

Proportionality: WTO Law: in Comparative Perspective

MADS ANDENAS* AND STEFAN ZLEPTNIG**

SUMMARY

I.	INTRODUCTION	372
II.	THE PRINCIPLE OF PROPORTIONALITY	375
	A. <i>Legal Principles</i>	375
	1. Nature of Principles.....	376
	2. Public International Law and WTO Law	379
	3. Conclusions	381
	B. <i>Introducing Proportionality</i>	382
	C. <i>Test in Different Contexts</i>	383
	D. <i>Typology of Functions</i>	384
	1. Control and Limitation of Discretion	384
	2. Balancing of Conflicting Rights and Interests	385
	3. Standard for Judicial Review	385
	4. Scope of Legal Norms	386
	5. Limit and Rationalize the Power of Judges.....	386
	6. Political Theories and Proportionality	387
	E. <i>Different Elements of the Proportionality Test</i>	388
	1. Suitability.....	388
	2. Necessity	389
	3. Proportionality Stricto Sensu	390
III.	INTENSITY OF REVIEW	392
	A. <i>Intensity of Review in EC Law</i>	393
	B. <i>Standard of Review in WTO Law</i>	395
IV.	PROPORTIONALITY IN PUBLIC INTERNATIONAL LAW.....	398
	A. <i>Countermeasures</i>	398
	B. <i>Use of Force and Armed Conflicts</i>	400

* Professor of Law, University of Leicester; Senior Fellow, Institute of European and Comparative Law, University of Oxford. Email: ma199@le.ac.uk.

** Assistant, Institute of Constitutional and Administrative Law, University of Vienna. Email: stefan.zleptnig@univie.ac.at.

C. <i>Maritime Delimitation</i>	404
D. <i>Conclusion</i>	404
V. BALANCING IN US CONSTITUTIONAL LAW: THE INTERSTATE COMMERCE CLAUSE.....	404
VI. BALANCING IN THE WTO	408
A. <i>Objective Justifications: Public Policy Exceptions in the GATT</i>	408
1. Introduction	408
2. General Design	409
i. Necessary to	410
ii. Relating to.....	412
3. Application of the Measure: The Chapeau	413
3. Conclusion: How the Tests in Article XX GATT Operate.....	415
B. <i>Positive Obligations for Domestic Regulation</i>	416
1. SPS Agreement.....	416
2. TBT Agreement	421
3. Conclusion: How the Tests in the SPS and TBT Agreements Operate	423
VII. CONCLUSION	424

I. INTRODUCTION

Proportionality, necessity and balancing are discussed in the context of the World Trade Organization (WTO). We find these tests at prominent places in the GATS and the GATT, as well as in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). The meaning of these tests and their interrelationship is not always clear. There is considerable controversy among participants at the diplomatic, policy, treaty-making, or the dispute settlement level, who put different meanings into the different tests and concepts. The discussion among scholars is often influenced by a projection of national meanings and discourses in the WTO and GATS context.

The liberalisation of trade in goods and services requires that the meaning of and the relationship between these tests are clarified. In this article we set out a comparative approach for doing so at a general WTO level, but this approach is particularly relevant in the context of the GATS and the liberalisation of trade in services.

In the WTO, as in any other legal and political system, value choices are reflected in the legal order. The fundamental question in this respect is which institution should be competent to make those choices and how this should be done.¹ It may be that this is a task for the legislator, the courts, or for both.

1. See generally Joel Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998).

In those cases where courts and tribunals review the actions of other bodies, they usually face value choices in many different ways. That applies to the review of legislation and administrative action in domestic law. It also applies to the review of the compliance of states with international law obligations. The legal solutions and techniques for dealing with these issues will often be similar, but there is also considerable variation.

Our focus is on the role of proportionality and balancing in the dispute settlement system of the WTO. Proportionality is a prominent legal principle in many legal orders, and all legal systems have to undertake different forms of balancing, both in determining the content of rules and in their application.² Proportionality has a major impact at the national level, in federal-type legal systems, and in international law. It also serves to control the discretion exercised by domestic authorities and to limit the interference with, or the restriction of, individual rights of citizens. It is a key legal concept to assist with the trading-off of competing values. These issues also arise in the context of WTO law, particularly in the context of the reconciliation of trade and non-trade issues.

WTO lawyers have discussed the role of the principle of proportionality in the WTO legal order for several years. In 2001, Axel Desmedt published a rather full analysis in an article on proportionality in WTO law, and there have been a considerable number of other publications dealing with the same or related issues.³ Desmedt's overall conclusion is that there is "not one single overarching (unwritten) proportionality principle in WTO law."⁴ Other authors have similarly concluded that there is neither a general proportionality requirement in WTO law, nor has such a general test been applied by the WTO tribunals. The main argument advanced against proportionality is that the WTO is institutionally not ready for such a fundamental balancing of values and interests (mainly economic versus non-economic), and that such balancing is at the core of the proportionality analysis.⁵ Marceau and Trachtman point to some additional reasons for skepticism against balancing and proportionality in the WTO:

To many commentators, the idea of balancing tests in contexts where domestic regulation is subject to international scrutiny has been anathema to judicial restraint and national sovereignty There are two likely reasons. First, balancing tests seem to some to accord too much power to courts. However, it is not unusual for courts to be assigned the task of balancing, explicitly or implicitly, under specified circumstances. . . . Second, balancing tests seem to intervene too greatly in national regulatory autonomy.⁶

2. See discussion *infra* Part II.

3. Axel Desmedt, *Proportionality in WTO Law*, 4 J. INT'L ECON. L. 441, 441-480 (2001); *Id.* at 478 (arguing that "it seems that there is no basis yet for the recognition in WTO law of an unwritten and overarching proportionality principle as known in EC law.").

4. *Id.*

5. Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law after Korea—Beef, EC—Asbestos and EC—Sardines*, 37 J. WORLD TRADE 199, 231-33 (2003).

6. Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811, 850-51 (2002).

In contrast, Meinhard Hilf has argued in his writing that “the principle of proportionality is one of the more basic principles underlying the multilateral trading system.”⁷ The author emphasizes that a “sensitive balancing process, guided by the principle of proportionality . . . is needed in which no rule or principle involved should be left to redundancy or inutility. The principle of proportionality should govern any process of interpretation and application of WTO law with a view to obtaining a due relation between the different interests at stake.”⁸

This disagreement in academic writing is the background against which this article is situated. We attempt to explore whether the disagreement is a matter of semantics or whether it impacts more fundamental issues of the WTO legal order. It could be argued that it does not really matter whether one refers to a particular legal phenomenon as “proportionality” if different terms ultimately bear the same meaning. This is a challenge regularly faced by comparative law scholars, namely that “[a]pparently identical words may have a different meaning and apparently different words may have the same meaning.”⁹

The fundamental question which we address in this article is how comparative legal thinking about the principle of proportionality and other balancing tests can help explore some of the most challenging questions of WTO law. One core challenge is the balancing of competing values and interests in the WTO. Another challenge is the degree of international constraint imposed on domestic regulation. This leads to the questions of how much deference international organizations and their judicial bodies do show towards sovereign WTO Members, and how much they should show.

Our analysis is informed by insights from domestic constitutional law, legal theory, the law of human rights, European law, public international law, and WTO law. We attempt to provide a conceptual framework to analyze how balancing and proportionality are made to work in the law of the WTO and the dispute settlement process.

Our main conclusion is that there is no crude balancing of trade and non-trade values and interests in the WTO. The tests written into the WTO Agreements provide for a more sophisticated way of balancing, taking account of the individual circumstances at stake, and the competing rights and interests involved. We argue that comparative legal thinking based on insights gained from the principle of proportionality, and the role of principles generally, may help structure and rationalize this process.

In this article, we proceed as follows. In Chapter II, we first discuss the nature of legal principles from a theoretical perspective and how this may influence the thinking about balancing in WTO law. We then discuss the role of principles in public international law and WTO law, providing a background for the subsequent discussion of the principle of proportionality. The latter parts of Chapter II deal with the principle of proportionality in a comparative context. We identify its core functions and elements to carve out its essential characteristics. In Chapter III, we discuss the interaction between the principle of proportionality and the concept of

7. Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?*, 4 J. INT’L ECON. L. 111, 120 (2001).

8. *Id.* at 130.

9. Mark Van Hoecke, *Deep Level Comparative Law* 10-11, (Eur. Univ. Inst. Working Paper LAW No. 2002/13), available at <http://cadmus.iue.it/dspace/bitstream/1814/191/1/law02-13.pdf>.

standard (or intensity) of review. We argue that these concepts, which are often treated separately, need to be assessed jointly to gain a fuller understanding of (a) judicial review generally and (b) the principle of proportionality as applied as a test of review. Proportionality is also a core principle in public international law. For this reason, we explore its main characteristics in Chapter IV to assess its possible impact on WTO law. In Chapter V, we explore the necessity and balancing tests of U.S. constitutional law. We then assess the different balancing tests in WTO law in Chapter VI. We focus on the tests under Article XX GATT and in the SPS and TBT Agreements. Our analysis of those tests is informed by the preceding discussion of the main features of the principle of proportionality in different contexts. Finally, we draw some conclusions and offer some suggestions for a better understanding of the balancing undertaken by the judicial bodies of the WTO.

II. THE PRINCIPLE OF PROPORTIONALITY

In this chapter, we discuss the *function* and *scope* of the principle of proportionality and similar balancing tests. We thereby understand proportionality not only as a *judicial* doctrine but also as *legislative* doctrine for the political institutions to follow. Proportionality is a trade-off-device which helps resolve conflicts between different norms, principles, and values. It is also a determining factor for the role of courts in reviewing administrative or legislative measures.¹⁰ Proportionality thus provides a legal standard against which individual or state measures can be reviewed.¹¹ From a more procedural perspective, proportionality is closely related to the issues of intensity of review—the level of scrutiny exercised by judges—and whether there should be a full review on the merits or a more deferential standard of judicial review.¹²

A. Legal Principles

We begin our discussion by providing some conceptual reflections about the nature of legal principles. This shall provide a basic framework for the subsequent analysis of the principle of proportionality in different legal fora. In this chapter, we primarily focus on the characteristics of, and the relationship between, legal *rules* and *principles*. This distinction features prominently in the writings of Ronald Dworkin and has subsequently been refined, most clearly by German constitutional scholars.

There is no single authoritative definition of the concept of “legal principles,” either in domestic or in international law.¹³ The approach taken depends on a variety of factors, including the legal system at issue and the underlying legal

10. Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 105 (1993).

11. Malcolm Ross, *Behind Proportionality: The Cultural and Constitutional Context*, in ENGLISH PUBLIC LAW AND THE COMMON LAW OF EUROPE 83, 91 (Mads Andenas ed., 1998).

12. NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 171-74 (1996).

13. See Meinhard Hilf & Goetz Goettsche, *The Relation of Economic and Non-Economic Principles in International Law*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 5, 9-10 (Stefan Griller ed., 2003) (defining “principles”).

philosophy which informs the scholar's perspective on topics such as norms, rules, principles and values. Sometimes it also seems that continental lawyers are more interested in the search for underlying principles, taking the "top down" approach, as opposed to the common law "bottom up" approach.¹⁴

The debate about, for instance, trade and environment or trade and human rights often reflects the crucial role that general principles may play in the WTO law. Economic and non-economic principles, from both within and outside the WTO legal order, often need to be reconciled with—and balanced against—each other. It has been argued that proportionality has to play a crucial role in guiding this process.¹⁵

Finally, it is evident that principles, as understood in legal theory, are not necessarily the same as principles (or general principles) of EC law, public international law, or WTO law. These general principles may also be rules in a theoretical sense (see the discussion below), depending on their normative content. Werner Schroeder has argued that basic principles of EC law sometimes have a very narrow focus and lay down clear normative consequences; as a result, their legal character is one of rules rather than of principles.¹⁶

1. Nature of Principles

One recent suggestion to define principles is that they are "legal norms laying down essential elements of a legal order."¹⁷ Another formula is that principles "formulate general and flexible imperatives," which are "fundamental legal concepts and essential values of any legal system."¹⁸ Yet another suggestion is that a principle of law may be conceived as aiming at particularly valuable objectives and thereby "explains and justifies all or any of the more specific rules in question."¹⁹ While each of these definitions emphasizes a different aspect, taken together they provide a fuller picture of the basic nature of legal principles.

Traditionally, legal norms have been divided into rules and principles. One may alternatively distinguish between rules and standards,²⁰ but our approach is to focus on the rules – principles dichotomy.²¹

14. Hilf, *supra* note 7, at 129. *But see generally* ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. Macmillan 1960)(1885) (discussing the "guiding" or "leading" principles of the law of the constitution of England).

15. Hilf & Goettsche, *supra* note 13, at 38.

16. WERNER SCHROEDER, DAS GEMEINSCHAFTSRECHTSSYSTEM. EINE UNTERSUCHUNG ZU DEN RECHTSDOGMATISCHEN, RECHTSTHEORETISCHEN UND VERFASSUNGSRECHTLICHEN GRUNDLAGEN DES SYSTEMDENKENS IM EUROPÄISCHEN GEMEINSCHAFTSRECHT [THE COMMUNITY LAW SYSTEM. A STUDY OF DOGMATIC, THEORETICAL, AND CONSTITUTIONAL LAW BASICS OF THE SYSTEMIC THINKING IN EUROPEAN COMMUNITY LAW] 266 (2002).

17. Armin von Bogdandy, *Doctrine of Principles* 10 (N.Y.U. School of Law Jean Monnet Center, Working Paper 9/03, 2003), available at <http://www.jeanmonnetprogram.org/papers/03/030901-01.pdf>.

18. Hilf & Goettsche, *supra* note 13, at 9-10.

19. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 152 (1978).

20. There is also considerable discussion on this issue in the US legal literature which distinguishes between rules and standards. *See* Trachtman, *supra* note 1, at 45-46; Kathleen Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (emphasizing that in Ronald Dworkin's theory of rules and principles, standards would be called principles).

21. Ronald Dworkin famously distinguished between rules and principles, and many other legal

The main feature of rules is that they apply in an “all-or-nothing fashion.”²² They may be either valid or invalid.²³ More technically speaking, the character of rules implies that they lay down a “binary validity claim.”²⁴ Whenever there is a conflict of rules, this conflict can only be solved in two different ways: either by declaring one rule invalid or by “introducing an exception clause into one of the two rules.”²⁵ In the second case, one of the rules is the exception to the other.

Principles operate differently. They “express the idea of optimization.”²⁶ Principles are “norms commanding that something be realized to the highest degree that is actually and legally possible.”²⁷ Accordingly, principles can be realized to different degrees, as opposed to the all-or-nothing approach underlying rules.

Principles, similar to values, express the preference of some good over others. Whenever two countervailing principles collide, both will lay down competing optimization commands, and their relationship will not be absolute but relative.²⁸ Principles are not invalidated (as this would be the case with rules); instead, they are outweighed, depending on each other’s relative weight. It would not make sense to introduce an exception since one principle may not be the exception to another.²⁹

Conflicts of principles can only be solved through a balancing act which takes into account each principle’s weight. The “dimension of weight” is one of the main characteristics of principles.³⁰ The weighing and balancing of countervailing principles will lead to a “conditional priority of one of the colliding principles over the other with respect to the circumstances of the case.”³¹ The assessment turns on the question of which principle carries relatively more weight. Note that the precedence of one principle over the other only relates to the specific facts of the case, and this relationship may change under different circumstances.

In the context of international trade, this leads us to the preliminary conclusion that neither trade-related nor non-trade-related principles can be considered, from a legal point of view, as unconditionally preeminent. In many cases, their relationship can only be determined on the basis of the facts of an individual case.

Principles play different functions in the legal order. One important aspect is that they fulfill an ordering function in a fragmented body of law and thus promote the coherence of the legal system.³² Related is the function that principles help resolve ambiguities and fill gaps in the legal texts. Judicial reasoning and law-

theorists adopted this distinction as well. Despite some criticism raised against the rules – principles distinction, we believe it remains a useful and valuable conceptual tool to analyse legal norms and, in particular, to discuss the principle of proportionality and balancing. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24-26 (1978).

22. *Id.* at 24.

23. *Id.* (stating that “[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”).

24. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 255 (1996).

25. Robert Alexy, *On the Structure of Legal Principles*, 13 *RATIO JURIS* 294, 295 (2000).

26. *Id.* at 294.

27. *Id.* at 295.

28. *Id.* at 297.

29. *Id.* at 296.

30. DWORKIN, *supra* note 21, at 26.

31. Alexy, *supra* note 25, at 296.

32. von Bogdandy, *supra* note 17, at 7.

making is supported by reference to general principles. Another crucial function of principles is that they can act as “‘gateways’ through which the legal order is attached to the broader public discourse.”³³ All those aspects are relevant for WTO law as well, especially since it is in the process of evolving into a more mature legal system and generating some constitutional law-type norms, principles, and structures.³⁴

Based on the preceding observations, one notes the crucial role that provisions such as Article XX GATT—and the legal rules and principles contained therein—play in resolving conflicts between trade and non-trade interests.³⁵ Framing those interests in terms of legally protected principles, trade-offs between principles are necessarily seen as relative, depending on the weighing and balancing of countervailing rights and interests in concrete circumstances. This weighing and balancing, undertaken by the judiciary, follows from the character of principles. An alternative approach could be to reduce the role of principles in the legal system by increasingly transforming them into specific legislative rules. This would reduce the discretion exercised by the judicial bodies and provide greater predictability.³⁶ Conflicts between economic and non-economic values and interests can thus be resolved in different ways. First, it may be done through judicial balancing, based on legal provisions such as Article XX GATT or the relevant provisions in the SPS and TBT Agreements. Second, more specific legislation or treaty provisions may also address those concerns and reduce the discretion for the judicial bodies.³⁷ Given the frequent absence of specific rules on many sensitive issues and the prominent role of the dispute settlement process in shaping WTO law, the role and importance of principles has increased in the past and will continue to do so.

