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# The Principle of Proportionality

A comparative study of its application in WTO law and EU law

Kandidatnummer: 639

Leveringsfrist: 25. november 2014

Antall ord: 15 161



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# 1 Introduction

## 1.1 Statement of the problem

Legal principles are used frequently by international courts when interpreting provisions and ruling cases. The principle of proportionality is one of the most important legal principles in this regard. If Courts recognize a general principle of law, the question still remains on how they decide the content and scope of such principles.

## 1.2 Background/rationale for this thesis

The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement which served to regulate international trade. It was signed in 1947 and lasted until The Marrakesh Agreement<sup>1</sup> was signed 15 April 1994 and established the World Trade Organization (WTO). GATT is still in effect under the WTO framework, but it was subject to modifications by GATT 1994.

The organization has 160 members as of 26 June 2014<sup>2</sup>. The WTO works to facilitate trade. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other<sup>3</sup>. Negotiations were a key to the establishment of the WTO and negotiations remain a key to further development of the organization. In a nutshell, the WTO mainly includes agreements on trade with goods, services and intellectual property.

The Treaty of Rome entered into force in 1959 and established the European Economic Community (TEEC)<sup>4</sup>. The Treaty of Lisbon entered into force 1<sup>st</sup> December 2009 and established the European Union, which replaced the European Community (EC). The European Union took over all of the rights and obligations of EC.

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<sup>1</sup> Marrakesh Agreement Establishing the World Trade Organization, April 15 1994

<sup>2</sup> World Trade Organization, *Understanding the WTO: The Organization: Members and Observers* (2014)

<sup>3</sup> World Trade Organization, *Understanding the WTO: Who we are* (2014)

<sup>4</sup> Treaty Establishing the European Economic Community, March 25 1957

Both the WTO and the EU are trade liberalization regimes in the sense that they facilitate international trade.

The principle of proportionality is a “prominent legal principle in many legal orders, and all legal systems have to undertake different forms of balancing, both in determining the content of rules and in their application”.<sup>5</sup> The principle of proportionality has influenced balancing tests in both international and national legal systems.

There is broad consensus that the proportionality principle is part of international law and many national legal systems. However, there has been a debate on whether the principle of proportionality can be considered a general principle of both WTO and EU law.

The main question in this paper is whether proportionality is a general principle of law. I will further look at the application of the principle of proportionality in WTO law and EU law.

Even though there has been some disagreement on whether the principle of proportionality is an overarching principle in WTO law, there is no doubt that proportionality has had some impact on the development of WTO law. This will be further examined in chapter 4. The same can be said in regard to the EU, which will be further examined in chapter 5.

In general, legal provisions focus on the principle of proportionality within the WTO and EU without giving too much attention to its definition or meaning under international law.<sup>6</sup>

Reference to general principles and fundamental freedoms in EU law are connected and not always easy to distinguish.<sup>7</sup> The principle of proportionality is adopted in varying degrees in several international systems/courts, hereunder the WTO, EU and the European Convention on Human Rights.

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<sup>5</sup> Andenæs, Mads and Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*. In: Texas Journal of International Law, Volume 42:371 (2007), p. 371-423 on p. 373

<sup>6</sup> Mitchell, Andrew D., *Legal Principles in WTO Disputes*. 1st ed. Cambridge, 2008. P. 6

<sup>7</sup> Neergaard, Ulla and Ruth Nielsen, *EU ret*. 6. ed. København, 2010.

General principles of law can derive from both treaties, case law, soft law, directives or other sources. The classification of a principle as a general legal principle is not dependent on a special legal source.<sup>8</sup>

### **1.3 Objectives**

The main objective of this thesis is to compare the application of the proportionality principle as defined in chapter 2 in WTO law and EU law. It aims to give an overview over the relevant cases in WTO law and EU law on the proportionality principle and comment on similarities and challenges in the application. National systems can also be said to have adopted the principle of proportionality<sup>9</sup>, but this lies beyond the scope of this thesis.

The aim is not to contribute to the debate on whether proportionality is to be considered a principle of law, but rather to shed some light on some legal provisions and cases where parts of a proportionality act or balancing act is required.

### **1.4 Methodology**

The thesis will present a theoretical perspective on legal principles in general and specifically what the scope and application of the proportionality principle is in WTO law and EU law. In general, however, the thesis will carry a case law approach. A case law approach is necessary if you consider article 3.2 of the DSU, which states that the dispute settlement system of the WTO serves “to clarify the existing provisions...in accordance with customary rules of interpretation of public international law.”<sup>10</sup>

I will give reference to a number of cases under WTO and EU framework to illustrate how the principle of proportionality is applied within these areas of law. The examples of case law are not to be understood as a complete review of cases in WTO law and EU law where the principle of proportionality is given reference. Even though I have tried to use several different cas-

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<sup>8</sup> Neergaard (2010) p. 162

<sup>9</sup> Sweet, Alec Stone and Jud Matthews. Proportionality Balancing and Global Constitutionalism. In: Columbia Journal of Transnational Law, Volume 47 (2008), p. 73-165. P. 1 and 28

<sup>10</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15 1994, Article 3.2

es to shed some light on the application of the principle, there are many others that could be relevant in this regard.

To better understand the principle of proportionality, there will be given a short introduction of the historical perspective of the principle. I believe the best way to examine the thesis is by means of comparing the area of WTO law with EC law, where the principle of proportionality is more widely recognized. This will be done by giving examples of cases where the principle of proportionality is shown. I will comment on the cases and how the principle was used. Thereafter I will try to summarize the differences of the two areas of law.

## **1.5 Structure of the thesis**

Chapter 2 establishes a framework for the proportionality principle, including the historical background, the content and scope of the principle and the rationale for international courts to use legal principles in the adjudication of disputes.

Chapter 3 gives a short explanation of the dispute settlement systems in WTO law and EU law. This is done to facilitate the understanding on how cases develop in the two systems.

The main emphasis of this thesis is on chapter 4, where the use of the proportionality principle within WTO law and EU law is illustrated by a review of the most important legal provisions and relevant case law.

Chapter 5 aims to conclude the findings in the thesis, but also point to some challenges that may arise by allowing Courts to apply the proportionality principle and other legal principles as a basis for their adjudication.

## **2 Understanding the principle of proportionality**

### **2.1 Historical background**

The framework of the proportionality principle can be traced back to German administrative law in the 19<sup>th</sup> century.<sup>11</sup> It was used “as a criterion for determining the validity of police measures, checking whether discretionary powers were exercised in a manner excessively restrictive to the freedom of the private citizen”.<sup>12</sup> Other administrative courts also applied similar techniques of control.

This involved new encroachments on private freedoms that required new constraints on public power and judicial balancing between these two variables. In this manner the rule of law was extended at the same time as property rights were reduced. Subsequently the principle became engrained in national administrative law. More recently among constitutional lawyers proportionality has been hailed as the primary principle that enables constitutional review of state action.<sup>13</sup>

Having put the principle of proportionality very briefly into its historical background, I now move on to defining the content and scope of the principle.

### **2.2 Content and scope of the principle of proportionality**

Once an international court or tribunal has decided to draw upon general principles of law as a source of international law, the question arises as to how it will determine the existence, contents and scope of application of an applicable general principle of law.<sup>14</sup>

Proportionality is commonly referred to as a legal principle. It can also be described as a test or a standard, but its legal character is one of a principle.<sup>15</sup> Proportionality is a prominent le-

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<sup>11</sup> Mitchell (2008) p. 185

<sup>12</sup> Taskovska, Dobrinka, *On Historical and Theoretical Origins of the Proportionality Principle – A contribution towards a prospective comprehensive debate on proportionality*. In: Iustinianus Primus Law Review, Volume 3:1 (2012), pp. 1-11. P. 1

<sup>13</sup> Sauter, Wolf, *Proportionality in EU law: a balancing act?*. TILEC Discussion Paper, DP 2013-003 (2013)

<sup>14</sup> Raimondo, Fabián Omar, *General principles of law in the decisions of international criminal courts and tribunals*. PhD thesis (2007). P. 48



gal principle in many legal orders, and all legal systems have to undertake different forms of balancing, both in determining the content of rules and in their application.<sup>16</sup>

It is difficult to define a general content and scope of the principle of proportionality. One key challenge is that the principle of proportionality may have different meanings within differing legal systems. One should therefore exercise caution about ascribing the same meaning to the concept whenever the word proportionality is to be found in any guise.<sup>17</sup> Neither the EU Treaties nor the WTO Agreement contain explicit reference to the principle of proportionality with regard to reviewing the legality of EU actions or Member State actions.

