

**NECESSITY KILLED THE GATT  
ART XX GATT AND THE MISLEADING RHETORIC  
ABOUT ‘WEIGHING AND BALANCING’**

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*Art XX GATT, listing the policy grounds available to WTO Members that wish to deviate from their GATT obligations, makes some of them conditional on a requirement of necessity in relation to the pursued interest. In their reports, Panels and the AB have developed the analysis of this element in two separate but interlaced tests: one whereby they allegedly perform an exercise of ‘weighing and balancing’ of the interests involved (a value-judgment), the other ascertaining the trade-restrictiveness of the measures challenged (an optimization analysis). It is submitted that an appraisal of the case-law demonstrates that this distinction is artificial, and most importantly, that no real balancing is ever performed - or in any event, relied on - to determine the outcome of a dispute (Claim 1). However, a diffuse trend of ‘strict proportionality’ is discernible in the case-law, not so much within the ‘weigh and balance’ analysis, but within the trade-restrictiveness test. The latter, therefore, is arguably less value-neutral than the quasi-judicial bodies would claim it to be, and then WTO Members tend to understand, when construing the necessity requirement (Claim 2).*

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## I. INTRODUCTION

Art XX of the General Agreement on Tariffs and Trade (GATT) entitles Members of the World Trade Organization (WTO) to adopt WTO-inconsistent measures, provided that they fall into one of the categories listed therein, each related to a different policy objective, and they are applied in a non-discriminatory way. In particular, exceptions designed to promote public morals, human (and animal and plant) health, and compliance with GATT-consistent national norms must be ‘necessary’ to achieve the sought objective. This article is concerned with the interpretation and application of this necessity factor by WTO quasi-judicial bodies (Panels and Appellate Body).

The necessity test is but one of the typical devices used to govern the interplay of overlapping regulatory regimes in a situation of legal pluralism. Not unlike other doctrines, such as subsidiarity, margin of appreciation, comity, *Solange* etc, it aims to limit the scope and application of a regime that would normally enjoy priority over norms of other concurring regimes. The purpose of the said doctrines is to provide the ‘yielding’ norms with enough margin to operate, if certain conditions are/are not met, or if some subject-matters are/are not touched upon.<sup>1</sup>

An analysis of the interpretation and application of the necessity test, therefore, provides an optimal vantage point to take stock of the WTO’s impact on the regulatory autonomy of Member States and, accordingly, on the judicial review of national policies performed by the (quasi)judicial branch of a specific international legal regime. As such, the findings of this article can be easily compared with the analogue operation performed by other courts or tribunals (amongst others, the Court of Justice of the European Union, the European Court of Human Rights, investment tribunals).

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<sup>1</sup> For an insightful account of these doctrines as the normal toolkit to perform ‘constitutional interpretation and adjudication’ see, for instance, Ernst-Ulrich Petersmann, ‘De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement’ (2008) 6 *Loyola U Chicago Intl L Rev* 209-248. See also Michel Rosenfeld, ‘Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism’ (2008) 6 *Intl J Con L* 415-456.

The rationale of these techniques is closely related to the general regulatory design of the supra-national institution concerned: organizations whose purpose is the creation of common standards for, or the regulatory harmonization of, national regimes in certain areas are naturally inclined to discourage regulatory diversity and fragmentation (and to allow for State discretion only subject to certain conditions).<sup>2</sup> On the other hand, other organizations tend to acknowledge ample freedom in relation to domestic policies (the means): the focus is rather on the attainment of the agreed objectives (the ends), and regulatory diversity is the default standard (*laissez-régler*). The WTO system, in particular, is precisely premised on the principle of de-regulation, or of negative integration.<sup>3</sup> States retain their sovereign power to choose and implement their regulatory policies as they deem fit, as long as they do not interfere with the international commitments under the WTO.<sup>4</sup>

In this article, the WTO reports on the necessity test will be analyzed, to ascertain whether States preserve a considerable regulatory margin of manoeuvre in the WTO system, and whether such margin has a predictable scope. A negative answer to either of these questions would suggest that the spirit of negative integration has given way, at least in part, to normative harmonization and centralized cost-benefit assessment. To put it bluntly, the de-regulatory inspiration of the GATT 1947 is maybe under the wearisome attack of the necessity test, as performed by the Panels and the AB. Could it be that necessity has, to some extent, killed the GATT?

## II. THE NECESSITY TEST IN ART XX GATT

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<sup>2</sup> The European Union is one example in many fields of regulation, although it is suggested that the enlargement of its membership and competences might cause a shift from a model of positive integration to one of negative integration, see Giandomenico Majone, 'Liberalization, Re-Regulation, and Mutual Recognition: Lessons from Three Decades of EU Experience' (2009) Scottish Jean Monnet Centre Working Paper Series, Vol. 1, No. 1, <[http://www.gla.ac.uk/media/media\\_111516\\_en.pdf](http://www.gla.ac.uk/media/media_111516_en.pdf)>.

<sup>3</sup> Among the multiple works expounding this premise, Petros C Mavroidis, 'Market Access in the GATT' (2008) STALS Research Paper 7/2008 <[http://www.stals.sssup.it/site/files/stals\\_Mavroidis.pdf](http://www.stals.sssup.it/site/files/stals_Mavroidis.pdf)> stands out for clarity. See also Joel P Trachtman, 'The Constitutions of the WTO' (2006) 17 EJIL 623-646.

<sup>4</sup> The classic view is encapsulated in the following passage in Armin von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', in Jochen A Frowein and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* 5/2001 (2001) 609, 657: 'The [European Court of Justice]'s jurisprudence is based on the premise that legislative correction is possible at the supranational level. That possibility does not obtain within the WTO'.

The necessity test, as it stands now, is briefly but comprehensively enounced in the following recital of the report of the Appellate Body (AB) in the *Brazil Tyres* case:

In order to determine whether a measure is ‘necessary’ within the meaning of art XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. ... [I]n 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 responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not ‘reasonably available’, taking into account the interests or values being pursued and the responding Member’s desired level of protection, it follows that the measure at issue is necessary.<sup>5</sup>

It is possible to break this composite test down into single elements, each amenable to either of the two sub-tests which can be referred to, respectively, using the ‘weighing and balancing’ (WAB) formula<sup>6</sup> and the LTRM acronym (which stands for Least Trade-Restrictive Means). From the passage above, it transpires that both these tests aim to assess whether a certain measure is indeed necessary, the difference being that whereas the WAB test yields a ‘preliminary’ conclusion, the ‘confirmation’ comes from the LTRM test.

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<sup>5</sup> WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (17 December 2007) WT/DS332/AB/R [156].

<sup>6</sup> Which was first stated in WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef—Report of the Appellate Body* (11 December 2000) WT/DS161/AB/R, WT/DS169/AB/R, at [164]. The AB referred to the 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.’ More on this below.

Briefly, the necessity test routine comprises the following steps:

*Weighting and Balancing (WAB)*

- I. Assessment of the importance of the value at stake (the Value);
- II. Assessment of the contribution that the challenged measure makes to the Value;
- III. Assessment of the trade-restrictiveness of the measure.

*Least-Trade Restrictive Means (LTRM) test*

- I. Ascertainment of the correspondence between the Value and one of the prongs of Art. XX GATT;
- II. Annotation of the level of protection of the Value sought by the respondent;
- III. Ascertainment that no alternative measure can achieve the same level of protection, while being less trade-restrictive;
- IV. Ascertainment that alternative measures identified under 3) are reasonably available.

A first claim of this article is that the WAB-half – at least in the way it has operated so far before the Panels and the AB – brings no added value to the LTRM-half, other than serving as a gateway filter for unacceptable measures. However, this does not mean that the necessity test is reduced to a mechanical analysis, because some discretion-laden pattern is indeed discernible in the use that Panels and AB make of the LTRM test. The second claim, it follows, is that an element of *stricto sensu* proportionality (or cost-benefit analysis) guides at times the necessity test performed by Panels and AB, but this exercise of appreciation is not embedded in the balancing effort (as it would be normal to assume), but in the loose application of the LTRM analysis (which would, in principle, bar discretionary evaluation).

This article takes stock of the WTO's *grands arrêts* on necessity, by tracing the development of the test in a rigorous chronological perspective. This analysis permits to appreciate how the test was repeatedly integrated and adjusted over time, and reveals the process that led to the over-elaborated version described above. Such a retrospective will lead to the conclusion that, in essence, some elements of the necessity test as it stands now are less an essential part thereof than a residue of accumulation, and could be interpreted away without being too concerned with their distinct *effet utile*.

The interpretation and application of art XX GATT, and the necessity

test in particular, have attracted a fair amount of scholarly attention;<sup>7</sup> however, the following overview focuses on some original elements that have been generally disregarded in the literature. Namely, this article intends to substantiate the claim that the WAB-test is irrelevant and that the case-law reveals an unavowed pattern of judicial interference into States' policies.