Proportionality is commonly referred to as a legal *principle*. It can also be described as a *test* or *standard*, but its legal character is one of a principle. Robert Alexy wrote: “[t]he nature of principles implies the principle of proportionality and vice versa.”³⁸ The basic idea is that the principle of proportionality follows from the main characteristic of principles: the process of optimization.

If one considers fundamental human rights as principles, one realizes how proportionality and its three-step analysis (suitability, necessity and proportionality *stricto sensu*) follows from the nature of competing principles: in the first step, the test of *suitability* is to avoid that measures, which are not capable at all of achieving the pursued objective, are adopted. Such measures do not bring any benefit to the objective pursued; and, instead, they only entail negative effects for other countervailing interests or principles.³⁹ The *necessity* element requires that the means employed to achieve the objective pursued by principle P_1 be the least intrusive with regard to countervailing principle P_2 .⁴⁰ Whenever there is a choice

33. *Id.* at 8.

34. See Deborah Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EURO. J. INT’L L. 39, 42 (2001).

35. Joel Trachtman, *The Domain of Dispute Resolution*, 40 HARV. INT’L L. J. 333, 356 (1999).

36. *Id.* at 350-54 (discussing rules and standards, the costs and benefits associated with them and their institutional and strategic dimensions).

37. *Id.* at 376.

38. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 66 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

39. See *id.* at 68-69.

40. “As a principle, P_2 requires optimizing relative to what is both legally and factually possible.” *Id.*

between different suitable measures, the least intrusive must be employed. Necessity therefore allows for a distinction and choice among different *measures* adopted on the basis of principle P_1 . But the broadest question of whether any measure should be chosen at all to pursue a certain objective is not part of the necessity analysis; this involves a true balancing of the competing principles P_1 and P_2 . This final stage of the analysis, the process of weighing and balancing, is called proportionality in its narrow sense (proportionality *stricto sensu*).⁴¹

It is only in cases that have passed the necessity test that a balancing and weighing of competing principles will come into play. This final step, proportionality *stricto sensu*, is not guided by other substantive criteria, except for the criterion that the measures must not be excessive or disproportionate with regard to the pursued objective. One important requirement, however, is that the relative weight of each principle be taken into account.⁴²

The remaining question is how the weighing in this process should be undertaken and whether there are any substantive criteria guiding the weighing. As stated, weighing is relative and depends on the circumstances of each individual case. It establishes a conditional, as opposed to an absolute, priority of colliding principles.⁴³ Weighing in that sense requires that the priority be established on the basis of reasons advanced in a discursive process.⁴⁴

This is the crucial link between the theory of principles and proportionality. The third step of the proportionality analysis may be regarded as a specific *procedural obligation*. It requires public authorities and the judiciary to justify their decisions on the basis of rational legal arguments and in a structured manner.⁴⁵ The factors that need to be considered and justified through legal reasoning are the weight attributed to each principle, the degree of interference with those principles, and the way in which those countervailing principles are balanced against each other. The importance of principles and proportionality increases in the absence of clear hierarchies of norms and whenever the outcome of a dispute cannot be determined simply on the basis of clear legislative provisions. A more principles-oriented approach (in conjunction with better rules) may help structure and rationalize the WTO legal system, clarify imprecise and open-ended provisions, and contribute to WTO law's growing maturity and sophistication in the years to come.

2. Public International Law and WTO Law

In the previous section, we outlined some general features of legal principles. We now explore the role and legal status of general principles in public international law and in WTO law. General principles of international law have a very specific

at 68.

41. *Id.* at 67-68.

42. *See* Alexy, *supra* note 26, at 298.

43. MANFRED STELZER, DAS WESENSGEHALTSARGUMENT UND DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT [ESSENTIAL CONTENT ARGUMENT AND THE PRINCIPLE OF PROPORTIONALITY] 217-26 (1991).

44. *Id.* at 223.

45. Martin Borowski, *Prinzipien als Grundrechtsnormen* [Principles as Norms of Basic Rights], 53 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [AUSTRIAN JOURNAL OF PUBLIC AND INTERNATIONAL LAW] 307, 313-14 (1998).

connotation, whereas our previous discussion of principles was more generic. In light of the overall topic of this paper, both aspects should be covered and brought together in an attempt to define the role and status of the principle of proportionality in the WTO legal order.

General principles are a well-known and yet somewhat vague concept in public international law.⁴⁶ Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) lists “general principles of law” as one of the sources of international law.⁴⁷ In international law, principles play an important role in filling the gaps left by the international legal order and to avoid a *non liquet* in rulings by international judges.⁴⁸ Furthermore, they are crucial for international tribunals which may refer to general principles to justify their own decisions, because they provide a conceptual background for the interpretation of the law and state practice.⁴⁹ The openness of principles to public and legal discourse is reflected in the fact that they help the judiciary construe the law “in a dynamic fashion responsive to today’s problems.”⁵⁰

In cases of conflict between general principles and other specific norms of international law (treaties or customs), the norms will generally prevail.⁵¹ In the context of WTO law, “a principle could not be used with the effect of overriding a specific rule contained in the WTO agreements.”⁵² General principles only have a subsidiary function in the international legal order.

General principles may originate from different sources. Some principles may be derived from domestic law, from which they are borrowed and distilled on a comparative basis.⁵³ On the other hand, general principles of *international* law are unique to international law, even though they mostly overlap with the general principles of law recognized by Article 38 of the Statute of the ICJ. One standard textbook definition of general principles of international law is that they are “primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice.”⁵⁴

Examples of general principles, which may be either procedural or substantive in nature, are the following: *pacta sunt servanda*, principles governing the judicial process, *res judicata*, and the principles of equity, good faith, equality of states, interpretation, right to self-defense, and right to independence.⁵⁵ It has been argued that proportionality is also characterized as a general principle of *international* law, with its own foundations in the international legal order.⁵⁶

46. In EC law, general principles provide guidance for the interpretation of primary and secondary Community law and the exercise of powers by the institutions, and determine the legality of acts of the Community institutions and the member states, and, finally, fill gaps where lacunae exist in Community law. With regard to the principle of proportionality, see EMILIOU, *supra* note 12, at 121.

47. Statute of the International Court of Justice art. 38(1)(c).

48. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 129 (2003).

49. PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 303 (4th ed. 1998).

50. PAUWELYN, *supra* note 48, at 130.

51. Principles that are *jus cogens* are an exception.. See Hilf, *supra* note 11, at 128.

52. *Id.*

53. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 16-18 (6th ed. 2003).

54. *Id.* at 18-19 (emphasis omitted).

55. PAUWELYN, *supra* note 48, at 125-126.

56. Riccardo Mazzeschi, Book Review, 13 *EURO. J. INT’L L.* 1031, 1035 (2002) (reviewing ENZO CANNIZZARO, *IL PRINCIPIO DELLA PROPORZIONALITÀ NELL’ORDINAMENTO INTERNAZIONALE [THE PRINCIPLE OF PROPORTIONALITY IN INTERNATIONAL LAW]* (2000)).

WTO law is a branch of international law, and the WTO agreements need to be interpreted against the background of general principles of public international law.⁵⁷ The preamble to the Agreement Establishing the World Trade Organization (WTO Agreement) states that the parties to the WTO Agreement are “determined to preserve the *basic principles* and to further the objectives underlying this multilateral trading system.”⁵⁸ As Meinhard Hilf pointed out, there is no list of principles which one could refer to, and it is unclear whether those principles only encompass the economic justifications and objectives of the WTO system.⁵⁹ The long list of basic principles suggested by Hilf and Goettsche includes trade liberalization, sovereignty and national deference, sustainable development, non-discrimination, transparency, rule of law, due process, good faith, natural justice, and proportionality.⁶⁰ Cameron and Gray point to similar principles, such as the principles of effectiveness in treaty interpretation, *in dubio mitius*, legitimate expectations, non-retroactivity of treaties, state responsibility, estoppel, abuse of rights, and exhaustion of local remedies.⁶¹ Proportionality has not explicitly been recognized as a general principle of WTO law, even though it has been referred to by the appellate body to interpret individual provisions of the WTO Agreements.⁶² The point of reference has been the principle of proportionality as applied in the law on international countermeasures. In *Cotton Yarn*, the appellate body concluded:

It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, “punitive”, attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality . . . could be justified only if the drafters of the ATC [Agreement on Textiles and Clothing] had expressly provided for it, which is not the case.⁶³

3. Conclusions

Many conflicts between legal provisions are not only conflicts of rules but also conflicts of principles. From a theoretical perspective, those conflicts may thus consist of conflicts between rules, principles, as well as rules and principles.

57. JOHN JACKSON, *THE WORLD TRADING SYSTEM* 120 (2d ed. 1997); see generally PAUWELYN, *supra* note 48, ch. 2.

58. Preamble to the Agreement Establishing the World Trade Organization (WTO Agreement) Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

59. Hilf, *supra* note 7, at 112.

60. Hilf & Goettsche, *supra* note 13, at 16-17.

61. See generally James Cameron & Kevin Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT’L & COMP. L. Q. 248, 256, 258, 260, 270, 292-95 (2001).

62. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, paras. 256-260, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter *US – Line Pipe*], available at http://www.wto.org/english/tratop_e/dispu_e/202abr_e.pdf.

63. Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, para. 120, WT/DS192/AB/R (Oct. 8, 2001) [hereinafter *US – Cotton Yarn*], available at http://www.wto.org/english/tratop_e/dispu_e/192abr_e.pdf.

We shall make one caveat. “Global” principles of administrative law need to be reflected carefully, especially when transplanting national or European constitutional concepts to the WTO level.⁶⁴ Analogies and transfers must, in each case, reflect the specific legal and political system in which they operate, in particular since legal principles from a variety of national legal orders seem to resemble each other. Lawyers from different backgrounds may approach the same principles with different concepts in mind and may speak about the same legal phenomenon using different terminology: “[a]pparently identical words may have a different meaning and apparently different words may have the same meaning.”⁶⁵ In any case, one must not disregard the different forms of national constitutional and international law traditions which shape the thinking about principles—what they are as well as what they are based upon. In the European context, Jürgen Habermas rightly warned that:

the same legal principles would also have to be interpreted from the perspectives of different national traditions and histories. One’s own tradition must in each case be appropriated from a vantage point relativized by the perspectives of other traditions, and appropriated in such a manner that it can be brought into a transnational, Western European constitutional culture.⁶⁶

The concepts of proportionality, necessity, balancing, and reasonableness are widely used in many different jurisdictions. As we attempt to show throughout this article, their use and connotation varies from author to author, and from jurisdiction to jurisdiction. It is often difficult to reflect on one particular concept since it may be understood in many different ways. Proportionality, for instance, may generally be understood as a very strict test of review or a more relaxed and deferential test of review. Our own approach is influenced by the classical three-step proportionality test, developed in continental European legal thinking.

B. Introducing Proportionality

The principle of proportionality has many different facets. It is regularly invoked but its function, constituent elements, and scope of application often remain elusive. Proportionality is not a standardized legal concept and to a large extent depends on the legal regime within which it is used. The simplest formula to explain proportionality is the prohibition on using a “steam hammer to crack a nut, if a nutcracker would do.”⁶⁷ This formula is quite illustrative but not very helpful in addressing complex legal question that arise in connection with the proportionality test.

Characterizing proportionality at a very general level, one of its key functions is to define the relationship between the state and its citizens, resolving conflicts of

64. Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EURO. PUB. L. 563, 563 (2003); John M. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT’L L. & POL. 823, 829 (1999).

65. Van Hoecke, *supra* note 9, at 10-11.

66. HABERMAS, *supra* note 24, at 500.

67. R v. Goldstein (1983) 1 W.L.R. 151, 155 (UKHL)(Eng.).

interest between these two spheres. More specifically, proportionality in its traditional form has provided a tool to define and restrain the regulatory freedom of governments. Proportionality “sets material limits to the interference of public authorities into the private sphere of the citizen”⁶⁸

Proportionality as a legal concept mainly developed in the context of German Police Law (*Polizeirecht*) about a century ago.⁶⁹ The principle related to the interference by administrative authorities with civil liberties.⁷⁰ The German courts used proportionality to assess whether the measures taken by the police were more intrusive than necessary to achieve a certain objective.⁷¹ In German administrative law, proportionality developed as a device to control the discretion exercised by the administration.⁷² Some decades later, the principle of proportionality was also introduced to impose limitations upon the discretion of the legislator to enact legislation. This can be considered as the *constitutional law* aspect of proportionality as it is well-known in many (federal) legal systems.

The previous paragraph identified the two different ways in which the principle of proportionality can be applied. First, as a *legislative* and *administrative* doctrine which guides the actions of the legislator and the administration by establishing a standard against which those actions are measured. Second, as a *judicial* doctrine which lays down a specific standard of review applied by the judiciary in reviewing legislative and administrative measures. The proportionality test requires an active role to be performed by the judiciary.⁷³

C. Test in Different Contexts

Proportionality has developed as a test of review. It is used in different contexts. First, it is recognized in some systems as the test for the exercise of competences. Secondly, it is used to review justifications for interference with or restrictions on rights. Thirdly, it is also used to determine the extension of rights. Other limiting mechanisms, such as leaving national authorities a “margin of appreciation” in European Convention on Human Rights (ECHR) law, or having a rule of reason in U.S. federal anti trust law, may in fact incorporate similar balancing exercises.

In ECHR law, for instance, proportionality is applied in at least three different contexts: first, as a benchmark to establish the legality of derogations; second, with the aim to establish the legality of interferences by states with Convention rights; and, third, to determine scope of application of some of the rights established by the Convention.

On a more general level, a first use of proportionality is as a general test for the exercise of competences. This aspect features in domestic legal systems (e.g. control

68. Jürgen Schwarze, *The Principle of Proportionality and the Principle of Impartiality in European Administrative Law*, 1 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO [QUARTERLY JOURNAL OF PUBLIC LAW] 53, 53 (2003).

69. *Id.* at 55.

70. *Id.*

71. *Id.*

72. EKKEHART STEIN & GÖTZ FRANK, STAATSRECHT 240 (19th ed. 2004).

73. de Búrca, *supra* note 10, at 105.

of discretion in German administrative law),⁷⁴ as well as EU law. In the latter case, the Community courts control the exercise of discretion conferred on the Community institutions and, in particular, the European Commission. There are differences in the intensity of review depending on the area and subject matter of the decision. A second use relates to justifications for interference with, or restrictions on, rights. This is typically the case in areas such as EC free movement law, national constitutional law, the law of the ECHR and human rights in English law. In addition to the differences in the intensity of review depending on the area and subject matter of the decision, the kinds of rights involved provide another variable.

D. Typology of Functions

In this section, we distill the main functions of the principle of proportionality, many of which are also reflected in the debate on judicial review in the WTO and the balancing of trade and non-trade interests. Each of the functions mentioned below emphasizes one particular aspect of the principle of proportionality, so they should be regarded as complementary to each other.

1. Control and Limitation of Discretion

The basic idea underlying proportionality is that citizens of liberal states should only have their freedom of action limited insofar as is necessary for the public interest. Public authorities should, in the choice of their measures, choose the least onerous one. The principle of proportionality guides this process and thereby imposes restrictions on the regulatory freedom of governments.

The proportionality test, as a key legal instrument to control and check the discretion exercised by the administration, involves a means-ends relationship.⁷⁵ It establishes both a guideline as to the use of discretion by national authorities and a standard against which decisions are measured. The means employed by public authorities to attain a legitimate objective have to be the least onerous choice, and the impact on individual rights must not be out of proportion to the aim pursued. Democratic control over state actions is guaranteed through the close relationship between the rule of law and the principle of proportionality, whereby proportionality links the behaviour of public authorities to the rule of law. Modern thinking about the role of proportionality in public administration emphasizes that proportionality requires the administration to balance all relevant interests at issue and then to use its discretionary powers in light of this balancing exercise.⁷⁶

74. Different conceptual approaches towards administrative law exist in the European legal systems. Traditionally, the French system emphasized the discretion or freedom of the administration to take decisions, whereas the German system focused on the protection of individual rights of citizens. Changes and convergences have occurred in the recent past. Jürgen Schwarze, *Konvergenz im Verwaltungsrecht der EU-Mitgliedstaaten* [Convergence of Administrative Law of the EU Member-States], DEUTSCHES VERWALTUNGSBLATT [GERMAN ADMINISTRATION JOURNAL] 881-89 (1996).

75. EMILIOU, *supra* note 12, at 23-24.

76. Theo Öhlinger, *Die Verwaltung zwischen Gesetz, Billigkeit und Bürgernähe* [Administration between Law, Fairness and Closeness to the People], ZEITSCHRIFT FÜR VERWALTUNG [AUSTRIAN ADMINISTRATION JOURNAL] 678 (1999).

