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Clash of trade and national public interest in WTO law: the illusion of "weighing and balancing" and the theory of reservation

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Abstract

In the last two decades, World Trade Organization law's public interest exceptions (Article XX GATT, Article XIV GATS, Article 2.2 of the TBT Agreement and Article 20 TRIPS) have seen the emergence and evolution of the doctrine of "weighing and balancing." This paper provides a criticism of this doctrine through a comparative ontological analysis and demonstrates three propositions. First, it shows that the concept of "weighing and balancing" results from the ill-considered reception of a doctrine pertaining to federal systems. Second, the paper demonstrates through the analysis of the case-law that the role of "weighing and balancing" is rather poetical and, in reality, the Appellate Body does not engage in balancing. Third, it proposes that an outspoken "necessity" analysis should be carried out that is tailored to arrangements based on contractual promises and is guided by the notion of quasi reservation. The paper re-conceptualizes the Appellate Body's case-law and elaborates a doctrinal framework warranted by the function of World Trade Organization law's public interest exceptions.

Introduction

The clash of trade and local public policy is probably the most fascinating conceptual and doctrinal question of trading systems, because, due to the value choice it involves, it "judicializes" a political question. Each trading system encounters this problem (federal states with strong local regulatory powers, regional economic integrations and the world trade system, alike) and these systems, at times, have drawn on each other.[1] While this is normally a welcome

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development, it needs to be taken into account that **144*** legal transplantation should be done with utmost care in case of systems with diverging nature and ontology.

Approximately two decades ago, in *Korea – Beef*,[2] the Appellate Body (AB) introduced a novel doctrine ("weighing and balancing") in the analysis under Article XX GATT, which was subsequently extrapolated to Article XIV GATS, Article 2.2 of the TBT Agreement and Article XX TRIPS (hereinafter collectively referred to as "public interest exceptions"). Although this doctrine aligned with the balancing tests used in federal markets such as Australia, the EU and the US, it led to a misguided transplantation into the global trading system based on traditional public international law. The AB's doctrine of "weighing and balancing" has been criticized from various angles: it is inconsistent with an entrenched element of the case-law (WTO members' prerogative to set the level of protection); it is nothing but a play of words, as it asserts something the AB is not doing anyway; it expects the AB to carry out an analysis that it is neither authorized to, nor capable of doing.[3]

The paper aligns with this line of criticism with a comparative ontological analysis through the demonstration of three propositions. First, it shows that the concept of "weighing and balancing" results from the ill-considered reception of a doctrine pertaining to federal systems. The paper's central argument is that the cost-benefit analysis, which is inherent in balancing, fits patterns based on shared sovereignty (federal states and the EU), while arrangements based on contractual promises are infiltrated by the notion of quasi reservation, where the tribunal's function is to discern and discard unnecessary restrictions and to screen out abuse. Second, the paper demonstrates through the analysis of the case-law that "weighing and balancing" is a misnomer: its role is rather poetical and, in reality, the AB does not engage in balancing. Third, the paper argues that the AB should discard this misnomer and, instead, should outspokenly carry out the "necessity" analysis it is in fact doing. It elaborates, through the re-conceptualization of the case-law, the doctrinal framework warranted by the function of the public interest exceptions.

The paper's argument is presented in three steps. Section I. demonstrates the ontological and methodological differences between the cost-benefit analysis implied by balancing and the doctrine of "necessity". It shows that balancing is based on the federalization of system surplus, a function completely alien to WTO law's public interest exceptions, which, instead, function as a quasi treaty reservation calling for traditional treaty interpretation. This implies that balancing disgeneric values finds no warrant in provisions of a public international law nature.[4] On the contrary, the AB's **145*** mandate under the public interest exceptions is confined to peeling off unnecessary restraints without second-guessing the member state's value choice.

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[1] See e.g. *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (7 February 1990), para 37. As a further example, the treaty rules on the EU internal market, in particular the provisions on the free movement of goods, were modeled after GATT. For instance, both the chapeau of Article XX GATT and the last sentence of Article 36 TFEU refer to arbitrary discrimination and disguised restriction on trade.

[2] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R, adopted 10 January 2001.

[3] See e.g. Donald H. Regan, The Meaning of Necessary in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing, 6 World Trade Review 347 (2007); Filippo Fontanelli, Necessity killed the GATT: Art XX GATT and the misleading rhetoric about 'weighing and balancing', 4(2) European Journal of Legal Studies 39 (2012).

[4] For a general overview of the public international law background, see Federica Paddeu, Justification and Excuse in International Law: Concept and Theory of General Defences (Cambridge University Press, 2018).

Section II. presents the emergence and operation of the doctrine of "weighing and balancing" and showcases how the AB replaced the initial "necessity" analysis with fancy language that does not reflect the analysis it is actually doing. Section III. sets out the paper's conclusions. It re-conceptualizes the analysis the AB is actually carrying out and proposes an analytical framework that accords both with the reality of the case-law and the real function of the public interest exceptions.

I. "Balancing" and "necessity" analysis: two judicial doctrines for squaring trade and national public interest

The first and foremost question determining the interpretation of the public interest exception is the provision's *raison d'être*.[5] WTO law's public interest exceptions are not unique but part of a large family of legal constructions used in various regional economic integrations and federal markets. The conceptualization of the rivalry between trade and public interest, in essence, offers two ontological explanations, which indicate diverging methodologies. The "balancing" approach pertains to the internal market regimes of federal states. The US Constitution's Dormant Commerce Clause,[6] the Australian Constitution's Free Trade Clause[7] and the EU Internal Market[8] developed doctrines that authorize the judiciary to carry out a cost-benefit analysis. On the other hand, the "necessity" analysis stops short of contrasting the disgeneric values of trade and public interest and aims to make sure that the measure at stake contains no unnecessary restriction (that is, elements having no genuine link to the named public interest objective and elements that could be replaced by less restrictive but equally effective alternatives).