### III. NECESSITY IN THE GATT-DAYS: ENTER THE LTRM

As anticipated, the word 'necessary' in art XX(a) (b) and (d) GATT gradually unfolded into a complex legal test. It is noteworthy that, in the words of Schoenbaum, this provision led to a semantic shift, since in the test currently in use 'necessary no longer relates to the protection of living things, but to whether or not the measure is a 'necessary' departure from the trade agreement.'<sup>8</sup> Hence, the idea that all deviations from the trade obligations should be minimized is at the basis of the LTRM paradigm.

The LTRM principle was first used in 1990 by the GATT Panel *US – Section 337*,<sup>9</sup> which seemingly took cues from the EC's suggestion to the

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<sup>7</sup> Among the most recent and complete works, see Glyn Ayres and Andrew D. Mitchell, 'General and Security Exceptions under the GATT and GATS' in Indira Carr, Jahid Bhuiyan and Shawkat Alam (eds), *International Trade Law and WTO* (Federation Press 2012); Gisele Kapterian, 'A Critique of the WTO Jurisprudence on 'Necessity' (2010) 59 ICLQ 89; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia J Trans L 73; Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: in Comparative Perspective' (2007) 42 Texas Intl L J 371; Donald H. Regan, 'The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing' (2007) 6 WTR 347. For a detailed analysis of the single disputes relevant to the definition and application of this test see also Filippo Fontanelli, 'Whose Margin Is It? State Discretion and Judges' Appreciation in the Necessity Quicksand' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (European Law Publishing 2009) 377. For an earlier article that served as a stepping stone for the 2009 article and the present one, see Alan O. Sykes, 'The Least Restrictive Means' (2003) 70 U Chicago L Rev 403.

<sup>8</sup> Thomas J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 AJIL 269, 276, mentioned in Kapterian (n 7) 103.

<sup>9</sup> *United States – Section 337 of the Tariff Act of 1930* (1990) GATT BISD 36S/345, 392-93 [5.26]: '[A] contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' ... if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it'.

Panel,<sup>10</sup> an all the more reasonable hypothesis since Pierre Pescatore (former judge at the European Court of Justice and passionate advocate of the process of European integration) was sitting on the Panel. At that (pre-WTO) time, the LTRM analysis was the only selection device used to check the GATT-compliance of measures allegedly falling under one of the prongs of art XX(a), (b) and (d) GATT (besides the application of the *chapeau*), and other Panels adopted it after its first appearance.<sup>11</sup>

However, this early version of the LTRM test was still relatively under-developed. For instance, Panels tended to accept alternative less-restrictive measures without careful consideration of the level of protection set by the respondents; neither did they spend particular efforts to make sure that the alternative measure was reasonably available to them.<sup>12</sup> Nevertheless, in the early 90s Panels became familiar with the idea that GATT-inconsistency could be measured and arranged on a scale of gravity, and it was possible to identify the measure that was *less* GATT-inconsistent than the others.<sup>13</sup>

The LTRM test, on its face, is a formula of (Pareto) efficiency,<sup>14</sup> and it did

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<sup>10</sup> According to Stone Sweet and Mathews (n 7) 156, the EC put forward this test bearing in mind the doctrine of proportionality in use in EU and ECHR law. The US, on its part, had proposed a stricter test based on rational analysis of the measure (the so-called 'strict in theory, fatal in fact' strict scrutiny test). Seemingly, 'each side was proceeding on the basis of their understanding of how Least Restrictive Means tests are used *in their own systems*'.

<sup>11</sup> *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (1991) GATT BISD 37S/200, 223 [74-75] (inconsistencies with GATT obligations arising from a national measure were deemed to be legitimate only as far as they were 'unavoidable'; the word 'necessary' has the same meaning in art XX(b) and (d)); *United States – Restrictions on Imports of Tuna* (1991) GATT BISD 39S/155 (unadopted); *United States – Measures Affecting Alcoholic and Malt Beverages* (1992) GATT BISD 39S/206 [5.52].

<sup>12</sup> On this, see Kapterian (n 7) 103, and the literature referred to therein, in particular Deborah A Osiro, 'GATT/WTO Necessity Analysis: Evolutionary Interpretation and Its Impact on the Autonomy of Domestic Regulation' (2002) 29 *Legal Issues of Economic Integration* 123, 127-128.

<sup>13</sup> Kapterian (n 7) 105, holds that not only is this assessment difficult to make, due to the absence of a shared view on how to measure GATT-inconsistency, but also it does not seem to be allowed by art XX GATT, because the meaning of the word 'exception' 'does not provide space for shading.' However, this argument does not appear compelling: the LTRM test is an interpretative elaboration of the word 'necessity,' therefore, it does not relate to the (indeed monolithic) exceptional nature of the measure, but to the conditions precedent for it to arise, which might well be dependent on a value judgment.

<sup>14</sup> By this we mean that, since it keeps one of the variable fixed (achievement of the regulatory purpose), it is not a full-fledged cost-benefit analysis, of the kind used to

not take long for Contracting Parties to wonder why efficiency had become a standard of review in a regime that, purportedly, should eminently care about non-discrimination and negative integration, rather than regulatory positive harmonization. Moreover, the strict LTRM test understandably disconcerted the WTO Members, as it seemed to ‘require dispute settlement panels to dictate the specific measure to be adopted by a WTO Member, since presumably there was only one measure among all the alternatives that was the ‘least inconsistent’ with the GATT 1994.’<sup>15</sup>

When the US acted as responding party in the *US – Shrimps* dispute, it fought at length with the received interpretation of necessity deriving from the *US – Section 337* report, notably protesting that the intricate LTRM test and the steps that it required could not be inferred from the normal meaning of the art XX(b) provision in light of the standards of the Vienna Convention on the Law of Treaties:

The use of one word, ‘necessary’, was a slender reed indeed on which to hang such an extensive and complex set of obligations. Rather than attempt to impose a reading of the text that no reader could be expected to know, it would be wiser to interpret the language in accordance with its normal meaning.<sup>16</sup>

The backlash against the LTRM test was not simply an element of the US’ defensive strategy, but more generally an instance of the Parties’ distrust of the Panels’ and AB’s activism.<sup>17</sup> According to the US, the *chapeau* of art XX (mandating that domestic measures be *applied* non-discriminatorily and non-arbitrarily, and not disguise a trade restriction) would have been sufficient to ensure that protectionist measures could not stand scrutiny, and the LTRM test was, in short, uncalled-for and intrusive.

For a while, certain States simply could not come to terms with the LTRM test, as illustrated by Argentina’s vehement complaint<sup>18</sup>:

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maximize global welfare, but a truncated version thereof. On this, see Chad P Bown and Joel P Trachtman, ‘Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act’ (2009) 8 WTR 85.

<sup>15</sup> WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Panel* (15 May 1998) WT/DS58 [3.228] summarizing the position of the US.

<sup>16</sup> *ibid* [3.225].

<sup>17</sup> *ibid* [3.226]: ‘After all,’ the US stated ‘the basic thrust of the GATT was to prevent protectionism, not to intrude on the decision making of the contracting parties when pursuing legitimate policy objectives such as environmental protection’.

<sup>18</sup> WTO, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather—Report of the Panel* (19 December 2000) WT/DS155 [8.251-252].

Where does subparagraph (d) prescribe that the government of a State must analyze an array of options, and choose the least restrictive? What is the yardstick for defining what is less restrictive? Accepting this approach would mean supplanting the sovereignty of governments by a panel's evaluation. ... A certain degree of discretion must therefore be allowed to the member invoking the exception in determining which measure is necessary for securing observance of laws and regulations that are not inconsistent with the general agreement.

#### **IV. THE ABSOLUTE FREEDOM TO SET THE LEVEL OF PROTECTION**

In the first case of the WTO era, *US – Gasoline*,<sup>19</sup> the Panel applied art XX(b) GATT, and significantly expanded the necessity test used hitherto.<sup>20</sup> Firstly, it took cognizance of the different words that the Contracting Parties used in art XX GATT to indicate the link between the measure and the various values pursued, stating that a different meaning must be attached to each formulation. In particular, the 'necessity' word (letters a, b and d) postulated a closer connection between the measure and the policy objective than that required by the 'related to' formula (letters c, g and e).

The Panel set up a three-tiered test to perform the judicial review under art XX(b) GATT, requesting the responding party to establish

(1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective; and (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.<sup>21</sup>

The Panel ran the LTRM test and even suggested an alternative measure, less restrictive than (and as effective as<sup>22</sup>) the US one. In so doing, the

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<sup>19</sup> WTO, *United States – Standards for Reformulated and Conventional Gasoline—Report of the Panel* (29 January 1996) WT/DS2, WT/DS4.

<sup>20</sup> For the record, the US invoked the art XX(g) GATT defense as well (relating to the protection of limited natural resources), but the AB found that the measure under review was applied in a discriminatory way, and therefore breached the *chapeau* of art XX GATT.

<sup>21</sup> See *ibid* [6.20].