2. Balancing of Conflicting Rights and Interests

Whenever there is a conflict of rights, values and interests, this conflict will often need to be resolved through a judicial balancing act. If this process is guided by the principle of proportionality, the conflicting objectives will be reconciled through the application of the three-step proportionality test.

Proportionality is applied, amongst others, to review domestic measures restricting the free movement within the EC Internal Market. In this context, proportionality guides the balancing process between free trade objectives and other legitimate public policy objectives. This reasoning also generally applies to WTO law, even though proportionality and balancing are not used as openly as in EC law.⁷⁷ The balancing aspect is also part of the proportionality and necessity tests in public international law.

Frequently, competing interests and values are framed in terms of clear and precise rules elaborated by the law and policymaking process. If that is not the case, balancing of competing interests and values needs to be undertaken in the judicial arena and judges are required to make the necessary trade-offs according to the weight attributed to the different rights, interest, and values. It can be argued that the growing demand for necessity testing and balancing in WTO dispute settlement reflects the inability of the WTO's bodies to "legislate" on many of the complex issues.⁷⁸ The danger is that judges then act as substitute legislators.

The purpose of proportionality in such circumstances is to provide a test against which the balancing of conflicting interests may take place in a structured and deliberate manner. Legally, proportionality governs the ad hoc and variable substantive relationship between rules and principles and provides a rational legal tool to make the necessary trade-offs.

3. Standard for Judicial Review

Proportionality as a general principle of law underlies legislative and administrative actions. At the same time it is also used as a standard for judicial review.

The proportionality test is usually associated with a full review on the merits, going beyond the more traditional and narrower concept of a reasonableness review of the initial decision.⁷⁹ Judges applying the principle of proportionality also define a particularly active role for the judiciary within the legal system: the review of administrative or legislative measures *on the merits*. The fact that courts apply the proportionality test as an independent ground of review has always raised concerns

77. Desmedt, *supra* note 4, at 445.

78. Trachtman, *supra* note 1, at 85.

79. Under the traditional *Wednesbury* test in English law a decision can be challenged "if it is so unreasonable that no reasonable public body could have made it." PAUL P. CRAIG, *ADMINISTRATIVE LAW* 537 (4th ed., 1999); see also *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 A.C. 532, and *Huang v Secretary of State for the Home Department*, [2007] UKHL 11.

about undue judicial interference with administrative and legislative decision-making, the separation of powers, and balancing undertaken by the judiciary.⁸⁰

We can illustrate this point by reference to English law. Traditionally, the discretion exercised by public authorities was reviewed by the courts, which applied a deferential reasonableness test, the so-called *Wednesbury* test.⁸¹ Justification for this test was based on the constitutional position of the courts. The intensity with which courts apply the reasonableness test also depends on the subject matter at issue, ranging from fundamental rights to economic policy choices. Paul Craig has argued that in the context of English law, a proportionality test would provide a more structured formula than the *Wednesbury* test, because it would require both the administration and the courts to justify their decisions.⁸² Another argument in favor of the adoption of the proportionality test is that it demands a more reasoned analysis from the decision-maker than the imprecise reasonableness test.⁸³ Possible arguments against the adoption of the proportionality test as an independent ground of review relate to the separation of powers, the lack of expertise of the courts in the relevant area, and the fact that certain issues may be unsuited to a proportionality analysis.⁸⁴ Recently, due to the adoption of the Human Rights Act 1998, the proportionality test, rather than the more deferential *Wednesbury* test, has become a key feature of judicial review in English law.

4. Scope of Legal Norms

Proportionality is also a tool to determine the scope and limitations of legal norms. Examples include the inherent limitations of the free movement provisions, such as the *rule of reason* in the context of Article 28 of the EC Treaty (the judicially created “mandatory requirements” doctrine).⁸⁵ Other examples include the provisions on unlawful discrimination in ECHR and EC law. Despite the usually general wording of equality provisions, differences in treatment are allowed under certain circumstances. Proportionality serves the purpose to determine whether discrimination can be objectively and reasonably justified and thus does not fall afoul of the equality principle. The non-discrimination provisions include a kind of rule of reason.

5. Limit and Rationalize the Power of Judges

The proportionality test and its three-step structure also provides an important tool to confine the legal authority conferred on judges. As stated above, one important aspect of the principle of proportionality is that it is a key tool for the

80. See Paul Craig, *Theory and Values in Public Law: A Response*, in LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW 38 (Paul Craig & Richard Rawlings eds., 2003).

81. *Associated Provincial Picture Houses v. Wednesbury Corp.*, (1948) 1 K.B. 223, 230 (Eng.).

82. Paul Craig, *Unreasonableness and Proportionality in UK Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 99 (Evelyn Ellis, ed., 1999).

83. *Id.* at 100.

84. *Id.* at 102-03.

85. See Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325/33) art. 28 [hereinafter EC Treaty]; see also *Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649. The rule of reason has also been applied in the EU competition law field in interpreting arts. 81 and 82.

judiciary to give substance to relatively open-ended norms by connecting them to their objectives. Counterbalancing such far-reaching powers wielded by the judiciary, proportionality introduces rational legal arguments in the decision-making process. Those arguments need to be presented and justified by the parties to a dispute and the judiciary in a public, deliberative process. The requirement ensures that through the three-step analysis, the interests at stake, the weight attributed to conflicting norms, and the other reasoning applied are made transparent.⁸⁶

6. Political Theory and Proportionality

Finally, proportionality can be approached from the angle of different political theory. Pluralists may look at proportionality as a tool to enhance participation rights by requiring authorities to consider carefully the views of interested parties.⁸⁷ Liberals may be particularly interested in the three-step structure of the proportionality analysis which requires the administration to justify its decisions along the lines of the different steps.⁸⁸ Proportionality thus becomes a tool to enhance accountability and justification for governmental action.⁸⁹ Additionally, judges may also become more accountable since they also have to justify their decisions in a detailed fashion. Finally, republicans may consider proportionality as “a defence against naked political bargain” because it prevents some influential groups from getting exclusive access to the decision-making process.⁹⁰

86. See Craig, *supra* note 82, at 99-100. In the case of *R (Daly) v. Secretary of State for the Home Department*, he pointed out that neither the traditional approach to judicial review in English law as formulated in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* nor the heightened scrutiny approach adopted in *R v. Ministry of Defence, Ex. P. Smith* had provided adequate protection of European Convention rights as required under the Human Rights Act 1998, as held by the European Court of Human Rights (the ‘Strasbourg court’) in *Smith and Grady v. United Kingdom*. *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 A.C. 532, paras 26-28. Having referred to a material difference between the *Wednesbury* and *Smith* approach on the one hand and the proportionality approach applicable where European Convention rights are at stake on the other, he said: “This does not mean that there has been a shift to merits review.” *Id.* para. 28. In the case of *Huang v. Secretary of State for the Home Department*, the House of Lords revisited *Daly* and Lord Steyn’s statement:

This statement has, it seems, given rise to some misunderstanding. . . . The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker. It is not for him to decide what the recruitment policy for the armed forces should be. In proceedings under the Human Rights Act, of course, the court would have to scrutinise the policy and any justification advanced for it to see whether there was sufficient justification for the discriminatory treatment.

Huang v Secretary of State for the Home Department, [2007] UKHL 11 para. 13. The transparency and predictability achieved in tying the review to a three-step approach has not been accorded judicial attention in this way by English courts: the proportionality test has been regarded as determined by European Human Rights law or European Union Law.

87. Craig, *supra* note 80, at 38-39. Note that Craig’s arguments are situated within the context of judicial review of agency decisions in the UK.

88. *Id.* at 38.

89. *Id.*

90. *Id.* at 39.

E. Different Elements of the Proportionality Test

The principle of proportionality, in its most elaborate form, consists of three different elements: suitability, necessity, and proportionality *stricto sensu* (proportionality in the narrow sense).⁹¹ These elements need to be assessed cumulatively, but they are in ascending order in terms of intensity with which the measure is reviewed.⁹²

There is no single coherent principle of proportionality. Its constituent elements vary, as well as the degree and intensity of review imposed. It can also be the case that similar tests are given different names, such as necessity, reasonableness,⁹³ cost-benefit-analysis,⁹⁴ or rationality review, and yet their normative requirements may be very similar to the proportionality test.

1. Suitability

Suitability is the first step of assessment. It requires that the adopted measure is suitable or appropriate to achieve the objective it pursues.⁹⁵ In other words, suitability requires “a causal relationship between the the measure and its object.”⁹⁶ It can easily be argued that measures which are not suitable at all to pursue the stated objective should not be imposed on that basis.⁹⁷ Another function of this stage of assessment is to single out measures that claim to protect the general interest while, in reality, they have a protectionist purpose.

Courts have to determine the moment at which the suitability of a measure, as an objective standard should be assessed. In a given case, it may make a difference whether the measure is evaluated from an *ex ante* perspective (the moment when the

91. Jan H. Jans, *Proportionality Revisited*, 27 LEGAL ISSUES OF ECON. INTEGRATION 239, 240-41 (2000).

92. *Id.* The order of the steps and their emphasis may differ. For instance, in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69, at 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate: “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” See also Aharon Barak, *The Proportional Effect: The Israeli Experience*, 57 U. Toronto L.J. 369 (2007) and Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. Toronto L.J. 383 (2007) (providing further comparative analysis, on the steps of the proportionality analysis and the relative role of the different steps by two senior judges and academic scholars).

93. For the use of the concept of *reasonableness* in the sense of proportionality, see Federico Ortino, *From “Non-discrimination” to “Reasonableness”: A Paradigm Shift for International Economic Law?* 33-37 (N.Y.U. School of Law Jean Monnet Center, Working Paper 01/05, 2005), available at <http://www.jeanmonnetprogram.org/papers/05/050101.pdf> (distinguishing between *substantive* and *procedural* reasonableness).

94. See Trachtman, *supra* note 1, at 80-82 (pointing out the similarities and differences between proportionality, balancing and cost-benefit-analysis).

95. JUKKÀ SNELL, *GOODS AND SERVICES IN EC LAW: A STUDY OF THE RELATIONSHIP BETWEEN THE FREEDOMS* 196 (2002).

96. Jans, *supra* note 91, at 240.

97. See Joined Cases 62 & 63/81 *Seco v. Établissement d'Assurance*, 1982 E.C.R. 223, 236-37; Case C-240/95, *Criminal proceedings against Rémy Schmit*, 1996 E.C.R. I-3179, I-3200. In German law, see BVerwGE 27, 181, 187-88 (parking prohibition).

measure was enacted) or an *ex post* perspective (the moment when the measure is analyzed by the court). In domestic law, the legislator is often granted a certain “right to err” in making his appraisals about future developments, operation, and effectiveness of the measure adopted. Thus, the scope of discretion granted to the initial decision maker will also affect the intensity of review—ranging from mere review of evidence to intense substantive review of the decision.

2. Necessity

The necessity test requires that the objective, upon which a measure is based, cannot be achieved by alternative means that are less restrictive than the measure adopted. If there is a choice between several appropriate measures, the least onerous and equally effective measure needs to be selected.⁹⁸ This is often called the “least restrictive alternative.”⁹⁹ The test combines two questions. The first question is whether there are less restrictive, or milder, measures. Secondly, one needs to ask whether the alternative measures are equally effective in achieving the pursued objective.¹⁰⁰

The underlying objective of this test is that the measure adopted by the state should do minimal harm to citizens or the public interest. In the trade context, the necessity requires the states to impose the least trade-restrictive measure in pursuing non-trade-related domestic policy objectives.

Referring to an example from the case law of the ECJ, the Court in *de Peijper* ruled out the necessity of domestic legislation which the Dutch authorities tried to justify on public health grounds. The ECJ held that the measure was not necessary since the domestic authorities could have pursued the same objective as effectively by adopting other means which were less-restrictive to intra-Community trade.¹⁰¹ In *Familiapress*, another free movement case, the ECJ ruled that it was for the national court to assess whether the national prohibition was “proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.”¹⁰²

In some English cases, such as the *Shayler* judgment, necessity is obviously interpreted differently than the classical three-step test outlined in this chapter.¹⁰³

98. SNELL, *supra* note 95, at 198.

99. Jans, *supra* note 91, at 240.

100. FEDERICO ORTINO, BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW 471 (2004).

101. Case 104/75, *Adriaan de Peijper*, 1976 E.C.R. 613, 636.

102. Case C-368/95, *Familiapress v. Bauer Verlag*, 1997 E.C.R. I-3689, I-3717. *See also* Case C-275/92, *Her Majesty's Customs & Excise v. Schindler*, 1994 E.C.R. I-1039 (granting the domestic authorities a wide margin of discretion to restrict or prohibit certain types of lotteries on public policy grounds).

103. *R. v. Shayler*, (2003) 1 A.C. 247 (UKHL)(Eng.)(relating to the compatibility of Official Secrets Act 1989 with the Human Rights Act 1998). *See R. (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 A.C. 532; *Huang v. Secretary of State for the Home Department*, [2007] UKHL 11; *but see de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69 (laying down another version of the three step test which has been followed in the subsequent case law).

The English courts in these cases have tended to align “necessity” with the principle of proportionality *stricto sensu*. The relevant part of *Shayler* reads as follows:

It is plain from the language of article 10(2), and the European Court [of Human Rights] has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. “Necessary” has been strongly interpreted: it is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. . . . One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2) ¹⁰⁴

This quote illustrates quite well that necessity concepts may differ and yet reflect the same underlying concerns.

3. Proportionality *Stricto Sensu*

The third step is to analyze whether the effects of a measure are disproportionate or excessive in relation to the interests affected. This final stage of assessment comes into play once a measure has been found suitable and necessary to achieve a particular objective. It is at this stage that a true weighing and balancing of competing objectives takes place. The more intense the restriction of a particular interest, the more important the justification for the countervailing objective needs to be.¹⁰⁵

This third step will often not be reached. In EC law, the necessity analysis dominates most cases where the ECJ has applied the proportionality test. In some other cases, the ECJ tended to disguise proportionality *stricto sensu* as a normal necessity analysis, and it did not explicitly address the third step of analysis.¹⁰⁶ Within the necessity test, the Court has conducted a marginal review of proportionality, as some cases on consumer protection and product labeling illustrate.¹⁰⁷ The Court has hereby implicitly questioned the level of protection adopted by the Member States, in addition to a traditional review of suitability and necessity of the domestic measures.

In those rather rare cases where the ECJ has applied proportionality *stricto sensu*, it has usually reviewed the objectives submitted by the Member States to justify their domestic measures. In *Stoke-on-Trent*, the Court outlined proportionality *stricto sensu* in the most unambiguous way:

104. *Id.* at 268-69.

105. STEIN & FRANK, *supra* note 72, at 243.

106. ORTINO, *supra* note 100, at 471.

107. See Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 (holding that the fixing of a minimum alcohol content for alcoholic beverages is prohibited by Article 30 of the EEC Treaty) [hereinafter *Cassis de Dijon*]; see also Case 178/84, *Comm’n v. Germany*, 1987 E.C.R. 1227 [hereinafter *German Beer*].

Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods.¹⁰⁸

It should be noted that this was a rather exceptional statement in the jurisprudence of the ECJ.¹⁰⁹ Nevertheless, this statement highlights that balancing in the trade context usually involves the comparison of the value and the importance of the national objective upon which the measure is based with the overall interest in ensuring free trade. The relative costs and benefits of the domestic measure and the restrictions imposed on free trade will be assessed.

Danish Bottles is a classic case in which the ECJ applied the full proportionality test in the area of domestic environmental protection. It found that:

[T]he system for returning non-approved containers is capable of protecting the environment and . . . affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark. . . . *In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued.*¹¹⁰

In another case concerning the review of a Community legal act, the ECJ explained the full proportionality test as follows:

[T]he principle of proportionality . . . requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, *and the disadvantages caused must not be disproportionate to the aims pursued*¹¹¹

The application of the principle of proportionality in the area of fundamental rights is also illustrative. Whenever fundamental rights are restricted or interfered with by public authorities, the legislative or administrative measures will be assessed against the background of the principle of proportionality. This assessment is particularly relevant in areas covered by the ECHR and domestic constitutional law. Usually, the first stage of assessment is to identify the protected right or interest. One then moves on to identify the extent to which the right is interfered with or restricted. The next stage is to identify the reasons for that restriction. Finally, the last stage is to assess whether the interference was excessive or not. Restrictions have to be *suitable, necessary, and proportionate*. In this context, proportionality

108. Case C-169/91, *Stoke-on-Trent v. B&Q*, 1992 E.C.R. I-6625, I-6658.

109. *Jans*, *supra* note 91, at 248.

110. Case 302/86, *Comm'n v Denmark*, 1988 E.C.R. 4607, 4632 (emphasis added) [hereinafter *Danish Bottles*]; see Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3749.

