making*, "[l]aw is the product of its own period and environment and it cannot remain static."⁵⁰¹ Therefore, precedents necessarily must be defeasible.⁵⁰² The "dominant purpose all precedents, all arguments, and all principles must subserve," teaches Sir Allen, is "to do justice between litigants, not to make interesting contributions to legal theory."⁵⁰³ Consistent with this logic, Professor Becker argues persuasively in the context of property law that courts "should abandon precedent completely" when faced with "deviant language," i.e., "language that falls well beyond the parameters of conventional phraseology."⁵⁰⁴ To interpret such language, he urges courts to look to intent, custom, fairness, and policy considerations, because the benefits of *ad hoc* determinations will outweigh the costs of different courts interpreting the language differently.⁵⁰⁵

In thinking about the richness and subtlety of *stare decisis*, we ought not to pass up the chance to recall some wonderful turns of phrases penned by giants of legal thought. Lord Chief Justice Mansfield insists on "certainty and consistency of decision,"⁵⁰⁶ but also has "a deep impatience of the unintelligent and mechanical use of precedent merely for its own sake and without any true relevance to the underlying principles involved in a legal issue."⁵⁰⁷ Thus, in the 1762 case of *Fisher v. Prince*,⁵⁰⁸ he intones that "[t]he reason and spirit of cases make law, not the letter of particular precedents."⁵⁰⁹ In 1879, Oliver Wendell Holmes warned against legal petrification. "But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the

501. ALLEN, *supra* note 7, at 286.

502. For a distinction between "strict bindingness" (i.e., where precedents must be applied in every case) and "defeasible bindingness" (i.e., where precedents must be applied in every case unless exceptions apply), see *Appendix: Final Version of the Common Questions, Comparative Legal Precedent Study, September 1994*, in INTERPRETING PRECEDENTS 554 (D. Neil McCormick & Robert S. Summers eds., 1997).

503. ALLEN, *supra* note 7, at 283.

504. David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853, 860 (1998).

505. *See id.* at 860.

506. ALLEN, *supra* note 7, at 206.

507. *Id.* (emphasis added).

508. 3 Burr. 1363.

509. *Quoted in* ALLEN, *supra* note 7, at 212 (emphasis added).

merely logical point of view."⁵¹⁰ It is Holmes who argued against "a rule which persists for no better reasons than that 'it was laid down in the time of Henry IV.'"⁵¹¹ Likewise, a famous English judge, Sir Samuel Evans, writes in 1915 that precedents must not become "shackles to bind,"⁵¹² and thus the common law is to be perdurable, but not excessively so. In 1931, Lord Macmillan instructs in the case of *Birch v. Brown* that precedents ought to be "stepping-stones, and not halting-places."⁵¹³ Also in 1931, Judge Cardozo reminds us that *stare decisis* can stultify: "[t]he repetition of a catchword can hold analysis in fetters for fifty years and more."⁵¹⁴

In brief, the wisdom of giants such as these is, to use a different metaphor, that precedents ought to give the law a "tensile toughness" so that the law can "live and work," rather than be a "brittle structure" that "crumble[s] into powder."⁵¹⁵ Perhaps a prior holding is erroneous as a legal matter, or inimical to a widely accepted standard of justice. Indeed, perhaps the holding was ill conceived from the beginning.⁵¹⁶ Blackstone thus instructs that "precedents and rules must be followed *unless flatly absurd or unjust*,"⁵¹⁷ as does Justice Parke in 1833 in his classic *dictum* that precedents must be applied "where they are not plainly unreasonable and inconvenient."⁵¹⁸ Similarly, Sir Allen writes in *Law in the Making* that "[i]n the last analysis, the judge follows 'binding' authority only

510. Oliver Wendell Holmes, *Common Careers and Common Law*, 13 AM. L. REV. 608, 630 (1879) (emphasis added).

511. *Loschiavo v. Port Authority*, 58 N.Y.2d 1040, 1043 (N.Y. 1983) (quoted in dissenting opinion of J. Fuchsberg).

512. *The Odessa*, [1915] Probate Division 52, 62, quoted in 1 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996* 94 (1997) (emphasis added).

513. ALLEN, *supra* note 7, at 259 (quoting *Birch Bros. Corp. v. Brown*, 605 A.C. at 631 (1931)) (emphasis added).

514. Benjamin Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 689 (1931).

515. REMBAR, *supra* note 156, at 32. In *Higby v. Mahoney*, Judge Fuchsberg uses a similar metaphor. Writing of the inherent limitations of *stare decisis*, he notes that "the stability it [the doctrine of *stare decisis*] espouses must coexist with both the dynamics of an evolving society and the accruing wisdom born of the repeated injustices which a particular ruling has wrought." *Higby v. Mahoney*, 48 N.Y.2d 15, 22 (N.Y. 1979). Therefore, he concludes the "temper" of the doctrine "partakes more of the malleability of gold than of the rigidity of steel." *Id.*

516. See Summers, *supra* note 24, at 355, 396-97 (identifying situations when it is justified to overrule precedent).

517. SIR WILLIAM BLACKSTONE, *I COMMENTARIES ON THE LAWS OF ENGLAND* 70 (Clarendon Press ed., Hein & Co. 1992) (1769) (emphasis added). For a discussion of this famous remark and its historical context, see ALLEN, *supra* note 7, at 224-25.