For the purposes of this thesis I will define the principle of proportionality as it is most commonly defined in the EU legal order. This definition is also applied in WTO law, notably by Jan Jans<sup>18</sup> and more recently by Andenas and Zleptnig<sup>19</sup>. Following this definition, the principle of proportionality consists of three different elements; suitability, necessity and proportionality *stricto sensu*. The assessment of suitability reviews whether a measure is suitable or appropriate to achieve the objective pursued. The assessment of necessity considers whether there exists an alternative measure which is less trade restrictive than the measure at issue. The less trade-restrictive measure must be at least equally effective in achieving the pursued objective. The final step assess whether the effects of a measure are disproportionate or excessive with regard to the involved interests. Andenas and Zleptnig holds with regard to the third element, proportionality *stricto sensu*; “It is at this stage that a true weighing and balancing of competing objectives takes place. The more intense the restriction of a particular interest, the more important the justification for the countervailing objective needs to be.”<sup>20</sup>

The principle of proportionality is sometimes compared to the *Wednesbury* unreasonableness in UK law. However, *Wednesbury* unreasonableness can be said to be far less intrusive and

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<sup>15</sup> Andenæs (2007) p. 378

<sup>16</sup> Andenæs (2007) p. 373

<sup>17</sup> Craig, Paul and Gráinne De Búrca, *EU Law: texts, cases and materials*. 5th ed. Oxford, 2011. P. 526

<sup>18</sup> Jans, Jan H., *Proportionality Revisited*. In: *Legal Issues of Economic Integration* 27:3 (2000), pp. 239–265.p. 240-241

<sup>19</sup> Andenas (2007) p. 388

<sup>20</sup> Andenæs (2007) p. 389

more respectful of governmental discretion.<sup>21</sup> The principle of proportionality prescribes a much more structured approach to regulatory decisions than the Wednesbury doctrine.

The nature of this test and its relation and comparison to EU law will not be examined further.

### **2.3 Purpose of applying legal principles in international law**

There are several reasons as to why Courts choose to apply legal principles. One main reason is that principles may give important guidance in understanding legal provisions. Naturally, this is more relevant where the text of the provision in question is either silent or ambiguous. Legal texts are inherently incomplete and imprecise and this is an underlying problem when interpreting them.<sup>22</sup> Even though principles may give the Courts valuable assistance in interpreting legal provisions, some scholars argue that the use of principles may ultimately involve abandonment of the rule of law.<sup>23</sup> This shows the importance of applying principles in a critical manner.

Another reason may be that courts wish to secure legitimacy for a decision. Harbo argues that courts apply principles of law in their premises in order to rationalize decision making.<sup>24</sup> And that this is done “in an attempt to lend the decision some kind of neutrality, ie to secure that the decision is taken in an objective way, or at least give them the impression thereof.”<sup>25</sup> Such rationalization may make decision making more efficient. This is mainly because courts then can “limit the scope of arguments that they have to consider when solving concrete cases of a particular kind.”<sup>26</sup>

The decision-making can become more consistent and transparent if courts apply principles. However, if the principles are not applied in a coherent manner, this will lead to frustration for the Member States who will not be able to predict how the Court will apply the principle

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<sup>21</sup> Sauter (2013) p. 4

<sup>22</sup> Mitchell (2008) p. 13

<sup>23</sup> Mitchell (2008) p. 22

<sup>24</sup> Harbo, Tor-Inge, *The Function of the Proportionality Principle in EU Law*. In: *European Law Journal*, Volume 16:2 (2010), pp. 158-185. p. 160

<sup>25</sup> Harbo (2010) p. 160

<sup>26</sup> Harbo (2010) p. 161

in the case at issue. Principles may assist in identifying and balancing various interests affected by international trade.<sup>27</sup>

Application of principles may contribute to a flexible system. No one could foresee all the different possible disputes or circumstances that could arise after implementation of the WTO Agreements or the EU Treaties. Furthermore, “drafters may have deliberately left matters open or ambiguous due to an absence of agreement”.<sup>28</sup>

Even though general principles play a key role in interpreting legal provisions, it is not to say that they will automatically prevail over rules. Mitchell argues that WTO Tribunals should inspect a legal principle before using it in order to ensure that: “the principle has sufficient clarity and coherence to be of value; a concrete legal basis exists to validate the use of the principle; and the principle is not being used to contradict the plain meaning of the text of the WTO agreements.”<sup>29</sup> It could be argued that the EU Courts should apply a similar test before applying legal principles in EU law.

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<sup>27</sup> Mitchell (2008) p. 3

<sup>28</sup> Mitchell (2008) p. 15

<sup>29</sup> Mitchell (2008) p. 22

### 3 Dispute settlement

This section aims to give an overview over the dispute settlement systems in the two regimes. The dispute settlement systems have great importance for the effectiveness of provisions and legal principles. In both regimes, a trustee court has been delegated the task of enforcing treaties.<sup>30</sup> The dispute settlement bodies in both regimes have played a key and essential role in adopting the principle of proportionality. Both regimes have dispute settlement bodies that must be considered effective on an international scale.

#### 3.1 WTO

In general, “the WTO agreements provide for many wide-ranging rules concerning international trade”<sup>31</sup>. These rules may have major impact, economic and otherwise. This contributes to conflicting views on the correct interpretation and application by the Member States. Therefore, the WTO has a system to settle such disputes between Member States concerning their rights and obligations under the WTO agreements.

##### 3.1.1 Composition

The WTO dispute settlement system was one of the most significant achievements of the Uruguay Round and is provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Agreement is more commonly referred to as the Dispute Settlement Understanding or DSU. The DSU remedied a number of shortcomings in the former GATT dispute settlement system.

The WTO dispute settlement system aims to “secure a positive solution to a dispute”.<sup>32</sup>In general, Members have limited access to the WTO dispute settlement system. A dispute arises if a Member States believes another Member State has violated an obligation or commitment it has made under the WTO legal framework. Members are required to seek consultations with the other Member or Members which they consider to be concerned before a panel is

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<sup>30</sup> Sweet (2008) p. 46

<sup>31</sup> Bossche, Peter Van den, *The law and policy of the World Trade Organization: Text, cases and materials*. 2nd ed. Cambridge, 2008. p. 169

<sup>32</sup> DSU Article 3.7

established. The panel is an ad hoc body established for the purpose of adjudicating a particular dispute and consequently dissolves once their task is accomplished.<sup>33</sup>

DSU Article 17.1 provides for the establishment of a standing Appellate Body, to whom Members can appeal decisions of a panel. The WTO dispute settlement system is one of very few international dispute settlement mechanisms that provide for appellate review and has an appellate court.<sup>34</sup>

### 3.1.2 Jurisdiction

The WTO dispute settlement system has jurisdiction over any dispute between Members of the WTO if the dispute arises under the covered agreements.<sup>35</sup> The jurisdiction of the WTO dispute settlement system is compulsory, exclusive and contentious. A further clarification of these concepts is; Firstly, a Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system. Secondly, the WTO dispute settlement system excludes any other system, securing exclusivity of the WTO vis-à-vis other international systems and consequently protecting the multilateral system from unilateral conduct.<sup>36</sup> Thirdly, the WTO dispute settlement system may only clarify WTO law in relation to an actual dispute.

### 3.1.3 Source of law

After the WTO Agreement and its Annexes, the dispute settlement reports might be considered the second most important source of WTO law. By dispute settlement reports I refer to the reports of WTO panels and the Appellate Body. Reports of old GATT panels may also be considered as a source of WTO law. The above mentioned dispute settlement reports are in principle only binding on the parties to the particular dispute. However, the Appellate Body noted in *Japan – Alcoholic Beverages II*:

“Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, there-

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<sup>33</sup> Bossche (2008a) p. 209

<sup>34</sup> Bossche (2008a) p. 231

<sup>35</sup> DSU Article 1.1

<sup>36</sup> Bossche (2008a) p. 180-181

fore, should be taken into account where they are relevant to any dispute.”<sup>37</sup> Even though that case regarded prior GATT panel reports, the Appellate Body in *US – Shrimp* concluded that this reasoning also should apply to adopted Appellate Body Reports.<sup>38</sup> Consequently, if the Appellate Body applies the principle of proportionality in one case, it will be relevant in subsequent cases.

## 3.2 EU

The EU develops policy through regulations, directives and decisions. Naturally the system has a mechanism for testing the legality of such measures.

### 3.2.1 Composition

The judiciary powers of the European Union is managed by the Court of Justice of the European Union, hereinafter CJEU. Article 19(1) TEU provides that the CJEU shall include the Court of Justice, the General Court and specialized courts.<sup>39</sup> Further, the CJEU shall “ensure that in the interpretation and application of the Treaties the law is observed”.<sup>40</sup>

The CJEU is composed of one judge per Member State.

The Court of Justice, hereinafter ECJ, is the highest court in the European Union in matters of European Union law. It has a heavy caseload, completing 701 cases in 2013.<sup>41</sup>

### 3.2.2 Jurisdiction

There is a joint responsibility between national courts and the European Union Courts to interpret and maintain EU law. The Court of Justice has an exclusive responsibility to declare EU measures invalid and to provide authoritative interpretations of EU law across the Union,

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<sup>37</sup> WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, Japan – Taxes on Alcoholic Beverages, AB-1996-2.p. 14

<sup>38</sup> WT/DS58/AB/R, United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4.para. 109

<sup>39</sup> Treaty on the Functioning of the European Union, Article 19

<sup>40</sup> Ibid, Article 19

<sup>41</sup> Court of Justice of the European Union, Annual Report 2013 p. 81

whilst national courts have a monopoly over the adjudication of disputes.<sup>42</sup> The General Court has jurisdiction to hear specified action at first instance, unless the actions are brought by Member States, EU institutions or the European Central Bank, in which case the Court of Justice (ECJ) has sole jurisdiction.<sup>43</sup> This follows from Article 51 of the Statute of the Court of Justice of the European Union, hereinafter the Statute.