111. Case T-13/99, *Pfizer* [2002] ECR II-3305, paras 411-13; Case C-67/98, *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289, I-7316 (delegating the decision of whether domestic measure is disproportionate to the national courts).

stricto sensu involves a “fair balance” between the disadvantages for the person whose rights are restricted and the weight of the legitimate aims pursued by the state. Interferences with fundamental rights need to be “proportionate to the policy aims that underlie them.”¹¹²

The justification for balancing and proportionality *stricto sensu* was outlined above. In the area of fundamental rights, for instance, state measures that are necessary may still be disproportionate because the disadvantages caused to an individual are excessive, compared to the aims pursued by the state. A necessary measure may be proportionate when it just marginally impacts on fundamental rights. On the other hand, even a severe impact on fundamental rights, such as the shooting of a criminal, may, in individual circumstances, be the only possible way to achieve a specific objective. It is only after a finding of necessity that a careful balancing and weighing will come into play.¹¹³

III. INTENSITY OF REVIEW

In the above sections we have discussed substantive aspects of the principle of proportionality. This section focuses on the procedural sibling: the issue of intensity of review. The reason for including this topic here is the following. When courts apply a particular test to assess the legality of the reviewed measure, they will also have to determine the level and rigour of scrutiny with which they apply those tests. Intensity or standard of review determines how strictly courts assess the compliance of a domestic measure with the substantive requirements.¹¹⁴ The question is whether courts defer to the justifications provided by the national authorities or rather undertake an entirely independent review of the measure at issue.

In ECHR law, this question has been conceptualized as “margin of appreciation.”¹¹⁵ The intensity of review of national measures will depend on, among other things, the fundamental right concerned, the wording of particular provisions of the ECHR, the type of legitimate aim pursued by the member state, and whether common European standards exist.¹¹⁶ The concept of margin of appreciation, which is closely linked to the principle of proportionality, concerns the degree of deference that the European Court of Human Rights shows towards national authorities in interpreting and applying the ECHR.

Intensity of review is often treated as a free-standing concept, as the concept of standard of review in WTO law demonstrates. In contrast, in the analysis of the principle of proportionality in EC law the assessment of the *nature* of the proportionality test is often combined with an assessment of the *intensity of review* adopted by the courts in applying this test. Courts can, for instance, impose a very strict proportionality standard while largely deferring to the findings of the national

112. Philip Sales & Ben Hooper, *Proportionality and the Form of Law*, 119 L. Q. REV. 426, 426 (2003).

113. MICHAEL KRUGMANN, DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT IM VÖLKERRECHT [THE PRINCIPLE OF PROPORTIONALITY IN INTERNATIONAL LAW] 55 (2004).

114. SNELL, *supra* note 95, at 212.

115. Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 240, 242 (1996).

116. See generally Brems, *supra* note 115; see also HOWARD YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE 185-86 (1996).

authorities. This deferential review will make the proportionality assessment less rigorous than it seems at first glance. Proportionality taken together with varying degrees of intensity of review may be a very sharp or rather blunt weapon in the hands of the judiciary.

A. *Intensity of Review in EC Law*

The close connection between the substantive requirements of proportionality and intensity of review is illustrated in the famous *Fedesa* judgment where the ECJ ruled that:

[T]he principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary . . . when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

However, with regard to *judicial review of compliance* with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue ¹¹⁷

The intensity of review may range from rigorous to very deferential. The overall degree of deference shown towards a reviewed measure will be determined by a variety of aspects, including the strictness of the examination of the underlying facts (and the necessity of the measure), the degree of justification required from national authorities, and the extent to which the court generally defers to the discretion of the authorities that took the initial decision. With regard to *institutional* considerations, courts do not show the same degree of deference to all institutions or actors involved. The case law of the ECJ serves as an illustrative example. The Court has regularly reviewed the activities of both member states and Community institutions. In many areas, the Court has adopted a more lenient standard of review towards the acts of Community institutions than of member states.¹¹⁸ To give a concrete example, one may refer to Natalie McNelis' comparative study on the EC *BSE* case and the WTO *EC – Hormones* case.¹¹⁹ McNelis concludes that the ECJ adopted a deferential approach in the *BSE* case because it trusted that the

117. Case 331/88, *The Queen v. Minister for Agriculture, Fisheries and Food ex parte Fedesa*, 1990 E.C.R. I-4023, I-4063 (emphasis added) [hereinafter *Fedesa*].

118. Takis Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 66 (Evelyn Ellis ed., 1999).

119. Case C-180/96, *United Kingdom v Commission*, 1998 E.C.R. 2265; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, para. 117, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones ABR*], available at http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf.

Commission had acted in the Community interest.¹²⁰ In areas such as the Common Agricultural Policy and economic policy, the Commission, as a specialist bureaucracy with considerable expertise, and as guardian of the EC Treaty, enjoys a wide margin of discretion, particularly as to the nature and extent of the measures which it adopts.¹²¹ Similarly, the Court of First Instance, reviewing harmonizing Community legislation, held that “[t]he Community judicature is not entitled to substitute its assessment of the facts for that of the Community institutions, on which the Treaty confers sole responsibility for that duty.”¹²² In this context, the review by the courts of the necessity of the measure (the second element of the proportionality test) will be limited. While the Court is deferential towards the policy choices of the Community institutions, it puts more emphasis on the procedural aspects leading to the adoption of the measure.¹²³ Those processes and guarantees (e.g. due process and transparency requirements) will be reviewed more strictly.

The Court’s review is stricter when member states’ measures constitute potential obstacles to the free movement guarantees of the EC Internal Market.¹²⁴ This is the proper area to draw parallels to the WTO judiciary judging WTO Members’ actions.

The grounds of justifications and issues involved equally affect the intensity of review in EC law. Political issues, such as national security or economic policy, generally entail a wide discretion and choice of measures for public authorities. Courts will be ill-suited to evaluate these policy choices concerning the collective or public interest. Furthermore, Member States may have particular competence and expertise in certain areas which will lead courts to undertake a lighter review of the justifications provided by these states.¹²⁵ Conversely, domestic measures aimed, for instance, at consumer protection have been scrutinized closely by the ECJ.¹²⁶ Consumer protection is an area closely linked to the EC’s Internal Market where the Court has gained considerable experience. Equally, courts tend to adopt a stricter approach when individual rights and interests are at stake, such as the restriction of fundamental rights and market freedoms.

Additionally, measures diverging from the majoritarian view or practice of the member states may be assessed more strictly than measures in areas where a consensus among the member states does not (yet) exist.

120. See Natalie McNelis, *The Role of Judge in the EU and WTO. Lessons from the BSE and Hormones Cases*, 4 J. INT’L ECON. L. 189, 200-01 (2001).

121. Case 55/75, *Balkan-Import-Export v. Hauptzollamt Berlin-Packhof*, 1976 E.C.R. 19, 30. The expertise argument is often invoked in the WTO context (greater expertise of domestic agencies and decision-making processes). For an overview, see MATTHIAS OESCH, *STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION* 55-57 (2004).

122. Case T-13/99, *Pfizer*, 2002 E.C.R. II-3305, para. 169. See also Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-5755 paras. 57-67 [hereinafter *Working Time Directive*].

123. Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and WTO*, 15 EURO. J. INT’L L. 307, 319 (2004).

124. Compare Case C-369/89, *Piageme v. BVBA Peeters*, 1991 E.C.R. I-2971 (stating that Article 30 of the EEC Treaty precludes labeling requirement imposed by member state) with Case C-51/93, *Meyhui v. Schott Zweisel Glaswerke*, 1994 E.C.R. I-3879 (labeling requirement imposed by a Directive).

125. Sean Pager, *Strictness vs. Discretion: The European Court of Justice’s Variable Vision of Gender Equality*, 51 AM. J. COMP. L. 553, 556 (2003).

126. See *German Beer*, *supra* note 107; see also Case 261/81 *Rau* [1982] ECR 3961.

B. *Standard of Review in WTO Law*

In the WTO legal order, the concept of standard of review determines the nature and intensity of review exercised by the WTO judiciary. Similar to intensity of review in EC law, it is about the depth with which the challenged national measures are scrutinized.¹²⁷ The underlying concern for WTO law is to what extent judges (need to) defer to national findings of facts and law and whether the judges may adopt different factual and legal conclusions than the domestic authorities under review (i.e., second guess the national determinations).¹²⁸

Through its central role in dispute settlement, standard of review influences the vertical relationship between supranational adjudicators and makers of sovereign member states.¹²⁹ It allocates the power to decide, in the last instance, on sensitive issues of law and fact.¹³⁰ It is for this reason that standard of review has been recognized as an important concept of the WTO legal order and features prominently in the Panel and AB reports, as well as in the academic literature.¹³¹ Usually, it is treated as a free-standing concept with a bearing on the conduct of the panel review of domestic measures. We attempt to situate it in the context of the overall subject of this article.

The historical developments leading to the current standards of review have been explored elsewhere and need not be repeated here.¹³² It suffices to say that there is no explicit provision on standard of review in the GATT or the WTO Agreements, except for Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.¹³³

In the *EC – Hormones* case, the appellate body seized the opportunity to define a general standard of review for all WTO Agreements (except for those which prescribe a different standard).¹³⁴ The appellate body carefully ruled that the standard of review “must reflect the balance established . . . between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”¹³⁵ Referring to DSU Article 11 as the textual basis, the AB declared the proper standard of review to be an “objective assessment of the matter” by the panel.¹³⁶ The relevant part of DSU Article 11 reads as follows:

127. Matthias Oesch, *Standards of Review in Dispute Resolution*, 6 J. INT’L ECON. L. 635, 637 (2003).

128. *Id.* at 637-38.

129. See Stefan Zleptnig, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, 13 EURO. BUS. L. REV. 427, 456 (2002).

130. See *id.* at 456-57.

131. There is now considerable literature on this issue. See Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193 (1996); see also OESCH, *supra* note 121 (discussing different approaches to standards of review).

132. See OESCH, *supra* note 121, at ch. 4 (discussing GATT 1947 and its development of the notion of standard of review).

133. See generally James Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J. INT’L ECON. L. 125 (2003) (discussing Article 17.6 of the Agreement on the Implementation of Art. VI of the General Agreement on Tariffs and Trade [hereinafter “Anti-Dumping Agreement”]).

134. *EC – Hormones ABR*, *supra* note 119, para. 117.

135. *Id.* para. 115.

136. *Id.* para. 116.

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.¹³⁷

In *Hormones* the AB ruled out two other possible standards of review. Both the de novo review (in which the panel substitutes its findings for that of the national authorities) and the total deference standard were rejected as inappropriate for the WTO dispute settlement system.¹³⁸

The “objective assessment” standard itself is rather vague. It does not necessarily provide for precise substantive guidance regarding the nature and intensity of review exercised by the panels. Different authors have recently pointed out that, as a consequence, the appropriate standard of review is to be defined independently under each WTO agreement. For instance, panels will review national measures covered by the trade remedy agreements (e.g., anti-dumping, safeguards, and countervailing duties) differently from measures covered by the SPS and TBT Agreements or the GATT.¹³⁹

The intensity of review set forth in DSU Article 11 relates to two different but interrelated aspects, the review of facts and law.¹⁴⁰ The review of facts involves two steps. First, it relates to the process of fact-finding (the raw evidence) by domestic authorities.¹⁴¹ The panel will review whether factual evidence was properly and sufficiently established.¹⁴² Second, it relates to the conclusions that national authorities draw from that factual evidence.¹⁴³ In their evaluation of raw evidence, WTO Members are usually granted a certain margin of discretion, subject to the condition that they adequately explain and justify how they reached their conclusion.¹⁴⁴

Under the WTO trade remedy agreements, the panels’ role is to review investigations and findings made by national authorities. Panels do not have the power to redo the original investigation and substitute their findings for that of national authorities (de novo review). They may, however, scrutinize whether the authorities respected the procedural requirements imposed on the domestic decision-making process and provided a “reasoned and adequate explanation” for their determinations.¹⁴⁵

137. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU], available at http://www.wto.org/English/docs_e/legal_e/28-dsu.pdf.

138. *EC – Hormones ABR*, *supra* note 119, para. 117.

139. See generally Holger Spamann, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, 38 J. WORLD TRADE 509 (2004) (arguing that national authorities would not necessarily fare worse under a de novo standard of review of trade measures); see also Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491 (2004) (examining the review of trade remedy measures, SPS and TBT measures, and measures covered by the GATT 1994).

140. Oesch, *supra* note 127, at 639.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 640-41.

145. Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, para. 103, WT/DS177/AB/R (May 16, 2001)

The following quote from *US – Cotton Yarn* summarizes the key elements of the standard of review as applied in this trade remedy case:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.¹⁴⁶

The structure of review under the SPS and TBT Agreements will be different. Panels do not necessarily need to defer to formal investigations conducted at the national level. They will often be the first body to formally assess evidence, such as scientific justifications submitted in support of a particular domestic measure. Panels will then be less constrained in reviewing domestic fact-finding than under the trade remedy agreements. Under the GATT, panels may be in a similar position since they are often assessing facts which have neither been previously examined nor determined in formal procedures. Again, there may be no need to defer to the formal findings of domestic authorities. Regarding standard of review under the SPS Agreement, the AB once held:

[W]ithin the bounds of their obligation under Article 11 to make an objective assessment of the facts of the case, panels enjoy a "margin of discretion" as triers of fact. Panels are thus "not required to accord to factual evidence of the parties the same meaning and weight as do the parties" and may properly "determine that certain elements of evidence should be accorded more weight than other elements."¹⁴⁷

The *review of law* determines the consistency of a national measure (on the basis of established evidence) with the WTO Agreements and the extent to which panels can review the interpretation of WTO law submitted by the Members. In this area, it seems undisputed that the correct interpretation of the WTO Agreements is a matter for the panels and the AB, and there is no need to show deference towards national authorities.¹⁴⁸

Standard of review in WTO law is a complex concept. It is hybrid in nature, due to "the interplay of substantive and procedural rules which, together, specify the role of Panels when reviewing national authorities' determinations."¹⁴⁹ The nature and intensity of review under the WTO Agreements depends on various factors. It

(emphasis omitted) [hereinafter *US – Lamb Meat*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds177_e.pdf.

146. *US – Cotton Yarn*, *supra* note 63, para. 74.

147. Appellate Body Report, *Japan – Affecting the Importation of Apples*, para. 221, WT/DS245/AB/R (November 26, 2003) (citations omitted) [hereinafter *Japan – Apples*], available at http://www.wto.org/english/tratop_e/dispu_e/245_abr_e.pdf.

148. OESCH, *supra* note 121, at 30-33.

149. Spamann, *supra* note 139, at 514.

is relevant whether domestic authorities already conducted formal investigations which may include procedural guarantees for those affected by the decision-making process. Another issue is the expertise of the domestic decision-makers. On the other hand, panels may be the first to review evidence submitted to justify a particular measure.

The way in which the review is conducted and the depth of scrutiny adopted by the panels will have a crucial impact on the substantive findings of the panels. To illustrate this point, we can refer to the necessity (or least trade-restrictiveness) requirement.¹⁵⁰ The panel will make a finding on the necessity of a domestic measure by taking into account and balancing a range of substantive, procedural, and factual criteria. Legal principles and substantive tests are hereby closely intertwined with the concept of standard of review, and the relationship between these different concepts will be one of mutual influence and dependence. The intensity of review strongly impacts on the court's assessment of the compliance of the reviewed measure with the substantive treaty requirements. It is this *matrix-type relationship* between substantive and procedural standards which governs the application of the principle of proportionality and similar tests in the judicial process.

IV. PROPORTIONALITY IN PUBLIC INTERNATIONAL LAW

The principle of proportionality has been extensively discussed in the context of domestic and EC law. In those areas, it is usually applied to the relationship between states and citizens and the exercise of legislative or regulatory competence. In addition, proportionality in public international law governs the relationship between equal and sovereign states. There are many areas of public international law where the principle of proportionality plays an important role. At the same time, it is difficult to identify a coherent substantive content of proportionality across the whole range of public international law. We focus on some core areas where proportionality plays a crucial role in determining the scope of international norms and the powers that states may exercise vis-à-vis other states and their populations.

A. Countermeasures

The principle of proportionality plays a prominent role in the law of international countermeasures. We will discuss proportionality and countermeasures generally and then turn to relevant case law and the important International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.

Generally, proportionality in the law of countermeasures determines the extent to which countermeasures in response to wrongful acts are permissible, thus regulating both the *nature* and *intensity* of the response.¹⁵¹ Proportionality imposes limitations on the unilateral power to take countermeasures. The precise normative content of proportionality in the area of countermeasures, however, is more difficult to determine. It includes at least two interconnected aspects: “[p]roportionality requires not only employing the *means* appropriate to the aim chosen, but implies,

150. Alexy, *supra* note 38, at 66.

151. Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EURO. J. INT'L L. 889, 915-16 (2001).

above all, an assessment of the appropriateness of the *aim* itself.”¹⁵² The latter aspect relates to the aim pursued by a state in response to wrongful conduct by another state. The aim itself needs to be appropriate and reasonable in the context of the situation and the breached rule.¹⁵³ Once the appropriateness of the aim pursued has been established, countermeasures are required to be proportionate to the original breach.

Proportionality featured prominently in the *Gabcíkovo-Nagymaros (Hungary v. Slovakia)* case before the ICJ. The Court’s succinct formula relating to proportionality was that “the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.”¹⁵⁴ The countermeasure at issue—Czechoslovakia had diverted the river Danube—was found disproportionate and unlawful by the Court:

Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law.¹⁵⁵

The ICJ did not only evaluate the countermeasure in purely quantitative terms (the injury suffered), but took account of other qualitative factors as well (in particular, the parties’ rights involved). Hungary, for instance, which had committed the original wrongful act, still had the right to an “equitable and reasonable share of the natural resources of the Danube.”¹⁵⁶ It was by taking the countermeasures at issue that Czechoslovakia had deprived Hungary of this right and thus violated the principle of proportionality.