518. *Mirehouse v. Rennell*, 1 Cl & F., 527, 546, quoted in ALLEN, *supra* note 7, at 227-28, 279 (emphasis added).

if and because *it is a correct statement of the law*. . . . [B]ut where it is plainly and admittedly founded on error, his obligation disappears. He owes a higher obligation to his mistress, the law."⁵¹⁹

Even when a precedent is legally correct and just, there are, for example, breaks with tradition in statutes that call for breaks in tradition in judicial interpretation of those statutes.⁵²⁰ Changing social, cultural, or moral attitudes, or political, economic, or factual conditions, compel a court to modify or reverse its own or a lower court's precedent (or, for that matter, to urge a higher court to do so).⁵²¹ Dramatic, or even evolutionary, changes may require precedents to be bent, if not broken.⁵²² Technological innovation represents one of the most potent forces in this regard. And, only part of a prior pronouncement, not the entire previous written opinion, need be the focus of a future judge's attention.

We should not, then, be surprised by the report of Professors Atiyah and Summers that, as of 1991, "American appellate judges expressly overrule precedents at least two or three times each year in almost every state."⁵²³ Yet, judges must not feel free to legislate, for are they not - at least in a natural law paradigm - supposed to "find" instead of "make" the law? Indeed, the term "*stare decisis*" itself connotes standing firmly - not slavishly adhering to - prior decisions. A judge must decide a case at bar in accordance with any applicable precedent *that cannot be distinguished* on valid grounds.⁵²⁴

Thus, when we turn to the problem of what "precedent" is, we see not only that it is, but that it must be, more than the commonly recognized shield against arbitrary departures from the foundational principle of justice that like cases be treated alike. It also is and must

519. ALLEN, *supra* note 7, at 280-81 (emphasis original).

520. See, e.g., McMahan, *supra* note 196, at 145 (arguing that the Uruguay Round Agreement on Agriculture is a break with GATT tradition and the Appellate Body report in the EC - Bananas case does not recognize this fact and the special nature of agricultural trade).

521. See Ferdinand Hogroian, *Comments on Customary International Law*, IV(1) INTERNATIONAL LEGAL THEORY 17 (American Society of International Law 1998) (discussing the formation of precedent); REMBAR, *supra* note 156, at 28 (noting the importance of "the fixing of facts" to the process of forming precedent).

522. See REMBAR, *supra* note 156, at 29 (discussing the Commerce Clause and economic changes since the Constitution was written, and discussing the First Amendment and the information technology revolution). Put differently, to paraphrase what Roscoe Pound reputedly once said, the law must be stable, but it must not stand still.

523. Summers, *supra* note 24, at 404 (citing P.S. ATYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO AMERICAN LAW ch. 5 (1991)).

524. See SIR GERALD FITZMAURICE, II THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 584 (1986).

be a sword to manage change and thereby avoid injustice in a particular case. "What I wish to sink deep into your minds" about *stare decisis*, intoned Llewellyn,

is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same precedent, are contradictory of each other*. That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side.⁵²⁵

Therefore, we also ought not to be surprised by the abandonment of the strict doctrine of *stare decisis* by English courts by the early or middle of the twentieth century, and certainly no later than 1966 with the issuance of the House of Lords Practice Statement:⁵²⁶

Their Lordships regard the use of precedent as an *indispensable foundation* upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognize that *too rigid adherence* to precedent may lead to *injustice* in a particular case and also *unduly restrict* the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as *normally binding*, to depart from a previous decision when it appears right to do so.⁵²⁷

Indeed, the Practice Statement reminds us of an oft-quoted remark of Lord Chief Justice Mansfield in the 1774 case of *Jones v. Randall*⁵²⁸: "The law of England would be a strange science if indeed it were

525. LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 4, at 74.

526. See W. Barton Leach, *Revisionism in the House of Lords: the Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797, 798 (1967).

527. House of Lords, Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (issued 26 July 1966) (Lord Chancellor Gardiner) (emphasis added).

528. See 1 Cowp. 37 (cited in Allen, *supra* note 7, at 212).

decided upon precedents only. *Precedents serve to illustrate principles and to give them a fixed certainty.*"⁵²⁹

The subtlety, then, with *stare decisis* is not whether it exists, but rather how firmly adjudicators interpret the doctrine. Just how great of an effect does the past have on the present? Under what circumstances is it legitimate to depart⁵³⁰ from the past? How far a departure is justified? These are the challenges facing a common law adjudicator.