<sup>22</sup> *Ibid* [6.22-29]. In particular, [6.27]: 'slightly stricter overall requirements applied to both domestic and imported gasoline could offset any possibility of an adverse

Panel took upon itself the burden of proof regarding the research of the alternative, and seemingly deviated from the general principle that the party who wants to invoke an exception must prove that preconditions for its application are met.<sup>23</sup>

More importantly, the newly established Appellate Body clarified that the subject of the judicial review of national regulatory measures is the measures themselves, not the value that they pursue (the Value) and the expected level of attainment thereof.<sup>24</sup> As Mavroidis lucidly puts it, ‘*a WTO adjudicating body [...] can extend its judicial review only with respect to the means used to achieve the ends: ends are not justiciable, means are.*’<sup>25</sup>

The *US – Gasoline* dispute, ultimately, established the untouchable nature of the level of protection set unilaterally by the State (let alone the choice of the value to protect),<sup>26</sup> although this alleged autonomy has come under

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environmental effect from these causes, and allow the United States to achieve its desired level of clean air without discriminating against imported gasoline. Such requirements could be implemented by the United States at any time’. According to Kapterian (n 7) 103, the test was applied somehow loosely, since the Panel was content with an alternative capable to achieve one of the objectives of the measure ‘often,’ but presumably not always, as sought after by US. On this loose version of the LTRM (where the alternative is less trade-restrictive, but also slightly less effective than the one quashed), see Donald H Regan, ‘Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, *Da Capo*’ (2001) 99 Mich L Rev 1853, 1899–1900.

<sup>23</sup> Moreover, the AB snubbed US’ attempt to use the costliness of the alternative measure as a proof of its non-availability, by using art 27 of the Vienna Convention, see WTO, *US – Gasoline—Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 27: ‘The fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government’.

<sup>24</sup> See [7.1]: ‘It was not [the Panel’s] task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. ... Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products’.

<sup>25</sup> Petros C Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (OUP 2005), 191. See also the similar dictum in WTO, *Canada – Certain Measures Concerning Periodicals—Report of the Panel* (14 March 1997) WT/DS31/R [5.9]: ‘we are neither examining nor passing judgment on the policy objectives of the Canadian measure regarding periodicals; we are nevertheless called upon to examine the instruments chosen by the Canadian Government for the attainment of such policy objectives’.

<sup>26</sup> See Report of the Panel (n 19), [6.22]: ‘it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary [to adopt the

scrutiny over time, and it is now controversial whether States are actually free to choose their preferred level of protection.<sup>27</sup>

## V. THE ADDITIONAL CHALLENGE OF ART XX(D) GATT

Shortly after that, the Panel in *Canada – Periodicals* rejected Canada's invocation of art XX(d) GATT. The Canadian measure fell even before making it to the necessity test, because Canada failed to prove that it 'secured compliance' with the designated law.<sup>28</sup> This outcome suggested that, although 'ends' are safe from judicial review (see above), it is not guaranteed that *all* measures will get undisturbed to the necessity stage, especially if they are allegedly covered by art XX(d) GATT (as opposed to letter (a) and (b)).

Indeed, measures falling under art XX(d) GATT pursue a Value (compliance with a national law, ie enforcement of its obligations) that is not an abstract one like 'public morals' or 'human health,' hence a judicial body can reasonably assess whether the trade-restrictive measure is *prima facie* instrumental to the enforcement of the national norm invoked, even before getting to the LTRM phase, where that contribution is examined and measured. Incidentally, neither of these tests implies any review of the aim of the national laws itself or of the policy the latter are designed to promote. In other words, Panels must initially verify whether the domestic measures do actually 'secure compliance' with a wider discipline, simply assessing *prima facie* the existence of a means-ends relationship between the two. Afterward, the LTRM test examines the efficiency of the measures with respect to the national policy (as opposed to the general aim

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challenged measures]. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement.' On the absolute freedoms of Members to set their appropriate level of protection, see WTO, *Australia – Measures Affecting Importation of Salmon—Report of the Appellate Body* (6 November 1998) WT/DS18/AB/R [199].

<sup>27</sup> Michael Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 JIEL 1077-1102.

<sup>28</sup> See *Canada – Periodicals*, Report of the Panel (n 25) [3.5]: 'The general objective of these measures is to help the Canadian periodical industry raise advertising revenues. Tariff Code 9958 ensures the achievement of this goal, with Section 19 of the Income Tax Act'. The Panel reaches its conclusion (see [5.10]) through the test set by a GATT Panel, whereby the 'to secure compliance' formula means 'to enforce obligations under laws and obligations,' not 'to ensure the attainment of the objectives of the laws and regulations' (see Report of the Panel in *EC – Regulations on Imports of Parts and Components* (1990) GATT BISD 37S/132 [5.14-5.18]).

it pursues, such as fighting evasion, or securing efficient border control). These two steps are not concerned with questioning the appropriateness of the Value pursued, and are based on seemingly technical evaluations.<sup>29</sup>

An application of the XX (d)-specific preliminary test is visible in the *Mexico – Soft Drinks* case, where the Panel and the AB did not get as far as examining whether the challenged measures were ‘necessary’ under art XX(d) GATT, since the latter did not ‘secure compliance with [the relevant national] laws and regulations,’ and therefore fell outside the scope of the exception. To appreciate how the same preliminary analysis does not apply to exceptions other than the XX(d) ones, suffice it to recall the Panel’s Report of the *EC – Tariff Preferences* case. In that case, the Panel found that the challenged measure did not fall under the health heading, since it was ‘not one designed for the purpose of protecting human life or health’.<sup>30</sup> Nevertheless, the panellists, rather than stopping the review, went on—*arguendo*—to demonstrate that the necessity test and the *chapeau* requirements were not met.

Intuitively, as seen above, the different approach is due to the different degree of confidence that Panels have when dealing with the review of measures allegedly covered by art XX(b) or XX(d) GATT. Even before entering the necessity test, the Panel can refuse to apply the art XX(d) GATT justification just by focusing on the ‘securing compliance’ parameter, and without questioning the legitimacy of the domestic policy indicated by the State. To sum up, the preliminary test applicable under art XX(d) GATT (‘is the measure *prima facie* capable of securing compliance with the national law?’) adds a layer to the review, but does not threaten the neutrality of the analysis with respect to the Value. On the contrary, it takes some temerity for a Panel to state that a measure does not fall under the category of art XX(b) GATT and, as a consequence, does not even deserve to reach the necessity test. Such a finding implies an appraisal of the declared Value and a *prima facie* understanding of the measure’s contribution to it. Therefore, it is not surprising that the Panel in *EC – Tariff Preferences*<sup>31</sup> was self-conscious about its preliminary finding,

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<sup>29</sup> Contrarily, when it comes to measures allegedly covered by the art XX(b) GATT exception, not only is the LTRM test virtually always granted, but it must also be performed solely as regards to the ‘abstract’ value (health promotion), irrespectively of whether the measures are necessary to enforce any wider national regulation scheme. It goes without saying that in such cases it is easier for the responding Party to argue that the measure brings at least some contribution to the (even prospective) attainment of the public interest pursued.

<sup>30</sup> See WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries—Report of the Panel* (1 December 2003) WT/DS246/R [7.210].

<sup>31</sup> The same holds true with respect to the *China – Raw Materials* case, see below.

and preferred to render it more solid showing that the measure would have been struck nevertheless, even if its initial decision on the non-subsumption under art XX(b) GATT were ultimately wrong.<sup>32</sup>

Another notable example in this respect is *Colombia – Entry Ports*, in which Colombia tried to defend some border measures invoking art XX(d) GATT, namely compliance with national regulations aimed at the prevention of under-pricing techniques and smuggling. The Panel, relying on statistical data, concluded that the measures were virtually unable to reduce smuggling. Therefore, they were not necessary, for they did not contribute to the enforcement of the relevant national policy.<sup>33</sup>

## VI. ENTER THE WAB

In this well-known dispute, the claimants held that Korea's measures requiring that imported beef be sold only in specialized imported beef stores, as well as Korean laws and regulations restricting the resale and distribution of imported beef, resulted in a violation of art III.4 GATT (national treatment). Korea objected, *inter alia*, that these measures were necessary to comply with its Unfair Competition Act (a domestic regulation providing for consumers' protection), for the purpose of preventing retailers from deceiving consumers by selling imported beef as domestic beef. In the course of this controversy, the necessity test underwent a momentous mutation, possibly due to Korea's incisive defence, which sought to hamper the Panel's review of necessity, invoking the mantra of regulatory autonomy (and sending out the veiled threat that activism accusations could follow):

Korea noted that so far GATT/WTO case law has not explored the link between regulatory diversity, on the one hand, and the necessity

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<sup>32</sup> This difference is efficiently encapsulated in Panama's remark in the WTO, *Colombia – Indicative Prices and Restrictions on Ports of Entry—Report of the Panel* (27 April 2009) WT/DS366/R [7.495]: 'whereas the Art. XX(b) exception is purpose-oriented, the Art. XX(d) exception is «functional»'.