Decisions from the General Court can be appealed to the ECJ within two months. However, the appeal is limited to questions of law, which includes “lack of competence of the General Court, breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.”<sup>44</sup> There are a number of ways in which EU norms can be challenged, but the principal Treaty provision is article 263 TFEU (Treaty on the Functioning of the European Union). Article 263(1) allows the Court to review the legality of acts, other than recommendations and opinions, taken by the institutions listed in Article 263(1). This clearly covers regulations, decisions, and directives, which are listed in Article 288 TFEU. The ECJ has, however, held that this list is not exhaustive, and that other acts which are sui generis can also be reviewed, provided that they have binding force or produce legal effects<sup>45</sup> The Union Courts have used the heads of review in Article 263 as the framework through which to develop general principles of law, which function as principles of administrative legality, drawing on concepts found within national legal systems. These include fundamental rights, proportionality, legitimate expectations, non-discrimination, transparency, and more recently the precautionary principle.<sup>46</sup>

The EU principles serve a number of functions. They can be used as interpretative guides when construing Treaty provisions and EU legislation. Breach of a general principle of EU law can also serve as the ground for annulling an EU legislative, delegated, or implementing act. Breach of a general principle in the areas covered by EU law may in addition be the rea-

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<sup>42</sup> Chalmers, Damian, Gareth Trevor Davies and Giorgio Monti, *European Union Law: cases and materials*. 2nd ed. Cambridge, 2010. P. 143

<sup>43</sup> [http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU\\_1.3.10.html](http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_1.3.10.html)

<sup>44</sup> The Statute art. 58

<sup>45</sup> Case C-57/95 France v Commission...

<sup>46</sup> Craig (2011) p. 519 ii

son why a national rule is found to be in violation of EU law.<sup>47</sup> Cases (for individuals) are first brought for the national courts. National courts may ask the ECJ for a preliminary ruling on the matter if in doubt of how to interpret the relevant EU provision.

### 3.2.3 General principles

In the name of preserving “the rule of law” the Court has developed principles of a constitutional nature as part of EU law, which bind the EU institutions and Member States when they act within the sphere of EU law.<sup>48</sup> It is the ECJ, as interpreter of the Treaties, which adjudicates on the limits of EU competence as against the Member States.<sup>49</sup>

Article 267 TFEU only gives the Court the power to give rulings on the Treaties and acts of the EU institutions, but the Court has consequently interpreted its power more broadly to include anything which forms part of the EU legal order. This applies even if it is neither a provision of the Treaties nor a piece of secondary legislation, be that international agreements to which the Union has succeeded the Member States or general principles of law and fundamental rights when there was no explicit reference to these in the Treaties.<sup>50</sup>

A judgment given by the Court of Justice binds the referring national court.<sup>51</sup> Even though there aren't meaningful sanctions that could be applied if national courts do not follow rulings, the national compliance is very high.<sup>52</sup> This is natural, as the Member States are part of collaboration on European matters, and it is in their interest to follow the guidelines set by the EU courts. This contributes to a system which is predictable and easily understood.

## 3.3 Special relation between WTO and EU law in dispute settlement

The EU is considered a Member State of the WTO framework. The EU frequently uses the WTO dispute settlement system in order to contribute to the correction of violations of trade

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<sup>47</sup> Craig (2011) p. 519 vi

<sup>48</sup> Craig, Paul and Gráinne De Búrca, *EU Law: texts, cases and materials*. 5th ed. Oxford, 2011. P. 63

<sup>49</sup> Craig (2011) p. 63

<sup>50</sup> Chalmers (2010) p. 160 - 161

<sup>51</sup> Chalmers (2010) p. 169 – with case reference

<sup>52</sup> Chalmers (2010) p. 169



rules. Even though the EU is a WTO Member on its own, the same applies to the 28 Member States of the European Union. They are all WTO Members in their own right. The specific Member States of the European Union might be given reference on their own in the WTO framework if their national laws differ.

## 4 Proportionality in WTO law

This chapter aims to illustrate relevant provisions and cases where the proportionality principle is visible in varying degrees. This chapter also illustrates the different balancing approaches and different wording.

### 4.1 Debating on the principle of proportionality

Whether or not proportionality is part of WTO law has been widely debated. Opinions on the matter vary to a large extent. Denying the existence of proportionality, Desmedt states that “there is no uniform proportionality principle in WTO law”<sup>53</sup>, after reviewing several WTO Agreements in detail. He further clarifies his opinion by stating: “In order for such a principle to apply in the WTO, one should expect Members to negotiate a rule, rather than wait for such a principle to emerge from dispute settlement cases in the WTO.”<sup>54</sup> Opposite, Hilf argues that proportionality could be raised to a level where it is “one of the more basic principles underlying the multilateral trading system”.<sup>55</sup> He further clarifies that even though there is no explicit reference to the proportionality principle in WTO law “the basic idea of proportionality, i.e. the due balancing of competing rights, is reflected several times in WTO Agreements”.<sup>56</sup> Mitchell agrees with Hilf and states that “proportionality is reflected in various aspects of the WTO Agreements and is not simply something that is emerging from the decisions of WTO Tribunals”.<sup>57</sup> Even though the views of Desmedt and Hilf are considered extreme in their respective ways, there are many reviews of the principle of proportionality that lies in between these extreme positions. One example is Andenas and Zleptnig.<sup>58</sup>

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<sup>53</sup> Desmedt (2001) p. 479

<sup>54</sup> Desmedt (2001) p. 480

<sup>55</sup> Hilf (2001) p. 120

<sup>56</sup> Ibid, Hilf p. 120

<sup>57</sup> Mitchell p. 191

<sup>58</sup> Andenas (2007)

## 4.2 Conflicting values and interests

According to the WTO Appellate Body Repertory of Reports and Awards 1995-2010<sup>59</sup>, a principle of proportionality was first recognized by the Appellate Body in *US – Cotton Yarn* where it stated “... the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member.”<sup>60</sup> Although the case was in the context of remedies, this shows that proportionality influences the dispute settlement system of the WTO.

The principle of proportionality and balancing competing interests will be most relevant when trade liberalization conflicts with other societal values and interests. These conflicts are relatively frequent and the WTO framework therefore provides for a set of rules to reconcile trade liberalization with such values and interests. Some of the core societal values and interests are public health, consumer safety, the environment, employment, economic development and national security. Mitchell claims “The correct way to use proportionality as a principle for balancing competing interests in WTO disputes is not to import it as a substantive requirement of WTO law, but rather to apply it in interpreting particular language, such as “necessary” or “least trade restrictive”, in the provisions of the WTO Agreements”.<sup>61</sup> There is a wide range of exceptions that pursue the promotion and protection of other societal values and interests. In general, we distinguish between public policy exceptions and positive obligations. I will first go through the public policy exceptions of GATT article XX and GATS Article XIV in subsections 4.1.3 and 4.1.4 before I move over to the positive obligation in the SPS Agreement and the TBT Agreement in subsections 4.1.6 and 4.1.7.

## 4.3 GATT article XX

GATT article XX allows the member states a general permission to derogate from the provisions of GATT. It is maybe most frequently invoked in relation to the two main principles of non-discrimination, namely Article I on the MFN treatment obligation and Article III on the

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<sup>59</sup> World Trade Organization, *Repertory of Appellate Body Reports: Principles and Concepts of General Public International Law* (2014). P.3.6 Proportionality

<sup>60</sup> WT/DS192/AB/R, *United States – Transnational Safeguard Measure on Combed Cotton Yarn from Pakistan*, AB-2001-3. Para. 119

<sup>61</sup> Mitchell – p. 196

national treatment obligation. The application and scope of these Articles will not be discussed in further detail. GATT Article XX is invoked by a Member State only when a measure of that Member has been found to be inconsistent with any other GATT provision. Unless this is the case, article XX is not relevant. In other words, a Member invokes article XX in order to justify a GATT-inconsistent measure. To date, this provision has already touched upon some of the most sensitive issues of WTO law.<sup>62</sup>

When determining whether a measure otherwise inconsistent with GATT obligations can be provisionally justified, Article XX sets out a two tier test. The Appellate Body clarified the application of this test in *US – Gasoline*:

“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under Article XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.”<sup>63</sup>

Following the steps set out in *US – Gasoline*, for a measure to be justified under Article XX, it must firstly fall under one of the subparagraphs in (a) to (j). Secondly the measure must be in conformity with the chapeau of Article XX. I will first go through the relevant subparagraphs in subsections 4.3.1 to 4.3.4 and then look at the chapeau in subsection 4.3.5.

GATT article XX (a) to (j) set out specific grounds of justification for measures which would otherwise be inconsistent with provisions of the GATT. “These paragraphs reflect a proportionality analysis, because they require an evaluation of the relationship between two competing interest – namely, the objective of trade liberalization and the protection of non-trade interests”.<sup>64</sup> Article XX lists the reasons as to when the general exceptions may be applied. The most important include;

- (a) public morals
- (b) human, animal or plant life or health
- (d) compliance with laws or regulations

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<sup>62</sup> Andenæs/Zleptnig p. 406

<sup>63</sup> WT/DS2/AB/R, United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1. P. 22

<sup>64</sup> Mitchell chapter 6 p. 192

(g) exhaustible natural resources

The other reasons are less frequently invoked and will not be reviewed in this thesis. This is not to say that the principle of proportionality is not relevant in relation to these. Letters (b), (d) and (g) are most frequently invoked, but there is some new case law on letter (a) that I believe can further illustrate the use of balancing acts in WTO.

