Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy

*By Ingo Venzke**

A. Introduction

Judicial lawmaking in the GATT/WTO context has for some time drawn considerable attention. Some are inclined to show a sense of existentialist anxiety in view of the fact that legal practice does not neatly live up to the orthodox doctrinal order of things. Others see judicial lawmaking as (theoretically or practically) inevitable and tend to readily embrace it as a way of overcoming defunct political processes.[1] What-

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[1] Good contributions on this issue are usually more nuanced, but still come with diverging emphases along these lines. *See*, *e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333 (1999) (portraying judicial lawmaking as a matter of fact); Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609 (2001) (canvassing different understandings and looking above all at attempts for dealing with legitimatory implications); Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism?*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 861 (2004); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004); Robert Howse, *Moving the WTO Forward – One Case at a*

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ever its normative appraisal, as a matter of fact adjudicatory practice has developed some of trade law's cardinal norms. The rise and increasing sophistication of adjudication in the GATT/WTO context has also gone hand in hand with a surge of authority on the part of adjudicators and a larger overall detachment of the law from politico-legislative politics.

The GATT/WTO context may thus be one of the principal sites for studying in closer detail how international courts and tribunals exercise international public authority by way of lawmaking.[2] There are numerous examples of how adjudicatory practice changes international trade law and contributes to the creation of legal normativity. One might, for instance, think of Art. XXIII GATT stipulating that a member may file a complaint if it "consider[s] that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired." Jurisprudence initially held that any harm in trade that "could not reasonably have been anticipated" at the time when concessions were negotiated would qualify; a breach of obligation was neither necessary nor sufficient.[3] Ever since the 1960s, however, a GATT violation would *ipso facto* be considered a "prima facie nullification or impairment" in the sense of Art. XXIII.[4] John Jackson summarized that the meaning of

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Time, 42 CORNELL INTERNATIONAL LAW JOURNAL 223 (2009) (pointing to a number of instances where adjudicators advanced the law in view of political deadlock).

[2] Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue. The project follows a broad understanding of "court" that includes judicial institutions in the GATT/WTO. There are formal differences such as that they only make *recommendations* and do not *decide* cases. But by now and in view of the real-life practices of these institutions there should be little squabble with this denomination. *Cf.* Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 605 (2002).

[3] The test was one akin to something like "legitimate expectations", known from contract law. *See* Working Party Report, *The Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, 3 April 1950, BISD II/188; GATT Panel Report, *Treatment by Germany of Imports of Sardines,* G/26, 31 October 1952, BISD 1S/53.

[4] GATT Panel Report, *Uruguayan Recourse to Article XXIII, L/1923*, 16 November 1962, BISD 11S/95. *Cf.* with illuminating detail Arwel Davies, *The DSU Article 3.8 Presumption That an Infringement Constitutes a Prima Facie*

Art. XXIII was "brought almost full circle by the evolutionary case-by-case process" of adjudication.[5] And on a more general note he pertinently observed that:

> There are some important lessons in the GATT/WTO story. … Perhaps the most significant lesson is that human institutions inevitably evolve and change, and concepts which ignore that, such as concepts which try to cling to "original intent of draftspersons," or some inclination to disparage or deny the validity of some of these evolutions and changes, could be damaging to the broader purposes of the institutions.[6]

The phenomenon and its normative implications demand closer analysis.

The present contribution examines how adjudicators in the GATT/WTO context have contributed to shifts in the meaning of the general exceptions spelled out in the black letters of Art. XX GATT and how their interpretative acts have come to represent reference points in discursive practices. It draws attention to the spell of precedents in legal discourse and highlights strategies on the part of adjudicators.[7] Against the expectations of governments and in spite of repeated fixations in norm texts that adjudicators "cannot add to or diminish the rights and obligations provided in the covered agreements" (Arts 3(2) and 19(2) DSU), adjudicatory practice has shifted normative expectations among participants with regard to general exceptions in trade law. The Appellate Body has in effect come to reign supreme over Art. XX and over the junctures between trade objectives and other public policy concerns. The following analysis of changes in Art. XX illustrates how the Appellate Body has built up strategic space by way of general pronouncements that were not strictly necessary for deciding the case and that would in later proceedings be used to carry judgments of (il)legality. Along the way, this contribution also endeavors to highlight

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Case of Nullification or Impairment: When Does it Operate and Why?, 13 JOURNAL OF INTERNATIONAL ECONOMIC LAW 181 (2010).

[5] JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 143 (2006). *See* GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, 17 June 1987, BISD 34S/136.

[6] JACKSON (note 5), 82.

[7] With a fresh look on the working of precedents, *see* Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue.

the impact that changes in the institutional context and culture have had on interpretations of the law.

The argument falls into four parts. The first part sets the scene by introducing initial institutional developments, the normative environment, and the social contexts for legal argumentation focused on Art. XX GATT (B.). The second part shows how GATT panels responded to mounting conflict between trade and non-trade objectives (C.). Institutional changes and the possibility of appellate review then considerably strengthened the working of precedents, increased the authority of adjudicators, and portrayed rather immediate repercussions on substantive law. With recent developments in the law on general exceptions, legal discourse has palpably transformed into a controversy surrounding the legitimacy of adjudication in a scheme of multilevel governance (D.). The last part recalls the force of precedents in the transformation of Art. XX and dwells on the idea that legal interpretation has turned into a debate about legitimacy (E.).

B. Institutional Developments, Normative Environment, and Social Contexts

Adjudication portrays a number of particular features in the context of the GATT/WTO. First of all, its institutional development offers a superb illustration of institutional growth (or mission creep) that has been told many times: At the dusk of the Second World War, the GATT of 1947 was meant to form part of an International Trade Organization (ITO), only that the ITO never came into existence.[8] The GATT contained very vague procedures on how to deal with "disputes," a word that does not appear anywhere in the GATT. It framed processes of consultation and hinged on negotiation – a long way from anything that resembles judicial proceedings. In Robert Hudec's fitting words, "[i]t was a diplomat's legal order. At least, that is the way it started out."[9]

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[8] ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW. THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 4-5 (1993). It should be noted, however, that the GATT of 1947 was modified with the Final Act of the Uruguay Round in 1994.

[9] Robert Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 JOURNAL OF WORLD TRADE 615 (1970).