<sup>33</sup> *ibid* [7.588]. In WTO, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (6 April 2004) WT/DS276/R, the Panel was dismissive of the possibility to justify the challenged measure under art XX(d) GATT, see [4.371-374]. It was enough for the Panel to note that Canada had not proven that the grain segregation measures it adopted contributed to the enforcement of the national policies on competition and on fair commercialization of grain. The half-hearted invocation of art XX(d) GATT was sweepingly rejected by the AB (in WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from The Philippines—Report of the Appellate Body* (17 June 2011) WT/DS371/AB/R, [175-180]), for Thailand's failure to make a *prima facie* defense and demonstrate that the measures were necessary under the general exception.

requirement, on the other. Korea submitted that there is a correlation between the two in the sense that were a regulatory objective to be sought in a very strict manner, the choice of instruments would consequently be influenced. Since the level of protection sought cannot be put into question, the choice of instrument will have to be appreciated in the same context.<sup>34</sup>

The Panel rejected Korea's defence and quashed the challenged measures, pointing at less restrictive alternatives,<sup>35</sup> and to an inconsistency of Korea's policies.<sup>36</sup> These findings were subsequently upheld on appeal. The AB (unlike the *Argentina – Hides and Leather* Panel) took upon itself the task of expounding the meaning of the term 'necessity' and to draw the limits of the LTRM test. It clarified that art XX GATT did not cover only 'indispensable' measures (which are 'certainly' allowed protection<sup>37</sup>), but also measures bearing a slightly less direct link with the Value, provided that they are not just 'making a contribution' thereto.<sup>38</sup>

<sup>34</sup> WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef—Report of the Panel* (31 July 2000) WT/DS161/R, WT/DS169/R [242].

<sup>35</sup> As for the LTRM test, see Report of the Panel [672]: 'For instance, a generally applied record-keeping requirement backed with sanctions would constitute a WTO consistent alternative to the WTO inconsistent dual retail system. If foreign beef shops can keep book-records, it is difficult to see why the same could not be requested from domestic shops'.

<sup>36</sup> In fact, the AB correctly stresses the legitimacy of the reasoning by which the panel had noted the absence of similar measures in other market sectors. Korea had alleged that this fact could not imply that the stricter measures adopted for the beef sector were not necessary, as this finding would amount to an interference in Korea's right to set the level of protection at its sole discretion, and to set different levels of protection in different market sectors. The AB stated that this comparative analysis had in fact the different purpose of highlighting that efficient alternative measures were available, as the one Korea used to enforce in the non-beef sectors of the market. See *Korea – Beef*, Report of the Appellate Body (n 6) [175-178]. Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12 JIEL 153, 159, notes that the panel and the AB characterized Korea's goal in different ways, somewhat contrary to the principle that each State has the power to define it autonomously, and that the loose formulation of the goal adopted by the AB made it easier to find equally efficient alternatives.

<sup>37</sup> This is also a controversial statement. By putting indispensable measures in a safe haven, the AB makes it unlikely that the balancing is applied at all, see Regan, *The Meaning* (n 7) 354.

<sup>38</sup> *Korea – Beef*, Report of the Appellate Body (n 6), [161]. See the similar holding of the ECtHR in the *Handyside* case (*Handyside v. the United Kingdom*, App. no. 5493/72 (ECHR, 7 December 1976) 5, where the judges observed that 'the adjective 'necessary,' ... is not synonymous with 'indispensable' [and] neither has it the flexibility of such expressions as ... 'admissible,' ... 'useful,' 'reasonable,' or 'desirable'.

More importantly, the AB's reasoning on the necessity of measures that are not 'indispensable' encouraged Panels and AB to embark on the review of the Values at stake, opening the floodgates to the WAB test and to cost-benefit analysis. Firstly, the AB hinted at a graduation of importance of the Values, suggesting that 'the more vital' the value, the easier it would be for the measure to prove 'necessary.'<sup>39</sup>

It is remarkable to learn from the AB, keeping in mind the *Section 337* paradigm, that the outcome of the necessity test is not solely a matter of efficiency, but also depends on a value-judgment (that is, how important the pursued Value is). This was but the first crack in the LTRM building. The AB went on to add other elements that should provide guidance in the 'process of weighing and balancing a series of factors,' an exercise that implies, on its face, a significant degree of discretion by the reviewer.<sup>40</sup> Specifically, it lays down two additional guidelines: the greater the contribution of the measure to the enforcement of the national policy, and/or the lighter its trade-restrictiveness, the more easily it will pass the necessity test. Enter the WAB test:

In sum, 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.<sup>41</sup>

This move signalled that the AB is into the business of looking into the merits of the measures under review (not simply into their efficiency and their functional design) and of embarking on a review of proportionality.<sup>42</sup>

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<sup>39</sup> *Korea – Beef*, Report of the Appellate Body (n 6), [162]. To help the adjudicator in handling such an indistinct test, the AB argues that it is helpful to 'take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument'.

<sup>40</sup> *ibid* [163].

<sup>41</sup> *ibid* [164].

<sup>42</sup> See Regan, *The Meaning* (n 7) 355-356: 'there is nothing in the text of Article XX(d) to suggest that different regulatory purposes are accorded different values by Article XX(d). *A fortiori*, there is nothing to suggest that it is appropriate for the Appellate Body to rank Members' regulatory purposes according to the Appellate Body's

There is an inherent contradiction between this balancing activity and the oft-repeated assumption that Member States have the right ‘to determine for themselves the level of enforcement of their WTO-consistent laws,’ that is, the level of protection of the Value.<sup>43</sup> However, the AB declared that the fully fledged WAB test was already ‘encapsulated’ in the LTRM *Section 337* test, packed within the ‘reasonable expectation that the contracting party employs’ alternative measures. In other words, the AB allegedly did nothing new, and simply unpacked the ‘reasonable’ element, so as to obtain the WAB test.

In the *EC – Asbestos* case<sup>44</sup> the WAB/LTRM compound test of *Korea – Beef* was applied again, although ultimately the French ban at bar was found to be *indispensable* to achieve the Value (a zero-risk protection against asbestos-related illness<sup>45</sup>). Accordingly the AB spared the ban from the WAB assessment,<sup>46</sup> after noting that that the preservation of human life and health is ‘vital and important in the highest degree.’<sup>47</sup> On this occasion, the EC’s invocation of a zero-risk policy proved successful, as it made the LTRM test an uphill battle for the claimant. Since then, many responding parties have tried to mimic this strategy when invoking art XX GATT, but Panels and AB have countered this strategy, by somehow assessing the veracity (not the appropriateness, of course) of zero-risk declarations.<sup>48</sup>

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intuitions about their value’. See Andrew Lang, *World Trade Law after Neoliberalism – Reimagining the Global Economic Order* (OUP 2011) 323, noting that the AB’s statement implies a strong test of *stricto sensu* proportionality, and Peter Van den Bossche, ‘Looking for Proportionality in WTO Law’ (2008) 35 *Legal Issues of Economic Integration* 283–294.

<sup>43</sup> *Korea – Beef*, Report of the Appellate Body (n 6) [176]. This contradiction is lucidly described in Joseph H.H. Weiler, ‘Comment on Brazil – Measures Affecting Imports of Retreaded Tyres’ (2009) 8 *WTR* 137, 141. See also Regan, *The Meaning* (n 7) 353 ff.

<sup>44</sup> WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products—Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R.

<sup>45</sup> WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products—Report of the Panel* (18 September 2000) WT/DS135/R [8.217]: ‘controlled use does not constitute a reasonable alternative to the banning of chrysotile asbestos that might be chosen by a decision-maker responsible for developing public health measures, bearing in mind the objectives pursued by France [absolute halt to risk-spreading]’.

<sup>46</sup> In this respect, see Regan, *The Meaning* (n 7), and Robert Howse and Elisabeth Türk ‘The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute’, in Grainne de Búrca and Joanne Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (Hart 2002) 283, 324.

<sup>47</sup> See *Report of the Appellate Body* (n 44), [172].

<sup>48</sup> Since the notion of zero-risk ‘is an abstraction,’ it is understandable that the adjudicators feel entitled to reshape it as a ‘de minimis’ risk-tolerance, see Damien J Neven and Joseph HH Weiler, ‘Japan – Measures Affecting the Importation of

Famously, the AB in *Korea – Beef* second-guessed Korea's declared objective to eliminate 'all fraud,' noticing that such 'unlikely' objective would probably require a ban on all imports, hence Korea's policy objective was toned down to a more modest 'considerable reduction' of fraud, an aim that could be conveniently achieved also by less-restrictive measures than those adopted.<sup>49</sup> Conversely, the Panel and the AB showed more deference to Brazil's declaration, in the *Tyres* case, that the purpose its measure intended to achieve was the reduction of the risks of waste tyre accumulation 'to the maximum extent possible.' Brazil arguably got away with that because it managed to convince the Panel that reduced tyre-accumulation was *the* Value, whereas it actually was a means to protect health (the real Value). In so doing, it benefitted from an *Asbestos*-treatment with respect to necessity. This is further developed in part 8, below.