In addressing these questions, we can say for sure the choice is not limited to rigid adherence or casual respect. Rather, there is a continuum, sketched in Chart 3 below. Rigid adherence would suggest the Appellate Body will overturn a *de facto* precedent it has established only when a change has been made to the underlying text by the WTO Ministerial Conference, or an authoritative interpretation has been issued concerning the relevant text by the GATT Council. Casual respect would imply one or perhaps a few reasonable arguments, but not necessarily brilliantly persuasive ones, which may well be policy-based rather than legal in nature,⁵³¹ are enough to move the Appellate Body to depart from a prior holding. Surely the Appellate Body members, were they asked about it, would not regard themselves as forced to operate at either of these extremes. In all likelihood, they would agree there is a continuum defined by these extremes, and that it is their responsibility – as an adjudicatory group and as individual jurists – to know where they operate on the continuum and why.

We can also be confident in defining at least two more points on the continuum. Closer to the extreme of "casual respect" lies the

529. Quoted in ALLEN, *supra* note 7, at 212 and in ALAN HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 293 (1966) (emphasis added).

530. By "departing" from precedent I mean that a subsequent court, or in the international trade context the Appellate Body in a later case, renders a ruling different from a precedent, even though the facts of the later case are materially similar to the facts of the earlier case that generated the precedent. The departure may be implicit (*e.g.*, where a court consciously ignores a precedent, in good faith thinks a precedent is inapposite, re-characterizes the facts or holding of a prior case, reinterprets a precedent to mean something different than what it actually does, or explains and distinguishes a precedent that genuinely is conflicting) or overt (*e.g.*, where a court explicitly overrules or modifies a precedent, creates an exception to the precedent, synthesizes or re-constructs a body of prior cases, or openly refuses to follow a precedent). See Robert S. Summers & Svein Eng, *Departures from Precedent*, in *INTERPRETING PRECEDENTS* 519, 520-25 (D. Neil MacCormick & Robert S. Summers eds., 1997).

531. By these examples, I do not mean to over-play the distinction between "legal" and "policy" arguments. Perhaps it would suffice simply to differentiate between "strong" and "weak" arguments, whatever their essential nature. The point is to attempt a plausible continuum that underscores the falsity of thinking only in binary terms.

possibility that a single strong legal argument made by a WTO Member to the Appellate Body, if not rebutted convincingly by the other party to the case, suffices to overturn a *de facto* precedent. Closer to the extreme of "rigid adherence" is the possibility that more than one strong, un-rebutted legal argument is required of a WTO Member if the Appellate Body is to be moved to depart from its prior holding.

**CHART 3:
A CONTINUUM OF ADHERENCE TO PRECEDENT**

<i>Extreme</i>	<i>Intermediate</i>	<i>Intermediate</i>	<i>Extreme</i>
Rigid Adherence to a <i>De Facto</i> Precedent, Need Legislative Action to Overturn	Multiple Strong Legal Arguments Needed to Over- <i>a De Facto</i> Precedent	One Strong Legal Argument Needed to Overturn a <i>De Facto</i> Precedent	Casual Respect For a <i>De Facto</i> Precedent, Policy Argument(s) May Suffice

In between each intermediate point and the closest extreme lie still more possibilities.

For example, in the 1993 New York case of *Dufel v. Green*, the court positioned its philosophy of *stare decisis* between the "multiple strong arguments" and "rigid adherence" positions. "Although [the doctrine of *stare decisis*] does not require unyielding adherence to even recent precedent, *the mere existence of strong arguments to support a different result is not sufficient*, in and of itself, to compel the court to overturn judicial precedent."⁵³² In contrast, in the 1981 New York case of *DeAngelis v. Lutheran Medical Center*, the court seems to suggest its philosophy is between the "one strong argument" and "casual respect" points, that it might be inclined to depart from an egregious precedent for pressing policy reasons.

We are aware that courts should not shirk their duty to overturn unsound precedent and should strive to

⁵³² *Dufel v. Green*, 603 N.Y.S.2d 624, 625 (N.Y. App. Div. 1993) (emphasis added).

continually develop [sic] the common law in accordance with our changing society.... Yet the mere potential ability to change the common law is not the same as the *desirability* of making a particular change.⁵³³

Obviously, the continuum offers many choices to a court. The *Dufel* and *DeAngelis* quotations ought to highlight the fact that a court does well when it reveals and justifies its choice.

Why? Because, first, only through such pronouncements can future potential litigants understand the power that past holdings exert on the minds of present adjudicators before whom they may bring their cases. Second, only through these pronouncements, which serve as yardsticks, can the adjudicators be held accountable to present litigants and higher courts. Third, only by attempting such pronouncements can the adjudicators themselves think through their approaches to *stare decisis*, and thereby work to improve the quality of their reasoning.

It should also be apparent that no one court is expected to stay at the same point on the continuum for all time. The House of Lords Practice Statement itself illustrates that shifts are not only possible, but even welcome. Yet, no court ought to move itself from one point to another lightly or frequently. Carefully reasoned and explained movements along the continuum are as important to preserving the strength of a rule-based system as is fidelity to any one position.

2. *The Challenge for the Appellate Body*

It seems at this juncture in the WTO's history that there is little in the way of the second face of *stare decisis*. Possibly that face is visible in pre-Uruguay Round GATT adjudication, a possibility requiring another article to explore. As for adjudication under the DSU, however, there is as yet no "*Brown v. Board of Education*" type of report that represents a stunning break with *de facto* precedent. Nor is there even a truly dramatic report in which two lines of *de facto* precedent struggle mightily with one another, a titanic clash within the common law, as it were.