Over the years, the GATT developed features that made it look and work very much like any other international organization in spite of its defects at birth. At its inception, the GATT was run and characterized by the same diplomats who had negotiated it. They represented the parties and also staffed the small secretariat. On their own initiative, they developed the panel procedure for dealing with disputes and thereby created a mechanism that has since advanced to be one of trade law's flagships. Legal disputes would be referred to panels of three or five independent panelists and their reports needed to be adopted by the Council made up of all contracting parties. Consensus decisions were necessary at decisive points in the process – a requirement that gradually eroded in practice.[10]

The process used to be dominated by GATT diplomats and trade experts but came under the increasing influence of trained lawyers and the characteristic form of reasoning moved towards a judicial technique.[11] The creation of a legal division within the GATT secretariat in the early 1980s is of enormous importance in this regard. The secretariat has regularly drafted panel reports, worked towards consistency and contributed to a legal mode of dispute settlement.[12] Most decisive changes have, of course, come with the 1994 Marrakesh Agreement setting up the WTO. I will deal with this transformation at a later state. For now it remains helpful to briefly flesh out the normative environment in which legal practice centered on Art. XX GATT takes place.

The basics are that Art. XX comes into play in practice as a justification of trade restrictions that would otherwise amount to a violation of the GATT. Measures that come under Art. XX normally aim at non-trade objectives and need justification because they conflict with the general prohibition of quantitative restrictions (Art. XI), with the prohibition of discrimination between like products whose imports are still restricted in quantitative terms (Art. XIII), or with the obligation to pro-

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[10] WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT 232-236 (1990); HUDEC (note 8), 9.

[11] Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191 (2001); Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

[12] Martin Nettesheim, *Von der Verhandlungsdiplomatie zur internationalen Wirtschaftsordnung: Zur Entwicklung des internationalen Wirtschaftsrechts*, 19 JAHRBUCH FÜR NEUE POLITISCHE ÖKONOMIE 48, 54 (2000).

vide national treatment with regard to internal taxation and regulation (Art. III).[13] For Art. XX to become relevant there needs to be an inconsistency in the first place. While there is room for considering a policy's aim already at this stage of the legal analysis (with the possible effect of finding that there is no violation),[14] trade restrictive measures that aim at other public policy considerations are typically found to be in prima facie violation of the GATT and are accordingly addressed under Art. XX.

Art. XX GATT 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:
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> (a) necessary to protect public morals;
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> (b) necessary to protect human, animal or plant life or health; …
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> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; … .

For some time, potential conflicts between trade and other policy considerations used to slumber underneath an agreed upon borderline separating normal trade policies from policies that struck everyone as unjustified and abnormal. John Ruggie famously termed this shared understanding "embedded liberalism," meaning that trade liberalization was embedded in the usual working of the interventionist welfare state

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[13] On the last point, *see* Joseph H. H. Weiler, *Law, Culture, and Values in the WTO – Gazing into the Crystal Ball*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, 749, 758 (Daniel L. Bethlehem, Donald RcRae, Rodney Neufeld & Isabelle Van Damme eds, 2009) (noting that "the material and conceptual contours of the discipline of national treatment not only remain contested but are, *par excellence*, the creature of legal discourse").

[14] I have deliberately left aside the considerable jurisprudence and commentary on the well-known intricacies in determining "likeness". On the stages of legal analysis at which a policy's aim may come into consideration, *see* JAN WOUTERS & BART DE MEESTER, THE WORLD TRADE ORGANIZATION 52-54 (2007); Weiler (note 13).

– at the end of the day, the argument went, everybody would be better off.[15] This context provided the preconditions for GATT experts to follow a narrow focus on trade. Within their community, shared understandings of an embedded liberalism were transformed into economic ideas about free trade that became increasingly detached from the real life preconditions under which their arguments did actually work.[16] While disputes mounted, the old ethos of GATT trade experts and a *corps d'esprit* retained its grasp on the interpretation of the law. GATT panels would tread beaten paths and argue along lines drawn in the past.[17] An insider network was rather successful in sustaining isolation from disturbing outside perspectives on trade law by creating and maintaining a very high threshold for policies to be justifiable under Art. XX.

C. The Era of the GATT

I. The Creation of an (Almost) Impossible Threshold

Starting at the end of the 1970s, a number of domestic regulatory policies would condition market access in a way that required the exporter (or the exporter's country) to meet certain criteria. Some early cases were rather obvious attempts of governments to disguise protectionist trade restrictions, while other cases were not so clear-cut. In *United States – Tuna*, a typical example, Canada filed a complaint against actions taken by the U.S. government prohibiting imports of albacore tuna and related products from Canada.[18] The context of events showed that the United States took such action in response to the seizure of

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[15] John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INTERNATIONAL ORGANIZATION 379 (1982). *See also* his seminal *International Responses to Technology: Concepts and Trends*, 29 INTERNATIONAL ORGANIZATION 557 (1975). *Cf.* Weiler (note 11), 194-195; Howse (note 11), 99.

[16] Howse (note 11), 99.

[17] HUDEC (note 8); Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, 505, 508 (Daniel L. Bethlehem, Donald RcRae, Rodney Neufeld & Isabelle Van Damme eds, 2009).

[18] GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198, 22 February 1982, BISD 29S/91.

nineteen fishing vessels and the arrest by Canadian authorities of a number of U.S. fishermen that, according to Canada, fished illegally within 200 miles of its West Coast and thus under its fisheries jurisdiction.[19] The embargo on imports was an evident violation of the prohibition of quantitative restrictions (Art. XI).[20] This part of the analysis did not yield any surprises and by the time the proceedings came to a conclusion, the United States had already lifted the import ban. The parties to the dispute nonetheless agreed that the panel should continue its work in order to settle the crucial question "whether or not a contracting party should have the right to disregard obligations under the GATT in order to use trade measures to bring bilateral pressure to bear on non-trade issues."[21] This is the question that would pervade significant parts of GATT/WTO adjudication on Art. XX in the following decades.

In *United States – Tuna*, the United States unsuccessfully tried to justify its actions on the basis of Art. XX(g). Its actions were rather evidently part of the larger squabble between the two countries as well as a response to pressure on part of the U.S. tuna industry.[22] The panel left open, however, what it also recognized as a key question: that is, whether market entry could in principle be conditioned by policies pursuing non-trade objectives.

The panel's analysis of whether the U.S. policy did actually pursue its stated aim might be read so as to suggest that such kinds of policies are at least not wholly excluded from the scope of Art. XX. This is how Canada later used the report in its defense in *Herring and Salmon* – another case that paradigmatically demonstrated how public policy considerations are invoked to justify unwarranted protectionism that works to the benefit of domestic pressure groups. GATT panels found the answer to this challenge by creating a standard for justification that would be next to impossible to meet, thus effectively excluding a whole range of alternative policy considerations from intermingling with free trade objectives.

One of the main questions in *Herring and Salmon* was to establish what it actually means that a policy must be "*related to* the conserva-

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19 *Id*., para. 2.1.

20 *Id*., para. 4.15.

21 *Id*., para. 3.4.