## VII. PAYING LIP-SERVICE TO THE WAB: GAMBLING AND CIGARETTES

The *US – Gambling* and *Dominican Republic – Cigarettes* cases<sup>50</sup> added nothing to the *Korea – Beef* test (apart from the *Gambling* one inaugurating the case-law on a new Value, ie morals and public order<sup>51</sup>), but it is worthwhile to examine how the WAB test played out in these disputes. In the reports *Korea – Beef* and *US – Asbestos*, in spite of the large amount of reasoning devoted to its formulation, the balancing moment hardly contributed to the *dispositifs* (in *Asbestos*, the measure was indispensable, therefore no balancing was needed; in *Korea – Beef* the conclusion was reached through the LTRM analysis, even if a WAB balance would have been very easy to assess: since Korea had an outright ban in place, the 'trade-restrictiveness' score was clearly at its maximum).<sup>52</sup>

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Apples: One Bad Apple?' in Henrik Horn and Petros C Mavroidis (eds), *The WTO Case Law of 2003* (CUP 2006) 289–290.

<sup>49</sup> *Korea – Beef*, Report of the Appellate Body (n 6) [172] and [178].

<sup>50</sup> WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body* (7 April 2005 WT/DS285/AB/R; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes—Report of the Appellate Body* (25 April 2005) WT/DS302/AB/R.

<sup>51</sup> WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Panel* (10 November 2004) WT/DS285/R [3.279]: 'Remote supply of gambling raises significant concerns relating to the maintenance of public order and the protection of public morals.' See also [3.273–277]. Morals and public order are protected under art XIV(a) GATS, the avatar of art XX(a) GATT.

<sup>52</sup> See Regan, *The Meaning* (n 7) 361, referring to *Asbestos*, *Gambling* and *Cigarettes*: 'when it comes to actually deciding the case, all three rely on the principle that

As it turned out, the WAB did not play a significant role in these two cases either. In *Gambling*, the AB found that the US measures were necessary in the abstract, but were applied in violation of the *chapeau* of art XX GATT.<sup>53</sup> In *Dominican Republic – Cigarettes*, instead, the challenged measures<sup>54</sup> were found to be unnecessary because they were so ineffective that many other GATT-consistent alternatives could be foreseen, and keeping the zero-tolerance level as a constant would have not been reasonable.<sup>55</sup> The respondent party attempted to lure the Panel into issuing a good cost-benefit report, describing the high importance of the public interest pursued (compliance with tax laws) and the minimal impact of the measures on the imports, but even if the Panel did not challenge this reconstruction the measure was not spared.<sup>56</sup>

Arguably, the *Korea – Beef* bit where the AB maintained that the balancing test is ‘encapsulated’ in the LTRM analysis (see above) might be revealing of the real stance of WTO judicial bodies towards the balancing task. The reason why the WAB is never really used to balance values between them and to assess their proportionality is that the WAB, in the particular WTO scenario, is of no practical use. Of its three elements, one is virtually untouchable<sup>57</sup> (the importance of the Value), and the LTRM test already

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Members get to choose their own level of protection.’ See also Caroline E Foster, ‘Public Opinion and the Interpretation of the World Trade Organisation’s Agreement on Sanitary and Phytosanitary Measures’ (2008) 11 JIEL 427, 437; Howse and Türk (n 46) 326.

<sup>53</sup> The Panel had held that since the US had failed to negotiate with Antigua, it could not be sure that the measure was actually the LTRM available. The AB overturned this part of the Panel report.

<sup>54</sup> Which were allegedly taken to enforce the obligations under the national Tax Code, and were useful in preventing cigarette smuggling, see WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes – Report of the Panel* (26 November 2004) WT/DS302/R [4.88].

<sup>55</sup> *ibid* [7.228]: ‘Dominican Republic has not proved why, for example, providing secure tax stamps to foreign exporters ... would not be equivalent to the current tax stamp requirement in terms of allowing it to secure the same high level of enforcement with regard to tax collection and the prevention of cigarette smuggling.’ More boldly, the AB found ‘no evidence to conclude that the tax collection requirement secures a zero tolerance level of enforcement...’ (see Report of the Appellate Body (n 50) [72]).

<sup>56</sup> On the difficulty of understanding the rationale and the functionality of the WAB test, see Steve Charnovitz, ‘The WTO’s Environmental Progress’ (2008) 10 JIEL 685.

<sup>57</sup> The fact is, in any event, that ‘in no case to date has a Panel or the Appellate Body found that a measure pursues values of only moderate or negligible importance.’ See Ayers and Mitchell (n 7) 18 (of the preview available online). Similarly, Regan, *The Meaning* (n 7) 363: ‘the Appellate Body has yet to say that any specific legitimate

takes care of the other two (the ‘less-restrictive but equally effective’ quality of the sought-after alternative postulates that efficiency and restrictiveness are already known variables, and are decisive in appraisal of necessity).<sup>58</sup>

The classic balancing test, therefore, has little in common with a real proportionality test, nor does it allow for express cost-benefit analysis.<sup>59</sup> The ‘weighing and balancing,’ all things considered, must be seen as a preparatory exercise, a propaedeutic to the LTRM test. It is possible to get a glimpse of this unconfessed approach in *Dominican Republic – Cigarettes*, where the Panel, after running the WAB assessment, bridges to the LTRM as follows: ‘having said that [referring to the WAB], the Panel will focus its analysis on whether [the measure] ... is in fact necessary [to achieve the Value],’<sup>60</sup> clearly suggesting that only the LTRM test is apt to ascertain the necessity of a measure, the WAB serving merely as a warm-up test.

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regulatory purpose is less valuable than any other.’ For some examples, see for instance the Report of the Panel in *US – Gambling* (n 51) [6.492], acknowledging that the interests and values protected by the challenged measures serve very important societal interests that can be characterized as ‘vital and important in the highest degree’ (see also [6.558]). Likewise, see *Dominican Republic – Cigarettes*, Report of the Panel (n 54) [7.215]: ‘The Panel finds no reason to question the Dominican Republic’s assertions in the sense that the collection of tax revenue ... is a most important interest for any country and particularly for a developing country such as the Dominican Republic.’ See also WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres—Report of the Panel* (12 June 2007) WT/DS332/R [7.112]. Even with respect to China’s mundane attempt to invoke art XX(d) in WTO, *China – Measures Affecting Imports of Automobile Parts—Reports of the Panel* (18 July 2008) WT/DS339/R, WT/DS340/R, WT/DS342/R [7.360] the Panel could not help acknowledging the importance of the proclaimed interest (tax collection). See also WTO, *United States – Measures Relating to Shrimp from Thailand—Report of the Appellate Body* (16 July 2008) WT/DS343/AB/R and WT/DS345/AB/R [313], and *Colombia – Entry Ports*, Report of the Panel (n 32) [7.566] (fighting under-invoicing and money laundering). In this respect, see also McGrady (n 36) 162.

<sup>58</sup> See Regan, *The Meaning* (n 7) 357: ‘the only consideration in the Appellate Body’s list that is relevant to a cost-benefit balancing test and not to a less-restrictive alternative test is the value of the regulatory purpose, which as we have already seen is a seriously suspect consideration’.

<sup>59</sup> This cost-benefit analysis, in fact, was merely proclaimed in *Korea – Beef* and never applied, see Joel P Trachtman, ‘Regulatory Jurisdiction and the WTO’ (2007) 10 *JIEL* 631, 647. For an enlightening analysis of the necessity test under cost-benefit terms that takes into account the Learned Hand test and other similar formulas, see David Collins, ‘Health Protection at the World Trade Organization - The J-Value as a Universal Standard for Reasonableness of Regulatory Precautions’ (2009) 43 *JWT* 1071.

<sup>60</sup> *Dominican Republic – Cigarettes*, Report of the Panel (n 54) [7.215], quoted also in Kapterian (n 7) 122.

It is just argued, here, that the ‘balancing’ result is rarely spelled out in clear terms, and virtually never relied upon to decide on the WTO-legality of the measure.<sup>61</sup> Take for instance the *Colombia – Entry Ports* case. Formally, the Panel held that since one of the three factors of the ‘balancing’ was irredeemably flawed (the measure made an insignificant contribution to the policy objective), the art XX(d) GATT defence did not stand.<sup>62</sup> Although seemingly the case was decided on the WAB, this outcome could have been the result of the least-restrictive test as well: given the low level of effectiveness, many better alternatives were available to the defendant (like in *Korea – Beef*). At most, the WAB is a simpler version of the LTRM, filtering out measures that are *prima facie* untenable.<sup>63</sup>

This might sound fair: after all, it was not clear in the first place how the Panels and the AB could be entitled to perform any sort of balancing between values, given the presumption for regulatory autonomy that reigns in the WTO. Balancing and proportionality are a prerogative of constitutional adjudication,<sup>64</sup> and are at variance with the negative integration paradigm described above.<sup>65</sup> However, as Sykes first showed in 2003, there is some discernible pattern in the practice of Panels and AB, whereby certain Values are treated more deferentially than others (in particular, the protection of human health<sup>66</sup>). The following section intends to account for this trend in the case-law, and explain how it pervades the application of the LTRM test (whereas the WAB slowly turned into what it actually is, i.e. little more than a boilerplate section of the reasoning), and in particular the search for ‘reasonably available alternative measures.’