#### 4.3.1 Article XX (b)

This provision concerns measures that are “necessary to protect human, animal or plant life or health”. It sets out a two-tier test, requiring that a measure is designed for the stated purpose and that the measure is necessary to fulfill that policy objective. This approach was demonstrated by in US – Gasoline<sup>65</sup> and upheld in more recent cases<sup>66</sup>.

The first element does not raise special difficulties in its interpretation. The requirement bears a close resemblance to the first test under the principle of proportionality, namely that the measure must be *suitable*.<sup>67</sup> It is the second element of the test under Article XX(b) that gives rise to the major interpretative problems. The interpretation and application of the necessity requirement has evolved considerably over the years.<sup>68</sup>

In *Thailand – Cigarettes*, the panel ruled that the measure at issue “could be considered to be “necessary” only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ...”.<sup>69</sup> The Panel came up with a number of less-restrictive-on-trade measures Thailand could have taken to achieve their goal and subsequently the measure was not deemed to be necessary. This adoption of the second element of the test as adopted by the Panel in *Thailand - Cigarettes* bears a close resemblance to the second test of proportionality, namely necessity.<sup>70</sup>

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<sup>65</sup> Panel report US – Gasoline para. 6.20

<sup>66</sup> See for example EC – Tariff Preferences

<sup>67</sup> Bossche3 p. 287

<sup>68</sup> Bossche2 p. 556

<sup>69</sup> GATT Panel Report, Thailand – Cigarettes para. 75

<sup>70</sup> Bossche 3 p. 287

The above mentioned approach and the case law of Article XX(b) “underwent a major change” in early 2001.<sup>71</sup> The Appellate Body noted in *EC – Asbestos* regarding the necessity requirement:

“one aspect of the ‘weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure’ is reasonably available is the extent to which the alternative measure ‘contributes to the realization of the end pursued’”.<sup>72</sup> The Appellate Body was here referring to its ruling in *Korea – Various Measures on Beef*, which will be discussed in relation to Article XX(d).

In *EC – Asbestos*, the Appellate Body also put forward a new requirement, different to the one in *Thailand – Cigarettes* by stating:

“The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition”.<sup>73</sup>

It is also important to note that Member States have the right to choose their level of protection. This means that a “challenge of the necessity of a measure under Article XX is therefore limited to arguing that the measure at issue is not necessary to achieve that level of protection”.<sup>74</sup>

In the more recent case, *Brazil – Retreaded Tyres*, the Appellate Body seems to confirm previous case law regarding the necessity requirement by stating:

“We begin our analysis by recalling that, in order to determine whether a measure is “necessary” within the meaning of Article XX (b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This com-

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<sup>71</sup> Bossche 3 p. 288

<sup>72</sup> *EC – Asbestos* para. 172

<sup>73</sup> *EC – Asbestos* para. 172

<sup>74</sup> Bossche (2008b) p. 290

parison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.”<sup>75</sup>

However, the Appellate Body further noted:

“...the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban.”<sup>76</sup>

Bossche points out that the Appellate Body seems to “introduce a proportionality *stricto sensu* assessment”<sup>77</sup>. However, he concludes by stating “I doubt whether this was what the Appellate Body in *Brazil – Retreaded Tyres* intended but future case law will have to clarify this issue.”<sup>78</sup>

A more recent case is *China – Raw Materials*. The Panel concluded that China had not demonstrated that the export restrictions at issue were “necessary” within the meaning of Article XX(b). This decision was not appealed by China. The Appellate Body follows the same procedure as above, but has not clarified whether a proportionality *stricto sensu* assessment is applied in relation to Article XX(b).

#### 4.3.2 Article XX (d)

Article XX(d) concerns measures that are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ...”<sup>79</sup> As with Article XX(b), Article XX(d) also sets out a two-tier test to determine whether the measure at issue can be provisionally justified. With regard to the first element, the Appellate Body held in *Korea - Various Measures on Beef*:

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<sup>75</sup> *Brazil – Retreaded Tyres* para. 178

<sup>76</sup> Appellate Body Report, *Brazil – Retreaded Tyres* para. 210

<sup>77</sup> Bossche 3 p. 294

<sup>78</sup> *Ibid* Bossche 3 p. 294

<sup>79</sup> GATT Article XX (d)

“the measure must be one designed to ‘secure compliance’ with laws or regulations”.<sup>80</sup> It must be clear that the requirement that a measure must be “designed” to secure compliance with laws or regulation is similar to the test of the first element of the test under Article XX(b). It similarly bears close resemblance to the first step of proportionality, *suitability*.

Regarding the necessity requirement, the Panel in *US – Section 337*<sup>81</sup> applied the least restrictive test which was mentioned above in relation to Article XX(b) in *Thailand – Cigarettes*.

The necessity requirement in Article XX(d) as interpreted and clarified by the Appellate Body in *Korea – Various Measures on Beef* has been applied by several Panels since.<sup>82</sup> “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>83</sup> This shows that there is a process weighing and balancing in order to determine if a measure is necessary within the meaning of Article XX(d). Bossche notes that the “weighing and balancing provided for by the Appellate Body in *Korea – Various Measures on Beef* does not take place after the necessity of the measure at issue has been established (...) but during the examination of the necessity of the measure.”<sup>84</sup> Therefore, even though the weighing and balancing of the factors seem to bear some resemblance with the proportionality *stricto sensu* test, it cannot be considered a manifestation of such a test.

The balancing to evaluate if a measure is necessary “is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could “reasona-

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<sup>80</sup> *Korea – Various Measures on Beef* para. 157

<sup>81</sup> See para. 5.26

<sup>82</sup> See *Canada – Wheat Exports and Grain Imports* (2004), *Dominican Republic – Import and Sale of Cigarettes* (2005), *EC – Trademarks and Geographical Indications* (2005).

<sup>83</sup> *Korea – Beef* para. 164

<sup>84</sup> Bossche<sup>3</sup> p. 289



bly be expected to employ” is available, or whether a less WTO-inconsistent measure is “reasonably available”.<sup>85</sup>

*China – Raw Materials* is an example of recent case law regarding the necessity requirement of article XX (d) and (b). The panel concluded that China had not demonstrated that the export restrictions at issue were necessary within the meaning of Article XX (d). This finding was not appealed by China to the Appellate Body.

#### 4.3.3 Article XX (g)

Article XX (g) concerns measures relating to the conservation of exhaustible natural resources. The provision is together with Article XX (b) seen to have fundamental importance because it departs from core GATT rules on environmental protection purposes.<sup>86</sup> For a measure to be justified under Article XX (g) it must fulfill a three-tier test, focusing on firstly, conservation of exhaustible natural resources. Secondly, the requirement that the measure is relating to the first requirement. This is the test that is interesting in a balancing perspective. And thirdly that it be made effective in conjunction with restrictions on domestic production or consumption.

The GATT Panel in *Canada – Herring and Salmon* observed that “Article XX (g) does not state how the trade measures are to be related to the conservation...”. This consequently raised the question on whether any relationship would be sufficient or if a particular relationship was required. The Panel concluded that measures did not have to be necessary or essential to the conservation of an exhaustible natural resource, but it had to be primarily aimed at this objective to be considered as “relating to” conservation within the meaning of Article XX (g). This assessment was further upheld in *US – Gasoline*. Andenæs: clarified to require at last a substantial relationship.<sup>87</sup>

The Appellate Body in *US – Shrimp* clarified its understanding of “relating to” the conservation of exhaustible natural resources to require a “close and real relationship” between the

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<sup>85</sup> Korea – Beef para. 166

<sup>86</sup> Bossche p. 634

<sup>87</sup> Andenæs/Zleptnig p. 409

measure and the policy objective. A measure may not be disproportionately wide in its scope or reach in relation to the policy objective pursued.<sup>88</sup>

In *China – Raw Materials*, the Appellate Body referred to its report in *US – Shrimp* and noted: “In order to fall within the ambit of subparagraph (g) of Article XX, a measure must “relate to the conservation of exhaustible natural resources”. The term “relate to” is defined as “having some connection with, being connected to”. The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be “a close and genuine relationship of ends and means”.<sup>89</sup>

It is easier for a measure to be justified following the related to test rather than the necessity test under XX (b) or (d).

#### 4.3.4 Article XX (a)

There is limited WTO case law regarding this provision. Article XX (a) was interpreted and applied by the Panel in *China – Publications and Audiovisual Products*. The case concerned restrictions on trading and distribution of publications and audiovisual products in China. China invoked Article XX (a) to justify otherwise GATT-inconsistent restrictions on trading and distribution of publications and audiovisual products. China’s core argument was that the restrictions could be justified under Article XX (a) because “the system of selecting importation entities undertaking content review is, as a whole, necessary to protect public morals”.<sup>90</sup> The Appellate Body upheld the Panel’s findings that the measures at issue were not necessary to protect public morals.<sup>91</sup>

The examination of the necessity requirement was very much in line with WTO case law on the necessity requirement of Article XX (b) and (d). The same review and comments of the proportionality test on suitability and necessity can be said to apply to this provision.