Article 51 of the recent ILC Articles on Responsibility of States for Internationally Wrongful Acts is entitled “Proportionality.”¹⁵⁷ This provision reaffirms the ICJ’s approach in *Gabcíkovo-Nagymaros* and reads as follows: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”¹⁵⁸

The Commentaries to the Draft Articles explain the reasoning behind Article 51 and outline the two components of the proportionality requirement. The first component is *quantitative* and assesses the injury suffered by the injured state. The

152. *Id.* at 897 (emphasis added).

153. *Id.* at 899.

154. *Gabcíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 56 (Sept. 25).

155. *Id.*

156. *Id.* para. 85.

157. See also U.N. International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, (adopted at the Commission’s fifty-third session in 2001 and submitted in the UN General Assembly as a part of the Commission’s work) and *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR 56th Sess., Supp. No. 10, art. 51, para. 4, U.N. Doc A/56/10 (2001) [hereinafter International Law Commission’s Articles], available at <http://untreaty.un.org/ilc/reports/2001/2001report.htm> (search by chapter “State Responsibility”). See also James Crawford *et al.* *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading* 12 EUR. J. INT’L L. 963-991 (2007).

158. *Id.* art. 51.

second component is *qualitative* and requires that additional factors be taken into account, such as the “importance of the interest protected by the rule infringed and the seriousness of the breach.”¹⁵⁹ Proportionality of countermeasures will therefore be assessed in relation to the injury suffered, while the gravity of the wrongful act, the importance of the protected interests, and the impact on rights of both the injured and the responsible states are also taken into account and balanced against one another.

Proportionality as a legal principle governing the relationship between the wrongful act and the countermeasure refines the basic requirement in Article 49 of the Draft Articles. This provision, which states the objects and limits of countermeasures, requires that they be taken only to induce the state responsible for the wrongful act to comply with its obligations.¹⁶⁰ In this respect, proportionality goes beyond a mere necessity test since it is not only relevant whether the countermeasure was necessary to achieve compliance. It is possible that countermeasures are considered disproportionate in circumstances where they go beyond what is necessary to achieve compliance and instead pursue a punitive objective.¹⁶¹

*B. Use of Force and Armed Conflicts*¹⁶²

The principle of proportionality is an equally important concept for the law on the use of force (*jus ad bellum*) and the law of armed conflicts (*jus in bello*).¹⁶³ In the first case, it relates to the response to a particular attack and, in the second case, it relates to the conduct of that response and the balance that needs to be struck between military objectives and the damages inflicted on the enemy.¹⁶⁴ Proportionality is particularly interesting and controversial in these fields, given the significant and unalterable consequences which the interpretation and application of this principle may have. Moreover, the application of proportionality in these circumstances is useful to highlight its problems and limitations. In her 1993 article on proportionality and force in international law, Judith Gail Gardam critically notes that:

Despite the potential of proportionality to undermine pleas of self-defence, at no time has much attention been paid to its requirements. This omission is somewhat surprising, given the status of proportionality as one of the determinants of the legality of a state's use of force. Moreover, it remains relevant throughout the conflict.¹⁶⁵

In the law relating to the right to use force, proportionality refers to a belligerent's response to a grievance. The resort to force under the UN Charter is

159. *Id.* art. 51, para. 6.

160. *Id.* art. 49.

161. *Id.* art. 49, para. 7.

162. The authors gratefully acknowledge the research of Daniel Geron, which has been of assistance to this section.

163. Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 32-53 (2004).

164. *Id.*, at 391.

165. *Id.* at 404 (citation omitted).

limited by the customary law requirement that it be proportionate to the unlawful aggression which caused it. Article 51 of the UN Charter prohibits the use of force other than in self-defense, but it does not mention the principle of proportionality expressly. The International Court of Justice (ICJ) in *Military and Paramilitary Activities in and against Nicaragua* referred to the well-established rule of customary international law that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it”¹⁶⁶ In its *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the ICJ referred back to its *Nicaragua* decision and held:

The submission of the exercise of the right of self-defence to the conditions of *necessity* and *proportionality* is a rule of customary international law. . . . This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.¹⁶⁷

The Court’s jurisprudence highlights the requirement that actions of self-defense shall observe both the criteria of necessity and proportionality. The role of proportionality in this context is to impose limitations on lawful self-defense and to determine the harm that may be done to others. The means employed shall be necessary to respond to, and fend off, a particular attack and be proportionate in relation to the severity of the attack. To give a concrete example, it would be disproportionate to respond to a minor raid across the border with the use of nuclear weapons.

Taking a close look at the proportionality requirement, Judge Higgins has raised the fundamental question: “proportionate in respect of *what?*”¹⁶⁸ She then argued that proportionality usually relates to the injury received by a single incident.¹⁶⁹ In cases of continuing aggression or invasion, proportionality might not relate to specific injuries as such, but to the overall objective of ending or reversing the aggression.¹⁷⁰ With regard to the possible use of nuclear weapons in self-defense, the ICJ’s *Advisory Opinion on the Threat or Use of Nuclear Weapons* recognized still further factors involved in the assessment of proportionality, for instance the risks of escalating the conflict.¹⁷¹

In the *Oil Platforms* case, the ICJ considered two actions by the U.S. against Iranian targets to determine whether the self-defense responses were necessary and

166. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, paras. 176, 194 (June 27), available at http://www.icj-cij.org/icjwww/icas/inus/inus_ijudgment/inus_ijudgment_19860627.pdf.

167. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) paras. 41-42 (emphasis added) [hereinafter *Nuclear Weapons*], available at <http://www.icj-cij.org/icjwww/icas/iunan/iunanframe.htm>.

168. ROSALYN HIGGINS, PROBLEMS AND PROCESS. INTERNATIONAL LAW AND HOW WE USE IT 231(1994) (quotes omitted).

169. *Id.*

170. *Id.* at 231-232.

171. *Nuclear Weapons*, *supra* note 167, para. 43.

proportionate to the Iranian attack.¹⁷² The United States failed to convince the ICJ that its attacks on the platforms qualified as “necessary” acts of self-defense against the Iranian attacks.¹⁷³ There is an interesting statement on the relationship between necessity and proportionality in the Court’s decision. Referring to the U.S. attack of October 19, 1987, the ICJ stated that, had it found this attack to be a necessary response to the Iranian attack, it might have been proportionate.¹⁷⁴ With regard to other U.S. attacks of 1988, which were part of a broader operation entitled “Operation Praying Mantis,” the Court held that neither the operation as a whole nor the more specific attacks could be regarded as “proportionate use of force in self-defence.”¹⁷⁵

The relevant parameters of the proportionality principle are even more complicated in the debate over the legality of the doctrine of anticipatory self-defense. The main question is whether the force used in anticipation of an attack is proportionate to the threat. Brownlie, for instance, has put forward some objection to anticipatory self-defense on the basis that it may be contrary to the principle of proportionality.¹⁷⁶ More fully, his argument goes as follows:

It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However, in the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality.¹⁷⁷

The substantive law of armed conflicts is also based on the requirements of proportionality. In the context of *jus in bello* proportionality refers to the balance to be struck between the achievement of a military goal and the cost in terms of lives of combatants and the civilian population. Proportionality is considered to be a fundamental principle of the law of armed conflict.¹⁷⁸ It is not always expressed as “proportionality” in the particular rules of the law of war, but its presence can be clearly seen to underpin and inspire many of the rules in this area.¹⁷⁹

Proportionality is a determining factor in a variety of situations, including the selection of targets, the means and methods of attack, and the conduct of the attack itself.¹⁸⁰ The underlying concern is to limit casualties and damages done to others “to what is proportionate to the achievement of the military goal.”¹⁸¹ The choice of the means of warfare and the damages that may result is clearly restricted by the

172. Oil Platforms (Iran v. U. S.), 2003 I.C.J. 161 (Nov. 6) .

173. *Id.* para. 76.

174. *Id.* para. 77.

175. *Id.*

176. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261-262 (1963).

177. *Id.* at 259.

178. Gardam, *supra* note 163, at 391.

179. See generally Convention Respecting the Laws and Customs of War on Land, Annex to the Hague Convention, U.S. – Neth., Oct. 18, 1907, 36 Stat. 2277 [hereinafter *Hague IV*]; Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

180. Gardam, *supra* note 163, at 407.

181. *Id.* at 406.

principle of proportionality. In this context, decision-makers and the military have to undertake a cost-benefit analysis to assess the damages that an action may cause, for instance, to non-combatants. It is hardly surprising that this involves a complex balancing of competing goals that needs to be reconciled by the military before and during their actions, and an assessment of those actions will take place by judges of those actions *ex post*.

The difficulties in applying the principle of proportionality in this area were presented in a Report to the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY):

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

The questions which remain unresolved once one decides to apply the principle of proportionality include the following:

(a) What are the relative values to be assigned to the military advantage gained and to the injury to non-combatants and/or the damage to civilian objects? . . .

....

(c) What is the standard of measurement in time or space? and

(d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants.¹⁸²

182. *Id.* at 406.; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ICTR PR/P.I.S./510-E, paras. 48-50 (June 8, 2000), reprinted in 39 I.L.M. 1257.

C. *Maritime Delimitation*

Finally, we may refer to the area of maritime delimitation, where proportionality appears as an element of *equity* intended to guide the decision-making process.¹⁸³ Recourse to the concept of proportionality is made to evaluate the award of continental shelf land to states.

D. *Conclusion*

We have shown that the principle of proportionality is an essential concept in international law. Yet its content remains diffuse, and the different nuances and functions vary from area to area. Generally, proportionality in international law is about the limits of unilateral state action necessary to pursue a legitimate objective. In some instances, proportionality goes further than that. In addition to the necessity of a state action, proportionality requires a complex balancing of quantitative and qualitative factors, including competing rights, values and interests. This is particularly pertinent in the areas of countermeasures and the use of force.

The international legal system traditionally lacks the element of subordination that can be found in the domestic context. Within this legal order, the principle of proportionality plays an important role as a standard to determine how far sovereign states can go in their relationships with other states. One core function of proportionality in international law is to impose functional limitations on the exercise of state powers. In this context, proportionality appears in two different ways. First, it serves as an overarching principle guiding the relationship between, and the scope of, other rules and principles. One function of principles in international law is to fill gaps and to avoid a *non liquet*, and this is where proportionality may come into play. Second, proportionality may be part of the substantive law on countermeasures, self-defense, or armed conflicts, and thereby establishes positive obligations for state actions in those areas.

V. BALANCING IN US CONSTITUTIONAL LAW: THE INTERSTATE COMMERCE CLAUSE

The Interstate Commerce Clause (ICC) is an important and complex feature of U.S. constitutional law.¹⁸⁴ Broadly speaking, the ICC covers two different aspects. First, it grants Congress the power to legislate on interstate commerce matters.¹⁸⁵ Second, it imposes limitations on states when interfering with interstate commerce.¹⁸⁶ The ICC can be said to fulfill a similar function to the free movement provisions in

183. HIGGINS, *supra* note 168, ch. 13.

184. U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). There is considerable literature on the development and current interpretation of the Commerce Clause. See generally LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6 (3d ed. 2000); Michael Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J. L. & PUB. POL’Y 395 (1998).

185. Lawrence, *supra* note 184, at 407.

186. *Id.*

EC law.¹⁸⁷ Furthermore, the ICC has sometimes been compared to the GATT, with scholars attempting to gain some useful insights from the ICC doctrine for GATT law.¹⁸⁸

The ICC has many different facets which will not be discussed in detail here. However, particularly relevant for the scope of this paper is the difference under the ICC between (a) the strict necessity test applied to discriminatory regulation and (b) the balancing approach applied to non-discriminatory regulation.¹⁸⁹ Whenever state regulation affects interstate commerce, even by doing so incidentally, it needs to satisfy those tests; otherwise it will be struck down as unconstitutional.¹⁹⁰ The balancing approach seems to resemble the proportionality analysis in EC law. According to both of these concepts, the judges will ultimately assess whether legitimate interests sought by public authorities outweigh the burden imposed on free trade or other protected rights and interests.

The applicable tests of review depend on whether state regulation discriminates against out-of-state or interstate commerce. If there is discrimination, state regulation will be measured against a strict standard, as opposed to the more deferential balancing test applied to non-discriminatory measures.¹⁹¹

If state regulation is *discriminatory* against interstate commerce, it is subject to strict judicial scrutiny and may only be upheld if two conditions are fulfilled. First, the measure must pursue a legitimate local purpose.¹⁹² State interests may, for instance, involve public health or safety, environmental protection or the prevention of consumer fraud.¹⁹³ Second, even if state regulation pursues a legitimate purpose, it will be considered unlawful if there are less discriminatory means by which the state could achieve the same purpose.¹⁹⁴ The burden is on the state to prove the necessity of its measure.¹⁹⁵ This approach has been called the heightened scrutiny test.¹⁹⁶ The courts may adopt different degrees of scrutiny under such a less restrictive means test. In *C & A Carbone v. Town of Clarkstown*, for instance, the Supreme Court formulated a particularly strict standard of scrutiny:

Discrimination against interstate commerce in favor of local business or investment is *per se invalid, save in a narrow class of cases in which the*

187. GEORGE BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 452 (2d ed. 2002).

188. Robert Howse, *Managing the Interface between International Trade and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, 2 WORLD TRADE FORUM 139-66 (Thomas Cottier & Petros Mavroidis eds. 2000).

189. TRIBE, *supra* note 184, at 1049-51.

190. *Id.*

191. One of the justifications provided for a strict standard for discriminatory measures is the political representation argument. It says that lawmakers may be exposed to pressures from the domestic constituency, which leads lawmakers to take decisions harmful to others who are not represented in the domestic political process (for instance, out-of-state companies). Courts should therefore only show deference towards democratic decisions if all interests affected have adequately been represented in the political process. See TRIBE, *supra* note 184, at 1051-55.

192. TRIBE, *supra* note 184, at 1049-51.

193. JEROME BARRON & THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 116 (1999).

194. TRIBE, *supra* note 184, at 1049-51.

195. Daniel Farber & Robert Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1412-13 (1994).

196. BARRON & DIENES, *supra* note 193, at 114.

*municipality can demonstrate, under vigorous scrutiny, that it has no other means to advance a legitimate local interest. . . . [A]rguments [that the municipality has no other means to advance a legitimate local interest] must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. . . .*¹⁹⁷

Conversely, *non-discriminatory measures* with only incidental effects on interstate commerce are subject to a lighter balancing test.¹⁹⁸ The reason for this test is that state regulation, even in the absence of discrimination, may still place an undue or excessive burden on interstate commerce.¹⁹⁹ Courts, adopting the balancing test, will inquire whether legitimate regulatory interests of the state *outweigh* the impediment to free movement of interstate commerce.²⁰⁰ There is also an additional least-restrictive-means requirement which is less strict than the one applied to discriminatory measures.²⁰¹ This ad hoc balancing test was elaborated by the Supreme Court in *Pike v. Bruce Church*:

Where the state regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, *it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.* If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on *whether it could be promoted as well with a lesser impact on interstate activities.*²⁰²

The main idea is that state regulation pursuing a legitimate interest is justified but should not be excessively burdensome on interstate commerce. This balancing test, in fact, leaves broad discretion to the courts to decide whether the burden on interstate commerce is excessive in relation to the benefits for the regulating state.²⁰³ Applying this judicial balancing test, the Supreme Court has “most often upheld the statute as one whose benefits outweigh its burdens.”²⁰⁴ This reflects the fact that the ICC balancing test is less intrusive and more deferential towards regulatory decision-making than the ICC test as applied to discriminatory regulation.

The application of this test goes beyond the ICC. Regulatory takings cases have developed over time using a variety of similar tests. The Rehnquist Court advanced a reasonable relationship test, which bore a striking similarity to the rational basis test utilized in economic analysis for Due Process and Equal Protection Clause cases.²⁰⁵ The court also referred to this relationship as an essential nexus.²⁰⁶ In *Dolan v. City of Tigard*, Chief Justice Rehnquist stated that despite any semantic differences, jurisdictions applied the proper reasonable relationship test,

197. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392-93 (1994) (emphasis added).

198. BARRON & DIENES, *supra* note 193, at 110-13.

199. *Id.*

200. *Id.* at 115.

201. *Id.* at 114.

202. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

203. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3.5 (2d ed. 2002).

204. TRIIBE, *supra* note 184, at 1062.

205. Daniel A. Crane, *A Poor Relation? Regulatory Takings after Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199, 215 (1996).

206. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

balancing the state interest against the exaction of private property.²⁰⁷ Each is arguably a form of proportionality, the same which is applied in Eighth Amendment capital punishment cases, in the ICC and in every clash of congressional legislation with the interests of the states.²⁰⁸

The Court's approach towards the Commerce Clause, and in particular the balancing test, has been subject to considerable criticism by judges and academics alike.²⁰⁹ On the one hand, some are concerned that it is inappropriate for judges to engage in a balancing process of competing (and often non-comparable) values or interests, in particular with respect to non-discriminatory measures. It is argued that this should be left to the legislative process rather than to judicial activism. As a consequence, courts are considered to be ill-suited to undertake that kind of balancing. They should adopt a deferential approach instead of second-guessing regulatory measures.²¹⁰ Another argument is that the balancing test has proven too uncertain and imprecise, which is why it has failed to become a guiding principle of constitutional law. This far-reaching debate on the merits of the Court's jurisprudence is beyond the scope of this article.