22 *Id*., paras 3.15 & 4.1.

tion of exhaustible natural resources."[23] The panel soberly decided that the text does not state how trade measures have to be related to the aim of conservation. It juxtaposed paragraph (g) with other paragraphs and came to the conclusion that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to be considered as "relating to" in the sense of Article XX(g).[24] It did not hint at any authority or offer any reasoning that might support its interpretative claim. With this interpretation in mind, it then had an easy time concluding that Canada's export prohibition on certain unprocessed salmon and unprocessed herring did not primarily aim at the conservation of exhaustible natural resources. It placed the weight of its findings on the fact that there were alternative means available that Canada could have employed. The fact that Canada did not resort to such alternatives was proof of ulterior motives, i.e., the protection of employment within the fish processing industry.[25] The panel did not look into Canada's legislative history nor into the decision-making process leading to the export prohibition but relied on an objective test of primary intent – the sole fact that alternative and less trade restrictive measures were available established that the measures did not primarily aim at the conservation of exhaustible natural resources.[26]

The panel's invention of a "primarily aimed at" standard had much appeal and a lasting impact. Subsequent legal practice centered on whether a measure was primarily aimed at the conservation of exhaustible natural resources as if the treaty text had been forgotten. A reference point in interpretation would no longer be "related to" but the panel's precedent. In the immediate follow-up, a panel under the Canada-United States Free Trade Agreement, which incorporates Art. XX GATT by reference, corroborated this interpretation, quoting the *Herring and Salmon* precedent at length.[27] It further cut down the legal analysis, arguing that there were alternative measures available to Canada that

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[23] GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, 22 March 1988, BISD 35S/98.

[24] *Id*., para. 4.6.

[25] *Id*., para. 4.7.

[26] *Cf*. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 516-518 (2005); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 JOURNAL OF WORLD TRADE 37, 50 (1991).

[27] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report, 16 October 1989, paras 7.04-7.05.

would have been less trade restrictive; whether a measure employed is the least trade restrictive would establish whether it is "primarily aimed at." [28] In effect, "related to" now meant "least trade restrictive." This line of reasoning had repercussions far beyond the parties to the dispute and led all the way to adjudicatory practice in the WTO. It is illustrative to see that the panel in *United States – Gasoline*, one of the very first cases within the WTO context, again engaged with the *Herring and Salmon* precedent in detail.[29] The panel's decision was ultimately overruled by the new Appellate Body (AB), but the AB also invested considerable efforts in relating its argument to *Herring and Salmon* – thus only testifying to the authority of this earlier decision.[30]

The qualification that a measure be "necessary" was also shaped in GATT adjudicatory practice in a way that rendered the threshold for justification by way of Art. XX very hard to meet. The defining showdown took place in *United States – Section 337* in which the panel found that for a measure to be necessary, "a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[31] This line of jurisprudence then reached its peak in *Thai Cigarettes* where the panel found trade restrictions to be GATT inconsistent and not justified under XX(b) precisely because alternative, less trade restrictive measures were available that could have met Thailand's public health concerns. It held that "import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there was no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."[32]

The panel's reasoning was notably determined by the objective of upholding a high categorical standard that should save the GATT system

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[28] *Id*., paras 7.04-7.11 & 7.38.

[29] Panel Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996, para. 6.40.

[30] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 16. *See further infra* notes 57-63 and accompanying text.

[31] GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, 7 November 1989, BISD 36S/345, para. 5.26.

[32] GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, 7 November 1990, BISD 37S/200, para. 75.

from protectionist policies otherwise entering via Art. XX. According to its categorical pronouncement, the existence of an alternative that is less trade restrictive and reasonably available is sufficient to render a measure unnecessary. What might look like reasonable alternative policies in the eyes of the GATT panel in *Thai Cigarettes* might, however, be more burdensome and costly for Thailand to implement. In the making of this interpretation of general exceptions, panels reasoned along functionalist lines and stressed trade objectives. How this rhetoric played out in legal practice may further be shown in the analysis of another way by which panels sought to save the GATT system from policy considerations with a trade-distortive potential: The practice of adjudication arguably created a territorial limitation on the scope of the general exceptions.

II. A Territorial Limitation?

Disputes at the intersections between trade objectives and other public policy aims grew in prominence in the early 1990s, fuelled by the panel reports in the *Tuna – Dolphin* cases. At issue were U.S. policies conditioning market access for tuna exporters with the stated aim of protecting dolphins. These policies could not so easily be ruled out as rather evident expressions of protectionism, un*related to* or un*necessary for* achieving policy objectives listed in Art. XX. And still, in *Tuna – Dolphin I*, the panel found the U.S. import prohibition to be in violation of Art. XI GATT and not justified under Art. XX (b) or (g).[33] Picking up the arguments of the parties, it saw the crucial question to be "whether Article XX(b) covers measures necessary to protect human, animal or plant life or health *outside the jurisdiction* of the contracting party taking the measure."[34] It noted that the text of Art. XX does not give away the answer and turned to the drafting history as well as to the purpose of the provision. It purported to see that the provisions were only

[33] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155. One issue that has to be sidestepped here, but which is of curial significance generally, is the delineation of Art. XI dealing with quantitative restrictions from Art. III concerning internal regulations.

[34] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155, para. 5.25 (italics added).

meant to allow the protection of human, animal and plant life that are under an importing country's jurisdiction. Its view might have been tainted by its apocalyptical angst. The panel argued at this juncture of its analysis that if this were otherwise, i.e., if members could unilaterally prohibit imports by way of setting up conditions under which products have to be produced, the multilateral trade regime would ultimately collapse:

> The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[35]

The panel could have stopped here. Instead, it proceeded to foster the jurisprudence on the relationship between the concrete policy and the stated aim. Even if an extraterritorial protection were permitted, it went on, the import prohibition would still not be justified because it was not "necessary." With reference to *Thai Cigarettes,* the panel found that a reasonable alternative was available, namely, negotiating international cooperative agreements. The panel even raised the threshold a notch. It required that the United States "had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement" for its policy to qualify as a necessary exception.[36] Concerning subparagraph (g), with reference to *Herring and Salmon*, the measure did not primarily aim at the conservation of natural resources, for the same reason that it was not necessary under subparagraph (b).[37] It merits emphasis that this GATT decision of 1991 is closely interwoven with a number of precedents – referenced in forty-five footnotes on its forty pages. International legal practice in trade law was already deeply embedded in a thick structure of precedents that structured the space of interpretation and that directed all actors' interpretative practice. The Contracting Parties did not adopt

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[35] *Id*., para. 5.27.

[36] *Id*., para. 5.28.

[37] *Id*., para. 5.31-5.33.

this report, but as later practice will show the panel's reasoning still influenced the discourse.