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<sup>88</sup> Bossche p. 637

<sup>89</sup> *China – Raw Materials* para. 355 (legg inn firkant-parenteser slik som i AB report)

<sup>90</sup> Panel report, *China – Publications and Audiovisual Products*, para. 7.727.

<sup>91</sup> Appellate Body Report para. 336-7.

#### 4.3.5 Chapeau of Article XX

If the measure at question can be justified of one of the subsections in article XX (a) to (j), it must further be examined whether it satisfies the requirement of the chapeau of article XX. This is referred to above as the two-tier test of Article XX<sup>92</sup> and determines whether a measure, “in its concrete application, is lawful under Article XX as a whole”<sup>93</sup>. The two-tiered way of determining whether a measure can be justified under was a result of the provision’s fundamental and logical structure.<sup>94</sup>

The chapeau reads:

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

In short, the object and purpose of the chapeau of Article XX is to avoid that provisionally justified measures are applied in such a way as would constitute a misuse or an abuse of the exceptions of Article XX.<sup>95</sup> In *US – Shrimp* the Appellate Body stated that the Chapeau “embodies the recognition on the part of the WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX ... on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.”<sup>96</sup> According to the Appellate Body, there must be balance between the right of a Member to invoke an exception under Article XX and the substantive rights of the other Members under the GATT 1994. In *US – Shrimp*, the Appellate Body held:

“In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate avail-

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<sup>92</sup> See section 4.3

<sup>93</sup> Andenas (2007) p. 410

<sup>94</sup> *US – Shrimp* para. 119

<sup>95</sup> Bossche p. 642, *Brazil – Retreaded Tyres* para. 215.

<sup>96</sup> *US – Shrimp* para. 156

ability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau”.<sup>97</sup>

It further held:

“The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations construed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measure at stake vary and as the facts making up specific cases differ”.<sup>98</sup>

Bossche claims the interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests and the right of other Members to trade.<sup>99</sup> This can be seen as an expression of a balancing act in the WTO framework. In searching for the balance, one must consider the requirements set out in the chapeau that the application of such a measure may not constitute either “arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Following this, the chapeau does not prohibit all kinds of discrimination. The decisive factor is whether the discrimination can be considered arbitrary or unjustifiable. The chapeau is a balancing process which will ultimately determine whether a discriminatory measure is arbitrary or unjustifiable, or constitutes a disguised restriction on international trade.”<sup>100</sup>

Mitchell argues that “the chapeau of Article XX can also be seen as embodying elements of a proportionality analysis, although the language used is less clearly linked to the general principle of proportionality”.<sup>101</sup>

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<sup>97</sup> US – Shrimp para. 157.

<sup>98</sup> US – Shrimp para. 159

<sup>99</sup> Bossche p. 642

<sup>100</sup> Andenæs/Zleptnig p 411.

<sup>101</sup> Mitchell chapter 6 p. 192

#### 4.3.5.1 *Arbitrary or unjustifiable discrimination*

In *US – Shrimp*, The Appellate Body found that three elements must exist for “arbitrary or unjustifiable discrimination” to be established. Firstly, the measure at issue must result in discrimination. Secondly, such discrimination must be arbitrary or unjustifiable. Thirdly, the arbitrary or unjustifiable discrimination must occur between countries where the same conditions prevail.<sup>102</sup>

#### 4.3.5.2 *Disguised Restriction on International Trade*

The Appellate Body stated in *US – Gasoline*:

“Arbitrary discrimination, unjustifiable discrimination and disguised restriction on international trade may, accordingly, be read side-by-side; they impart meaning to one another.”<sup>103</sup>

There is a close relationship between disguised restriction on international trade and arbitrary or unjustifiable discrimination. This is illustrated in *US – Gasoline*:

“the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination”, may also be taken into account in determining the presence of a “disguised restriction” on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”<sup>104</sup>

### 4.4 **GATS article XIV**

Similar to the GATT article XX, the General Agreement on Trade in Services (GATS) Article XIV, provides for a general exceptions provision. This allows Members to deviate from obligations and commitments under the GATS if certain conditions are met. Even though GATT Article XX and GATS article XIV are somewhat alike, there are also important differences. A big difference is the difference in justifications reasons in the two provisions. Nevertheless, “Article XX of the GATT and its jurisprudence provide us with a basis to interpret Article XIV of the GATS”.<sup>105</sup>

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<sup>102</sup> *US – Shrimp* para. 150

<sup>103</sup> *US - Gasoline*

<sup>104</sup> *US – Gasoline* p. 25

<sup>105</sup> *Bossche* p. 653

#### 4.4.1 Article XIV(a)

In *US – Gambling*, the Appellate Body reviewed whether a US prohibition on internet gambling could be justified under Article XIV(a) which states that a measure must be “necessary to protect public morals or to maintain public order. The Appellate Body held:

“Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994.” Further:

“Similar language is used in both provisions, notably the term “necessary” and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS”.<sup>106</sup>

Since the test is similar under GATS Article XIV and GATT Article XX, I will not comment further on the balancing test under this sub-paragraph.

#### 4.5 Common elements of GATT Article XX and GATS Article XIV

The specified paragraphs of Article XX use different standards, for example “necessary and “relating to”. The Appellate Body in *US – Gasoline* stated with regard to the different terms used in Article XX:

“In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories. ... It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind of degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”<sup>107</sup>

This shows that each measure must be considered in relation to the provision at issue.

The debate on proportionality in WTO law changed significantly in 2001 as a result of the Reports of the Appellate Body in *Korea – Various Measures on Beef* and *EC – Asbestos* and

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<sup>106</sup> Appellate Body Report, *US – Gambling*, para. 291.

<sup>107</sup> *US – Gasoline* p. 17-18

more recently, changed again, as a result of the Reports of the Appellate Body in *US - Gambling* and *Brazil – Retreaded Tyres*. The precise implications of this evolving case law for the principle of proportionality are, however, not necessarily clear and certainly not beyond discussion.<sup>108</sup>

In general, it is easier for a measure to fulfill the relating to requirement of Article XX(g) than the necessity requirement of Article XX(b) or (d).

#### **4.6 TBT Agreement**

The Agreement on Technical Barriers to Trade (TBT Agreement) and the GATT 1994 are not mutually exclusive. The Panel in the *EC – Asbestos* case clearly states that both could be examined if they both appear to apply to a given measure in a case.<sup>109</sup> The Panel clarified that it should firstly be examined whether the measure is consistent with the TBT Agreement. This is due to that the TBT Agreement deals specifically and in detail with technical barriers to trade. If the measure is found to be consistent with the TBT Agreement, the Panel stated that it must still examine whether the measure is also consistent with the GATT 1994. This approach has been upheld by Panels and the Appellate Body since.<sup>110</sup> This is also clear from the General Interpretative Note to Annex 1A of the WTO Agreement, which clearly states that the TBT Agreement would prevail.<sup>111</sup>

The analysis in this section focuses on Article 2.2. Mitchell claims the TBT Agreement gives WTO Tribunals the greatest scope to use the general principle of proportionality.<sup>112</sup> This is due to Article 2.2, which requires WTO Tribunals to scrutinize whether a Member's objective is legitimate and also whether the chosen measure is suitable and necessary to achieve the objective.<sup>113</sup> Article 2.2 of the TBT Agreement reads:

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<sup>108</sup> Bossche3 p. 283

<sup>109</sup> Pnel Report *EC – Asbestos* para. 8.16

<sup>110</sup> See AB Report *EC – Bananas III*, para. 204, Panel Report *EC – Sardines*

<sup>111</sup> Trenger fotnote

<sup>112</sup> Mitchell p. 202

<sup>113</sup> Mitchell p. 202

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”. Further: “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create”. It must be clear from the text of Article 2.2, it is not the measure, but the trade-restrictiveness of the measure which is assessed for necessity.<sup>114</sup> Legitimate objectives that may justify the creation of a trade obstacle in the form of a technical regulation are listed in article 2.2 and include:

- National security
- The prevention of deceptive practices
- The protection of human health and safety, animal or plant life or health
- The protection of the environment

It should be noted that this list is not exhaustive as indicated by the words *inter alia* in the introduction of the list. It will be up to panels and the Appellate Body to assess whether policy objectives other than those listed, such as animal welfare or fair labor practices, are, in a particular case, legitimate policy objectives within the meaning of article 2.2.<sup>115</sup>

Even though a measure is justified under article 2.2 as necessary to fulfil a legitimate policy objective, it may not remain justified in the future. Article 2.3 calls for a continuous valuation of whether the measure can be justified under article 2.2: “Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner”. Bossche says this could be seen as an “elaboration” of the necessity test of article 2.2.<sup>116</sup>

*US - COOL*<sup>117</sup> - The Panel found that the US measure requiring mandatory country of origin labeling was inconsistent with Articles 2.1 and 2.2. The Appellate Body reversed the Panel’s finding that the COOL measure violates Article 2.2. The Appellate Body found that Article 2.2 does not impose a minimum threshold level at which the measure must fulfil its legitimate objective.