The one-dimensional nature of *de facto stare decisis* ought not to be a surprise. Given concerns such as predictability, transparency, and

533. *De Angelis v. Lutheran Med. Ctr.*, 445 N.Y.S.2d 188, 194 (N.Y. App. Div. 1981) (emphasis added).

legitimacy (discussed in Part Three of this trilogy⁵³⁴), panels and the Appellate Body naturally write reports that are bridges with the past. Quick turnabouts at this early stage in the WTO's history might well undermine the entire dispute settlement system. Confidence in that system could be eroded. It could be criticized - as prominent protectionists like perennial presidential candidates Pat Buchanan and Ross Perot now claim - as an arbitrary, sovereignty-infringing Leviathan.⁵³⁵

However, within several years, probably not more than a decade, the *de facto* precedents themselves are sure to be the target of criticism by Members, non-governmental organizations, and individuals. Some will be said to have outlived their utility, to be inconsistent with the corpus of common law that has emerged, or to be morally objectionable based on changed standards. When this time comes, WTO adjudicators will be called upon to show themselves capable of more than wooden application of their past decisions. They will have to show their appreciation for the Janus-faced nature of *stare decisis*, in the Anglo-American sense, in the context of the *de facto stare decisis* regime that they created.

At that juncture, we shall see just how mature in its jurisprudence, and just how self-confident in its professional demeanor vis-a-vis the other WTO institutions and the WTO Members, the Appellate Body has become. The Appellate Body will have to face the same challenge as a common law adjudicator. It will have to pick the right opportunity to identify its philosophy on the role of precedent, seize it, and entertain a well-reasoned discussion of that philosophy. That is, when the world trading community openly acknowledges what is in some quarters admitted only privately and grudgingly - that the Appellate Body operates in a *de facto stare decisis* regime - WTO Members naturally will want to know where on the continuum the Appellate Body is, and why.

However, the challenge to respond will be more severe for the Appellate Body than for a common law adjudicator not at the apex of a judicial hierarchy. The Appellate Body is, aside from the General Council acting as the DSB, the principal judicial organ of the WTO. Standing at the zenith of the hierarchy, it has, I would argue, a near-

534. See *supra* note 5.

535. The public pronouncements of these two figures are so well known that only the most over-zealous writer would feel compelled to provide citations. However, some readers may wish a single source in which their protectionist sentiments are articulated, and I would commend for this purpose Patrick J. Buchanan, *The Great Betrayal* (1998).

sacred duty to help minimize trade friction in the global economy by consistent application of principled, well-articulated rules. Will the Appellate Body retreat into cloistered, defensive secrecy, and deny what we all by then will happily and openly admit to be occurring? Or, will it relish the limelight, accept the reality of the *de facto* body common law it has parented, and address head on for all to see the necessity to ensure this body is a living, breathing and increasingly integrated organism?

Perhaps because of the myth about *stare decisis* and international trade law,⁵³⁶ the Appellate Body has felt somewhat immune from the challenge. Or, to put it differently, the challenge has not yet manifest itself. However, as the analysis in Parts II and III above shows, the Appellate Body operates in a world of *de facto stare decisis*, a world it has had a very central role in creating. As the pace of cases filed at the WTO continues, and the number of Appellate Body reports grows, its body of *de facto* common law of trade inevitably will expand in depth and breadth. Put bluntly, every day there are more *de facto* precedents on which a WTO Member can rely or against which a WTO Member must inveigh.

The Appellate Body, therefore, is sure to be pressed by some disputing Members to adhere to its prior holdings, and simultaneously by other disputants to *depart* from these holdings. The arguments in both directions increasingly will be framed in ways very familiar to common law lawyers. Indeed, it may be misleading to suggest these developments are for the future. Already, the Appellate Body may be facing the challenges inevitably attendant to its brainchild, the *de facto* precedents. How should it face these challenges? Specifically, will it come to terms with the lissome nature of precedents, steering between the extremes of the continuum, unpalatable adherence and careless indifference? If so, how will it do so?

I submit that the fundamental reality the Appellate Body ought to keep in mind is that it has enormous *discretion* in carrying out the near-sacred duty I just identified. I am reminded of the point made by Sir Allen about the operation of *stare decisis* in English courts: "[i]t is therefore *fallacious to regard the application of precedents in the courts as a mere functioning of machinery*. It is a complex process, depending greatly upon the faculties of individual judges. . . ."⁵³⁷ I suggest the

536. See Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2, at pt. I.

537. ALLEN, *supra* note 7, at 279 (emphasis added).

Appellate Body use its discretion to lighten its burden. To some extent, the Appellate Body can shape the agenda, that is, the terms on which it addresses the challenge. It can do so by regulating the tension between a precedent that is too broad and one that is too narrow. It ought to appreciate that setting *de facto* precedents that are too large, that cover too much, can lead to the development of an international common law of trade that is insensitive, loses touch with justice, and results in hardships in particular cases.⁵³⁸ It ought to also appreciate that setting *de facto* precedents too narrowly, and that do not cover enough, can result in the development of an international common law of trade laden with technical details in which WTO Members are easily lost and thereby unclear as to where they stand.⁵³⁹ Worse yet, it can create opportunities for corruption as the Appellate Body, WTO Panels, and Members themselves seek to exploit the technicalities to advance a personal or political agenda notwithstanding systemic interests.⁵⁴⁰

The point, then, is that the Appellate Body would do well to exercise its discretion by crafting its holdings with care, ensuring their nature and scope is "just right." The lodestar for the Appellate Body ought to be Charles Rembar's observation about the sort of balancing that is required in adjudication.