For the time being, panels and the GATT insider network had in fact established that trade was trump. This bottom line was certainly subject to thorough critique.[38] Indeed, many vested their hopes in political processes to correct the issues.[39] Yet political agreement was not forthcoming and the dispute continued to make its way into adjudication. International trade norms on this issue continued to be primarily formed in the practice of adjudication.

D. The Reign of the Appellate Body

Changes in the interpretation of Art. XX at the inception of the WTO were closely intertwined with institutional reforms. The working of precedents has come to be of still greater significance with the dynamics introduced by a dispute settlement mechanism that comes with appellate review (I.). GATT precedents continued to direct all actors' arguments on Art. XX in the early WTO cases but the new Appellate Body forcefully redirected the legal discourse (II.). A central point of controversy has again been the meaning of "necessary" (III.).

I. Institutional Changes and the Working of Precedents

Both *Tuna – Dolphin* panel reports pointed to the politico-legislative process as the appropriate venue for resolving disputes about conflicts between trade obligations and other public policy considerations. During the Uruguay Round negotiations leading up to the Marrakesh Summit of April 1994, state delegates tried to curb dissatisfaction with

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[38] For an overview that relates opinions to overall outlooks on the working of international law, *see* Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1 (1994).

[39] Armin von Bogdandy, *Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT*, 3 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 243, 247 (1992) (noting that GATT adjudicators lack the authority for balancing competing interests).

how GATT panels had dealt with the issue by enacting new legal provisions; but little agreement was forthcoming and protracted disagreement only allowed for a rather laudatory "Decision on Trade and Environment" that was of very little help, if any.[40] The task of finding a remedy to looming conflicts was delegated to the newly established Committee on Trade and Environment (CTE) that has so far not been able to secure even a modest consensus on the interpretation of general exceptions, let alone an interpretative statement or even a reform of the treaty text.[41] As a result, adjudicators were left with interpreting and developing the law through their practice without significant guidance from politico-legislative processes.

Major changes did however occur with regard to the institutional context and the dispute settlement mechanism.[42] One of the principal novelties that came with the DSU was the possibility for appellate review. Several signs suggest that the new Appellate Body was expected to assume a limited role. At least to some it looked like a not so significant by-product of the whole package deal. A critical part of that deal was that panel (and Appellate Body) reports would now be adopted unless there was a consensus against their adoption in the Dispute Settlement Body. It was clear that this new "negative consensus" rule would lead to the automatic adoption of reports in almost all practical circumstances. It would also have a lasting effect on the relationship between adjudication and politico-legislative control.[43] In this context, appellate

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[40] Decision on Trade and Environment, adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh, 14 April 1994.

[41] The Doha Declaration invested the CTE with a renewed mandate, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, paras 31-33. Little progress could be made. What the CTE indeed does, is to draft notes on Art. XX that summarize the pertinent case law and pay close lip service to the panel and Appellate Body reports. They barely add a single word of genuine assessment or direction, *see, e.g.*, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice relating to GATT Art XX, paragraphs (b), (d) and (g)*, Note by the Secretariat, WT/CTE/W/203, 8 March 2002.

[42] Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EJIL 161 (1995).

[43] Von Bogdandy (note 1); Robert Howse, *The Legitimacy of the World Trade Organization*, in: THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, 355, 374 (Jean-Marc Coicaud & Veijo Heiskane eds, 2001) (noting that real judicial power comes into being only with the changes of the

review promised corrective measures against faulty panel reports. According to a proposal by the European Communities, the AB would only act if the panel report was "erroneous or incomplete."[44] Canada saw the Appellate Body's role in correcting "fundamentally flawed decisions" and the United States also thought that the new body would only review "extraordinary cases."[45] The contracting parties apparently thought that appellate review would be so limited that its seven members would only need to be employed part-time.[46]

Since the day of its creation, however, the Appellate Body has grown from an "afterthought to a centrepiece" as now Appellate Body member Peter van den Bossche put it.[47] Its success is largely due to its own agency and part of a general shift in legal culture. The AB is composed of mostly international lawyers who had general legal training and who were not exceedingly focused on *trade* law. At an early stage it embraced the Vienna Convention on the Law of Treaties (VCLT) and the norm text as a starting point of legal interpretation, built up persuasive authority and a consistent body of case law, and succeeded in striking a rather apt balance between trade objectives and other public policy goals in its jurisprudence.[48] The frequent recourse to appellate review of course also helped – in the first two years following the establishment of the AB *every* panel report was appealed.

State representatives sought to limit the lawmaking dimension of adjudicatory practice by tying the adjudicators to their consent in a number of ways. An expression of anxiety that judicial interpretation might not always live up to the ideal of uncovering the law that is present in the applicable treaties can be found in the intriguing Art. 3(2) DSU. It

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new WTO Agreement and that previous treaty interpretation in dispute settlements was controlled by the GATT bureaucracy).

44 Peter van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 289, 292 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006).

45 *Id.*

46 Dispute Settlement Body, *Establishment of the Appellate Body*, 19 June 1995, Decision of 10 February 1995, WT/DSB/1, paras 11-12.

47 Van den Bossche (note 44). *See further* Hélène Ruiz Fabri, *Le juge de l'OMC: Ombres et lumières d'une figure judiciaire singulière*, 110 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 39 (2006).

48 Van den Bossche (note 44).

stipulates that recommendations and rulings of the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements."[49] This provision was apparently so dear to the contracting parties that they reiterated this wording *verbatim* in Art. 19(2) DSU. It has figured as a reference point in panel proceedings and in the discussion of reports to buttress an actors' claim that the panel or AB transgresses its legal function and engages in lawmaking. While empirically speculative, it is probably true that this provision has done little to work against the phenomenon of judicial lawmaking. It is hard to see what more it does than to restate the adjudicators' task of applying the law.[50]

Art. 3(2) DSU also provides that "[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system." In its early steps in *Japan – Alcoholic Beverages II,* the Appellate Body leaned on this provision to argue that reports, even if they do not amount to binding precedents, "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[51] The Appellate Body went on to concur with the panel that unadopted reports have no legal status in the GATT/WTO system – leaving open what exactly the legal status of adopted reports would be – but "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."[52] The Appellate Body's take on the working of precedents underscores that a precedents' quality of being binding or not is second to its persuasive power.

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[49] *Cf.* Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 405 (2005) (offering a discussion of this qualification that borders on superb parody).

[50] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87 and 110/AB/R, 13 December 1999, para. 79 (noting that "we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements").

[51] Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS 8, 10 and 11/AB/R, 4 October 1996, 14-15. *Cf.* Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, 18 January 2011, para. 7.59.

[52] *Id*., 15; quoting Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10 and 11/R, 11 July 1996, para. 6.10.