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<sup>114</sup> Appellate Body Report, *US – Tuna II (Mexico)*, 2012, para. 319

<sup>115</sup> Bossche (2008a) p. 819

<sup>116</sup> Van de Bossche p. 819 – sjekk hans henvisning til et annet sted.

<sup>117</sup> *United States – Certain country of origin labeling requirements*, DS386, DS384



“To date, there is no case law on the assessment of necessity under the TBT Agreement.”<sup>118</sup> However, in line with case law on the assessment of necessity under Article XX(b) and (d) of the GATT 1994, it is to be expected that the assessment of necessity under the TBT Agreement will also involve a process of weighing and balancing the above-mentioned and other factors and elements.

## 4.7 SPS Agreement

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) “applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade”.<sup>119</sup> SPS measures often take the form of technical barriers to trade<sup>120</sup>, but are subject to a different set of WTO rules.<sup>121</sup> SPS measures are frequently adopted to protect humans, plants or animals in their territories from food-safety risks or risks from pests or diseases.<sup>122</sup> Bossche claims that “the rules contained in the SPS Agreement reflect an attempt to balance the sometimes conflicting interests of the protection of health against SPS risks and the liberalization of trade in food and agricultural products”.<sup>123</sup> The basic principles of the SPS Agreement “reflect the underlying aim of balancing the need to increase market access for food and agricultural products, on the one hand, with the recognition of the sovereign right of governments to take measures to protect human, animal and plant life and health in their territories, on the other. These basic principles and their connection to the principle of proportionality will be reviewed below.

### 4.7.1 Article 2.2 and 5.6

Article 2.1 expressly recognizes that Members can take SPS measures. However, Article 2.2 limits this right by the requirement that: “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or

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<sup>118</sup> Bossche (2008a) p. 820

<sup>119</sup> SPS Agreement article 1

<sup>120</sup> See above, subsection 4.1.6?

<sup>121</sup> Bossche (2008a) p. 832, 839-40

<sup>122</sup> Bossche (2008a) p. 832

<sup>123</sup> Bossche (2008a) p. 833

plant life or death”<sup>124</sup>. The necessity requirement in Article 2.2 has not yet been subject to interpretation in dispute settlement. As this requirement is made more specific in other provisions of the SPS Agreement, Members prefer to challenge SPS measures under these more specific provisions (ex. Article 5.6).<sup>125</sup> It is similar to the necessity requirement in GATT Article XX(b) and (d). If it is invoked, it is natural to assume that the interpretation of these provisions will play a key role in interpreting the necessity requirement of Article 2.2 of the SPS Agreement. There has however, been cases regarding the requirement of scientific evidence under Article 2.2.<sup>126</sup>

Article 5.6 refines the necessary-obligation set out in article 2.2.<sup>127</sup> It requires Members to ensure that SPS measures “*are not more trade-restrictive than required to achieve their appropriate level of ... protection, taking into account technical and economic feasibility*”.<sup>128</sup> Footnote 3 of the SPS Agreement further elaborates on the requirement set out in article 5.6. It provides: “*a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade*”. This clearly mirrors the necessity test of EU law, which requires that the least restrictive means be used.<sup>129</sup>

The Appellate Body in Japan – Apples<sup>130</sup> acknowledged the relevance of the proportionality principle in relation to Article 2.2 and Footnote 3. The Appellate Body upheld the Panel’s findings that “a measure is maintained “without sufficient scientific evidence” within the meaning of Article 2.2 of the SPS Agreement if there is no “rational or objective relationship” between the measure and the relevant scientific evidence. Given the negligible risk identified

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<sup>124</sup> SPS Agreement Article 2.2

<sup>125</sup> Bossche (2008a) p. 843

<sup>126</sup> See *Japan – Apples, US – Poultry*

<sup>127</sup> Andenæs/Zleptnig p. 415

<sup>128</sup> SPS article 5.6

<sup>129</sup> Mitchell p. 200

<sup>130</sup> DS245, Japan – Measures affecting the importation of apples

on the basis of the scientific evidence and the nature of the elements composing the measure, the Panel concluded that Japan's measure is "clearly disproportionate" to that risk".<sup>131</sup>

*US - Poultry*<sup>132</sup> - The measure was found inconsistent with Article 2.2 because it was maintained without sufficient scientific evidence. The Panel's report was adopted by the DSB. There was not an appeal to the Appellate Body. Since the measure was not justified under the SPS Agreement, it was also found to be inconsistent with Article XX (b) of the GATT. This demonstrates the relationship between the SPS Agreement and the GATT.

*US – Salmon* - Application of the necessity test, relying on Footnote 3. The Appellate Body held: "the footnote to this provision clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

- (1) is reasonably available taking into account technical and economic feasibility;
- (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
- (3) is significantly less trade restrictive to trade than the SPS measure contested."<sup>133</sup>

#### **4.8 Conclusions on the positive obligations**

In general, "the SPS and TBT Agreements lay down positive normative standards for trade restrictive measures that go beyond the principle of non-discrimination and also apply to non-discriminatory domestic regulation".<sup>134</sup>

In both the TBT and the SPS Agreement domestic measures must pursue an accepted public policy objective. Further on, the measure must be no more trade-restrictive than necessary. Andenæs holds that "this determination is governed and influenced by a balancing and weighing process aiming to ensure that the obstacles to international trade are not disproportionate or excessive to the objectives pursued by the Members".<sup>135</sup>

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<sup>131</sup> Appellate Body report, Japan – Apples, para. 147

<sup>132</sup> DS392, United States – Certain Measures Affecting Imports of Poultry from China

<sup>133</sup> Appellate Body report, Australia – Salmon para 194

<sup>134</sup> Andenæs (2007) p. 420

<sup>135</sup> Ibid

## **5 Proportionality in EU law**

In the previous chapter I assessed how the principle of proportionality has been applied in WTO law. This chapter gives a review of the application of the principle of proportionality in EU law, mainly by referring to relevant case law.

### **5.1 Article 5 TEU**

The principle of proportionality is recognized in Article 5 TEU which states in paragraph 1 that: “The use of Union competences is governed by the principles of subsidiarity and proportionality”. Further, in paragraph 4: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. Before moving on to the principle of proportionality as developed by the ECJ, I find reason to comment on article 5 TEU and the proportionality protocol.

Article 5 TEU should not be considered as a codification of case law mentioned below in section... It should rather be seen “as the addition of a procedural test in the legislative context”.<sup>136</sup> It can further be argued that “its likely impact appears limited or at least secondary to that of the principle of subsidiarity”. This understanding is supported by Protocol no. 2 to the EC Treaty which deals with the application of the principles of subsidiarity and proportionality.

Following the aim and objective of this thesis, it is not necessary to further elaborate on Article 5 TEU. I therefore move on to the application of the principle of proportionality by the ECJ.

### **5.2 Disparate views**

There are disparate views on the application of the principle of proportionality in EU law. In one end, Harbo argues that the principle of proportionality “has no clear or fixed substantial meaning”.<sup>137</sup> He further questions “whether the court, although claiming to do so, is really

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<sup>136</sup> Sauter – Proportionality in EU law: a balancing act? P. 8

<sup>137</sup> Harbo p. 160

applying the principle of proportionality in the first place”.<sup>138</sup> Another extreme is Schwarze, who claims that the principle of proportionality is the most important general principle of EU economic law. Other views lie between these extreme opinions, holding that the principle of proportionality is a principle of EU law, but that its application is varied.<sup>139</sup>

### 5.3 Proportionality test

In any proportionality inquiry the relevant interests must be identified, and there will be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation.<sup>140</sup> The ECJ has developed a rich body of jurisprudence on general principles of law, hereunder the principle of proportionality.<sup>141</sup> The meaning of the word “general” refers according to Emiliou to the fact that the respective principle of law is inherent in a series of infinite applications of the law.<sup>142</sup> It can also be argued that the principle should have some universal meaning. This might be illustrated by the fact that the general principle is also present in other national or international systems of law.<sup>143</sup> Together with supremacy, direct effect and state liability, proportionality is one of the core general principles of EU law. However, the former three principles were derived from the EU legal order itself whereas in the EU, context proportionality has been derived from the laws of the Member States.<sup>144</sup> There is no doubt that the European Union recognizes general principles in the Unions’ law. Take for example TEU Article 6 paragraph 3 that reads: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” This clearly shows that the EU recognizes fundamental rights as guaranteed by the ECHR<sup>145</sup> as general principles of the Union’s law. The principle was first adopted by the Court, and was later codified into Article 6

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<sup>138</sup> Harbo p. 171

<sup>139</sup> See Sauter, Craig

<sup>140</sup> Craig (2011) p. 526

<sup>141</sup> Craig (2011) p. 525

<sup>142</sup> Emiliou, The principle of proportionality in european law: a comparative study, Kluwer, 1996, p. 115 – Harbo p. 159

<sup>143</sup> Harbo p. 159

<sup>144</sup> Sauter p. 4

<sup>145</sup> European Convention on Human Rights

TEU.<sup>146</sup> Another example of a principle that was developed and adopted over time by the Court is the principle of gender equality and prohibition against gender discrimination. Today, it is codified in the Charter of Fundamental Rights of the European Union.