A principle by definition must have *some* generality; it must spread over a number of particulars dissimilar in *some* respects but alike in essence. How large that number, how broad the rule, what constitutes the essence, where the principle should stop and another principle begin – *that is the heart of the law*. *The answer will vary* according to the purpose of the rule, the need it seeks to meet, the problems in administering it, the requirements of fairness.⁵⁴¹

If the Appellate Body exercises its discretion wisely, then it will at least reduce the number of instances in which WTO Members challenge extant *de facto* doctrine as overly broad or excessively

538. See generally REMBAR, *supra* note 156, at 28 (discussing problems with overly broad precedents).

539. See *id.* (discussing problems with excessively narrow precedents).

540. See generally REMBAR, *supra* note 156, at 28 (discussing problems with excessively narrow precedents).

541. *Id.* at 28 (emphasis added).

narrow. The Appellate Body will not be in the uncomfortable position of having to defend exaggerated or myopic doctrine. Rather, it will be comfortably self-confined to the challenge – which is daunting enough – of exploring whether a *de facto* precedent that was perfectly appropriate when established simply has exhausted its useful life in the light of intervening global economic, political, technological, or cultural events. In turn, the Appellate Body will not give any more ammunition for attack to anti-multilateralist, anti-free trade forces. In brief, it will have served the calling of working to minimize trade friction.

B. *The Persuasiveness of Precedent*

1. *The Teaching*

Students of Anglo-American jurisprudence should be quite comfortable with the proposition that not every precedent exerts the same force on the mind of an adjudicator. Among the universe of precedents, some retain greater vitality, and for a longer period, than others. (Students of American constitutional law might find this characterization, when applied to the Supreme Court, too charitable! They are bound to wonder at times whether the Court adheres to the doctrine of *stare decisis* in any meaningful sense.⁵⁴²) Some precedents simply are more sound, and have a better discursive justification, than others. To be more precise, the degree of substantive acceptability of a one precedent, and the extent to which that precedent is reasonably coherent within the extant legal context, are not necessarily the same as the “merits” or “fit” of another precedent. This point is no less true in the current *de facto stare decisis* regime than in Anglo-American setting. In either context, then, we ought to ask why this is so.

The received wisdom on this question from many legal classics is synthesized nicely by Professors MacCormick and Summers.⁵⁴³ In a word, they are eclectic, and rightly so. There cannot be one explanation, in the abstract, for the persuasiveness of a precedent

542. See generally SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS* (1995) (discussing the alteration of precedent on the Supreme Court between 1946 and 1992).

543. See D. Neil MacCormick & Robert S. Summers, *Introduction*, in *INTERPRETING PRECEDENTS* 1, 10-11 (D. Neil MacCormick & Robert S. Summers eds., 1997); Summers, *supra* note 24, at 355, 373-77; *Appendix, supra* note 502, at 551, 555-56. I have taken some of these factors out of order to suit the present analysis.

that is itself persuasive. Any such explanation is sure to be under-inclusive, over-inclusive, or maybe even a bit of both. Thus, I shall draw upon the MacCormick-Summers multi-variable test for explaining the different degrees of normative force of precedent.

I do think, however, their test can be re-organized and embellished to suit the present purposes, and I shall do so. It should be admitted that neither they nor I undertake the project of establishing the threshold of substantive acceptability and reasonable coherence that a precedent must have to be "just persuasive enough." That, after all, is (or should be) the project of the Appellate Body. Hence, I would hope it will be clear in defining this threshold for WTO Members. To assist in this project, I suggest the Appellate Body consider examining the MacCormick-Summers variables, as modified below.

The variables can be placed into one of three broad categories. The first such category I shall call "*legal infrastructure*," by which I mean the formal organizational structure and attendant rules of the judicial system in which an adjudicatory tribunal operates. I shall call the second category "*legal thought*," by which I mean simply intellectual developments in the law. The final category I shall label "*social context*," which is meant to connote the environment in which a tribunal operates and intellectual developments occur. These categories, and the variables in them, are summarized in Chart 4 below.