This section gives a concise overview of the two approaches in terms of ontology and methodology and demonstrates that the concept of balancing, taking into account its *raison d'être* and function, finds no warrant in WTO law's public interest exceptions. **146***

A. The underlying ontologies: federalization of system surplus and the theory of quasi treaty reservation

In federal markets, states' public choices may be subject to a judicial cost-benefit analysis.[9] While in a democratic society the political process (presumably) guarantees optimal outcomes, where costs and benefits are contrasted and compared, in the context of cross-border trade,

[5] The general legal consideration that the purpose of a textually equivocal provision guides its construction is confirmed by Article 31 of the 1969 Vienna Convention on the Law of Treaties.
[6] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).
[7] *Cole v Whitfield* [1988] HCA 18 (1988). For a comparative overview, see Gonzalo Villalta Puig, The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test (Thomson/ Lawbook Co. 2008).
[8] Although in EU internal market law this balancing has remained in large part implicit, see Federico Ortino, Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law 471 (Hart, 2004), Mads Andenas & Stefan Zleptnig, Proportionality: WTO law: in comparative perspective, 42 Texas International Law Journal 371, 390 (2007), at times it was made explicit by the CJEU, see e.g. Case C-169/91, Stoke-on-Trent v. B&Q, 1992 E.C.R. I-6625, para 15, Case 302/86, Commission v Denmark, 1988 E.C.R. 4607, para 21. See also the EU labeling cases, where the CJEU found labeling an alternative less restrictive measure notwithstanding the fact that it provided a lower level of protection, implicitly indicating that the value of free movement overrode consumer protection. See Joseph H. H. Weiler, The Constitution of the Common Marketplace: Text and Context in the Evolution of the Free Movement of Goods, in The Evolution of EU Law 368 (Paul Craig & Grainne de Búrca eds., OUP, 1999); Ortino, ibid, at 417-426.
[9] For US law, see *Pike v. Bruce*, above n 6, at 142. For Australian law, see *Castlemaine Tooheys*, above n 1.

courts have a supplementary function, given that out-of-state stakeholders have less chance to take part in the political process.[10] Furthermore, in a federal system both federal level and state level stakes are internal common interests. Hence, the cost-benefit analysis aims to maximize the "common good" at large, requiring a comparison of the federal costs and the local benefits.

The above rationale calls for a balancing where the court conceives the state interest in pursuing a local legitimate end and the federal interest in free trade as part of the same equation and is looking for the point of equilibrium yielding the utmost total surplus. The two subsets of interests are not alien to each other; quite the contrary, they are of equal rank and are part of the "common surplus". Hence, the court will endorse a restriction if, in its overall effect, it enhances the "common surplus". A state measure whose incremental local surplus fails to exceed the incremental loss to the federal surplus has a negative overall common surplus and, hence, has to be rejected.

On the contrary, WTO law's public interest exceptions have a different genesis, as they subject members to contractual rules without siphoning their sovereignty.[11] The ontology of these provisions is informed by the WTO's concession-based architecture: members promised various concessions and trade benefits (tariff-bindings,[12] abolition of quantitative restrictions,[13] MFN[14] and national treatment[15]) but with important limits and qualifications, such as Article XX GATT, Article XIV GATS,[16] which may be conceived as quasi treaty reservations.[17] **147***

Contrary to federal systems (federal markets), the WTO is a scheme built up of mutually promised and granted benefits (concessions) whose balance is maintained by these opposing elements. Notwithstanding its multilateral nature primarily accruing from the entrenched principle of MFN, the WTO has a genuine synallagmatic architecture. When joining and, later on, during the trade rounds, states "sold" trade liberalization in exchange for redeeming

[10] See *Helvering v. Gerhardt*, 304 U.S. 405, 412 (1938).
[11] Cf. Axel Desmedt, Proportionality in WTO Law, 4 Journal of International Economic Law 441, 478 (2001) (There is "not one single overarching (unwritten) proportionality principle in WTO law;" "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.").
[12] Article II GATT
[13] Article XI GATT
[14] Article I GATT
[15] Article III GATT
[16] Such as measures against unfair trade (anti-dumping and countervailing duties, Article VI GATT), general exceptions (Article XX GATT and Article XIV GATS), safeguard measures (Article XIX GAT), balance of payment safeguards (Articles XII and XVIII(8)-(12) GATT) and national security (Article XXI GATT).
[17] Dale Arthur Oesterle, The WTO reaches out to the environmentalists: is it too little, too late?, Colorado Journal of International Environmental Law and Policy 1, 4 (2000) ("Thus, the language in Article XX(b) and (g) reserves the right of member countries to pass national legislation on environmental preservation and conservation."); Dale Arthur Oesterle, Just say "I don't know": a recommendation for WTO panels dealing with environmental regulations, 3(2) Environmental Law Review 113, 115-116 (2001) (designating Article XX GATT as a set of reservations); Sanford Gaines, The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 University of Pennsylvania Journal of International Law 739, 839 (2001); Kristin Bartenstein, L'article XX du GATT: le principe de proportionnalite et la concordance concrete entre le commerce et l'environnement, 43 Les Cahiers de Droit 651 (2002) (arguing that Article XX GATT is not an exception to a general rule, which, according to traditional methods of statutory interpretation, has to be interpreted strictly but it confers on member states a right that is of equal value to GATT's core principles.); Keith E. Maskus & Jerome H. Reichman, The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, in international Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime 3, 32 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (Article XX contains an "express list of reserved state police and welfare powers"); Andenas and Zleptnig, above n 8, at 407 (designating Article XX as one of GATT's "public policy exceptions, which limit the scope of legal rules and provide for derogations from main treaty obligations.").

commitments. Quantitative restrictions were generally ruled out by Article XI GATT, while tariff concessions were made binding by Article II GATT, same as the various concessions concerning services under the GATS Schedule of Commitments. The lack of bilateral agreements and the fact that concessions and commitments were offered and assumed in relation to the entire community and were not confined to those members who reciprocated them, does not shadow the fact that the system's foundation-stone is the convoluted system of synallagmatic relations and compromises, which finally lift in the multilateral scheme.[18]

Furthermore, in WTO law, the interests of the trading system (or those of the members) are contrasted with extraneous public interest benefits. The world trade system is obviously not meant to protect or maximize the common good of the global community[19] but is limited to the protection of the system's synallagmatic structure and to making sure that members deliver on their promises and will not undermine the promised tariff concessions with dodgy protectionist measures drying out their tariff bindings and commitments. Notably, while WTO members sold trade liberalization, they certainly did not promise to deliver on their promises through foul and fair; they made their commitments and promises with qualifications and reservations, which were mutually accepted. When a state restricts trade with reference to a public interest exception of WTO law, in fact, it argues that the abstention from adopting the measure has never been promised. This ontology, instead of a cost-benefit analysis that aims to maximize the aggregate good made up of the federal and the local interests, calls for a treaty interpretation to identify the limits of trade concessions and promises.[20] **148***

Put it simply, while in federal markets the court tries to reckon the common surplus (made up of the federal and state benefits) and strikes down state measures that lead to substantially sub-optimal results, the architecture of WTO is based on mutual concessions and commitments. Here, there is nothing like a "common surplus" and the assessment of the measure should be carried out along the question whether the restriction was in the member states' contemplation or not. A cost-benefit analysis finds no warrant in WTO law's public interest exceptions:[21] members have never promised to shape their internal regulatory policies in a way that maximizes the surplus of the system as a whole; they merely promised not to restrict trade

[18] This idea found reflection in the AB's report in *US – Shrimp*, where it was held that the purpose of Article XX GATT is to strike the right balance between rights and duties serving as the foundation of the world trade regime. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, paras 156 & 159. The synallagmatic nature is reinforced by the place, reason and function of non-violation claims. See Sungjoon Cho, GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?, 39 Harvard International Law Journal 311, 315-316 (1998).