General principles must be respected both internally in EU institutions, but also by the Member States' national law within the EU area. National law regarding areas of law outside the EU context does naturally not have to comply with general principles recognized in EU law, unless of course, the same principle is recognized under national law. De Burca claims the Court of Justice has applied the proportionality principle in a wide spectrum of ways, ranging from a very deferential approach, to quite a rigorous and searching examination of the justification for a measure which has been challenged.<sup>147</sup>

The *Internationale Handelsgesellschaft*<sup>148</sup> case is often mentioned as the starting point of the proportionality principle in EU law.<sup>149</sup> The Court held:

“It therefore appears that the requirement of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals. The principle of the system of deposits cannot therefore be disputed”<sup>150</sup>

Even though there is no explicit reference to the principle of proportionality, the relevance of the case is undisputed. In the same case it was also confirmed that fundamental rights were to be considered principles of EU law when the Court stated:

“In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”<sup>151</sup>

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<sup>146</sup> Neergaard/Nielsen p. 164-5

<sup>147</sup> 1993 13 YBEL 105, 111-11, Burca p. 526

<sup>148</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 1970

<sup>149</sup> Sweet p. 47, Mitchell?, Neergaard/Nielsen?, Sauter, Harbo

<sup>150</sup> *Internationale Handelsgesellschaft* para. 12-13

<sup>151</sup> *Internationale Handelsgesellschaft* para. 4

As mentioned in chapter two, subsection 2.2, the proportionality test for the EU level consists of three elements, suitability, necessity and proportionality in stricto sensu. All three steps must be fulfilled in order for a measure to be proportionate. In other words, the three elements of the test are cumulative.<sup>152</sup> If one step fail to be fulfilled, it is not possible for the other elements to be fulfilled. The ECJ starts with the first requirement. Due to the cumulative nature of the test, the ECJ less often reaches the final requirement, proportionality stricto sensu.

The steps mentioned above were set out clearly in *Fedesa*<sup>153</sup> (1990), regarding a European directive which prohibited the use of certain hormonal substances in livestock farming.

“The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>154</sup> “Whereas in the suitability and necessity test there are clear traces of some guideline according to which the courts make the assessment, it is (even) more difficult to determine the exact content of the stricto sensu test.”<sup>155</sup>

Proportionality can be used to challenge EU actions and Member State actions that fall within the sphere of EU law.<sup>156</sup> The former will be examined in subsection 5.5 and the latter in subsection 5.6. In general, “different considerations tend to apply in these two spheres”<sup>157</sup>, which will be illustrated below. The nature of the proportionality test involved differs significantly, with the EU usually being subject to a manifestly disproportionate test and the Member States to (modified versions of) a least restrictive means test.<sup>158</sup> Both with regard to the EU and re-

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<sup>152</sup> Mitchell chapter 6 p. 188

<sup>153</sup> Case C-331/48 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, ex parte: *Fedesa et al.* See **Sauter note 39**.

<sup>154</sup> *Fedesa*

<sup>155</sup> *Harbo* p. 165

<sup>156</sup> *Craig* (2011) p. 526

<sup>157</sup> *Craig Proportionality I* p.2

<sup>158</sup> *Sauter* p. 6

garding the Member States the degree to which the relevant policies have been centralized plays a role in determining the standard of review. An example is where the Member States invoke national public policy exceptions to principles of EU law such as the market freedoms. The degree to which this is possible depends inter alia on the degree of harmonization that has been achieved. Likewise the strictness of the test to which EU measures are subjected depends in part on whether common policies are involved.<sup>159</sup>

## 5.4 Review of acts from the EU institutions

The principle of proportionality is essential in reviewing legal acts from EU institutions. Craig highlights three categories of cases in which the principle of proportionality has been applied to acts from EU institutions, namely “cases involving discretionary policy choices, whether societal, political or economic in nature; cases concerned with the infringement of a right recognized by EU law; and cases involving a disproportionate penalty or financial burden.”<sup>160</sup> The first two categories will be used to go through some of the most relevant case law in relation to the proportionality principle when reviewing acts of the EU institutions. The latter category will not be examined in further detail.

### 5.4.1 Discretionary policy choices

Under this type of case, proportionality is used to challenge a discretionary policy choice made by the administration. The guiding principle was developed in *British American Tobacco*<sup>161</sup>: “Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”.<sup>162</sup> In other words, the measure of review will be deemed appropriate whenever the EU legislature exercises a broad discretion involving political, economic, or social choices requiring it to make complex assessments.<sup>163</sup>

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<sup>159</sup> Sauter p. 7

<sup>160</sup> Craig, Proportionality I p. 2.

<sup>161</sup> Case C-491/01 R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, 2002

<sup>162</sup> Case C491/01 para. 123

<sup>163</sup> Craig B chapter I p. 4



Several cases where proportionality is challenged have arisen in relation to measures adopted under the Common Agricultural Policy (CAP). One example is *Fedesa*<sup>164</sup> where the Council adopted a directive which prohibited the use of certain hormones in livestock farming. The applicants argued that the directive infringed on the principle of proportionality and subsequently challenged the validity of national legislation that implemented the directive. The applicants argued both that the measure was not suitable and that it was not necessary for the pursued objective. Given a choice between several appropriate measures, the ECJ continued: “However with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by ... the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”.<sup>165</sup> The reasoning in *Fedesa* has been applied in several other cases.

#### 5.4.2 Rights recognized by EU law

These claims are made on the basis of rights enshrined in the Treaties or EU legislation. Craig holds that “the ECJ will tend to construe limits to such rights strictly, with the consequence that there will be a searching inquiry into the suitability and necessity elements of proportionality”.<sup>166</sup> This is exemplified by *Hautala*.<sup>167</sup> In this case, *Hautala* wanted access to a report on conventional arms export from the Council. The Council denied her access and she therefore brought the case in for the Court of First Instance (now, the General Court). The court annulled the Council’s decision to refuse her access to the document because the Council had failed to consider the possibility of partial access to the report. Ruling from CFI:

“The exceptions provided for in Article 4(1) of Decision 93/731 on public access to Council documents must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that, before refusing access to a document uncondition-

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<sup>164</sup> Case *Fedesa* footnote

<sup>165</sup> *Fedesa* 14

<sup>166</sup> Craig b chapter I p. 13

<sup>167</sup> Case C-353/99P, *Council v Hautala*, 6 December 2001, unreported

ally, the Council is obliged to examine whether partial access should be granted, that is to say, access to the information not covered by the exceptions”.

Further, “Secondly, as regards the principle of proportionality, the aim of protecting the public interest with regard to international relations may be achieved even if the Council does no more than remove, after examination, the passages in the contested report which might harm international relations”. The case was appealed to the ECJ, which upheld the ruling from the Court of First Instance and clarified the role of the proportionality principle. The ECJ held: “The principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.” Further: “In the absence of any reason to show why an institution should be able to keep secret the items of information in a document which are not covered by the exceptions laid down in Article 4(1) of Decision 97/731, a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions. The aim pursued by the Council in refusing access to the contested report could be achieved even if the Council did no more than remove, after examination, the passages in the report which might harm international relations”. This clearly shows that the ECJ meant that the CFI’s application of the proportionality principle could be justified.

In *Hauer*<sup>168</sup> the applicant challenged a Community Regulation that limited the planting of new vines. The case concerned a Community administrative measure which infringed on the right to property. This illustrates the connection between common policies, proportionality and rights. Although the idea of “common constitutional traditions” as a foundation for the general principles of EU law is an attractive one in principle, it is unquestionably true that the differences between specific national conceptions of particular human rights are often great. Thus, even if the ECJ accepts the argument of a particular party that a given right should be recognized as part of EU law, the way in which the Court determines the legal scope of that right and the permissible restrictions upon it in the context of the case at hand may well differ from the way it would be applied in a national context, as seen in *Hauer* and *Internationale Handelsgesellschaft*.<sup>169</sup>

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<sup>168</sup> Case 44/79 *Hauer v Land Rheinland-Pfalz*, 1979 ECR3727

<sup>169</sup> Craig (2011) p. 371

In *Kadi*, The applicant argued that the Regulation constituted a disproportionate infringement of his property rights. The ECJ reiterated its normal approach and held that property rights were not absolute and hence could be restricted, provided that the restrictions corresponded to objectives of Community public interest and did not constitute a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.<sup>170</sup>

This case might be considered to be in contrast with *Hauer*.

## 5.5 Review of measures taken by Member States

If EU courts find that a Member State action infringes one of the four freedoms concerning goods, workers, establishment, and the provision of service and capital, the Member State must try to justify the infringement by the relevant Treaty article.<sup>171</sup> One example of such a Treaty article is Article 36 TFEU which states:

“The provisions of Article 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”<sup>172</sup>

In addition, the Member State action must comply with the principle of proportionality. Even though this is not explicitly mentioned in the provision of the Treaty, “the ECJ has demanded that the challenged measure must be the least trade restrictive possible to attain the end in view.”<sup>173</sup> In relation to free movement of services, Article 56 TFEU prohibits restrictions on the provision of services between Member States. The Court of Justice applies Article 56 to any measure which makes access to the service market of a state more difficult.<sup>174</sup>

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<sup>170</sup> *Kadi* case para 355

<sup>171</sup> *Craig* (2012b) p. 2

<sup>172</sup> Article 36 TFEU

<sup>173</sup> *Craig* (2012b) p. 2

<sup>174</sup> *Chalmers* p. 784

### 5.5.1 In relation to free movement

Proportionality has been widely used in connection to cases regarding free movement. The application has been strict, but this is natural following that free movement is a fundamental principle of EU law. Therefore the ECJ has followed a strict line in applying the principle.