	<p>Establishment of precedent by influential or prestigious tribunal?</p> <p>Direct relationship: The greater the prestige, the greater the normative force.</p>	<p>Dramatic changes in related, relevant areas of law?</p> <p>Inverse relationship: The more dramatic the changes, the less the normative force.</p>	<p>Length of time since precedent was set?</p> <p>Direct relationship: The greater the length of time, the greater normative force.</p>
		<p>Area of law in which precedent is set, namely, contracts or property versus common law or constitutional law, and procedure versus substance?</p> <p>Relationship depends on area of law.</p>	

We may think of this Chart, conceptually at any rate, in terms of an equation. The Chart establishes for us a series of relationships, which also are discussed below under the assumption of *ceteris paribus* (all other things being held constant). The dependent variable is the normative force of a precedent (be it in the *de jure* Anglo-American sense or *de facto* Appellate Body sense). By "normative force," as intimated earlier, I mean the substantive acceptability and reasonable coherence of the precedent. All other

variables are independent. The question the equation addresses is what differentiates the normative force and substantive acceptability of one precedent from another? Each independent variable provides a unique answer, expressed in terms of a hypothesized general relationship to the dependent variable. The relationship may be direct or inverse. The hypothesis is grounded on our experience and common sense.

In the category of the "legal infrastructure," we find three variables. First, the higher the tribunal that issues a precedent sits in the judicial hierarchy, the more forceful the precedent.⁵⁴⁴ Second, a precedent decided by the entire tribunal, a "full bench," is more persuasive than a precedent laid down by a sub-set thereof.⁵⁴⁵ Third, a precedent of a more influential or prestigious tribunal will, *ipso facto*, be more persuasive.⁵⁴⁶

In the category of "legal thought," we find four variables. First, the presence of a well-argued dissent in the precedent-setting case may cause future adjudicators to re-think the precedent, or at least to work harder to distinguish it from the case they are called upon to resolve.⁵⁴⁷ Second, the normative force of a precedent will be diminished if the precedent has been criticized severely by academics, or if it contravenes to the trend of the law in other jurisdictions of note.⁵⁴⁸ Third, the more dramatic the changes in related areas of law, the more likely a tribunal will find these changes to be relevant, and in turn the more likely the changes will undermine the precedent.⁵⁴⁹ Fourth, the degree of force of a precedent may vary depending on the area of law of the

544. See Summers, *supra* note 24, at 374 (item (a)); Appendix, *supra* note 502, at 555 (item (a)). For a detailed treatment of the relationship between the organization of a court system and the use of precedents, see Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS 437 (D. Neil MacCormick & Robert S. Summers eds., 1997). For a discussion of this variable in the English context, see ALLEN, *supra* note 7, at 275-80.

545. See Summers, *supra* note 24, at 374 (item (b)); Appendix, *supra* note 502, at 555 (item (b)).

546. See Summers, *supra* note 24, at 374 (item (c)); Appendix, *supra* note 502, at 555 (item (c)). Whether this relationship depends, in turn, on the factors that affect the court's influence on prestige is beyond the scope of the present discussion.

547. See Summers, *supra* note 24, at 376 (item (g)); Appendix, *supra* note 502, at 556 (item (g)).

548. Professors MacCormick and Summers list trends in academic writing as a separate factor, while I consider it to be includable with trends in other jurisdictions. See Summers, *supra* note 24, at 377 (items (i) and (j)); Appendix, *supra* note 502, at 556 (items (i) and (j)).

549. See Summers, *supra* note 24, at 377 (item (k)); Appendix, *supra* note 502, at 556 (item (k)).

precedent.⁵⁵⁰ Strict adherence to precedent is more important in contract and property rights, where settled rules are constantly relied upon in everyday transactions. Less strict adherence to precedent is appropriate with respect to common law rules a court itself has created, or in constitutional areas where the only alternative to change is by means of an improbable amendment to the constitution. Less strict adherence is also appropriate with respect to procedural as distinct from substantive rules, at least insofar as fundamental values are not embodied in a procedural rule.

Finally, there are three variables in the social context category. First, changes in the political, economic, religious, or cultural climate influence how a subsequent court views a precedent.⁵⁵¹ The more dramatic these changes, the more incongruous the precedent will appear to be with contemporary times, and its normative force will have been greatly diminished. Second, a precedent will retain greater vitality for a longer period if the underlying arguments in its favor are not challenged forcefully by advocates before the tribunal, *i.e.*, if there is no "meta-attack" on the pillars upholding the precedent.⁵⁵² Third, the mere passage of time may contribute to the strength of a precedent.⁵⁵³ In other words, the longer a precedent has been around, the more likely it passes into the sublime realm of legal tradition, *i.e.*, the more difficult it is to overturn because it is assumed that a large number of agents have relied on it and shaped their behavior accordingly.