[19] Cf. Andenas and Zleptnig, above n 8, at 403 ("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.")

[20] Investment arbitration provides an interesting point of reference as to the conceptualization of WTO law's public interest exceptions. While WTO law has been largely devoid of such a conceptual debate, the status of investment treaty provisions modeled after Article XX GATT and Article XIV GATS have been an issue both in arbitral practice and scholarship. See Levent Sabanogullari, General Exception Clauses in International Investment Law (Nomos, 2018); Caroline Henckels, Should investment treaties contain public policy exceptions? 59(8) Boston College Law Review (2018) (arguing that exceptions should be conceived as permissions limiting treaty obligations' scope and not as defenses justifying unlawful conduct.); Caroline Henckels, Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict, in International Investment Law and the Law of Armed Conflict (Katia Fach Gomez, Anastasios Gourgourinis & Catharine Titi eds., Springer, 2019) (arguing that security exceptions should be conceived as either limiting the scope of treaty obligations or as treaty-internal affirmative defenses.).

[21] See Desmedt, above n 11, at 476 & 478.

beyond what is necessary for attaining certain local public interest objectives. Hence, the relevant question is how to delimit this quasi reservation.

B. The resulting methodologies: balancing disgeneric values versus discarding unnecessary restraints

The heart of the analysis under WTO law's public interest exceptions and its counterparts is whether the restriction is related and proportionate to the legitimate local end pursued by the state. The central legal problem accrues from the fact that trade and public interest are not unigenous values. As a corollary, they cannot be balanced against each other without a proper value-judgment, while value-judgments are normally considered to be a non-judiciable political choice.

Courts and tribunals may be expected to compare policy options when these have to be assessed by means of the same measure of value. For instance, although involving a complex and detailed economic analysis, in antitrust cases courts examine whether a concentration significantly impedes competition in the market and may lead to higher prices in comparison to the situation prevailing absent the merger; in the same vein, they inquire whether an agreement restricts competition and results in higher prices in comparison to the counter-factual absent the agreement.[22] Here, the two situations are contrasted with the use of the same measure of value, even if the economic analysis is complex and burdened with various uncertainties. Nonetheless, comparing a state act's impact on trade to the furtherance of a legitimate local end (such as public health **149*** or public morals) calls for an "exchange rate", whose determination is normally the prerogative of the state.

The two standard models as to whether a tribunal may define an "exchange rate" are the doctrine of "necessity" and the doctrine of "balancing". Put it simply, while in case of balancing the tribunal does not shy away from comparing public interest benefits to the restriction of trade and from deciding that one overbears the other, the doctrine of necessity is based on the notion that such a comparison is beyond the tribunal's competence. Under the latter, the tribunal has no power to develop an "exchange rate" and is under the necessity of taking the state's policy as a circumstance extraneous to the analysis. This confines the purview of the examination to three questions, representing various understandings of necessity. First, is the measure reasonably related to the public interest benefit (necessity in absolute terms)? Second, do some elements of the restriction go beyond what is necessary (necessity in relative terms)? Third, is the state's reference to the public interest, fully or partially, abusive (consistency)? Accordingly, here, the essential question is whether the restriction exceeds what is (inevitably) necessary to attain the targeted objective, the latter's definition being the prerogative of the state. This also embraces the question whether there is any other alternative measure that attains the same public interest objective with less harm to trade. Once established that the public interest goal is genuine, all reasonably connected trade restrictions are considered justifiable, irrespective of the ratio between the advancement of the public interest and the restriction of trade.

[22] For EU competition law, see Pierre A. Buigues, Patrick Rey, The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework (Elgar Publishing, 2004, 46-47); Valentine Korah, An Introductory Guide to EC Competition Law and Practice 78 (Hart, 2007); Richard Whish, David Bailey, Competition Law 933-935 (OUP Oxford 2012).

While, under the doctrine of necessity, the tribunal accepts the state's "exchange rate" between trade and local public interest benefits,[23] the analysis is not perfectly deferential (such an approach would leave so much room for protectionism-minded abuse that it would make the system inoperational). While disgeneric values are not confronted, when investigating whether the same legitimate end could be achieved through a less restrictive measure,[24] the two alternatives are not expected to make exactly the same but merely a roughly similar contribution to the public interest end. Up to a certain margin, insignificant differences as to the effectiveness in attaining the public interest purpose are disregarded. Nonetheless, this "analytical latitude" should not be confused with balancing, which vests tribunals with the power of setting an "exchange rate" for disgeneric values.[25]

The two approaches are not each other's antipoles, they are, instead, a continuum where balancing is the extended version of the necessity analysis: the fact that the public interest benefit fails to outweigh the trade restriction component is not sufficient for the measure's condemnation under the doctrine of necessity; on the other hand, if a public **150*** interest purpose can be attained via a less restrictive measure, it should certainly fail under the doctrine of balancing.

II. The pretense of "weighing and balancing" in the AB's case-law: preaching water but drinking wine

The doctrine of "weighing and balancing" was established in *Korea – Beef*[26] in relation to Article XX GATT, and subsequently extrapolated by the AB to Article XIV GATS and Article 2.2 of the TBT Agreement. Although the case did not reach the AB, the panel applied the doctrine to Article 20 TRIPS in *Australia – plain packaging*.[27] Taking its inter-treaty trajectory into account, the doctrine may be reasonably regarded as pertinent to the SPS Agreement, too. This leads to believe that "weighing and balancing" acquired the standing of a general doctrine governing WTO law at large.

The doctrine impregnated both the question of "reasonable relatedness" (is the measure reasonably related to the public interest purpose?) and "least restrictiveness" (is there any reasonably available less restrictive alternative to achieve the same object?). This apparently less deferential standard, allegedly encapsulating a cost-benefit analysis in the form of comparing trade volumes and local public interest benefits, became part of the settled decisional mantra. Nonetheless, while opening a new chapter in the history of the case-law, it brought about merely a linguistic revolution entailing little or no substantive change as compared to the pre-*Korea-Beef* world. In essence, the AB kept on doing what it had been doing but employed an ambitious parlance peculiar to the internal markets of federal states.