In *Cassis de Dijon*<sup>175</sup>: The necessity test failed as there was a less restrictive way available, namely displaying the alcohol content on the packaging of the drinks. Consequently the requirements for spirits imposed by German law were disproportionate when it was compared to the less-restrictive way of informing consumers by way of labeling:

“Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.”<sup>176</sup>

In *Trojani* the ECJ held that:

“The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality.”<sup>177</sup>

In *Danish Bottles*, regarding a case within the area of domestic environmental protection, the ECJ found that “the system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports. In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued”<sup>178</sup>. Article 34 TFEU prohibits restrictions on the

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<sup>175</sup> Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Nranntwein (Cassis de Dijon)*, 1979 ECR 649

<sup>176</sup> *Cassis de Dijon* para 8

<sup>177</sup> Case C-456/02 para. 46

<sup>178</sup> *Danish Bottles* para 21

import of goods from other Member States. Environmental issues are often dealt with under Article 36, but the protection of the environment has also been recognized as a mandatory requirement, especially in the context of recycling schemes and their effect on trade.<sup>179</sup>

In *Jipa*, Mr. Jipa, a Romanian national was repatriated from Belgium to Romania by virtue of a readmission agreement<sup>180</sup> signed by the two countries. Even though Mr. Jipa in principle could rely on the right to move and reside freely within the territory of the EU Member States, the ECJ pointed out that the right of freedom of movement is nevertheless not unconditional and may be subject to limitations and conditions imposed by the Treaty, in particular on grounds of public policy or public security. However, the judgment shows suspicion of whether the measure was actually disproportionate, with the court emphasizing that such measures, given their fundamental conflict with free movement, should not go beyond what was strictly necessary.<sup>181</sup> This shows that the proportionality principle varies depending on what right is infringed. A part of the doubt was whether the Belgian order had in fact been legitimate. This was something the national judge should examine. It may be noted that although Jipa concerned the Member State of origin of the EU citizen, its logic should be applicable to any state imposing exit restrictions.<sup>182</sup>

In *Rottmann*, regarding a German citizen who had obtained nationality by deception. The ECJ concluded that a Member State, in exercising its powers in the sphere of nationality, may withdraw its nationality from a citizen of the Union. This requires that the nationality was granted by way of naturalization and that the person obtained the nationality by deception.

In *De Peijper* the court gives an example of the “least restrictive option” rule being applied literally and thoroughly.<sup>183</sup> The least restrictive option assumes a distinction between the ob-

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<sup>179</sup> Chalmers p. 771

<sup>180</sup> The 1995 Agreement between the Governments of the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Government of Romania on the readmission of persons who are in an illegal situation

<sup>181</sup> Chalmers p. 479

<sup>182</sup> Chalmers p. 479

<sup>183</sup> Chalmers p. 890

jectives of a measure and the means used to pursue those objectives. The Court has been most faithful to the strict De Peijper approach in its treatment of market externalities.<sup>184</sup>

In *Gebhard*, concerning a German lawyer was operating under the title “avvocato” in Italy without having registered at the local bar as was required in Italy. The Court held:

“It follows, however, from the Court’s case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”.<sup>185</sup> The Court does not actually use the term proportionality, but it most nevertheless be clear that this is a manifestation of the principle. This case can be read as an alternative formulation of the proportionality test as applied to the Member States that bears less resemblance to the Fedesa standard.<sup>186</sup>

## 5.6 Conclusions on EU case law

The analysis of the proportionality principle in EU law has focused more directly on case law. The case law has shown that the proportionality test within EU law consists of three elements, necessity, suitability and proportionality in stricto sensu. There is more case law referring to the first two elements of the test, but this is natural considering that the test is cumulative.

Further on, the case law has illustrated that the proportionality test varies within the EU depending on the dispute at issue and what rights are infringed. Sauter explains that disparate views of the proportionality principle may be explained by the nature of the EU.<sup>187</sup>

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<sup>184</sup> Chalmers p. 890

<sup>185</sup> Case C-55/94 para 37

<sup>186</sup> Sauter p. 11

<sup>187</sup> Sauter p. 2

## **6 Conclusion**

This chapter aims to provide a brief overview of the findings of this thesis. I try to point to the main differences and similarities in applying the principle of proportionality in WTO law and EU law. In addition, I try to point out some challenges that may arise in applying the principle of proportionality.

The comparison of the principle of proportionality in WTO law and EU law could have been done in greater detail, for example by going through several more cases, but unfortunately, there is not room for such a thorough analysis within the frame of this thesis.

### **6.1 Main differences**

There is far more case law within the area of EU law. Even though both systems aim to facilitate international trade to varying degrees, EU embodies several more areas of law than the WTO, for example fundamental human rights.

The dispute settlement systems are different, especially in the first instance, where the WTO system refers a dispute to ad-hoc panels. In contrast, within the EU a case is brought before the General Court. If a case is appealed it is brought to the Appellate Body in the WTO or the ECJ in EU. These courts bear more similarities than the first instances.

In EU law the principle of proportionality has dual tracks as it is applied both to EU acts and to acts of the Member states. In WTO law, the principle of Proportionality is applied between Member States in relation to dispute settlement.

The third element of the principle of proportionality as defined in chapter 2 is more apparent in EU law than in WTO law.

### **6.2 Similarities**

Proportionality is often used as a balancing procedure in controversial cases where the dispute settlement bodies have a hard time deciding what is right. As stated by Sweet: “each of the systems examined, judges adopt PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed”.

The suitability requirement of EU law can be said to bear some similarities with the related to requirement of Article XX of the GATT. Similarly, the necessity test in EU law can be compared to the necessary requirement in WTO law.

The proportionality test in both regimes, consist of a three-tier test of suitability, necessity and proportionality *stricto sensu*. As mentioned above, the proportionality requirements of EU law are cumulative. There is also a similar cumulative requirement in WTO law. WTO measures must also be suitable – see for example *Brazil - Retreaded Tyres*, where the Appellate Body held that an import ban must have a genuine relationship of ends and means with the objective pursued, in the sense that it must make a material contribution to the realization of the ends. This shows that proportionality has influenced both areas of law.

This paper shows that the use of the principle of proportionality is desirable and necessary in the dispute settlement systems of the WTO and EU. It is however important that the dispute settlement systems apply the principle of proportionality in a coherent manner so that the parties to the relevant dispute can predict the application of the principle. This is not to be understood as an argument for having the exact same content and scope of the principle of proportionality in both regimes. This would be unnatural since the dispute settlement systems deal with different cases, especially in the EU. There are however, positive effects of having a principle of proportionality which has common elements in the two legal systems. This way, application of the principle in one system may influence and improve application of the principle in the other.

### **6.3 Challenges**

The dispute settlement must be more specific in addressing the principle. Even though the principle of proportionality is stated in article 5, it must be clear that this cannot be used as a general expression of the proportionality principle in EU law. The ECJ must bear an obligation to further clarify the principle.

There is not just one sole answer to how the principle of proportionality should be used in both areas of law or all other areas of law. This might be considered as a challenge, because it



impedes a uniform general understanding of the principle. At the same time, this might be necessary to keep the dynamic character of the principle of proportionality.

The WTO is member-driven, meaning that the organization is run by its member governments. Decisions are normally taken by consensus. Since the principle of proportionality may have different meanings in different legal systems, it may take time for everybody to agree on a meaning it should have in the context of the WTO.

The balancing act can be mainly theoretical and not consider all relevant factors. See for example Danish Bottles where a recycling scheme was deemed not to be necessary. Chalmers claims that “the Court did not consider economic reality, but merely the theoretical fact that other kinds of containers were in principle also recyclable, suggested that environmental protection was not being taken seriously, and would be subordinated to trade”.<sup>188</sup>

The EU is a member of the WTO. There may therefore, arise questions to how the general principles being developed by the dispute settlement bodies in the WTO may affect the EU legislative and political process.

The meaning of the proportionality principle as developed by the ECJ may impact the WTO dispute settlement system to a greater extent than other national legislation. This might be explained by the EU's member-based characteristics. Rulings from the ECJ already represent a consensus by its Member States.

Particularly the EU dispute settlement system has a heavy case load. Important cases will take long time to reach a decision. In terms of the judicial review of the EU institutions, as it is difficult for national courts to grant it, it will lead to illegal EU measures persisting longer than they should. The same may not be said with regard to the WTO dispute settlement system, where the panels and Appellate Body operate under very strict and timeframes.

The WTO is a young system and can be argued to be rather fragile. It is still unclear how the Appellate Body will rule on certain issues, since there are still many provisions in the WTO

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<sup>188</sup> Chalmers (2010) p. 771

system that yet has to be contested. The meaning of terms like necessity, least restrictive means and relating to are dynamic terms which may vary depending on areas of law and the specific dispute. There are both positive and negative effects of the dynamic character of such terms.

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TFEU Treaty on the Functioning of the European Union

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