2. *The Challenge for the Appellate Body*

The lines of *de facto* precedent created by the Appellate Body reports in *United States - Wool Shirts, EC - Bananas, United States - Reformulated Gas*, and *Japan - Alcoholic Beverages* are quite apparent. As I pointed out in Part V.A.2 above, we see in these lines the first of the two faces of precedent of which Karl Llewellyn speaks: the adherence to the past. What we do not see in these lines, however, is a titanic struggle with prior decisions. In the progeny cases,

550. See *Summers*, *supra* note 24, at 376 (item (h)); *Appendix*, *supra* note 502, at 556 (item (h)).

551. See *Summers*, *supra* note 24, at 374 (item (d)); *Appendix*, *supra* note 502, at 556 (item (d)).

552. See *Summers*, *supra* note 24, at 375 (item (e)); *Appendix*, *supra* note 502, at 556 (item (e)).

553. See *Summers*, *supra* note 24, at 375 (item (f)); *Appendix*, *supra* note 502, at 556 (item (f)).

subsequent adjudicators "have it easy" in at least one respect: they do not have to choose among two conflicting *de facto* precedents established by the Appellate Body. But as we have seen, *stare decisis* is Janus-faced. At some point in the not too distant future, if that point is not already upon us, there will be in the growing jurisprudence of the WTO Appellate Body a struggle between two different authorities. Which line will be more persuasive - the one whose normative force prevails over the other - and why? The answer to this question, if dealt with conscientiously by the Appellate Body, will reveal a subtle, nuanced understanding of the meaning of the past for the present and future.

To be sure, regarding the persuasiveness of its own *de facto* precedents, the Appellate Body will not have to worry much about the variables in the legal infrastructure category. First, it need not worry about its hierarchical rank. It is at the apex of the WTO judiciary (excluding the DSB), and there is no prospect of it losing this vaunted status. The Appellate Body need only be concerned about a textual or interpretive change wrought by the WTO Ministerial Conference or General Council. Second, the Appellate Body need not worry about the number of its members that participated in the prior adjudications. Under Article 17:1 of the *DSU*, only three of the seven members of the Appellate Body adjudicate a given case.⁵⁵⁴ The *DSU* does not create the possibility that a case may be heard by the full bench. Third, the Appellate Body need not worry about a more influential court in the international trade arena. It may be impressed with an opinion from the ICJ, the European Court of Justice, or the United States Court of International Trade. But, none of these courts necessarily commands more respect than the other, and the Appellate Body is not obligated to accord opinions of these courts more respect than its own prior decisions, or, indeed, any respect at all.

In contrast, some of the legal thought and social context variables are sure to affect the normative force of the Appellate Body's *de facto* precedents. While there are no dissenting opinions to contend with (not yet, anyway), it is quite routine to perform a search on Lexis and call up law review articles criticizing Appellate Body reports; the volume of such articles will certainly expand. The political,

554. *DSU*, *supra* note 31, art. 17:1 (stating that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case"). From time to time the Appellate Body does meet as a whole, pursuant to its working procedures, to determine the rotation of Appellate Body members as regards hearing appeals.

economic, religious, and cultural context in which past reports were issued obviously will evolve, and some aspects of that context will undergo revolutionary changes in the new millennium. Some of the changes may be "non-changes." For example, the economic gap between developed and developing countries might not narrow, and developing countries may demand a re-interpretation of trade rules so as to serve better their interests. We can surmise - though not yet observe - that lawyers arguing before the Appellate Body may attack *de facto* precedents ever-more aggressively and creatively. That is, they are likely to present the sorts of direct challenges to precedents that may cause the Appellate Body to re-think its earlier holdings.

Among the legal thought variables in particular, two are especially likely to influence the normative force of *de facto* precedents. The first concerns changes in related, relevant areas of law. So vastly beyond tariff and simple non-tariff barrier matters has the agenda for international trade law expanded that every international trade lawyer and scholar must re-tool in areas previously though largely irrelevant - the environment, labor, competition policy, foreign direct investment, and even national security law and human rights law, to name just a few. A claim by all but the most gifted lawyer or scholar to expertise in all (or even more than two) of these areas is mere bluster. At the same time as we must become greater generalists in our field, we inevitably focus on certain sub-specialties. WTO Panelists and Appellate Body members are not immune from the challenge. Indeed, for them the challenge is most immediate, because they must make decisions on matters on or related to the new trade agenda. Yet, two observers warn of "a legal order in danger of over-reaching itself, a specialist trade institution finding itself determining disputes which are also about environmental policy, for example, where the principal actors in the system have no established expertise."⁵⁵⁵ This admonition is exactly why *stare decisis* is Janus-faced. If it had only the commonly recognized meaning of adherence to the decisions of the past, then the mistakes of the present could not be corrected in the familiar judicial manner in the future. The doctrine, therefore, must mean a very high level of deference, but not slavish adherence. In brief, the Appellate Body will feel increasingly pressed to "square" its reports with developments in international environmental law, international labor law, international antitrust law, international investment law,

555. James Cameron & Karen Campbell, *Introduction*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION* 21 (James Cameron & Karen Campbell eds., 1998).

national security law, and human rights law, and a variety of other allied fields. Its *de facto* precedents that are out-of-joint with rulings in these fields will (or should) be attacked in written and oral presentations made to the Appellate Body. Academics, rarely slow to probe inconsistencies in the law, surely will provide critical analyses of a *de facto* common law web that is not seamless.

The second legal thought variable whose influence is worth monitoring is the area of law in which a precedent, whether *de facto* or *de jure*, is established. In the Appellate Body context, this variable is manifest in three ways. First, does the precedent concern a substantive or procedural matter? As suggested earlier, there is less normative force associated with a precedent on a procedural issue in which no core values are embedded.