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[23] Cf. Robert Howse, Moving the WTO forward – one case at a time, 42 Cornell International Law Journal 223, 230 (2009) ("If one views Article XX as a reservation of state sovereignty, it seems inappropriate for the Appellate Body to tell states which of their sovereign interests is of the highest importance.")

[24] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332 and 285/AB/R, adopted 3 December 2007, para 178.

[25] See Csongor István Nagy, Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty, in Czech Yearbook of International Law, vol. IX, 2018, pp. 197, 201-202.

[26] Appellate Body Report, *Korea – Beef*, above n 2.

[27] Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, WT/DS441/AB/R, WT/DS458/AB/R and 467/AB/R, adopted 28 June 2018, paras 7.2429-7.2431.

This section presents what the AB pretends to do and what it, in fact, does under the label of weighing and balancing. It gives an overview of the emergence and trajectory of the doctrine in the AB's case-law on Article XX GATT and its extrapolation to Article XIV GATS and Article 2.2 of the TBT Agreement and offers a consistent re-conceptualization.

A. The trajectory of "weighing and balancing" in the AB's case-law

In *Korea – Beef*, a dual retail system was maintained that required imported beef to be sold in separate stores. The AB held that the application of Article XX calls for the examination of three issues: was the measure, first, suitable ("designed") and, second, "necessary" to attain the named public interest purpose,[28] and, third, did it comply with the requirements of the chapeau (did it contain "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade")?

The AB set out a two-prong test for necessity under Article XX: the measure is expected to be reasonably related to the identified public interest objective ("reasonable relatedness") and to be the least restrictive from the reasonably available regulatory **151*** options (there is no less restrictive but comparably effective way to achieve the same objective).

The notion of "reasonable relatedness" calls for the judgment of necessity in absolute terms. Here, the pertinent question is whether the measure is reasonably related to the named public interest purpose. The AB noted that the colloquial meaning of "necessary" ranges from measures that are "indispensable" to measures "making a contribution to" the purpose to be attained and concluded that "a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[29] Indispensable measures are automatically considered necessary. The necessity of measures having a less obvious relation to a local legitimate end can be ascertained on the basis "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."[30]

Necessity needs to be judged also in relative terms: a measure may not qualify as necessary, if a less restrictive alternative is available. While acknowledging that member states are free to set their level of protection (that is, the desired level of public interest benefits),[31] the AB considered that the foregoing "weighing and balancing" is also "comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'."[32]

Applying the above doctrinal structure to the dual trading system, the AB affirmed the panel's finding that while the measure was reasonably related to the enforcement of Korean rules on unfair trade practices (which prohibited the fraudulent misrepresentation of imported beef as domestic beef), Korea failed to demonstrate that "investigations, prosecutions, fines, and record-keeping", which were considered to be less restrictive, did not amount to a reasonably

[28] Para 157.
[29] Para 161.
[30] Para 164. See also para 162.
[31] Para 176.
[32] Para 166.

available alternative ensuring the desired level of protection (considerable reduction of the number of frauds).[33]

Korea – Beef was followed by various cases: some of these enriched the poetical language but none of them involved genuine balancing in terms of comparing trade volumes to local public interest benefits. While quite a few state measures were condemned for not complying with the public interest exception, all of them were denounced either because they had no reasonable relationship to the named public interest objective or were unnecessary in the sense that the same level of effectiveness (protection) could be secured through a reasonably available less restrictive measure.

In *EC – Asbestos*,[34] France banned asbestos for public health reasons. The complainant, Canada, a major exporter of asbestos, argued that "controlled use" represented **152*** a reasonably available and less restrictive alternative to the total ban.[35] However, the AB discarded this regulatory option, as it was incapable of ensuring the same level of protection as a total ban.[36]

In *US – Gambling*,[37] US federal law's prohibition of cross-border supply of gambling and betting services, which violated the US market access commitments, was found necessary to "protect public morals or to maintain public order" under Article XIV GATS. The AB reiterated that the search for a less restrictive alternative is impregnated by the process of weighing and balancing and the significance of the value at stake is factored into this process. The AB held that the results of the "comparison between the challenged measure and possible alternatives" should be considered "in the light of the importance of the interests at issue."[38] The circle of alternative measures is delimited by the notion that measures that are theoretical in nature or impose "an undue burden on that Member, such as prohibitive costs or substantial technical difficulties"[39] are not considered to be reasonably available. The AB also reiterated that the Article XIV analysis must not encroach on a member state's sacrosanct prerogative to "achieve its desired level of protection with respect to the objective pursued".[40]

Applying these doctrinal considerations, the AB concluded that the prohibition was necessary in terms of "reasonable relatedness" and there was no less restrictive alternative securing the same level of protection.[41] Ultimately, an element of US law was disapproved under the chapeau: the US failed to demonstrate that, with respect to remote betting services for horse racing, the prohibitions applied evenly to foreign and domestic service suppliers and, thus, involved no "arbitrary and unjustifiable discrimination".[42]

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[33] Paras 174 & 178-180.
[34] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R and WT/DS135/AB/R, adopted 12 March 2001.
[35] Para 173.
[36] Para 168 & 174.
[37] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and WT/DS285/AB/R, adopted 7 April 2005.
[38] Para 307.
[39] Para 308.
[40] Para 308. For the allocation of burden of proof, see paras 310-311.
[41] The AB found that engaging in consultations with the complaining state in order to reach a negotiated settlement was not reasonably available, because it could not guarantee the appropriate results and, hence, could not serve as a basis of comparison. Para 317.
[42] Paras 367-369.

In *Brazil – Retreaded Tyres*,[43] the importation of retreaded tyres was banned to tackle public health and environmental protection problems entailed by accumulation of litter, although domestic retreading of tyres and the importation of used tyres remained possible. Retreaded tyres have a shorter life-span than new tyres and, hence, lead to a faster accumulation of litter, which, in turn, causes health and environmental hazards.

The AB, after reiterating the weighing and balancing test and confirming as obvious that it is the prerogative of the member state to set the public interest objectives and the level of protection,[44] complemented the legal test with two elements. **153***

First, as an addition to the poetic language, it held that the process of "weighing and balancing" is a "holistic operation" that reduces the factors of analysis to the same denomination.[45] This implies that, at least conceptually, the analysis needs an "exchange rate" to translate trade volumes and local public interest benefits to the same "currency".