As of late, the Appellate Body has fostered the authority of its reports as decisive reference points for panel proceedings. To a large extent this dynamic has unfolded in the context of disputes over "zeroing," a method for calculating anti-dumping duties. Panels have recurrently found that nothing prohibits zeroing while the Appellate Body has consistently reversed panel reports on this matter. In *United States – Oil Country Tubular Goods Sunset Review,* the AB eventually found that it is not only appropriate for panels to follow AB jurisprudence but that they would even be expected to do so.[53] In a renewed appeal on issues of zeroing, in *United States – Stainless Steel (Mexico)*, the AB then stressed that its findings are clarifications of the law and, as such, are not limited to the specific case. It rather strongly attacked the panel, "[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system".[54]

The AB effectively created a lingering threat by suggesting that disregard for its precedents might actually amount to a failure of exercising a proper judicial function.[55] What was already evident in the historiography of legal practice with regard to Art. XX throughout the GATT era, now appears but obvious: GATT/WTO judicial practice creates a body of precedent that strongly bears on what trade law is. Participants in legal argument can simply not escape the discussion of previous judicial interpretations and practice demonstrates the normative expectation that they (in particular adjudicators) *should* relate to precedents. How does this process of lawmaking by way of interpretation unfold with

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[53] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 17 December 2004.

[54] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para. 162; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, paras 362-365. *Cf.* Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, para. 188 ("following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same").

[55] *Id.*, para. 162. The claim would be that panels fail to conduct an "objective assessment" of the matter before them as is required by Art. 11 DSU.

regard to the general exceptions of Art. XX GATT in the era of the WTO?

II. Sea-Shifts in Interpretation

The very first case that came before a panel within the brand new WTO institutional framework promptly played public policy concern (in this case issues of pollution) against trade objectives. Treading the path set in GATT jurisprudence, the panel in *United States – Gasoline* held that the measures imposed on foreign producers of gasoline could neither be justified under Art. XX (b) nor XX (g). It found that there was a less trade restrictive alternative reasonably available so that the measures taken were not necessary in the sense of Art. XX (b).[56] With *Herring and Salmon* it further argued that "relating to" in Art. XX (b) means "primarily aimed at" and that primary intent can be inferred from the fact of whether the measure was the least trade restrictive – levelling out any difference between the standards.[57] The panel's reasoning had by now become an easy exercise and at the time it was a predictable statement of the law.

The United States appealed and the Appellate Body's decision demonstrates a remarkable shift in interpretation. The aura of a new beginning did not, however, elevate its reasoning above the discussion of precedents. The AB saw itself forced to engage with the interpretation in *Herring and Salmon*. It took up the challenge head on and strove to get out of the deadlock built up by GATT jurisprudence. How did it do so? It found the panel's (and its predecessors') interpretation to be in violation of the Vienna Convention on the Law of Treaties because it disregarded the difference in the wording between the individual paragraphs of Art. XX.[58] It is interesting that none of the disputing parties questioned that "related to" means "primarily aimed at" implying a least restrictive measures test – this seems to have already been beyond doubt even if, as the AB pointed out, "the phrase 'primarily aimed at' is not treaty language and was not designed as a simple litmus test for inclusion or exclusion from Art. XX (g)."[59] With some uneasiness, the AB

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56 Panel Report, *US – Gasoline* (note 29), para. 6.28.

57 *Id*., para. 6.40.

58 Appellate Body Report, *US – Gasoline* (note 30), 16-17.

59 *Id*., 19.

still continued to use the expression "primarily aimed at" for a more lenient standard and concluded on that basis that the measures taken could in principle qualify under paragraph (g).

The AB then turned to the chapeau of Art. XX whose main purpose it found in preventing the abuse of exceptions.[60] It stressed that Art. XX requires a two-tiered analysis, first of the measures at issue and whether they fall within the purview of one of the paragraphs (a) to (j), and second, whether those measures meet the requirements set out in the chapeau. The second step would deal with the manner in which measures are applied rather than with their content.[61]

The shift in emphasis from the individual paragraphs to the chapeau in examining whether a measure may be justified by Art. XX has come with a significant change in the possibilities for future development. On the basis of the chapeau, the AB now opened up a new chapter of jurisprudence. It is also in this first report that the AB expands the outlook for the interpretation of trade law beyond the narrow functionalist lines that had confined previous practice – the GATT is not, the AB noted *en passant* and with considerable repercussions, "to be read in clinical isolation from public international law."[62] This has become of immediate relevance in the AB's second decisive redirection of legal interpretative practice with regard to Art. XX. After it had changed the interpretation of the threshold that a measure has to meet in order to be justifiable, it turned to the still pending question of what came under the heading of "extraterritoriality."

The famous *United States – Shrimp* case was concerned with U.S. import restrictions on shrimp and shrimp products. The United States required that shrimp be harvested in a way not exceedingly harmful for sea turtles, and only then could it be imported. This case resembled *Tuna – Dolphin I* in almost all relevant elements. It is most remarkable then that all parties to the dispute as well as the panel related their arguments to the *Tuna – Dolphin* reports even though neither of them

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60 *Id*., 22.; *cf*. Rüdiger Wolfrum, *Article XX GATT 1994, General Exceptions [Chapeau]*, in: 2 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 66 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds, 2006), margin numbers 8-12.

61 Appellate Body Report, *US – Gasoline* (note 30), 22. In concrete cases the distinction between the two may be far from evident.

62 *Id*., 17.

had been adopted.[63] The panel in *United States – Shrimp* was also wholly unimpressed with the AB's report in *United States – Gasoline*.[64] It followed the argumentative pattern carved out in GATT jurisprudence and resumed the apocalyptic note that, were the United States or any other member allowed to require that importers meet internal regulatory standards set unilaterally by the importing country, the whole multilateral trading regime would be at risk. It is the very nature of the measures, the panel argued, that puts the multilateral trading system at risk.[65] The only repercussions that *United States – Gasoline* had on the panel's reasoning is that it now tied its analysis to the chapeau of Art. XX, but evidently the panel saw this as just another reference point for its ready-made legal reasoning.[66]

The Appellate Body overturned the panel and established a lasting precedent on how to deal with the justifications in Art. XX.[67] Mirroring its report in *United States – Gasoline*, the AB criticized the fact that the panel had not followed the international law rules of interpretation and again underscored that the first task of the interpreter is to examine the ordinary meaning of the words of a treaty.[68] The AB found that textual and contextual evidence indicates that the purpose of Art. XX is not to safeguard a functioning multilateral trading system, but rather the abuse of exceptions. Again, reiterating its earlier reasoning, it had to first be established whether the policy falls within the purview of one of the paragraphs and, secondly, whether the manner in which it is applied amounts to an abuse.[69]

According to the Appellate Body, sea turtles can be considered "exhaustible natural resources" and the U.S. measures did in principle

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[63] *Cf*. David Driesen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VIRGINIA JOURNAL OF INTERNATIONAL LAW 279, 306 (2001).