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<sup>61</sup> Note, for instance, how the utmost importance of the public interest is a variable that did not affect the result in the *Cigarettes* case, or how the ruinous effect on trade of the remote-gambling ban was not, per se, sufficient to prevent the AB from finding it ‘necessary,’ and pass on to the *chapeau* test, in *Gambling*.

<sup>62</sup> *Colombia – Entry Ports*, Report of the Panel (n 32) [7.619].

<sup>63</sup> This use of WAB is consistent with the evidentiary regime: it is for the responding party to propose a *prima facie* case of necessity, and this is where the WAB should operate, see Christopher Doyle, ‘Gimme Shelter: the ‘Necessary’ Element of GATT Article XX in the Context of the China-Audiovisual Products Case’ (2011) 29 Boston U Intl LJ 143, 159.

<sup>64</sup> On this, see extensively Stone Sweet and Mathews (n 7) 138 and *passim*.

<sup>65</sup> On the WTO incompetence to rule on similar conflict of values, see Steve Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’ (2002) 27 YJIL 59, 101.

<sup>66</sup> See Petros C Mavroidis, George A Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents, Cases and Analysis* (West Group 2010) 693.

One clear example of this trend is that Panels and AB, from time to time, do not shy away from taking an exploratory detour to look into the consistency of the respondent party's policies, with respect to the chosen level of protection for values *other* than the Value.<sup>67</sup> This is expressly provided for in art 5.5 SPS, for the purpose of encouraging States to adopt sanitary and phytosanitary policies that are at least roughly homogeneous.<sup>68</sup> On the contrary, nothing in the GATT or in the basic formulation of the LTRM test suggests that a measure is *per se* less necessary if the State has set a lower level of protection for *other* Values, or if it seems fit to implement them using less-restrictive measures.

### VIII. THE WILDCARDS: COMPLEMENTARITY AND QUANTITATIVE CONTRIBUTION

In the *Brazil – Tyres* dispute, Brazil's ban of foreign re-treaded tyres (other than those from MERCOSUR countries) was purportedly aimed at securing a better level of health protection.<sup>69</sup> The AB hung to the WAB test, describing it as 'a holistic operation that involves putting all the

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<sup>67</sup> In the *Asbestos* case (no 44) the AB had refused to take into account the fact that the EC enforced less rigid measures with respect to other dangerous substances; in *Korea – Beef* (no 6) it looked at the less restrictive policies adopted by Korea in other sectors in the market, but allegedly only for the purpose of finding reasonable alternatives to the dual-retail system. In the *Gambling* case, instead, the Panel went further and seemed to review the US conduct in a parallel sector of the services market (namely, non-remote gambling services) in order to question the overly high level of protection of public morals pursued, see *US – Gambling*, Report of the Panel (n 51) [6.493]: '[we ought to] determine whether particular aspects associated with the remote supply of gambling and betting services will justify a prohibition, particularly in light of the tolerant attitude displayed in some parts of the United States to the non-remote supply of such services.' The Panel determined that on-line gambling entails some specific risks that could require a different regulation from the one governing non-remote gambling services (see [6.521]). Finally, in *China – Raw Materials* (see below) the Panel noticed that China's invocation of health policy objectives attached only to some of its export duties. The Panel inferred from the China's failure to invoke art XX(b) GATT with respect to other equivalent measures an adverse inference as to the genuineness of its defense, see [7.496] ff.

<sup>68</sup> On the obligation under art 5.5 SPS, and in particular on how this provision compares to the obligation under art XX GATT, see Michael Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 JIEL 1077, 1083 ff.

<sup>69</sup> At [4.11] of the Report of the Panel (n 57), Brazil mentions, *inter alia*, the risks related to cancer, dengue (and other mosquito-borne diseases), reproductive problems and environmental contamination that would be aggravated by permitting that non-reusable tyres are disposed and amassed in large landfills that might harbor mosquito colonies.

variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.<sup>70</sup> In truth, the Panel diligently considered and weighed the three WAB factors: human life and health are very important (good), the ban is extremely trade-restrictive (bad), but likely to make a certain contribution towards the overall policy of disposed tyres reduction (average).

As mentioned above, there is a difference in the Value (health) and the purpose that the measure is supposed to achieve (reduction of disposed tyres). Arguably,<sup>71</sup> Brazil's insistence on the latter was a smart move in the LTRM perspective: interlacing health and tyre-waste reduction within one policy objective left the Panel and the claiming party with a truncated LTRM review to perform. If Brazil had declared that health protection was *the* Value, it would have been easier for the Panel to point at alternative less-restrictive measures that could ensure a similar or better result, and had nothing to do with disposed tyres. By focusing on tyre-disposal as the ultimate objective, instead, Brazil managed to limit the Panel's review to the tyre-reduction effect of the measure, drastically narrowing down the Panel's margin of discretion in looking for alternative measures.

The AB also confirmed the Panel's loose evaluation of the third factor, that is, the assessment of the contribution made by the measure in 'qualitative' (*lege*: rough) terms, rather than on the basis of quantitative measurable data.<sup>72</sup> This quantitative appraisal is especially likely to be justified when the contribution is not observable immediately or in the short term, or when it forms part of an aggregate contribution made by several cumulative measures.<sup>73</sup>

When the Panel performed the LTRM, it essentially discarded all alternative measures proposed by the EC, because they were either

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<sup>70</sup> *Brazil – Tyres*, Report of the Appellate Body (n 5) [182].

<sup>71</sup> This is also the central view in Bown and Trachmann (n 14).

<sup>72</sup> *Brazil – Tyres*, Report of the Appellate Body (n 5) [147]. See also [210]. Note how this assessment of the rough contribution of the measure is apparently at variance with the AB's statement that a necessary measure is 'located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to,' in *Korea – Beef*, Report of the Appellate Body (n 6) [161]. This method to assess the contribution of the measure, as Bown and Trachmann (n 14) rightly note, is similar to the 'suitability test' advocated in the 90's by the US. However, this takes place within the virtually irrelevant WAB, so it does not substitute the LTRM.

<sup>73</sup> *Brazil – Tyres*, Report of the Appellate Body (n 5) [151].

unfeasible or already in place, *together* with the challenged ones.<sup>74</sup> It should be noted that in this case, since the assessment of the contribution was conducted without looking at its magnitude, or, as the AB put it more elegantly, ‘qualitatively,’ the LTRM was affected accordingly. As seen above, the WAB is a preparatory exercise, which does not substitute the LTRM test; but if the LTRM relies on the information collected in the WAB, any flaw in the latter would transmit to the former.

In *Brazil – Tyres*, the ‘qualitative’ assessment of the contribution of the ban to the sought objective had a double consequence. It impaired the balancing phase (non-measurable entities can hardly be weighed against each other) and affected the LTRM test, because it is impossible to look for equally-effective alternatives when the effectiveness of the original measure is not known to begin with, at least in objective terms.<sup>75</sup>

#### **IX. THE PRACTICE OF EXCEPTION-SHOPPING, AND THE REVIVAL OF THE WAB**

In this case,<sup>76</sup> China invoked the art XX(a) GATT exception in order to justify several measures targeting the sale and distribution of imported audiovisual products. These measures were directly or indirectly aimed at ensuring that the Chinese authorities perform some control review over the imported material. The Panel accepted the subsumption under the art XX(a) GATT, and expressed its customary praise for the policy objective and the (legitimately) high level of protection sought.<sup>77</sup> The claimant (the US) did not challenge this qualification, limiting itself to claim that the measures were not necessary. In so doing, it somehow conceded implicitly that Chinese censorship on foreign audiovisual materials was a perfectly legitimate policy (that only needed to be performed efficiently and non-discriminatorily), and that its exported materials could actually harm

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<sup>74</sup> On this particular aspect, see McGrady (n 36) 155–60.

<sup>75</sup> See Bown and Trachtmann (n 14): ‘the Appellate Body’s approach also makes impossible the use of a LTIARA test, for such a test must determine equivalence of contribution, and equivalence of contribution requires assessment of magnitudes. So, in effect, the Appellate Body has now implicitly backed away not only from balancing, but also from the traditional LTIARA test’.

<sup>76</sup> WTO, *China – Measures Affecting Trading Rights and Distributional Services for Certain Publications and Audiovisual Products—Report of the Appellate Body* (21 December 2009) WT/DS363/AB/R. A thorough comment is provided in Joost Pauwelyn, ‘Squaring Free Trade with Culture with Chinese Censorship: The WTO Appellate Body Report on *China – Audiovisuals*’ (2010) 11 Melbourne J Intl L 119.

<sup>77</sup> WTO, *China – Audiovisuals—Report of the Panel* (12 August 2009) WT/DS363/R [7.817–818].