Second, the AB made an evolutionary but ephemeral contribution to the case-law, which was later on overruled in *EC – Seal Products*.[46] It held that extremely restrictive measures, such as import bans, encounter a heightened standard as to their contribution to the named public interest purpose ("material contribution").[47]

Even though the named public interest purposes (public health and environmental protection) were regarded as most vital and important,[48] given that an import ban is a measure that is "as trade-restrictive as can be",[49] the AB held that the measure was expected to be capable of producing "a material contribution to the achievement of the objective" and a slight or insignificant contribution would not pass muster.[50] Nonetheless, it found that the import ban did have such an effect.[51]

Interestingly, while the analysis of reasonable relatedness was impregnated by the concept of "material contribution", this heightened standard did not find its way in the inquiry regarding the possible less restrictive alternatives. The AB regarded the high level of protection set by Brazil as a reference point cast in stone, and discarded all alternative measures that were not capable of securing the same level of protection or were "particularly costly, or would require advanced technologies."[52] The analysis was fully devoid of any comparison between the public interest benefits and the trade restriction between the different measures. The alternative measures offered by the complaining party were less effective but, at the same time, way less restrictive of trade. The AB did not compare the loss in public interest benefits to the gains in trade. It simply discarded the alternative measures as not ensuring the same level of effectiveness in attaining the public health and environmental protection purposes, without any

[43] Appellate Body Report, *Brazil – Retreaded Tyres*, above n 24. For an analysis of the case, see Sebastien Thomas, Trade and Environment under WTO Rules after the Appellate Body Report in Brazil-Retreated Tyres, 4 Journal of International Commercial Law and Technology 42 (2009).
[44] Para 140. See also para 170.
[45] Para 182.
[46] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R, WT/DS400/AB/R and WT/DS401/AB/R, adopted 22 May 2014.
[47] Para 150-151 & 210.
[48] Para 144.
[49] Para 150.
[50] Para 152. See also para 150.
[51] Para 155.
[52] Paras 171-175.

inquiry into the redeeming virtue in terms of trade volumes. This manifests itself saliently when the AB discards material recycling as an alternative less restrictive measure, because it "is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres."[53]

While Brazil technically lost the case under the chapeau, because the importation of used tires was allowed, it could bring its rules in conformity with WTO law by putting an end to the imports of all used tires, without having to change its environmental and health measures (i.e. the import ban on retreaded tires). **154***

In *Dominican Republic – Cigarettes*,[54] the debate emerged from a provision that prescribed that a stamp had to be affixed on all packets of cigarette under the supervision of the local tax authorities in the territory of the Dominican Republic. Although the requirement equally applied to domestic and imported products, it was much more burdensome for the latter. Domestic producers could integrate it into their normal production processes without significant additional costs. At the same time, the requirement that the stamp could not be affixed outside the territory of the Dominican Republic deprived foreign producers of this possibility and made them unpack and repack the boxes in order to affix the stamps. This, allegedly, amounted to approximately 10% of the price (contrary to domestic production, where it accounted for 0.1% of the price).[55]

Although it was accepted that tax collection and the prevention of tax evasion is "a most important interest" and the restrictive effects were not intensive, the measure was found unecessary, because there were less restrictive alternatives available to achieve the same level of enforcement, such as provision of secure tax stamps to foreign exporters. The AB affirmed the panel's conclusion that there was "no supporting evidence 'that there is a causal link between allowing stamps to be affixed abroad and the forgery of tax stamps'"[56] and "other factors, such as security features incorporated into the tax stamps, or police controls on roads and at different commercial levels, would play a more important role in preventing forgery of tax stamps, tax evasion and smuggling of tobacco products."[57] The AB confirmed "that the alternative of providing secure tax stamps to foreign exporters, so that those tax stamps could be affixed on cigarette packets in the course of their own production process, prior to importation, would be equivalent to the tax stamp requirement in terms of (…) secur[ing] the high level of enforcement" pursued by the Dominican Republic.[58]

In *China – Publications and Audiovisual Products*,[59] China, to ensure the protection of public morals, limited the approval as a publications import entity to wholly state-owned companies, prohibited foreign-invested enterprises from importing printed publications and audiovisual entertainment products and regulated the number, structure and geographical coverage of publications import entities ("state plan").

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[53] Para 175.
[54] Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R and WT/DS302/AB/R (adopted on April 25, 2005).
[55] Para 7.188 of the Panel Report.
[56] Para 59.
[57] Para 71.
[58] Para 72.
[59] China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R and WT/DS363/AB/R (adopted on December 21, 2009). For a comprehensive analysis, see Christopher Doyle, Gimme Shelter: The Necessary Element of GATT Article XX in the Context of the China-Audiovisual Products Case, 29 Boston University International Law Journal 143 (2011).

The AB concurred with the panel that it was unconvincing that not wholly state-owned companies and foreign-invested enterprises would be unable to hire qualified personnel or to acquire the necessary organizational know-how and expertise to conduct proper content review. So even though the protection of public morals was **155*** considered to be a „highly important governmental interest", China adopted a high level of protection and the measure's trade restrictive effects were unclear, neither the AB, nor the panel were persuaded that these requirements made "a material contribution to the protection of public morals."[60]

The state plan on the total number, structure and geographical coverage of publications import entities was found capable of making a material contribution to the protection of public morals,[61] because the limitation on the number of entities makes interaction, content review, inspections and enforcement easier.[62] Nonetheless, the AB agreed with the panel that the requirements of suitable organization, qualified personnel and state plan had a less restrictive alternative. Shifting content review from import entities on the government and giving the latter the „sole responsibility for conducting content review" would be „significantly less restrictive and would make a contribution to the protection of public morals in China that is at least equivalent to the contribution made by the suitable organization and qualified personnel requirement and the State plan requirement."[63] Although this regulatory alternative calls for the change of the system and allocation of additional governmental human and financial resources, given that in the impugned arrangement content review was carried out by wholly state-owned enterprises and there was no indication that the government would accomplish this task at higher costs, it was considered to entail no undue financial burden on the public budget.[64] The AB held that "an alternative measure should not be found not to be reasonably available merely because it involves some change or administrative cost."[65]