[64] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/R, 15 May 1998, para. 7.53.

[65] *Id*., paras 7.44 & 7.60.

[66] *Id*., paras 7.31-7.62.

[67] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998.

[68] *Id*., para. 114.

[69] *Id*., paras 116, 117 & 121.

qualify under paragraph (g).[70] The decisive issue then was whether the measures conformed to the demands of the chapeau. The Appellate Body's legal analysis at this stage is remarkably strong and the legacy of GATT jurisprudence crumbles under its impact. The AB found that the purpose of a measure could not be invoked so as to categorically exclude a whole range of measures from the purview of Art. XX. Rather, the chapeau deals with the manner in which the policy is applied in order to part illegitimate protectionism from justifiable measures.[71] Neither Art. XX nor WTO law in general can be read so as to give effect to overarching trade objectives brushing aside all other considerations, the AB stated.[72] In the present case, however, it found U.S. policies to constitute an unjustifiable discrimination of international trade because the United States had failed to negotiate equally and seriously with all the complainants.[73] Its measures were also an arbitrary discrimination because of the regulations' rigidity and inflexibility and because of a lack of transparency and procedural fairness in the implementation of the regulations.[74]

The AB could have confined itself to precisely these findings. And yet it took a further step which it couched between these two parts of its legal analysis. Without direct reference to the unadopted *Tuna – Dolphin* panel reports, it argued that measures seeking justification under Art. XX will in most practical circumstances be measures "conditioning access to a member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by

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[70] It is interesting to note how the Appellate Body supported its reasoning that sea turtles are an exhaustible natural resources with reference to the Preamble of WTO Agreement, by pointing towards developments in international law pertaining to the protection of the environmental, and by stating that "the generic term 'natural resources' in Art. XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'". *Id*., paras 129-130; quoting *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, (1971) ICJ Reports 16, 31.

[71] *Id*., para. 149

[72] *Id*., paras 152-154 (citing ample evidence from the Uruguay negotiations in support). *Cf*. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case. A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491 (2002).

[73] Appellate Body Report, *US – Shrimp* (note 67), paras 161-176.

[74] *Id.*, paras 177-184.

the importing Member." To argue that such features make measures *a priori* incapable of justification under Art. XX would render "most, if not all, the specific exceptions of Art. XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[75] Though a little later the Appellate Body noted that it does "not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation."[76] In the case at hand it could rely on a territorial nexus between sea turtles and the United States. The AB did however line up all the arguments that would be necessary to overturn the GATT reports on this issue.

This finding on the principled scope of Art. XX was not precisely necessary to overrule the panel. It marks a stark departure from the traditional take on the issue and formed the central point of controversy in the compliance proceeding that followed suit. In this second shot at challenging U.S. measures in the implementation of the findings in *United States – Shrimp*, Malaysia again emphasized the unilateral nature of the U.S. regulations conditioning market access and argued that such measures inevitably resulted in arbitrary or unjustified discrimination, recalling the apocalyptic scenario of the end of the free trade world. The panel rejected this claim closely along the lines of the AB report. Malaysia appealed and argued that the AB's earlier findings on the matter (i.e., that unilateral measures such as those by the United States were not *a priori* excluded from the scope or Art. XX), is only dicta and that the panel was wrong to rely on it.

Boldly and emphatically the AB stated that its original findings were not dicta, but rather expressed principles that were central to its ruling:

> The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not dicta; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in *United States – Shrimp*. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on

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[75] *Id.*, para. 121.

[76] *Id.*, para. 133.

> this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case.[77]

The AB had first challenged the "territorial limitation" that was part of legal contestation ever since *Tuna – Dolphin I* with a general statement in *United States – Shrimp* that was not precisely necessary for deciding the case. In *United States – Shrimp (21.5)*, it then elevated its earlier pronouncement to form an essential part of its original ruling.[78] This is an intriguing pattern of politics in interpretation: A general statement may first go without much criticism because it is not decisive and may at a later stage be invoked as a basis for carrying judgments concerning (il)legality. This appears to be a pattern that the AB has also used in another decisive case that will be addressed shortly: *EC – Asbestos*.[79]

The adjudicatory practice at the inception of the WTO shows how the Appellate Body has opened up avenues for member states to rely on general exceptions and at the same time it has considerably strengthened its own authority. As a bottom line, José Alvarez notes, "[n]either the WTO's admirers nor its detractors within the environmental community can deny that the *Shrimp/Turtle* Appellate Body has given a whole new layer of meaning to the bare text of Art. XX of the GATT."[80] Of course this meaning remains contested.

III. Proportionality, Interpretation and Legitimacy

Some have suggested that the notion of proportionality has found its way into legal practice in the context of the WTO with this new layer of meaning (1.). The Appellate Body does indeed seem to have further increased its powers by claiming that it needs to engage in an exercise of balancing competing interests in order to assess whether a measure can be justified on the basis of general exceptions (2.). Finally, with the advancement of the theme of proportionality, contestation as to the mean-

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[77] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5)*, WB/DS58/AB/R, 22 October 2001, para. 138.

[78] TREBILCOCK & HOWSE (note 26), 532.

[79] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, 12 March 2001.

[80] JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 472 (2005).

ing of Art. XX on the whole has turned into a discourse about the legitimacy of international adjudication in a scheme of multilevel governance (3.).

1. Proportionality

In *United States – Gasoline* and *United States – Shrimp* the Appellate Body saw its task with regard to the chapeau of Art. XX to lie in examining whether measures were "applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[81] In the latter report it specified that "[t]he chapeau of Article XX is … but one expression of the principle of good faith … . One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights."[82] It immediately went on to add that:

> 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 … . 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 measures at stake vary and as the facts making up specific cases differ.[83]

With this reasoning the Appellate Body built up considerable strategic space and reserved for itself the right of case-by-case decision.

What is more, the report's language closely resembles a description of what would be required in the application of the principle of proportionality.[84] Proportionality certainly comes with an overabundance of meanings. A shared focus of its uses might lie in its reference to a bal-

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[81] Appellate Body Report, *US – Gasoline* (note 30), 22; Appellate Body Report, *US – Shrimp* (note 67), para. 151.

[82] Appellate Body Report, *US – Shrimp* (note 67), para. 158.

[83] *Id*., para. 159.