Chinese public morality.<sup>78</sup>

The Panel used the two-step analysis (WAB and LTRM), ‘concluding’ at first that the measures were necessary (under the WAB), then that they were not, because reasonable alternatives were available. In an attempt to clarify, the AB definitively certified the preparatory (‘intermediate’) role of the WAB:

the Panel’s use of the word ‘conclude’ in setting out its *intermediate* findings risks misleading a reader, as does its characterization of certain requirements as ‘necessary’ before it had considered the availability of a less restrictive alternative measure.<sup>79</sup>

The AB also fine-tuned the *Brazil – Tyres*’ opening to the ‘qualitative’ assessment of a measure’s contribution, maybe realizing that a loose evaluation of this factor would falsify both the WAB and the LTRM tests. It recalled that the contribution is to be assessed primarily with the support of evidence and factual information, and only residually is a qualitative assessment possible.<sup>80</sup> Moreover, it criticized the analysis of the Panel, for relying too much on assumptions and failing to do as promised, ie assessing the ‘actual contribution’ of the Chinese measures to the protection of public morals.<sup>81</sup>

Whereas the Panel seemingly engaged in an accurate WAB test<sup>82</sup> and used

<sup>78</sup> On the unfortunate implications of this strategy, that seemed hinge upon the care with which all parties involved tried to avoid a head-on clash on the Chinese censorship regime, see Pauwelyn (n 76) 132–135.

<sup>79</sup> *China – Audiovisuals*, Report of the Appellate Body (n 76), [248] (emphasis added).

<sup>80</sup> *ibid* [253].

<sup>81</sup> *ibid* [294]: ‘In reaching its finding regarding the contribution made by the State plan requirement to the protection of public morals in China, the Panel simply stated that limiting the number of import entities ‘can make a material contribution’ to the protection of public morals in China. Yet, the Panel neither addressed quantitative projections nor provided qualitative reasoning based on evidence before it to support that finding.’

<sup>82</sup> *China – Audiovisuals*, Report of the Panel (n 77) [7.828], [7.836], [7.863], [7.868]. For the Panel those measures imposing requisites for national importing enterprises were likely to be effective, and they did not restrict imports a priori, therefore they were legitimate. Other measures, to the contrary, were found not to be reasonably contributing to the attainment of the overall policy, and raised protectionism concerns, therefore they were reviewed more strictly. However, in light of their low trade-restrictiveness (and of the importance of the value pursued) some of them passed the necessity test, whereas others affecting the importing rate more significantly (or qualitatively, setting *a priori* prohibitions) were rejected by the Panel.

the results thereof to pronounce on the necessity of the measures, the AB reversed the analysis, and held that China failed to prove that *any* of the measures was apt to make an actual contribution. However, this did not lead the AB's report to a sudden conclusion (as one might expect: if a measure makes no contribution to the stated policy, it certainly fails under the WAB test, but it also renders the LTRM test moot). Instead, the AB entered the LTRM anyway, and confirmed the Panel's assessment (other measures were reasonably available<sup>83</sup>). However, the premise on the contribution was so different that it is hard to understand what the AB meant when it said that 'United States has demonstrated that the proposed alternative would ... make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China's desired level of protection of public moral.'<sup>84</sup> It seems that the AB, like in the *Dominican Republic – Cigarettes* precedent, summoned an eighth member, Monsieur Jacques de la Palice, the only one who could subscribe without embarrassment that the measure made *no* contribution, and that accordingly any of the alternative proposals was (of course) *as effective*, or even *more*.<sup>85</sup>

## X. MAKING SENSE OF THE *TYRES* GUIDELINES ON CONTRIBUTION

In the *China – Raw Materials* dispute,<sup>86</sup> several complaining parties challenged Chinese measures setting export restrictions on certain raw materials. China invoked, among other things, art XX(b) and (g) GATT

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See Fontanelli, *Whose Margin* (n 7), 399, noting that this was the as close to a real balancing as one could hope to find in the WTO case-law.

<sup>83</sup> *China – Audiovisuals*, Report of the Panel (n 77) [7.898]: 'It emerges ... that implementing the US proposal would make a contribution that is at least equivalent to that of the relevant [China measures]. At the same time, the US proposal would have a significantly less restrictive impact on importers – in fact, it would have no such impact – without there being any indication that it would necessarily have a more restrictive impact on imports of relevant products than the [measures] at issue'.

<sup>84</sup> *China – Audiovisuals*, Report of the Appellate Body (n 76) [335].

<sup>85</sup> Note that the AB expressly insists that the LTRM is the dynamic combination of the values collected during the static WAB analysis, making it all the more weird, if one thinks that the AB itself had denied that the measures could made *any* contribution. See *ibid.*, [310]: 'if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the 'necessity' of the measure will 'outweigh' such restrictive effect'.

<sup>86</sup> WTO, *China – Measures Related to the Exportation of Various Raw Materials—Report of the Panel* (5 July 2011) WT/DS394/R, WT/DS395/R, WT/DS398/R. The AB Report was published on 30 January 2012.

(on the preservation of exhaustible resources<sup>87</sup>), with arguments displaying various levels of conviction and convincingness. The Panel found that these measures were adopted in violation of the China's Accession Protocol to the WTO,<sup>88</sup> and therefore the general exceptions of art XX GATT could not apply, since there was no reference to the GATT discipline in the applicable WTO instrument.<sup>89</sup> The AB later confirmed this view.<sup>90</sup>

However, the Panel performed the review of the measures at issue under art XX GATT, to ensure the completeness of its Report had the AB chosen to reverse the finding on the application of this provision. Leaving the art XX(g) GATT-defence aside,<sup>91</sup> we should focus on the Panel's reasoning on the health-related argument (which is similar to Brazil's one in *Tyres*: in essence, limiting exports of both scrap and raw materials, China would favour the transition of its industrial economy to a 'recycle' or 'circular' model, causing the increase of health protection standards that follows naturally from the adoption of an environmentally sustainable model).<sup>92</sup>

The claimants contended that the health-friendly description of the export duties was a mere *ex post facto* rationalization of measures that were not originally designed to protect health. The Panel upheld this complaint,<sup>93</sup> but decided to assess whether the measures could nevertheless make some material (although unintended) contribution to that end. The Panel concluded that the evidence submitted did not evince that the export restrictions made a material contribution to the protection of health (for one thing, because China, while highlighting the beneficial effects of said policies, omitted to account for their health-adverse effects).<sup>94</sup> Moreover the Panel, mindful of the *Brazil – Tyres dictum* about the 'aptness' of the

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<sup>87</sup> *China – Raw Materials*, Report of the Panel (n 86) [7.356]: 'China's argument is that refractory-grade bauxite and fluorspar are exhaustible natural resources; they are scarce, are not easily substitutable, and thus need to be managed and protected'.

<sup>88</sup> See art II, paragraph 3.

<sup>89</sup> *China – Raw Materials*, Report of the Panel (n 86), section VII.B.5.

<sup>90</sup> *China – Raw Materials*, Report of the Appellate Body (n 86) [307].

<sup>91</sup> Primarily, because the standard required is not one of necessity, but of 'relation to' the policy objective. Moreover, the defense failed because China did not prove to be in compliance with the even-handedness condition of art XX(g) GATT, whereby measures restricting exports must be made effective 'in conjunction' with restrictions on domestic production or consumption.

<sup>92</sup> *China – Raw Materials*, Report of the Panel (n 86) [7.471-472].

<sup>93</sup> *ibid* [7.516].

<sup>94</sup> *ibid* [7.538], [7.604].

measure to make some ‘future contribution’ to the policy objective, determined that it was not enough for China to simply claim that these measures could increase national growth and welfare, and consequently raise the level of health protection.<sup>95</sup> After declaring China’s failure to demonstrate that the measures fell under art XX(b) GATT, like in the *EC – Tariff Preferences* case, the Panel went on *arguendo*, to prove that in any event the measures could not pass the LTRM test.

## XI. CONCLUSION

The first claim of this article is that, as it emerged repeatedly in the case-law, the balancing test filters measures that would have failed the least-restrictive analysis upfront, for being both ineffective *and* significantly restrictive. No actual balancing is ever performed through the ‘weighing.’ The WAB is similar to the weighing-in session in boxing: fighters are weighed, but the real confrontation occurs later,<sup>96</sup> and somewhere else (in the LTRM ring, as it were).

The second claim is, however, that some proportionality might be spotted here and there, in the use of the LTRM routine, under the radar of the reports’ reasoning. A list of these instances, without pretence to exhaustiveness, is below:

- As mentioned above,<sup>97</sup> sometimes the Panel takes the liberty to look into other policy areas regulated by the State, so as to get a sense of what could be an appropriate level of protection for similar Values, and whether the measure under analysis is so unusually restrictive that it might harbour a protectionist design. Obviously, when the measure is designed to achieve a relatively ‘less vital’ Value, it will be easier to find out that the State has in place less rigid policies regarding equivalent values.