A few conclusions can be drawn from the preceding discussion. First, both the least-restrictive means test and the balancing test provide standards against which regulatory measures can be assessed. This is a useful attempt to rationalize judicial review. Doubts remain as to whether the standards are sufficiently precise, intellectually coherent, and clear enough to provide guidance to the regulators, as well as to make judicial review more predictable.²¹¹ The discussion about the Commerce Clause reflects similar issues arising in WTO law. It relates to the appropriate role for judges and judicial review in a federal and international legal system. It is also about the allocation of powers and the question of whose view should ultimately prevail in case of disputes: the judges' or the regulators' view.

Both in the context of the Commerce Clause and WTO law, political representation arguments have been raised. One justification for judicial review is to ensure the appropriate protection of minorities (or foreigners) not represented in the domestic political process. These arguments can be turned into an important proceduralist aspect of substantive tests, such as balancing under the Commerce Clause or proportionality. The greater the representation of all interests affected in the domestic process, the more deference tribunals may show towards the political process.²¹²

207. Crane, *supra* note 205, at 223.

208. Regarding the Eighth Amendment, see *Ewing v. California*, 538 U.S. 11 (2003). Regarding issues of federalism, see *Tennessee v. Lane*, 541 U.S. 509 (2004); *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982); *U.S. v. Lopez*, 514 U.S. 549 (1995).

209. See, e.g., *TRIBE*, *supra* note 184.

210. The Commerce Clause jurisprudence is a highly complex and difficult area of constitutional law. One commentator noted that "[g]enerations of law students, judges, practicing lawyers, and legal commentators have struggled to understand exactly what the Supreme Court does when it decides cases involving the Dormant Commerce Clause." Lawrence, *supra* note 184, at 464.

211. Lawrence, *supra* note 184, at 397.

212. See Zleptnig, *supra* note 129, at 450-54; Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO AND THE NAFTA. TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 35-69 (JHH Weiler, ed., 2000).

VI. BALANCING IN THE WTO

One aim of this paper is to outline some important areas of WTO law where proportionality or similar balancing tests do occur. The preceding discussion has shown that the concept of proportionality, while its core remains the same, has different constitutive elements and objectives which very much depends on the area of application of this principle. Another factor is that the different elements of the proportionality test may be applied with an ascending degree of scrutiny.

Within WTO law, we can conceptually distinguish between two different areas of application: public policy *exceptions*, which limit the scope of legal rules and provide for derogations from main treaty obligations (e.g., GATT Article XX), and *positive obligations* imposed on Members by the SPS and TBT Agreements. These positive obligations lay down substantive criteria for domestic regulation to ensure that domestic regulation does not impose too burdensome constraints on international trade.²¹³

Within either of these categories, one may further distinguish between the *substantive* and *procedural* aspects of the different tests. The substantive aspects lay down normative requirements to assess the compliance of domestic measures with WTO law. Related to substantive obligations are procedural obligations incumbent on the Members, which we will refer to as the procedural aspect. Procedural obligations need to be taken into account at the national level (in administrative proceedings or the legislative process) and will subsequently be reviewed by the judicial bodies of the WTO. Insofar as these procedural requirements relate to the quality of the domestic processes, they impose “procedural checks” on domestic decisionmaking.²¹⁴

A few authors have argued that the principle of proportionality is not explicitly (or even implicitly) recognized in the law of the WTO.²¹⁵ Our own approach in this chapter is to move the existing debate further and to outline some structural features inherent in the different tests laid down in the WTO Agreements. Whenever appropriate, we will draw parallels to the proportionality and balancing tests in other legal orders.

A. *Objective Justifications: Public Policy Exceptions in the GATT*

1. Introduction

GATT Article XX provides for a list of general exceptions from the GATT obligations. The scope and application of this provision is crucial for WTO Members that want to justify their domestic policies as GATT-consistent and invoke one of the public policy exceptions in Article XX. To date, this provision has already touched upon some of the most sensitive issues of WTO law and is likely in the future “to raise some of the most difficult questions that the WTO will face.”²¹⁶

213. Howse, *supra* note 188, at 154.

214. Scott, *supra* note 123, at 337.

215. See Desmedt *supra* note 3.

216. Donald McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTION IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 219, 233 (Marco Bronckers & Reinhard Quick eds., 2000).

Any domestic measure, in order to qualify as a lawful exception under Art XX GATT, needs to comply with the conditions laid down in this provision.²¹⁷ The AB in *US – Gasoline* set out the appropriate method and sequence of steps for applying Article XX.²¹⁸ This consists of two different steps, which, taken together, make the full assessment of a measure under Article XX. The first step is to assess whether the *general design* of a measure falls within the scope of one of the exceptions in Article XX (a) – (j). Subsequently, the *application* of a measure is assessed against the criteria in the introductory clauses (Chapeau) of Article XX.

2. General Design

The first step is to determine whether the domestic measure can be justified in accordance with one of the public policy exceptions. So far, the main focus of the case law has been on health measures (paragraph b), enforcement measures (paragraph d) and conservation measures (paragraph g).²¹⁹ The right of WTO Members to adopt a specific public policy objective and to choose the desired level of protection or enforcement has not been questioned by the panels or the AB.²²⁰ In *Asbestos*, for instance, the AB held that “it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”²²¹ In *US – Gasoline*, the AB previously stated that “WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with . . . [GATT] provisions. . . .”²²² As far as the assessment of the appropriateness of the aim pursued is concerned, Members will have a wide margin of discretion. This discretion is subject to the condition that the chosen objective falls within the scope of the exceptions mentioned in Article XX GATT.

The next step will be to determine the relationship, or connection, between the aim pursued and the measure adopted. This is a sensitive issue, for it has an impact on the intensity with which judges review (second-guess) domestic policy choices. The relationship between the aim and measure is typically at the core of any

217. In this paper we will not specifically deal with Article XIV of the GATS, as it is equivalent to Art. XX GATT; the recent *U.S. – Gambling* dispute confirmed that jurisprudence developed under Article XX of the GATT is also relevant for the interpretation of Article XIV of the GATS. For a discussion of the relevant GATS issues, see THE WORLD TRADE ORGANISATION AND TRADE IN SERVICES (Mads Andenas and Kern Alexander eds., 2007) and Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services. The Best is Yet to Come*, 18 EUR. J. INT’L L. (forthcoming, 2007) (arguing for a horizontal approach for all services sectors built on a necessity test to be adopted in the negotiations within the Working Part on Domestic Regulation based on the mandate in Art. VI:4 GATS).

218. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, para. 6.20, WT/DS2/R (Jan. 29, 1996) [hereinafter *U.S. – Gasoline PR*], available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (search by “document symbol”).

219. Committee on Trade and Environment, *Note by the Secretariat: GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, WT/CTE/W/203 (March 8, 2002) at paras. 1-5 [hereinafter *GATT Secretariat*].

220. *Id.* para. 16.

221. Appellate Body Report, *Measures Affecting Asbestos and Asbestos-Containing Products*, para. 168, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos*], available at http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf.

222. *US – Gasoline*, *supra* note 218, para. 7.1.

proportionality inquiry (both in the domestic and international context) but also of other tests such as the Interstate Commerce Clause.

In Article XX there is a textual difference in the individual paragraphs between the requirement that a measure be “necessary” to protect a specific public policy objective (e.g. public morals; human, animal or plant life or health) or, alternatively, that it be “related” to such an objective (conservation of exhaustible natural resources; products of prison labor). We now explore the scope and application of these two tests.

i. Necessary to . . .

The necessity test in Articles XX (b) and (d) has been subject to considerable academic interest and also featured prominently in the WTO jurisprudence. In the *Thai – Cigarettes* case, the panel elaborated on the necessity criterion and stated that trade restrictions were necessary “only if there were no alternative measures consistent with the [GATT], or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”²²³ In *US – Gasoline*, the panel’s standard was whether “there were measures consistent or less inconsistent with the General Agreement that were reasonably available”²²⁴ The focus on the least trade-restrictive and least GATT-inconsistent measure has led to considerable criticism in the academic literature, particularly for imposing too many constraints on legitimate domestic policy choices.

Subsequent reports by the AB refined the necessity test. *Korea – Beef* is particularly relevant in this respect. According to the AB, in order to evaluate the necessity of a measure one needs to take into account, first, “the extent to which the measure contributes to the realization of the end pursued,” and second, “the extent to which the compliance measure produces restrictive effects on international commerce.”²²⁵ As a consequence, measures with a lesser impact on international commerce “might more easily be considered as ‘necessary’ than a measure with intense or broader restrictive effects.”²²⁶ Summarizing its approach, the AB held that

determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.²²⁷

The AB stressed that a “weighing and balancing” approach contributes to determining whether a Member could “reasonably be expected to employ” an

223. Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, para. 75, DS10/R – 37S/200 (November 7, 1990) [hereinafter *Thai – Cigarettes*].

224. *US – Gasoline PR*, *supra* note 218, para. 6.25.

225. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, para. 163, WT/DS161/AB/R (Dec. 11, 2000) [hereinafter *Korea – Beef*], available at http://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf.

226. *Id.*

227. *Id.* para. 164.

alternative measure or “whether a less WTO-inconsistent measure is reasonably available.”²²⁸

One interpretation of this judicial development is that the necessity test evolved from a “least-trade restrictive approach to a less-trade restrictive one, supplemented with a proportionality test (‘a process of weighing and balancing of a series of factors’).”²²⁹ Within this balancing test, the AB will assess the relative importance of domestic interests or values pursued. This approach implies a significant shift towards a greater role of the panels and the AB in evaluating the legitimacy and necessity of domestic measures. On the other hand, some have argued that the approach in *Korea – Beef* introduces a more relaxed necessity test—a kind of *de minimis* rule—which leaves more discretion and an additional margin of appreciation to the Members.²³⁰

The AB further elaborated on the necessity requirement of Article XX in the *Asbestos* case. The report concludes that “in determining whether a suggested alternative measure is ‘reasonably available,’ several factors must be taken into account, besides the difficulty of implementation.”²³¹ That determination will be influenced by the “the weighing and balancing” of various factors, as outlined in *Korea – Beef*.²³² The main factors that need to be taken into account in this assessment are (a) the extent to which the alternative measure contributes to the realization of the end pursued and (b) the importance of the interests and values pursued by the Member.²³³ It is then necessary to assess whether there “is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.”²³⁴ This approach does not put into question the objective pursued by the Member, but is intended to provide a standard for evaluating the necessity of a domestic measure.

In recent disputes the AB has confirmed and applied the concept of necessity as previously developed in *Korea – Beef* and *EC – Asbestos*. The AB report in *US – Gambling* elaborated on the necessity standard under Art XIV(a) GATS, and the AB report in *Dominican Republic – Cigarettes* dealt with the necessity standard under Art XX(d) GATT.²³⁵

228. *Id.* para. 166.

229. *GATT Secretariat*, *supra* note 219, para. 42.

230. Neumann & Türk, *supra* note 5, at 211; Robert Howse & Elisabeth Türk, *The WTO Impact on Internal Regulations—A Case Study of the Canada – EC Asbestos Dispute*, in *THE EU AND THE WTO. LEGAL AND CONSTITUTIONAL ISSUES* 283, 324-25 (Gráinne de Búrca & Joanne Scott eds., 2001). See also Panagiotis Delimatsis *Determining the Necessity of Domestic Regulations in Services. The Best is Yet to Come* 18 EUR. J. INT’L L. (forthcoming, 2007) (going further in finding a shift that allows for a less intrusive necessity test with greater regulatory diversity, and supporting this on his analysis of *Dominican Republic – Cigarettes*, *infra* note 244).

231. *EC – Asbestos*, *supra* note 221, para. 170.

232. *Korea – Beef*, *supra* note 225, para. 164.

233. For instance, the more important the interest or value pursued, the easier it will be to justify the domestic measure enacted to achieve that objective as “necessary.” See *Korea – Beef*, *supra* note 225 paras. 163-164.

234. *EC – Asbestos*, *supra* note 221, para. 172.

235. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, paras. 304-327, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US – Gambling*], available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e/285arb_13_e.pdf; Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, paras. 57-74, WT/DS302/AB/R (Apr. 25, 2005) [hereinafter *Dominican Republic – Cigarettes*], available at http://www.wto.org/English/tratop_e/dispu_e/302abr_e.pdf.

In sum, the necessity test seems to imply the following: a measure is necessary if it is indispensable or alternative measures are not reasonably available to achieve the same legitimate public policy objective.²³⁶ This determination will be made upon a weighing and balancing of different factors, including the trade-restrictive effects of the measure, the importance of the aim pursued, and the contribution made by possible alternative measures to achieve that aim pursued. This test certainly introduces a flexible balancing approach into Article XX GATT and a certain degree of subjectivity on the part of the judiciary. At the same time, it requires both the judiciary and the parties to the dispute to structure and justify their arguments along the lines defined by the AB in its jurisprudence and to present the arguments in such a way that they fit with the requirements imposed by the necessity analysis.

ii. Relating to . . .

Other exceptions in Article XX are subject to the condition that the measure is “related to” a legitimate public policy objective (e.g. conservation of exhaustible natural resources in Article XX(g)). The term “related to” indicates that this standard requires a looser degree of connection between the measure and the aim than the stricter necessity test. The AB in *Korea – Beef* stressed that the term “relating to” is “more flexible textually than the ‘necessity requirement’ found in Article XX(d).”²³⁷ Initially, the GATT panel in the *Canada – Salmon and Herring* case argued that “relating to” included not only measures that are necessary or essential to achieve the conservation of exhaustible natural resources but are “primarily aimed at” the chosen objective.²³⁸ Subsequently, the AB in *US – Gasoline* clarified that the term “relating to” requires at least a “substantial relationship” between the means and end which “cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air. . . .”²³⁹

In *US – Shrimp*, the AB assessed whether the domestic measure was “reasonably related” to the ends, arguing that “[t]he means and ends relationship [between the measure and the policy pursued in that case] . . . is observably a close and real one”²⁴⁰ This was also the AB’s interpretation of the test as applied in the previous *Gasoline* case. The AB reaffirmed that the requirement of “relating to” is about a “close and genuine relationship of end and means.”²⁴¹ The AB further held that the *design* of the domestic measure was “not disproportionately wide in its

236. In *Korea – Beef*, the AB referred to “a range of degrees of necessity,” and determined that indispensable, absolutely necessary and inevitable measures “certainly fulfill the requirements of Article XX (d).” *Korea – Beef*, *supra* note 225, para. 161.

237. *Id.* para. 161, n. 104.

238. Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, para. 4.6, L/6286 – 35S/98 (Nov. 20, 1987) [hereinafter *Canada – Herring*], available at http://www.wto.org/gatt_docs/English/SULPDF/91330016.pdf.

239. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 19, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S. – Gasoline ABR*], available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (search by “document symbol”).

240. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 141, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US – Shrimp*], available at http://www.wto.org/English/tratop_e/dispu_e/58abr.pdf.

241. *Id.* para. 136.

scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”²⁴²

While the scope of the “relating to” test is still somewhat unclear, the AB has at least outlined some general criteria for that test.²⁴³ The main requirements are a “close and genuine relationship” between the measure and the aim pursued, which, in other words, need to be reasonably related.²⁴⁴ The test is less strict than the necessity test. This may lead to the result that—insofar as the specific tests are concerned—a measure relating to environmental objectives can be justified more easily under Art XX(g) GATT (conservation of exhaustible natural resources) than under Article XX(b) GATT (protection of human, animal or plant life or health). In both cases, WTO Members can define and choose without judicial interference the level of protection they consider appropriate. The assessment of the measures adopted pursuant to that policy choice, however, will be more intrusive. First, the necessity test requires an assessment of whether a WTO Member could reasonably have been expected to employ a less trade-restrictive alternative. This determination will be governed by a balancing and weighing of different factors. Conversely, the “related to” test seems to be a more deferential reasonableness standard which also includes some elements of a proportionality inquiry.²⁴⁵

3. Application of the Measure: The Chapeau

In the preceding analyses we focused on the tests set out in individual paragraphs of Article XX GATT. If a national measure is found to comply with these requirements, it will be “provisionally justified.”²⁴⁶ The next step is to turn to the introductory clause of Article XX GATT, also known as Chapeau, to determine whether a measure, in its *concrete application*, is lawful under Article XX as a whole. The chapeau reads as follows:

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 adoption or enforcement by any contracting party of measures ²⁴⁷

In *US – Gasoline* the AB had begun to develop a coherent theory regarding both the function of the chapeau and its relationship with the general exceptions. The AB stressed that the “purpose and object of the introductory clauses of Article XX is generally the prevention of [abuse of the exceptions in Article XX].”²⁴⁸ While those exceptions “may be invoked as a matter of legal right, they should not be

242. *Id.* para. 141.

243. McRae, *supra* note 216, at 226.

244. *Id.*

245. Desmedt, *supra* note 4, at 470-76.

246. *US – Shrimp*, *supra* note 240, para. 147.

247. General Agreement on Tariffs and Trade, art. XX chapeau, Oct 30, 1994, 1867 U.N.T.S. 187 (emphasis added) [hereinafter GATT].