[84] For suggestions that proportionality analysis would now already be required in the application of Art. XX, *see*, *e.g.*, Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 111, 121 (2001); Trachtman (note 1).

ance that needs to be struck between competing rights or interests.[85] According to German legal doctrine, which has been quite influential on this issue, proportionality analysis demands four steps in the legal evaluation of a certain measure: First, the measure must pursue a *legitimate aim (legitimer Zweck)*; second, it must be suitable or *effective* (*geeignet*) for the achievement of the stated objective; third, it must be *necessary* (*erforderlich*), which means that no less restrictive or less intrusive alternative is available; fourth, it must be *appropriate* (*angemessen*) for the achievement of the aim. This last element, also termed proportionality *stictu sensu*, demands a weighing and balancing of competing interests with the possible consequence that a measure may be found illegal because it imposes an undue disadvantage even if no alternative was available that could achieve the stated objective to the same extent.[86]

The concept of proportionality eventually did appear in the WTO context in a number of cases dealing with trade remedies.[87] It remains thoroughly debated whether it has also become part of the legal analysis with regard to general exceptions.[88] Observers largely agree in any

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[85] Matthias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574 (2004) (suggesting to think of proportionality as an analytical structure for striking such balance); *cf.* Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, in this issue.

[86] Eberhardt Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 568 (1973) (on the formative years of the jurisprudence of the German Federal Constitutional Court); Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, in: FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT, 445 (Peter Badura & Horst Dreier ed., 2001).

[87] Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001, paras 120 & 122. *See also* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, paras 257-259. *Cf.* Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EJIL 985 (2006); Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARVARD INTERNATIONAL LAW JOURNAL 337 (2007).

[88] *See* Axel Desmedt, *Proportionality in WTO Law*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (2001) (offering an overview and com-

event – be it in appraisal or dismay – that if proportionality analysis were part of the exercise, this would inexorably imply a whole range of rather discretionary judgments and would further increase the power of adjudicators.[89] The material for contestation and shades of contingent answers stem from judicial practice. The Appellate Body's report in *Korea – Beef* is the main point of reference on the issue.

2. The Contested Meaning of "Necessary"

In *Korea – Beef* the Appellate Body for the first time interpreted the term "necessary" in Art. XX (d). The AB got off to a surprising start when it turned to two standard dictionaries in order to find the ordinary meaning of the term.[90] This was not only surprising because parties in dispute over the meaning of "necessary" would hardly be convinced by the authority of a dictionary but also because the Appellate Body immediately afterwards rejected the definitions it had found in the dictionaries and came up with its own rather unpersuasive shot at the meaning.[91] The Appellate Body went on to state that:

> [A] treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument . …[92] In sum, de-

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parison of the fields of trade law where proportionality has or might become relevant).

[89] Anne-Charlotte Martineau, *La technique du balancement par l'Organe d'appel de l'OMC (études de la justification dans les discours jurisdiques)*, 123 REVUE DU DROIT PUBLIC 991, 1014 (2007).

[90] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/AB/R, 11 December 2000, paras 159-160. *Cf*. on the use of dictionaries Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 453, 461 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006); Douglas A. Irwin & Joseph H. H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE REVIEW 71, 95 (2008).

[91] *Id*., para. 161.

[92] *Id*., para. 162.

> termination 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.[93]

The AB then candidly asserted that this interpretation is supported by the *United States – Section 337* precedent. A process of weighing and balancing, it maintained, corresponds to the well-established qualification that an alternative measure be "reasonably available."[94] This is surely a far stretch and a valiant claim. If nothing else, it testifies to the Appellate Body's endeavor to connect its interpretations to precedents and to instantiate new meanings within prevalent discursive structures.

The AB further stated that "[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."[95] It then went on to address the question whether Korea could have reasonably been expected to employ an alternative measure "to achieve the *same* result."[96] It concurred with the panel that Korea's measures were "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices."[97] In a final step, it pointed to the administrative costs that alternatives might imply and found that these would not be extraordinary. The Appellate Body thus concluded that a less trade restrictive measure was reasonably available and Korea's measures were thus not necessary in the sense of Art. XX(d).

Any further elaboration on the Appellate Body's reasoning is doomed to be imbued by one or the other interpretation of what the Appellate Body actually did. This also holds true when discussing what the Appellate Body itself did with its reasoning in later cases. Has *Korea – Beef* introduced a fully-fledged proportionality analysis into the con-

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93 *Id*., para. 164 (italics added).

94 *Id*., para. 166.

95 *Id*., para.176.

96 *Id*., para. 178 (italics added).

97 *Id*., para. 179; referencing Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/R, 31 July 2000, para. 675.

cept of necessity where it appears in Art. XX? Does Art. XX require that benefits achieved for a legitimate public policy aim are proportionate to the costs in terms of trade restrictions? Opinions diverge. One observation that could hardly be refuted is that there would be a rather manifest tension between the requirements of a proportionality analysis and the categorical statement that members are free to choose their own level of protection. In contrast to a test demanding that the measure be least trade restrictive, a fully-fledged proportionality analysis would demand that measures be *appropriate*; that is, their costs in trade restrictions must not be excessive in relation to the benefits for the public policy aim. A measure might then be found unjustifiable even if there was no alternative to meet the member's level of protection. The interest of free trade (the interest of other members in market access) might *outweigh* another member's interest in health protection, for instance.[98] It is certainly hard to see how such an exercise in balancing would not be in tension with the credo that a member state is free to choose its own level of protection.

In *EC – Asbestos*, the immediate follow-up to *Korea – Beef*, the Appellate Body repeatedly stressed the importance of health protection and found that asbestos and the French substitute, cellulose and glass fibers, were unlike products.[99] This would have resolved the issue of legality – only if a measure is discriminatory and therefore in prima facie violation of the GATT would it be in need of justification by way of Art. XX. The Appellate Body went on, however, to engage in an analysis of the general exceptions and extended its interpretation of "necessity" to subparagraph (b). It reiterated the central passages of *Korea – Beef* and reproduced its conflicting elements.[100] It found that no other alternative could have met France's concern to the same extent, thus making this case the first in which a member *could have* succeeded in justifying a policy by way of general exceptions. This finding was rather superflu-

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[98] *Cf.* Elisa Ruozzi, *L'application du principe de proportionnalité en droit de l'Organisation Mondiale du Commerce*, in: LA CIRCULATION DES CONCEPTS JURIDIQUES, 475 (Hélène Ruiz Fabri & Lorenzo Gradoni eds, 2009); Donald Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REVIEW 347, 347 (2007).

[99] Appellate Body Report, *EC – Asbestos* (note 79) paras 113-215 & 129-131.