- When the Value is human health, the ‘zero risk’ (or ‘maximum possible enhancement’) level of protection can be accepted (see *Asbestos, Brazil – Tyres*), whereas in connection with other Values it is routinely

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<sup>95</sup> *ibid* [7.553]: ‘For the Panel, even if growth makes environmental protection statistically more likely, this does not prove that export restrictions are necessary for environmental gains. For example, to the extent that a higher income per capita generates citizens’ preferences for a better quality of environment, income redistribution policies may serve the environmental objective just as well as it is claimed that export restrictions do’.

<sup>96</sup> This brings to mind Bown and Trachtman’s lament (n 14) 88: ‘Yet, one might ask, if you consider these factors, but you do not compare them with each other ... how do you determine which domestic measures are acceptable and which are not?’.

<sup>97</sup> See above, particularly notes 67-68 and accompanying text.

toned down by the AB (see *Korea – Beef*, *Dominican Republic – Cigarettes*, *Apples I* and *Apples II*).<sup>98</sup> More generally, it is not unheard of that adjudicators, when ascertaining whether the less-restrictive alternative can meet the level of protection of the original measure,<sup>99</sup> lower the ‘appropriate level of protection’ predetermined by the State, so as to make the alternative eligible.<sup>100</sup>

- When the Value is health protection, at least in one case it was acceptable to evaluate the contribution of the measure ‘qualitatively,’ prospectively, and cumulatively with other policy measures (*Brazil – Tyres*). This opening was unprecedented, and was somehow shut down when, dealing with the policy objective of public morals, the AB required again that the measure be evaluated relying on objective evidence of the actual contribution (*China – Audiovisuals*).<sup>101</sup>

- Likewise, the qualitative approach of *Tyres* fits into the habit of relaxing the scientific boundaries of the assessment of health-related protection. In a similar vein, see how the AB held in *EC – Hormones* and *Asbestos* that governments are not obliged to base their health policies on the mainstream scientific opinion, as long as the minority views that they espouse come from ‘qualified and respected sources’.<sup>102</sup>

Although these trends are hardly disputable, especially in their cumulative effect, their existence does not add to the predictability of the necessity

<sup>98</sup> WTO, *Japan – Measures Affecting the Importation of Apples—Report of the Appellate Body* (10 December 2003) WT/DS245/AB/R, and WTO, *Australia – Measures Affecting the Importation of Apples from New Zealand—Report of the Appellate Body* (29 November 2010) WT/DS367/AB/R. The *Apples* cases are not discussed in this article, as the necessity test applied therein is derived from art 5.6 of the SPS Agreement, rather than art XX GATT. A brief discussion of both disputes is provided in Filippo Fontanelli, ‘When SPS applies to apples. The Japan – Apples and Australia – Apples WTO disputes’ in Sabino Cassese et al. (eds), *Global Administrative Law: Cases, Materials, Issues, third edition*, (IRPA-IIJL 2012), Vol. IV, 23-29 <<http://www.irpa.eu/wp-content/uploads/2012/08/The-Casebook-Chapter-4.pdf>>.

<sup>99</sup> On the difficulty of this exercise, see WTO, *Australia – Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada—Report of the Panel* (18 February 2000) WT/DS18/RW [7.128–7.131] (in which the LTRM was governed by art 5.6 SPS).

<sup>100</sup> On this, see Ming Du (n 68) especially 1097 ff.

<sup>101</sup> In my view, the *China – Raw Materials* Panel Report does not disprove this distinction, at least because China’s demonstration about the contribution to health are *prima facie* untenable. The main problem of China’s measures, with respect to the art XX(b) GATT justification, is that apparently they were not designed to pursue higher levels of health protection: they would have failed even at the rational analysis soft test advocated in the 90’s by the US.

<sup>102</sup> WTO, *EC – Measures Concerning Meat and Meat Products – Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R [194]. *EC – Asbestos*, Report of the Appellate Body (n 44) [178]. See Mavroidis, Bermann and Wu (n 66) 699-700.

test. They are not amenable to the text of art XX GATT, nor are they clearly derived from the reasoning of Panels and AB on the correct way to interpret and apply this provision. In other words, these trends are under the radar, and so are the reasons and the conditions of their operation, the ‘necessity’ standard of review ‘enables the AB to keep maximum adjudicatory flexibility; but it leaves Members uncertain of the legality of their measures’<sup>103</sup> or, to put it more graphically, leaves Members and (judicious) judges ‘wandering in deserts of uncharted discretion.’<sup>104</sup>

Weiler pointed out that the AB in *Korea – Beef* blurted out its genuine take on the WAB (a real proportionality test), only to reassume a moderate (but impenetrable) attitude, later in the same *Korea* report and in following ones.<sup>105</sup> This assumption of discretion, given the AB’s mandate to ‘complete’ the WTO contract, is not pernicious *per se*. After all, it is a matter of jurisdictional allocation, and it might be acceptable that States devolve to the WTO (and to its judiciary) the competence to bring down not only discriminatory measures, but also inefficient measures, as it is normally the case under the TBT and SPS.<sup>106</sup> One can easily draw a comparison between the Apples cases and some of the art XX GATT cases described above. Japan and Australia’s measures to prevent the slightest risk of plant disease were not discriminatory, but were disproportionate in light of the remoteness of the risk. Likewise, think of Korea’s concern for commercial fraud in the meat sector, Dominican

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<sup>103</sup> See Ming Du (n 68) 1096. In Bown and Trachtman’s words: ‘The result ... is so incoherent as to leave states unsure as to what types of measures may withstand scrutiny’ (n 14) 88. Similarly, Kapterian (n 7) 118.

<sup>104</sup> *ExxonShippingCo. v. Baker*, 2008, 128 S.Ct.2605, citing Frankel (1973) ‘Criminal Sentences: Law without order.’ This quote is used in Fontanelli, *Whose Margin* (n 7), to exemplify the main claim of that work, that the margin of action that Members should be afforded has turned into a margin of adjudication in the hands of the judges, through the misuse of the necessity test.

<sup>105</sup> Weiler (n 43) 144. According to Ming Du (n 68) 1101: ‘The AB’s approach is pragmatic in the sense that it both retains de jure regulatory autonomy, but de facto allows balancing scrutiny to root out indefensible, haphazardly set risk levels’.

<sup>106</sup> See Trachtman (n 59) 647: ‘The WTO’s negative integration ‘trade-off devices,’ including national treatment, least-trade restrictive alternative testing and balancing testing, may be understood simply as mandates to judges to exercise discretion in the allocation of jurisdictional authority. [...] they leave much discretion to judges, they may plausibly be understood to orient and constrain judges towards, if not to, an approximation of efficiency. They do so under circumstances where it is difficult to imagine an alternative approach, other than one of positive integration. Positive integration has its own costs.’ For an earlier formulation and a wider discussion of this view, see *Id.*, ‘Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity’ (1998) 9 *EJIL* 32, 82 and *Id.*, ‘Institutional Linkage: Transcending ‘Trade and ...’ – an Institutional Perspective’ (2002) 96 *AJIL* 77.

Republic's apprehension about illegal border transactions, China's alleged interest in monitoring cultural material that could threaten its cultural identity: the implementation of these Values did not necessarily result in discriminatory measures, but their impact on trade was disproportionate, and WTO DSM bodies used an augmented LTRM test to strike them off.

The LTRM test, being narrowly devoted to ensure Pareto optimization,<sup>107</sup> fails to represent an open and flexible test for the evaluation of policies, therefore it is understandable that some deal of reasonableness and good governance<sup>108</sup> finds its way in the reasoning of the Panels and AB.

However, the haphazard accumulation of redundant and wearisome tests related to the necessity requirement of art XX(a) (b) and (d) GATT does not seem the optimal way to ensure that a bit of reasonableness underpins the Reports of the Dispute Settlement Body. As things stand now, Panels and AB are more likely to appear activist rather than reasonable when they soften the LTRM test: maybe it is time to dust the WAB and start embracing, very cautiously, a bit of proportionality *proprement dite*.

In sum, it is fair to note that the mandate of WTO quasi-judicial bodies is such that no real proportionality can control the outcome of a case.<sup>109</sup> This is visible in the truncated WAB (where the first factor is never really weighed), and in the obstinate use of the LTRM. There is some subterranean 'constitutional' trend, traceable in a 'loose' use of the LTRM and the statistical evidence showing that certain values and 'more Values' than the others.

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<sup>107</sup> According to Trachtman, Trade and... (n 106) 72, it can be overbroad and under-inclusive at the same time: '[n]ecessity testing engages in truncated maximization, or truncated comparative cost-benefit analysis, by keeping the regulatory benefit relatively constant and working on the trade detriment side. It thus evaluates a much more limited range of options, ignoring other groups of options that may be superior'.

<sup>108</sup> Lang (n 42) 325.

<sup>109</sup> Nor could the AB perform this constitutional test. See Lang (n 42) 320 ff; P. Van den Bossche (n 42) 283; Jan Neumann and Elisabeth Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law after Korea – Beef, EC – Asbestos and EC – Sardines' (2003) 37 *JWT* 199, 214, 233, and bibliography referred to therein. For a definition of the narrow proportionality test, see Trachtman, Trade and... (n 106) 35, and bibliography referred to therein.