In *US – Tuna II*,[66] the AB extrapolated the doctrine of weighing and balancing to Article 2.2 of the TBT Agreement, which requires that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective." The AB expressly referred to the doctrine of "weighing and balancing" developed under Article XX, reiterating the multi-factor analysis[67] and treated the level of protection (in this context called "degree of contribution") as non-variable.[68] Similarly to Article XX, the application of Article 2.2 involves an analysis of necessity in absolute terms[69] and the quest for a reasonably available but less restrictive alternative ("a comparative analysis").[70] Both analyses are, allegedly, multi-factor and are supplemented by an extra **156*** element specified by Article 2.2: risks non-fulfilment of the legitimate objective would create shall be taken into account.[71] Although ostensibly trade-

[60] Paras 255, 269, 271, 275-278. See Panel Report, para 7.854.
[61] Paras 279 & 297.
[62] Paras 280 & 283.
[63] Para 312. See also paras 315-316.
[64] Paras 317 & 325-327. It was also noted that as to certain products (e-publications, audiovisual products and films for theatrical release), the Chinese government had already made the final content review.
[65] Para 327.
[66] United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, WT/DS381/AB/R (adopted on May 16, 2012). For an analysis see Meredith A. Crowley & Robert Howse, Tuna–Dolphin II: a legal and economic analysis of the Appellate Body Report, 13(2) World Trade Review 321 (2014).
[67] Paras 318 & 322.
[68] Para 319.
[69] Para 315.
[70] Paras 320 & 322.
[71] Para 321.

restrictiveness and the public interest benefit may be balanced against each other, the level of protection envisaged by the state may not be questioned.[72]

The AB's application of the above requirements to Article 2.2 very clearly showcased the sharp contrast between the much-promising parlance and the most deferential practice. The USA restricted the dolphin-safe label to tuna harvested without "setting upon dolphins." Since this was the sole dolphin-safe label US law allowed, the use of an alternative dolphin-safe label based on the Agreement on the International Dolphin Conservation Program (AIDCP) was ruled out. Although the latter limited the dolphin-safe label to "tuna captured in sets in which there is no mortality or serious injury of dolphins", it did not prohibit individual fishing methods, such as "setting upon dolphins", as long as no dolphins were killed or seriously injured. This allowed fishermen to encircle tunas and dolphins and let the latter out of the seine at the end of the process, a practice making the tuna ineligible for the US label. Mexico argued that as a less restrictive alternative to the sole dolphin-safe label, the USA should also permit the use of the AIDCP label: the coexistence of the two labels would be less trade-restrictive, while still increasing consumer awareness and protecting dolphins. The panel accepted this argument.[73] Nonetheless, the AB found that the coexistence of the two labels would not guarantee the same level of protection (in the parlance of the Article 2.2 case-law: achieve the "United States' objectives to an equivalent degree") as the sole label. "[D]olphins suffer adverse impact beyond observed mortalities from setting on dolphins" and the AIDCP "would allow more tuna harvested in conditions that adversely affect dolphins to be labelled 'dolphin-safe';" furthermore, in case of two dolphin-safe labels were used, to some extent, "consumers would be misled as to the implications of the manner in which tuna was caught."[74] Although intuition suggests that the difference between the sole label and the coexistence of a dolphin-safe-plus and dolphin-safe-minus label should not be significant in terms of informing consumers about the method used and protecting dolphins, the AB found that the latter would fail to contribute to the USA's objectives to an equivalent degree.

In *US – COOL*,[75] Article 2.2 was applied to the US country-of-origin labelling. The panel established that a part of the labels (label B and C) fell short of fulfilling its objective, because they provided inaccurate or misleading information on the products' origin.[76] The panel established that while these labels may have reduced consumer confusion as compared to the situation involving no label, they were incapable of conveying any meaningful information to consumers, as the information on origin was not clear and accurate.[77] The AB, however, overturned this determination, because the **157*** labels contributed at least partially to the identified objective.[78] It held that Article 2.2 embeds no "minimum threshold of fulfilment" but "the achievement of [the] objective must be determined objectively, and then evaluated along with the other factors".[79] Although acknowledging that the measure's effectiveness was very weak, making only "some contribution to the objective of providing consumers with information on origin", while its trade-restrictiveness was of a "considerable degree" and "the

[72] Para 316.
[73] Paras 328-329.
[74] Para 330.
[75] United States — Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/AB/R, WT/DS384/AB/R and WT/DS386/AB/R (adopted on June 29, 2012).
[76] Para 433.
[77] Para 364.
[78] Para 466.
[79] Para 461.

consequences that may arise from non-fulfilment of the objective would not be particularly grave",[80] the AB concluded that it was fulfilling its objective.

As for the analysis of necessity in relative terms: since the panel did not engage in a comparative analysis, as it found that the measure was not fulfilling its objective,[81] the AB was unable to complete the panel's analysis to ascertain whether a less restrictive alternative was available.[82] Nonetheless, the AB pronounced that it is an essential condition that the alternative measure "make a contribution to the objective (…) at least equivalent to the contribution made by the COOL measure."[83]

In *EC – Seal Products*,[84] the European Union (at that time: European Communities) prohibited the importation and marketing of seal products, with the exception of products derived from hunting by Inuit and indigenous communities, hunting conducted for marine resource management purposes or cases where the seal product was for personal use. The EU argued that the measure was necessary to protect public morals. Albeit that the exemption of Inuit and indigenous hunts failed under the chapeau as involving unjustified discrimination between Canada and Greenland,[85] the general ban was found necessary under Article XX GATT both in terms of reasonable relatedness and lack of a reasonably available less restrictive alternative. The AB's report re-confirmed the highly deferential stance of the case-law in two ways: it discarded the concept of "material contribution" and revealed how deferential the Article XX review is when inquiring into the availability of less restrictive alternatives.

First, the AB discarded the "material contribution" standard established in *Brazil – Retreaded Tyres*, unconvincingly arguing that this had never been part of the legal test of "reasonable relatedness".

The panel established that given the extent of the EU regime's trade-restrictiveness, for a finding that the measure is necessary, it needs to be shown that there was a material contribution to the public interest objective.[86] However, the AB held that the analysis under Article XX encapsulates no requirement of a predetermined level of contribution. **158*** The intensity of the contribution goes into a blender with the other factors, such as the importance of the public interest objective and the level of trade-restrictiveness. Given that all of these are relevant but none of them are determinative, it cannot be established (not even if the public interest objective is less vital and the trade restriction is immense) that the measure needs to be susceptible of making a material contribution.[87]

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[80] Para 479.
[81] Para 481.
[82] See paras 483, 486, 488 & 491.
[83] Para 488.
[84] Appellate Body Report, *EC –Seal Products*, above n 46.
[85] The AB found that the EU failed to show how this special treatment, which was designed and applied de facto solely to Greenland, resulting in a discrimination between Canada and Greenland (para 5.333.), was related in any sense to the public interest objective, given that these hunts cause the very same pain and suffering. Notably, the EU explained the exception with the economic and social interests of the Inuit and other indigenous peoples. Paras 5.320 & 5.338-339.
[86] Panel Report, para 7.636.
[87] Paras 5.213 and 5.215. The AB's position that the requirement of material contribution was not overruled because it had never been part of the case-law, at least not as a firm requirement, is highly unconvincing. The report in *Brazil – Retreaded Tyres* did require the responding state to demonstrate that the measure was "apt to make a material contribution" (para 150.) and the AB did not explain how *EC – Seal Products* could be distinguished from *Brazil – Retreaded Tyres* in this regard. Namely, in both cases, the public interest objective

Second, the AB revealed the intensity of the deferential review enshrined in the inquiry into the availability of a less restrictive alternative.