Second, is the precedent confined to international trade law, or does it decide issues at the interface of trade and an allied field? The normative force of a precedent on an interface issue may be less, because that precedent bridges two dynamic areas of law. Insofar as there are changes in the allied field, the precedent may have to be revisited – again, for reasons of congruity.

Third, does the precedent involve an interpretation of a GATT-WTO textual provision? Or, is it a pure common law rule, *i.e.*, a rule crafted by the Appellate Body to fit in the interstices of a text? The Appellate Body may feel impelled to re-consider interpretive rulings if it perceives itself as operating in an environment of legislative inaction, that is, in an environment where neither the WTO Ministerial Conference or General Council is able or willing to make necessary changes expeditiously. In contrast, the Appellate Body may impart greater normative force to its own pure common law. Subject to the particularities of a case at bar, it knows it can revise the *de facto* precedent if and when needed. But, at the same time, it does not want to create the impression among WTO Members that it is easily moved to shift doctrine. Such shifts would jeopardize certainty (or, at least, stability) and predictability in its common law, and undermine its own credibility as a resolute adjudicator in the eyes of the multilateral trading community.

VI. SUMMARY: MONTESQUIEU CONTRA THE BANYAN TREES

In 1748, Montesquieu declared that “[j]udges . . . are . . . only the mouth that pronounces the words of the law, inanimate beings who

can moderate neither its force nor its rigor."⁵⁵⁶ His substantial influence on French revolutionaries, and through them on the civil law, resonates in modern international trade law. The orthodoxy is that WTO Appellate Body members (and, for that matter, panelists) are mechanical role players, Joe Blows spewing out reports by applying omniscient, unambiguous trade agreements to particular disputes. The orthodoxy admits no necessary connection among the reports, and certainly no need for the reports to fill in gaps in the agreements. I hope this article, along with Part One of the trilogy, *The Myth About Stare Decisis and International Trade Law*,⁵⁵⁷ have debunked the orthodoxy, or at least cast it very much in doubt.

The fact is that Montesquieu's civil-law conception does not square with the actual behavior of WTO Appellate Body members. They are not mere passive beings. They are actively involved in construction of the international rule of law. Yes, we can fault their construction work. They (and the panelists) are guilty of excessively long opinions, dull prose, and indirect diction. They have yet to acquire the legal writing skills of the great common law judges. Nevertheless, they are sage souls trying to put forth a noble effort to build a more harmonious, integrated world trading system. So serious are the trade frictions the world now faces, and so complex are the trade agreements the world has created for itself, that the demands on their intellectual acumen, not to mention professional integrity and physical stamina, are sure to continue, indeed, to increase. The Appellate Body members work in an arena where the imperfections of "legislators" - the trade negotiators who produced the Uruguay Round agreements and its progeny - are all too plain. They are compelled to resolve issues that are not addressed adequately, or at all, by the legislators in trade agreements. The adjudicators have no choice but to legislate (at least interstitially),⁵⁵⁸ and to do so efficiently and fairly so that future similar cases are decided - or distinguished reasonably - from previous similar cases.

Thus, we can now observe the emergence of at least four distinct lines of *de facto* precedent on procedural issues: burden of proof, judicial economy, standing, and sufficiency of complaints. We can

556. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler et al. trans., eds., Cambridge Univ. Press ed. 1989) (1748).

557. See *supra* note 2.

558. For an argument that Article 7 of the United Nations Convention on Contracts for the International Sale of Goods actually invites judges to play this more active role with respect to contract interpretation, see Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 738-91 (1998).

perceive at least three lines of *de facto* precedent on substantive issues: the interpretation of GATT Article XX, criteria for like product determinations, and the application of GATT Article XIII. These are the vibrant young banyan trees growing in Geneva.

Shall we be so blind as to ignore the banyan trees? Shall we deny that a majestic process, entirely consistent with the development of the international rule of law, is occurring? Shall we be so intransigent in our thinking - dare I say arrogant - as to continue with our faulty academic models and tired discourse? Shall we declare our political correctness and re-affirm our cultural sensitivity by resisting what is happening simply because it is, as I suggested in Part One of the trilogy, an *Americanization of WTO adjudication*?⁵⁵⁹ Or, shall we have the courage to admit the operation of a *de facto* doctrine of *stare decisis* and the consequent emergence of a *de facto* body of common law on international trade?

What we must do, I submit, is end the monstrous disconnect between orthodoxy and observed behavior. Admitting the Appellate Body members are not Montesquieu's judges, but rather precedent setters in their own right, is one step toward this objective. But, this will put the disconnect only in remission. A final step is needed to rid us of the disconnect for good: the implementation of a *de jure* doctrine of *stare decisis* in WTO adjudication. It is to this step, and a consideration of the attendant benefits for the world trading system in the 21st century, that I turn in Part Three of the trilogy, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*.⁵⁶⁰

559. Bhala, *The Myth About Stare Decisis and International Trade Law*, *supra* note 2.

560. Bhala, *Towards De Stare Decisis*, *supra* note 5.