248. *U.S. – Gasoline ABR*, *supra* note 239, at 22.

applied so as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the [GATT].”²⁴⁹

The main idea that the chapeau shall prevent an abuse of the right to invoke an exception by a Member was refined in *US – Shrimp*. Here the AB stated that the Chapeau “embodies the recognition on the part of the WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.”²⁵⁰ The AB further noted: “[t]he same concept may be expressed from a slightly different angle of vision. Thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of other Members.”²⁵¹

Interestingly, the AB focuses on the balancing of competing rights, interests and obligations as the predominant feature within the chapeau analysis. This expresses the concern of the AB to prevent abuse of the general exceptions which are only available upon a careful balancing of different factors.

The wording of the chapeau provides for three different standards for domestic measures.²⁵² These must neither constitute “arbitrary discrimination” or “unjustifiable discrimination” between countries where the same conditions prevail, nor must they constitute “a disguised restriction on international trade.”²⁵³ *US – Shrimp* demonstrates that the interpretation and application of these three requirements will be influenced and governed by the overarching balancing approach.²⁵⁴

With regard to the test of “arbitrary discrimination,” the AB held that the certification proceedings adopted in the United States:

appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. . . . It appears to us that, effectively, exporting Members applying for certificates whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.²⁵⁵

The requirements in the chapeau indicate that Members wanting to invoke an exception to Article XX need to apply their measures in a reasonable manner, taking into account not only their own treaty rights but also those of other GATT Members. It is this balancing process which will ultimately determine whether a discriminatory measure is arbitrary or unjustifiable, or constitutes a disguised restriction on international trade.

Balancing does not necessarily involve such broad and general objectives as free trade and environmental protection. The way in which balancing has been developed in the jurisprudence of the AB implies a weighing of more concrete rights

249. *Id.*

250. *US – Shrimp*, *supra* note 240, para. 156.

251. *Id.*

252. *Id.* para. 150.

253. *Id.*

254. *See* McRae, *supra* note 216, at 229-33.

255. *US – Shrimp*, *supra* note 240, para. 181.

and interests at stake. This process resembles a proportionality analysis. Historically and conceptually, proportionality is very much about the balancing of one or more public policy objectives against concrete individual or collective rights and interests. One could argue that this is also one of the AB's interpretations of the chapeau. Such an approach does not question the general policy objective pursued by the Members, but it introduces a test to assess whether a concrete measure, as applied, is disproportionate or unreasonable.

In *US – Shrimp*, the AB found that a measure constituted unjustifiable and arbitrary discrimination since that discrimination could reasonably have been avoided. That aspect of the analysis, in particular the assessment whether discrimination is *unjustifiable* or *arbitrary*, requires a typical balancing of competing rights and interests protected by the GATT. Part of the assessment in *US – Shrimp* turned on factors inherent in the regulatory process, such as transparency, due process or elements of basic fairness in domestic administrative proceedings.²⁵⁶ This can be seen as the procedural side of the balancing test or proportionality inquiry, recognizing that rights and interests can only be realized through fair and equitable domestic procedures. Such a proceduralist approach in the assessment of trade restrictions might lead to greater deference toward domestic regulatory choices although it includes, at the same time, a close scrutiny of the regulatory processes underlying the decision-making process.²⁵⁷

3. Conclusion: How the Tests in Article XX GATT Operate

One function of Article XX is to define the scope of the legal obligations under this provision.²⁵⁸ This is done through a two-step analysis which includes different standards and tests necessity or reasonableness. It also involves the due balancing of the right of a WTO Member to invoke the exception and the substantive rights of other WTO Members.

It has been argued that “in no case will the proportionality requirements contained in Article XX of GATT allow for a ‘balancing test’ of advantages resulting from overall trade objectives underlying the WTO agreements with the advantages resulting from national policy objectives as mentioned in the individual clauses of Article XX.”²⁵⁹ Our approach is slightly different. One aspect of proportionality is to govern the scope and application of exceptions such as Article XX and, as a consequence, to evaluate and balance the different interests at stake. As outlined above, balancing within Article XX needs to be undertaken several times in order to determine the necessity, reasonableness or proportionality of a particular measure. The question in those cases is to determine which rights or interests need to be balanced against each other, and it would be misleading to reduce this balancing act solely to general trade versus non-trade concerns.

Within the scope of Article XX, proportionality can be seen as a governing principle and flexible tool to guide the judicial inquiry into the lawfulness of domestic measures. In the chapter on proportionality in public international law, we

256. *Id.* paras. 181-182; Scott, *supra* note 123, at 350-351.

257. Scott, *supra* note 123, at 350-351.

258. See McRae, *supra* note 216, at 232.

259. Desmedt, *supra* note 4, at 476.

concluded that proportionality is a standard to determine how far states can go in their relationship with other states. Very often such a proportionality inquiry will not only include quantitative elements but also a balancing of protected rights, interests and values. We are well aware that proportionality, for instance, in the law of international countermeasures has a different normative role to play. Yet it is interesting to note that the necessity and balancing approach developed by the AB in the application of Article XX GATT structurally resembles the proportionality analysis in other areas of international law.

Finally, the balancing in Article XX should not be reduced to crude balancing of free trade against other legitimate public policy objectives, to the detriment of either of those categories. The test is more sophisticated than that, compared to the application of the principle of proportionality in EC law. Balancing in Article XX relates to (and influences) very specific legal requirements such as “necessary to,” “arbitrary,” “unjustifiable” or “disguised.” Those provisions are interpreted through a subtle balancing of the different interests at stake. Taken together, these different tests define the treatment of domestic measures under Article XX. This approach is more refined and structured than the proportionality analysis in Article 30 EC. It is also more structured than the US Interstate Commerce Clause or the general application of the principle of proportionality in public international law.

B. Positive Obligations for Domestic Regulation

The SPS Agreement and the TBT Agreement set out detailed positive obligations for domestic regulation. The most prominent standards are necessity, reasonableness, and proportionality. They apply as independent, positive requirements for domestic regulation and not just as justification provisions for a *prima facie* violation of other provisions. The positive obligations set out in the SPS and TBT Agreements are intended to mitigate the trade-restrictive effects of domestic regulation, while leaving sufficient discretion to Members to pursue their domestic public policy objectives.

1. SPS Agreement

The SPS Agreement applies to “all sanitary or phytosanitary measures which may, directly or indirectly, affect international trade.”²⁶⁰ One aim of the agreement is to provide national authorities with appropriate and clear normative standards to find a balance between trade liberalization and national regulatory competences.²⁶¹ The Preamble to the SPS Agreement mentions, among others, two major concerns: 1) that domestic sanitary and phytosanitary measures shall constitute neither arbitrary or unjustifiable discrimination between WTO Members nor a disguised restriction on international trade and 2) that the multilateral framework governing sanitary and phytosanitary measures contributes to minimizing their negative effects on international trade.²⁶²

260. Agreement on the Application of Sanitary and Phytosanitary Measures, Art. 1, Apr. 15, 1994, Multilateral Agreement on Trade in Goods, Annex 1 [hereinafter SPS], available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

261. ORTINO, *supra* note 100, at 457.

262. SPS, *supra* note 260, Preamble.

SPS measures are a very sensitive area of WTO law and policy. They often significantly impact core areas of public policy, such as national health and safety. According to the SPS Agreement, each WTO Member is free to determine its own appropriate level of sanitary or phytosanitary protection.²⁶³ The determination of the appropriate level of protection is considered by the AB to be “a prerogative of the Member concerned and not of the panel or of the Appellate Body.”²⁶⁴ The chosen level of protection is generally not questioned by the panels, and WTO Members could well pursue a zero-risk approach (if it complies with the other conditions of the SPS Agreement). However, the *instrument* chosen to attain that level of protection will be assessed as to whether it is adequate and complies with the necessity requirements laid down in the SPS Agreement. Within the scope of the SPS Agreement it is important to outline this distinction between the *objective* pursued by the state and the *instrument* chosen to attain that objective.²⁶⁵

Article 5.4 of the SPS Agreement requires Members, in determining their level of protection, to “take into account the objective of minimizing negative trade effects.”²⁶⁶ This provision could be seen as allowing for a full balancing of competing objectives, along the lines of proportionality *stricto sensu* (i.e., no excessive impact on trade). Yet the more limited nature and legal effect of this provision was clearly outlined by the panel in the *Hormones* case:

Guided by the wording of Article 5.4, in particular the words “should” (not “shall”) and “objective”, we consider that this provision of the SPS Agreement does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement.²⁶⁷

One possible reading of Article 5.4 of the SPS Agreement is that Members should avoid measures with excessive trade-restrictive effects. This means that the determination of the appropriate level of protection by a Member is subject to the condition that it “should” take into account the effects on trade.²⁶⁸ Due to this wording, Article 5.4 does not seem to allow for a true balancing and trade-off of possible negative effects on trade against the desired level of protection. It does not require any cost-benefit analysis of the intended level of protection either. These restrictions would run counter to the AB’s repeated findings that it is the Member’s prerogative to determine the appropriate level of protection.

Panels may face the difficulty that Members do not determine their appropriate level of protection explicitly or with sufficient precision. The AB stated that, in such circumstances, panels may establish the Member’s level of protection on the basis of the actual SPS measure applied.²⁶⁹ Such an initial determination is necessary to

263. *Id.* art. 2.

264. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, para. 199, WT/DS18/AB/R (November 6, 1998) [hereinafter *Australia – Salmon*] (emphasis omitted), available at http://www.wto.org/English/tratop_e/dispu_e/ds18abr.pdf.

265. *Id.* para. 200.

266. SPS, *supra* note 260, art. 5.4.

267. Panel Report, *European Communities – Measures Affecting Meat and Meat Products*, para. 8.166, WT/DS26/R (August 18, 1997) [hereinafter *EC – Hormones PR*].

268. SPS, *supra* note 260, art. 5.4.

269. *Japan – Apples*, *supra* note 147, para. 207.

assess whether the measure adopted complies with the relevant provisions of the SPS Agreement.

Subsequently, WTO Members need to undertake a risk assessment, upon which the national measures shall be based.²⁷⁰ The AB has clarified that the criterion that the measure be “based on” risk assessment requires “a *rational relationship* between the measure and the risk assessment.”²⁷¹ In other words, Members can only lawfully enact a SPS measure in those cases where the risk assessment “reasonably support[s]” the measure at stake.²⁷² Note that the rational relationship requirement is a separate obligation from the traditional necessity or proportionality analysis in other provisions of the SPS Agreement.

According to Article 2.2 of the SPS Agreement, domestic measures cannot not be maintained without “*sufficient scientific evidence*.”²⁷³ Clarifying this provision, the AB in *Japan – Apples* followed the panel’s conclusions and held that the sufficient scientific evidence criterion requires a “‘rational and objective relationship’ between the measure and the relevant scientific evidence.”²⁷⁴ The panel in this case, noting the lack of sufficient scientific evidence to support the Japanese measure, had found that the measure at issue was “clearly *disproportionate* to the risk identified on the basis of the scientific evidence available.”²⁷⁵

The next step of analysis is to turn to the necessity of the measure. This relates to the relationship between the aim pursued and the measure at issue. Article 2.2 of the SPS Agreement requires that any SPS measure is “applied only to the extent *necessary* to protect human, animal or plant life or health”²⁷⁶ Article 5.6 of the SPS Agreement refines this obligation, requiring WTO Members to ensure that SPS measures are not “more trade-restrictive than required to achieve their appropriate level of . . . protection, taking into account technical and economic feasibility.”²⁷⁷ Footnote 3, which is attached to Article 5.6 of the SPS Agreement, further delineates the concept of necessity:

[A] measure is not more trade-restrictive than required unless there is another measure, *reasonably available* taking into account technical and economic feasibility, that achieves the *appropriate level* of sanitary or phytosanitary protection and is *significantly less restrictive* to trade.²⁷⁸

The AB in *Australia – Salmon* elaborated on the necessity test and mainly referred to the requirements grounded in Footnote 3 of the SPS Agreement. It held that the three elements are cumulative, in the sense that all three elements have to be met for a finding of inconsistency with Article 5.6 of the SPS Agreement.²⁷⁹ A measure will therefore be consistent with Article 5.6 of the SPS Agreement if there

270. See SPS, *supra* note 260, arts. 2.2, 5.1.

271. EC – Hormones ABR, *supra* note 119, para. 193 (emphasis added).

272. *Id.*

273. SPS, *supra* note 260, art. 2.2 (emphasis added).

274. Japan – Apples, *supra* note 147, para. 147.

275. *Id.* para. 163 (emphasis added).

276. SPS, *supra* note 260, art. 2.2 (emphasis added).

277. *Id.* art. 5.6.

278. *Id.* at n.3.

279. Australia – Salmon, *supra* note 264, para. 194.

is no alternative measure available, if the alternative measure does not achieve the appropriate level of protection, or if it is not significantly less trade-restrictive.²⁸⁰

Some have argued that the components of the necessity test as outlined above (in particular, the criteria of being *reasonably* available and *significantly* less restrictive to trade) indicate a relaxed necessity test under the SPS Agreement. Member states may choose among several alternatives without being obliged to opt for the least trade-restrictive measure. This approach resembles the necessity requirement under Article XX GATT for which the AB introduced a flexible balancing approach. The conceptual similarity between Article XX GATT and Article 5.6 of the SPS Agreement remains to open to future clarification. With regard to the burden of proof, the complainant must establish a *prima facie* case that there exists an alternative measure which meets all three requirements, i.e. establish the *prima facie* inconsistency of the national measure with the SPS Agreement.

Member states are further required to comply with an additional discipline laid down in Article 5.5 of the SPS Agreement. The relevant part of this provision reads as follows:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.²⁸¹

The objective of this provision, which needs to be read in the context of Article 2.3 of the SPS Agreement,²⁸² is to achieve “consistency in the application of the concept of appropriate level of . . . protection” within the state.²⁸³ The underlying rationale is to prevent products that are similarly dangerous from being given different treatment: for instance, through a very high level of protection in one case and a very lenient treatment in another.²⁸⁴ The AB in *EC – Hormones* and *Australia – Salmon* specified the three elements which are part of the test under Article 5.5 SPS. First, the WTO Member adopts different appropriate levels of protection in different situations. Second, the different levels of protection are arbitrary or unjustifiable. Finally, the arbitrary or unjustifiable distinctions in the level of protection result in either discrimination or a disguised restriction of international trade.²⁸⁵

280. *Id.*

281. SPS, *supra* note 260, art. 5.5.

282. Article 2.3 SPS reads as follows: “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.” SPS, *supra* note 260, art. 2.3.

283. *Id.*

284. Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon, Japan – Varietals*, 2 J. INT’L ECON. L. 641, 653 (1999).

285. *EC – Hormones ABR*, *supra* note 119, para. 214.

The third element (“discrimination” or “disguised restriction”) seems conceptually the most controversial.²⁸⁶ The AB in *EC – Hormones* ruled that arbitrary or unjustifiable differences in the levels of protection may act as a “warning signal” that the measure in its application leads to discrimination between Members or to a disguised restriction on international trade.²⁸⁷ What therefore needs to be proven to find a violation of the third element of Article 5.5 SPS is that the Member in fact applies the SPS measure in a way which either discriminates between WTO Members or constitutes a disguised restriction, i.e., it provides protection for the domestic producers. In the subsequent *Australia – Salmon* case, the AB made an interesting finding concerning what constitutes a disguised restriction on international trade. It held that a measure that is not based on risk assessment strongly indicates a “trade-restrictive measure taken in the guise of an SPS measure, i.e., a ‘disguised restriction on international trade’.”²⁸⁸

The wording of Article 5.5 is clearly modeled upon the chapeau of Article XX of the GATT. Despite this similarity, the AB ruled out that the interpretation and reasoning of the chapeau may be imported into the analysis of Article 5.5 of the SPS Agreement. The justification provided by the AB is that there are “structural differences” between those two provisions and the standards they impose.²⁸⁹ The chapeau of Article XX GATT is generally more concerned with preventing the abuse of rights in the application of a measure, whereas Article 5.5 SPS primarily aims for consistency in the levels of protection with the aim to reduce unnecessary regulation.²⁹⁰

As was shown above, Article 5.5 does not require “absolute and perfect consistency” in the appropriate levels of protection in different situations. The AB recognizes that the different levels of protection are set on an “ad hoc basis and over time,” whereby the perception of risks is not the same at all times. Arbitrary and unjustifiable inconsistencies, however, are prohibited under the SPS Agreement.

The SPS Agreement attempts to bridge the gap between national regulatory autonomy and protectionist trade restrictions enacted as sanitary and phytosanitary measures. The individual provisions of the SPS Agreement guide the task of the panels and the AB to strike the delicate balance between necessary, legitimate, and protectionist measures. On the one hand, the agreement does not authorize a broad balancing of the costs and benefits of a regulatory measure in the sense of proportionality *stricto sensu*. Most importantly, Members are free to determine their level of protection without judicial interference, except for the requirement that differences in levels of protection shall be consistent. The Agreement’s detailed provisions, however, provide strict normative standards for the instruments chosen and applied by a WTO Member to achieve its level of protection. The necessity requirement aims to ensure that the chosen measure is no more trade restrictive than necessary. Proportionality elements also govern the determination whether different levels of protection are reasonably consistent and do not result in discrimination or a disguised restriction on trade. As outlined above, this

286. Pauwelyn, *supra* note 284, at 654.

287. *EC – Hormones ABR*, *supra* note 119, para. 215.