On the one hand, the AB proved to be very reluctant to accept less restrictive alternative measures that have a perceivably lower level of effectiveness. In investigating the availability of a certification and labelling system conditioning market access on compliance with animal welfare standards,[88] the AB accepted the conclusion that "even the most stringent certification system would be difficult to implement and enforce, and would lead to increased numbers of inhumanely killed seals" and, hence, a system based on certification and labelling "would be beset by difficulties in addressing EU public moral concerns regarding seal welfare."[89]

On the other hand, the AB introduced a new aspect to be taken into consideration in the search for a reasonably available alternative: "the burden on the industries concerned".[90]

In *Colombia – Textiles, Apparel, and Footwear*,[91] the assailed measure was a compound tariff having an ad valorem element and a fixed element conditional on the price undergoing a statutorily defined floor. The measures allegedly aimed to combat money laundering.

The panel found that it was not proved that the Colombian measure was designed to combat money laundering. The AB reversed this finding by establishing a much lighter standard of "design".

The AB clarified that the "the 'design' and 'necessity' steps of the analysis" are conceptually distinct but related aspects of the overall inquiry, hence, they may overlap and the same evidence and considerations may play a role in both steps.[92] The flow of the analysis under Article XX is gradually narrowing, where "the examination of the 'design' of the measure" is not "a particularly demanding step", contrary to "the assessment of the 'necessity' of a measure[, which] entails a more in-depth, holistic analysis."[93] In fact, the AB established that even the weakest relationship may give rise to **159*** a positive conclusion: for satisfying the requirements of the "design" analysis, it suffices if the measure "is not incapable of" furthering the public interest objective. Given that the panel confirmed that "at least some goods priced at or below the thresholds could be imported into Colombia at artificially low prices for money laundering purposes, and would thus be subject to the disincentive created by the higher specific duties that apply to these goods", it was fair to say that the measure was designed to combat money laundering.[94]

The AB seemed to suggest that even such an weak nexus or, in other words, contribution to the public interest objective may, at least theoretically, pass muster under the necessity analysis due to the importance of the objective and the low level of trade-restrictiveness.[95] It would make

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was considered to be very important, while the measure (an import ban in both cases) was regarded as restrictive as possible.

[88] Para 5.262.

[89] Paras 5.270-272 & 5.279.

[90] Para 5.277.

[91] Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel, and Footwear*, WT/DS461/AB/R, adopted 7 June 2016.

[92] Para 5.76.

[93] Para 5.70.

[94] Paras 5.85-86 & 5.89.

[95] Para 5.90.

no sense to allow a measure enter the necessity analysis, if it is unable, even theoretically, to pass muster under it. Nonetheless, even though the measure was accepted to serve "social interests that could be described as vital and important at the highest degree"[96] and the restriction on international trade was virtual (higher than modest)[97] but lower than an import ban,[98] it was found unnecessary in terms of relatedness.[99] The AB found that the nexus between the price floor and money laundering was not properly elucidated by Colombia, which carried the burden of proof in this regard. The analysis remained speculative and theoretical. Although it "[could] not be ruled out" that prices below the threshold did not reflect market conditions,[100] Columbia did not establish "with sufficient clarity the amount or proportion of import transactions" involving undervaluation for money laundering purposes.[101] Furthermore, the qualitative evidence falsified the existence of any material contribution. There was no evidence that depreciated prices pertained to money laundering[102] and there was indication that this method was not one of the means most commonly used for this purpose.[103] With this Colombia failed to demonstrate "the degree of contribution made by the compound tariff to the objective of combating money laundering."[104]

B. Does the AB engage in any balancing?

The examination under Article XX GATT and Article XIV GATS is made up of four elements: first, a very light suitability analysis, which inquires whether the measure was designed to attain the named public interest objective; second, an analysis of necessity in absolute terms (reasonable relatedness), which mainly centers around the measure's capability of contributing to the public interest objective; third, an analysis of necessity in relative terms, where the measure is compared to alternatives in terms of restrictiveness and effectiveness; and fourth, a prohibition of abuse, extending to **160*** an inquiry regarding any eventual unjustifiable discrimination and inconsistency. This legal test was extrapolated by the AB to Article 2.2 TBT.

The AB claims to use balancing in the second and third analytical element, where the importance of the named public interest objective, the measure's trade-restrictiveness and its rate of effectiveness (contribution to the public interest objective) are balanced on an ad-hoc basis, without having any pre-determined relative value. The AB's language suggests that if a member employs a very restrictive measure to attain an objective that is not prominently important, the contribution to the objective needs to be substantial. Nonetheless, this finds no reflection in the case-law, where the applicability of such a heightened level of contribution ("material contribution") was rejected in *EC – Seal Products*. More importantly, when it gets to the question of importance, the analysis is not about the abstract value of the objective but about the value the member attributes to it.[105]

One cannot find a single case where the AB suggested a less restrictive alternative with the argument that although it does not secure the same level of protection, its inferiority in terms of effectiveness is outbalanced by its superiority in terms of restrictiveness. In reality, the AB

[96] Para 5.114.
[97] Para 5.106.
[98] Para 5.111.
[99] Paras 5.116-117 & 5.149.
[100] Para 5.106.
[101] Para 5.108
[102] Para 5.108.
[103] Para 5.107.
[104] Para 5.110.
[105] Regan, above n 3, at 352.

consistently discards less restrictive alternatives that do not ensure the same degree of contribution to the public interest objective and has never engaged in any genuine balancing of trade and local public interest. The tenet that it is the member state's prerogative to set the desired level of protection (level of effectiveness), in fact, necessarily determines such an outcome.[106] This is confirmed by the fact that the AB has simply no power to compare trade volumes to issues like the life of humans and animals or environmental protection targets. The WTO case-law shows that the AB either does not engage in any sort of balancing, or means something utterly different by "weighing and balancing".[107]

The AB's formulation in *Brazil – Retreaded Tyres* is very expressive in this regard.