288. *Australia – Salmon*, *supra* note 264, para. 166.

289. *EC – Hormones ABR*, *supra* note 119, para. 239.

290. JAN NEUMANN, DIE KOORDINATION DES WTO-RECHTS MIT ANDEREN VÖLKERRECHTLICHEN ORDNUNGEN. KONFLIKTE DES MATERIELLEN RECHTS UND KONKURRENZEN DER STREITBEILEGUNG 479 (2002).

consistency requirement is subject to different conditions whose normative content remains somewhat elusive. For instance, there is some leeway in determining which distinctions in the levels of protection will be considered arbitrary or unjustifiable and those that will be acceptable. A further question is how far the consistency requirement imposes constraints on WTO Members to autonomously determine their level of protection and whether this does not lead to a true balancing of competing factors (chosen level of protection vs. discrimination; trade restriction vs. arbitrariness and justifiability) by means of judicial review.

2. TBT Agreement

The Agreement on Technical Barriers to Trade (TBT Agreement) aims to ensure, among other things, that national regulations, standards, testing, and certification procedures do not create unnecessary obstacles to international trade. Our analysis of the TBT Agreement primarily focuses on Article 2.2 as this provision seems most relevant for the purposes of this paper.

Within the scope of the TBT Agreement, both the policy objectives pursued by the Member and the level at which it decides to pursue those obligations are prerogatives of the states.²⁹¹ The preamble of the TBT Agreement recognizes that no Member shall be prevented from determining its appropriate level of protection.²⁹² This is similar to the WTO Members' discretion identified under the SPS Agreement.

The substantive obligation in Article 2.2 TBT requires that

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, *technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.*²⁹³

The last sentence refers to "legitimate objectives" that domestic measures (i.e., "technical regulations") aim to achieve. Article 2.2 TBT defines those objectives in a non-exhaustive list. The objectives include, among others, national security requirements, the prevention of deceptive practices, and protection of the environment. Both the panel and the AB in *EC – Sardines* stated that this list is only illustrative; other objectives may also be considered "legitimate." It is for the Member to determine those objectives.

While the chosen level of protection may not be called into question, the subsequent assessment of a domestic measure under Article 2.2 TBT takes place in different steps. Technical regulations must first be capable of contributing to a "legitimate objective." In contrast to the SPS Agreement, this term indicates that the

291. Panel Report, *European Communities – Trade Description of Sardines*, para. 7.120, WT/DS231/R (May 29, 2002) [hereinafter *EC – Sardines PR*], available at http://www.wto.org/english/tratop_e/dispu_e/231r_e.pdf.

292. Agreement on Technical Barriers to Trade, Preamble, April 15, 1994, Multilateral Agreement on Trade in Goods, Annex 1 [hereinafter TBT].

293. *Id.* art. 2.2 (emphasis added).

object and purpose of a measure may be questioned by the panels with regard to their legitimacy. The AB in *EC – Sardines* clearly stated that it was prepared to examine and determine the legitimacy of a TBT measure's objective, and the panel equally ruled that it was required to do so.²⁹⁴ Interestingly, the panel in *EC – Sardines* referred to a finding of the panel in *Canada – Pharmaceuticals Patents*, which defined the notion of “legitimate interests” in the context of Article 30 of the TRIPS Agreement.²⁹⁵ The panel in *Canada – Pharmaceutical Patents* stated that a legitimate interest is “a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.”²⁹⁶

Some authors are skeptical about the possibility that panels and the AB question the legitimacy of objectives pursued by WTO Members. Neumann and Türk, for instance, argued that Article 2.2 TBT should not equip WTO tribunals with the ability to *a priori* rule out the legitimacy of measures, since this could interfere with domestic policy choices. In addition to such political considerations, recital 6 of the TBT-Preamble clearly establishes that WTO Members remain free to adopt their level of protection. If the level of protection remains a national *domaine réservé*, it is not evident that the decision which value is legitimate should be centralized at the WTO level.²⁹⁷ We believe that there are also some valid arguments against this interpretation. Textually, Article 2.2 incorporates the notion of *legitimate* objectives, which implies that there are illegitimate objectives as well. The question then is “Who shall ultimately determine whether a measure is legitimate or illegitimate with regard to Article 2.2 TBT?” It would be unduly deferential towards WTO Members to let them decide on the legitimacy of the objectives pursued, without subjecting them to *any* subsequent oversight by the WTO judicial bodies. Finally, the issue of legitimate objectives should not necessarily be discussed together with the appropriate level of protection. As was stated by the *Sardines* panel, “it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them.”²⁹⁸ These two issues closely interrelate, but they should be assessed independently of each other.

If a measure has a legitimate objective, it shall be no “more trade-restrictive than necessary.”²⁹⁹ It is one of the key objectives of the TBT Agreement that Members avoid unnecessary obstacles to international trade. This requirement imposes constraints on the WTO Members which are similar to the least trade-restrictiveness requirement under the SPS Agreement. Referring to the preamble,

294. Appellate Body Report, *European Communities – Trade Description of Sardines*, para. 286, WT/DS231/AB/R (September 26, 2002) [hereinafter *EC – Sardines ABR*], available at www.wto.org/english/tratop_e/dispu_e/231abr_e.pdf.

295. Article 30 provides for an exception to exclusive rights conferred by a patent. The provision reads as follows: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the *legitimate interests of the patent owner*, taking account of the *legitimate interests of third parties*.” Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 30, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125 (1994) [hereinafter TRIPS], available at www.wto.org/English/docs_e/legal_e/27-trips.pdf.

296. Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, para. 7.69, WT/DS114/R (Mar. 17, 2000) [hereinafter *Canada – Pharmaceutical Patents*], available at http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf.

297. See Neumann & Türk, *supra* note 5, at 226-27.

298. *EC – Sardines PR*, *supra* note 291, para. 7.120.

299. *Id.* para. 4.7.

the panel in *EC – Sardines* ruled that “Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”³⁰⁰

The question arises whether the necessity analysis in Article 2.2 TBT should be the same as the three-step test under the SPS Agreement. According to this test, national measures will be consistent with Article 5.6 SPS if there is no alternative measure available, or if the alternative measure does not achieve the appropriate level of protection, or if it is not significantly less trade-restrictive. Due to the similar wording of the relevant provisions in the SPS and TBT Agreements, one may argue that the core necessity standards should be the same.

Finally, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, “*taking account of the risks non-fulfilment would create.*”³⁰¹ There is some uncertainty about the meaning of this requirement. On the one hand, it seems like a balancing or cost-benefit-analysis test, similar to the tests adopted in *Korea – Beef* and *EC – Asbestos* (balancing of the importance of the values and policies and the extent to which the measure contributes to the aim pursued). Assessing the risks of non-fulfilment of a particular objective will be part of the necessity analysis. It may actually make the necessity requirement more relaxed and less rigid.³⁰² On the other hand, the term could also point towards a full proportionality test. That would allow the panel to determine whether the costs of a measure (i.e., the negative effects on international trade) are excessive or disproportionate to the risks of not fulfilling the pursued objective. A measure could therefore be disproportionate even though it is the least trade-restrictive measure. This question has not been fully clarified yet.

3. Conclusion: How the Tests in the SPS and TBT Agreements Operate

The TBT Agreement is deferential towards the policy objectives that WTO Members want to achieve, but it shows less deference to the means employed to achieve those objectives. This is not unusual and reflects similar normative standards in the GATT and the SPS Agreement. It can be argued that there is a broader scope for a balancing test in the TBT Agreement. Additional criteria, which are not included as such in the SPS Agreement, relate to the legitimacy of the objectives pursued and the risk of non-fulfilment of those objectives. This entails more subjectivity, or discretionary elements, permitted in a panel decision.³⁰³

It remains to be seen whether the jurisprudence interpreting the TBT Agreement will move more towards a necessity and balancing test that structurally resembles the traditional proportionality test (for instance, as applied in public international law). Weighing and balancing of protected rights and interests may take place with regard to both the legitimacy of the objectives pursued and the weight attributed to the risk of non-fulfilment of that objective.

Generally, the SPS and TBT Agreements lay down positive normative standards for trade restrictive measures that go beyond the principle of non-

300. *Id.* para. 7.120.

301. *Id.* para. 5.15.

302. ORTINO, *supra* note 100, at 468.

303. Desmedt, *supra* note 4, at 459-60.

discrimination and also apply to non-discriminatory domestic regulation. These standards provide for detailed obligations that are more sophisticated and structured than the tests applied in the GATT, in EC free movement law or in the Interstate Commerce Clause. One difference is that the tests applied in the context of EC law and the Interstate Commerce Clause have been developed and elaborated through the jurisprudence, while the tests in the SPS and TBT Agreements were explicitly written into these more modern trade agreements. The main standards in the SPS and TBT Agreements are that the domestic measures pursue an accepted public policy objective and that they are no more trade-restrictive than necessary. This determination is governed and influenced by a balancing and weighing process aiming to ensure that the obstacles to international trade are not disproportionate or excessive to the objectives pursued by the Members.

VII. CONCLUSION

The WTO is a developing legal system. More than ten years after its creation, many of its provisions and underlying concepts are constantly being refined by jurisprudence and scholarly writing. This process is frequently accompanied and influenced by comparative legal thinking. A comparative view, which is also the basis of this article, may contribute to clarifying uncertainties and providing some input into the thinking about WTO law. Conversely, an overly simplistic transplantation of legal concepts from one legal order to another is not what this process should be about. This would lead to misunderstandings and confusion, and it would be perceived as illegitimate. A more fruitful approach is to reflect on concepts that have developed over decades in other legal systems and to benefit from the core elements of those concepts when analysing WTO law.

One of the most important challenges for WTO law is the balancing of competing rights, principles, values, or interests. The perceived juxtaposition of free trade and non-trade interests is one fundamental expression of this concern. Another concern is whether the WTO judicial bodies should do balancing *at all* or better leave that to national institutions. Legally, balancing in the WTO requires constant (re-)interpretation of specific provisions of the WTO Agreements which lay down the criteria to shall be taken into account by the WTO Members.

The increasing demand for authoritative and sensitive balancing is a major challenge for judicial bodies that have to cope with concrete disputes. Difficult practical questions relate to the scope of WTO law, the interaction with other legal regimes, the precise meaning of open-ended provisions, or the importance of non-economic values and interests in WTO law. Such a process requires appropriate and legitimate legal instruments for the judiciary to work with.

Some dispute that there is, or that there should be, adjudication of competing values in the WTO. Others may want to cloud the issue for a variety of reasons. Judges, for instance, may favor tests, so as to avoid "the impression that there is any need to adjudicate competing values at all."³⁰⁴ In analyzing the jurisprudence and disputes, which appear rather technical at first glance, one finds many instances where such a balancing of rights, principles, values, and interests is actually taking place and can hardly be avoided.

304. Howse, *supra* note 188, at 140.

The main concern is how to undertake balancing within the WTO legal system. This includes the definition of the standards and tests against which this balancing may take place. Most prominent are the concepts of necessity, reasonableness, and proportionality.

In our chapter on legal principles, we have concluded that one of the main characteristics of principles is the idea of *optimization*. Principles command that they be realized to the highest extent possible, and they do not apply in an all-or-nothing fashion. In case of a conflict, two principles do not strike each other out, as is the case with rules. Both principles generally remain valid and need to be balanced against each other. One insight from this theoretical approach is to recognize that in legal orders, which lack a clear hierarchy of norms and which contain many open-ended provisions, conflicts will often be resolved through a balancing of conflicting principles. In fact, the very nature of the existence of legal principles and open-ended provisions makes balancing unavoidable. The relationship between the different values and principles laid down in the WTO Agreements is thus relative, depending on the facts of the case and the different interests at stake. Substantive tests may help structure and rationalize this process, aiming to find an equilibrium between different competing objectives.

The increasing maturity of the WTO legal system has been analyzed against the background of its “constitutionalization.” One particular aspect of this process is the so-called “judicial norm-generation,” whereby constitutional-type principles and techniques are generated through the WTO jurisprudence.³⁰⁵ Deborah Cass explicitly mentions the principle of proportionality, rational relationship testing, and less restrictive means. It is necessary to have an open debate about the normative content and implications of these principles in WTO law.

Balancing within the WTO legal system can take place at two different levels. First, at the national level, domestic authorities are in many instances required by WTO law to take into account and weigh competing interests as part of their domestic decision-making process. Additionally, the domestic decision-making process must be transparent, open, and unbiased. This can be considered as the procedural aspect of substantive tests imposed by WTO law. Second, balancing also takes place at the WTO level, in particular in the dispute settlement proceedings. Whenever a dispute arises, the judicial bodies, applying the specific provisions of the WTO Agreements, will have to balance competing factors. This balancing process is structured and mediated by the standards and tests discussed in this paper.

Balancing is incorporated in many specific WTO provisions. Article XX GATT, for instance, consists of different steps of analysis, relating both to the design and application of domestic measures. While there is no overall balancing of competing values, the different steps of analysis within Article XX GATT each require a concrete evaluation and balancing of specific rights and interests at issue. One important function of the tests in Article XX GATT is to structure and rationalize the assessment of domestic measures. The same holds true for the SPS and TBT Agreements.

The principle of proportionality plays an important role in many national and international jurisdictions. It is both a doctrine for the legislature and for the administration to follow and a standard applied by the judiciary when reviewing the

305. See generally Cass, *supra* note 34.

acts of public authorities. Its normative content, including the intensity of review, may vary, but the core of any proportionality analysis remains the same. The basic idea is to limit discretion exercised by public authorities in a democratic society and to balance competing interests. Proportionality is a key principle in determining the relationship between different actors, including states vs. individuals (in domestic law), federal level vs. state level (in federal systems), and States vs. States (in international law). More specifically, the principle of proportionality is recognized in some systems as a general test for the exercise of free discretion. It is also used to review justifications for interference with, or restrictions on, rights. Other tests, such as necessity or reasonableness, may equally include elements of proportionality without disclosing this factor.

Proportionality analysis is closely linked to the concepts of intensity or standard of review. The experience in other legal systems has shown that intensity of review is one specific aspect of the principle of proportionality and relates to its procedural dimension (as opposed to the normative content—the substantive dimension). We therefore advocate a comprehensive assessment of the review power exercised by judges, taking into account the interwoven aspects of proportionality and intensity (or standard) of review. One can attempt to clarify these concepts by separating the procedural from the substantive aspects of judicial review and, at the same time, by outlining their interrelationship.

In the WTO, proportionality is not mentioned as such in the individual Agreements and has not been explicitly recognized as a general principle. Our basic argument is that proportionality, though not recognized as such, underpins and inspires many of the specific rules laid down in the WTO Agreements.

We can identify at least two possible ways how the principle of proportionality could apply in WTO law. First, proportionality as a principle of general international law may *inform* the interpretation of specific provisions of the WTO Agreements. Second, proportionality may be a specific *obligation* within the WTO Agreements, having been laid down in provisions such as Article XX GATT and similar provisions in the SPS and TBT Agreements. Those provisions often require balancing and the reliance on some sort of proportionality theory to define the specific obligations incumbent on the WTO Members.

Tests like necessity, reasonableness, and proportionality are not standardized and may well lead to confusion, given that they are applied in many different legal regimes. For instance, the concept of necessity is often mentioned in the WTO Agreements as well as in other legal systems. In the traditional reading of the principle of proportionality, necessity is the second step of analysis. It does not (explicitly) include a weighing and balancing of the advantages and negative impacts of a measure. Alternatively, the use of the concept of necessity in the context of UK human rights law stands for—and includes—a fuller proportionality analysis. Public international law also includes some balancing of rights and interests to refine the concept of necessity. Within the scope of Article XX GATT, necessity is equally not restricted to a simple assessment of the least trade-restrictiveness of a domestic measure. The determination whether a trade-restrictive measure is necessary to pursue a legitimate public policy objective will be made upon a balancing of different factors as elaborated in the jurisprudence.

What can be the possible consequences of a more coherent proportionality theory applied by the WTO judiciary? First, it imposes an obligation on Members to justify their measures according to a relatively structured legal criterion. It further

makes the judicial process more rational, coherent, and predictable. One effect is to limit the discretion of judges by requiring them to follow a sequence of steps in analyzing domestic measures. Through the three-step analysis, a structured deliberative process may take place, within which judges play a predominant role. The procedural aspect of proportionality, both in its application by domestic authorities and by the WTO judiciary, involves a “structured weighing of interests.”³⁰⁶ This includes the fact that all interested parties may articulate their views, which subsequently need to be taken into account in the balancing process. In that sense, the principle of proportionality may pose less of a danger to WTO Members pursuing legitimate policy choices than some other, vaguely defined tests.

One counterargument against proportionality (and balancing) in the WTO context is that it often provides judges with too great a power to examine legitimate domestic measure and to interfere with sovereign policy choices. Balancing by the judiciary may promote vagueness and leave the courts a “permanent loophole,” maximizing their freedom of action.³⁰⁷ Our argument is different. The more structured and rational a test, the more the courts will have to engage in a transparent judicial discourse with regard to trade-offs they are constantly required to make. Such discourse needs to take the arguments advanced by the parties more seriously. As the experience in other legal systems shows, this is no guarantee for elaborate and sophisticated judgments. Yet, it may contribute to reducing the vagueness and unpredictability of judicial reasoning in the WTO.

306. de Búrca, *supra* note 10, at 146.

307. Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1286-87 (1986).