> *We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.' If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, 'reasonably available'.*[108] **161***

III. Conclusions: proposal for a re-conceptualized analytical framework

When developing the doctrine of "weighing and balancing", the AB drew on federal markets but failed to take into account the remarkable differences between federal states and the world trade system. This resulted in the AB's importing something tailored to the needs of federal trade system, which, as a corollary, finds no warrant in WTO law.[109] The language used by the AB, inappropriately, reflects the parlance of constitutional free trade provisions. This implies two salient contradictions. On the one hand, such a balancing exercise finds no warrant in WTO law's public interest exceptions and is irreconcilable with these provisions' function. On the other hand, the AB imitates but does not carry out a balancing analysis and the allegation that it engages in balancing is in sharp contrast with what it is actually doing. Notably, the AB has always wisely avoided balancing in the sense of confronting public interest with trade.

This paper argues that it would be advisable to discard the terminological "frosting" represented by the doctrine of "weighing and balancing" and to make it explicit that the AB tests restrictive state measure with various means but short of balancing. It has to be noted that the AB's notion to carry out a balancing analysis is not only unjustified but also overly ambitious. The scholarship shows that balancing is beset with serious difficulties even in federal systems where courts do have the legitimacy for such an examination.[110]

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[106] Cf. Ortino, above n 8, at 471 ("[T]t is principally to establish whether these alternatives are indeed capable of achieving the specific public policy objective as effectively and to the same extent as the chosen measure.").
[107] Cf. Andenas and Zleptnig, above n 8 ("[T]here 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.")
[108] Para 156.
[109] See e.g. Regan, above n 3, at 366-369.
[110] For US law, see Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Michigan Law Review 1091 (1986) (arguing that what US courts do in not genuine

The parlance used by the AB gives the semblance of balancing, which is intensified by the fact that the measures failing under the "necessity" test would also fail under the balancing test. Nonetheless, if disregarding the AB's poetical language, the decisional practice may be re-conceptualized as inquiring into the measure's substantive "radiation" and allowing a certain "deferential latitude", when comparing the measure to other alternatives.

As for "reasonable relatedness", what the AB is doing is a substantive "radiation" analysis.[111] The requirement of "reasonable relatedness" aims to ascertain whether there is a genuine link between the restrictive measure and the identified public interest **162*** objective. The requirement that "there be a sufficient nexus between the measure and the interest protected"[112] is essential right because the AB engages in no balancing and the determination of the level of protection is the prerogative of the state. There is a compelling need to have a test that screens out measures not or only indirectly related to the objective. A comparison of trade volumes and public interest benefits would screen out unreasonable restrictions based on a trumped-up pretext, as these tend to make a feeble contribution to the named public interest objective, while restricting trade significantly. Nonetheless, under the doctrine of necessity, a whit of public interest may easily justify a highly restrictive measure, as the tribunal may not compare the two elements. For this reason, the tribunal needs to filter out measures that have no genuine link to the public interest objective. Although, in terms of prohibited measures, there is an overlap between balancing and "radiation" analysis, this does not change the practical difference between the two: the latter does tolerate measures having a weak but perceivable rate of effectiveness, provided no less restrictive alternative can be found.

The "deferential latitude" characterizing the search for a less restrictive alternative is the chief reason for the illusion of balancing. Although the fact that the level of protection is taken as granted makes balancing impossible, the "deferential latitude" allowed by the margin of comparison creates the false impression that the AB may give way to trade over local public interest benefits. Indeed, the latter is the point where the AB does not treat the rate of effectiveness envisaged by the state as sacrosanct. Nonetheless, this intrusion is intensely slight, especially in comparison to a genuine balancing and is far from implicating any cost-benefit analysis. The AB's approach is guided by the practical consideration that two regulatory alternatives may rarely have exactly the same rate of effectiveness and, hence, an overly rigid deferential standard would be unfeasible and would leave an unreasonably large room for veiled protectionism. Furthermore, due to the principle of good faith and the desire to obviate abuse, members are, indeed, expected not to stick to a measure when the less restrictive alternative is

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balancing and what they really care about under the Dormant Commerce Clause is protectionism.); Richard H. Fallon Jr., The Dynamic Constitution: An Introduction to American Constitutional Law and Practice 310-311 (Cambridge University Press, 2d ed., 2013.) ("[T]he Supreme Court regularly says that it will determine on a case-by-case basis whether the local benefits are great enough to justify the negative impact on interstate commerce. Virtually never, however, has the Court invalidated a state regulatory statute under the Commerce Clause unless that statute has had the effect of advantaging in-state economic interests over their out-of-state competitors."). For Australian law, see *Castlemaine Tooheys*, above n 1, para 40 ("The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process.").

[111] Cf. Andenas and Zleptnig, above n 8, at 405 & 416 ("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.").

[112] Appellate Body Report, *US –Gambling*, above n 37, para 292.

only slightly less effective. This is why the cast-in-stone reference-point is not the rate but the level of effectiveness (level of protection) envisaged by the state.

The above conceptualization is in line with the rationale and function of WTO law's public interest exceptions. These are exceptions to a multi-party contract based on a labyrinthine system of mutual benefits. Members promised concessions and benefits, such as capped tariffs, abolition of quantitative restrictions, and national treatment, with the explicit proviso that they retain the right to exercise public authority in relation to certain objectives. It was never promised that a member would exercise public authority in a way that causes less harm to the "community" than the benefit it generates for the member. Contrary to federal systems, WTO members have no "common cake" and are not expected to maximize the joint surplus of the system. Instead, public interest exceptions were inserted as a contractual reservation (affirmative defense) exempting certain public activities from the contractual commitments. Hence, here, the relevant question is whether a member delivers on its promises. The answer depends on the **163*** interpretation of the promises and their limits. As a corollary, instead of looking for the surplus-maximizing arrangement, the AB's inquiry should and does answer the question whether the measure at stake was within the contemplation of the parties.

The pretended "weighing and balancing" has a serious shortcoming as to the furtherance of the goals of WTO. While the outcome of balancing is, by definition, highly unpredictable, the allegation that the AB is making value choices may undermine the legitimacy of the system. To put it otherwise, the pretense of "weighing and balancing" diminishes clarity and predictability in the application of the public interest exceptions and erodes the legitimacy of the dispute settlement system without any redeeming virtue.