[100] *Id.*, para. 172 (interestingly, however, it omitted in relation to its earlier findings that the impact on trade was a relevant factor).

ous because the measure had already been found to be consistent with Art. III(4) and was thus not in need of justification. It is interesting to note that with these pronouncements the AB again lined up all the arguments for eventually justifying a measure by way of Art. XX even if such arguments did not carry the decision in the present case.[101] This is the same pattern that it had employed before in the *United States – Shrimp* saga in which previous dicta ultimately came to carry its later decision.

In *Brazil – Retreaded Tyres* the Appellate Body was again emphatic about the need to balance the importance of competing interests.[102] It fuelled controversy by coalescing a proportionality analysis with the requirement that the measure be least trade restrictive:

> [I]n 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 comparison 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.[103]

It remains very dubious whether the Appellate Body really meant what it said or did what it pretended to do, i.e., whether it really required that measures under Art. XX can only be "necessary" if they meet a fully-fledged proportionality test and whether it would actually test measures against this standard. Debates pertaining to proportionality in Art. XX straightforwardly extend to political and legal philosophy: The

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[101] *Cf.* Hélène Ruiz Fabri, *Drawing a Line of Equilibrium in a Complex World*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 125, 141 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (suggesting that this may be read as a signal sent by the judges that, once they get the chance, they would decide accordingly).

[102] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 137.

[103] *Id*., para. 178.

dispute about meaning has transformed into the question of whether adjudicators *should* engage in proportionality analysis.[104]

3. Interpretation and Legitimacy

The Appellate Body's words and deeds lend themselves to a wide spectrum of interpretations. Some argue that it has already engaged in proportionality analysis, others say it has not. Those who argue that it has done so also believe that it should do so and those who say that it has not done so also argue that it should not do so – the Appellate Body was right in what it did, whatever it did. Usually normative assessments seem to precede the analysis of what the court actually did. The issue very much divides the community of scholarly commentators.

One group claims that the Appellate Body balances the benefits of a certain measure for the achievement of a certain legitimate public policy goal against the cost of that measure in terms of reduced trade. Those who see a proportionality test at work also argue that the adjudicatory bodies within the WTO are right to examine a measure's appropriateness.[105] A number of complementary reasons are offered in support of this suggestion: In a rational-choice perspective, balancing might be considered part of the task delegated to the courts (the agent) by the members (the principals).[106] From the point of view of constitutional

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[104] Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law,* in: THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?, 35 (Joseph H. H. Weiler ed., 2000) (developing an early argument to this effect).

[105] Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect*, 49 WASHINGTON AND LEE LAW REVIEW 1407 (1992) (already advocating proportionality in response to the *Tuna-Dolphin I* report); Meinhard Hilf & Sebastian Puth, *The Principle of Proportionality on its Way into WTO/GATT Law,* in: EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION, 199 (Armin von Bogdandy, Petros C. Mavroidis & Yves Mény eds, 2002) (making out the advent of proportionality in the *US – Gasoline* and *US – Shrimp* reports); Ruozzi (note 98), 480-484; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEXAS INTERNATIONAL LAW JOURNAL 371, 414 (2007) (suggesting that "the AB focuses on the balancing of competing rights, interests, and obligations as a pre-dominant feature within chapeau analysis").

[106] Trachtman (note 1), 362.

doctrine and legal theory, balancing also appears to be a quite natural part of legal reasoning and there is no apparent reason why this should be different in the context of the WTO.[107] Authors tend to stress the rationalizing and constraining function that proportionality analysis in their opinion entails.[108] Balancing may then also be linked to constitutional qualities within the WTO.[109] Also note that the WTO's World Trade Report of 2005 embraces the jurisprudence on balancing in support of trade law's openness for non-trade public policy considerations – a good thing after all.[110]

Conversely, another group claims that the Appellate Body's rhetoric on balancing is misleading and should not be taken to imply proportionality analysis.[111] Rather, the Appellate Body respects, as it says it does, the regulative autonomy of its members and their right to freely choose their level of protection. If it does engage in a balancing exercise, this balancing does not extend to the benefits of the measure for legitimate public policy aims. This would inevitably contradict the member's right to freely choose their level of protection. Rather, balancing might be part of examining whether an alternative measure is reasonably avail-

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[107] Piet Eeckhout, *The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 JOURNAL OF INTERNATIONAL ECONOMIC LAW 3, 18 (2010).

[108] Usually such emphasis comes with significant caveats, *see* Martineau (note 89), 1022-1030; Kleinlein (note 85).

[109] DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION 34 (2005); Ernst-Ulrich Petersmann, *From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Governance'*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 86, 99 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006).

[110] WTO SECRETARIAT, WORLD TRADE REPORT 2005: EXPLORING THE LINKS BETWEEN TRADE, STANDARDS AND THE WTO 135-136 (2005).

[111] Regan (note 98); Petros C. Mavroidis, *Trade and Environment After the Shrimps-Turtles Litigation*, 34 JOURNAL OF WORLD TRADE 73, 79 (2000); Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in: EFFICIENCY, EQUITY, LEGITIMACY AND GOVERNANCE: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM, 227 (Roger B. Porter, Pierre Sauve, Arvind Subramian & Americo Beviglia Zampetti eds, 2001); Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW 53 (2009). *See also* Andrew Lang, *Reflecting on Linkage: Cognitive and Institutional Change in the International Trading System*, 70 MODERN LAW REVIEW 523 (2007).

able that would be less trade restrictive and would yet meet the same level of protection. Such an alternative measure might be more costly and this is where the Appellate Body engages in balancing the additional administrative or enforcement costs against the benefits in less trade restrictions. This leaves the public policy interests of a measure untouched. It is argued that the Appellate Body should not engage in examining the appropriateness of measures because it lacks a number of indispensable prerequisites for doing so.[112] Above all, judicial interpretation is not embedded in a functionally equivalent institutional context when compared to domestic or European arenas.

E. International Adjudication, Precedents and Legitimacy in Multilevel Governance

Legal discourse on Art. XX GATT is now largely concerned with questions of balancing, with establishing what proportionality analysis actually means, and with understanding how it relates to the regulatory autonomy of the contracting parties. The main reference point in legal contestation is the Appellate Body's enigmatic pronouncement in *Korea – Beef*.[113] The purpose of the preceding analysis has been primarily analytical. It has purported to show how international adjudication has developed the international trade law on general exceptions into standards for domestic regulatory policy. It has illustrated how participants in legal discourse cannot escape the spell of precedents as a matter of fact and that there is a prevailing understanding that they also should relate their arguments to previous decisions. Counsels and adjudicators seek the support of suitable precedents and twist those that are not quite fitting. Once a precedent is on the table, other participants in legal discourse are wise to relate to them just as well. The argument that precedents are not binding is of very little help and is barely ever made – if so, then only to discuss that same precedent in spite of its nonbinding nature. The quality of bindingness does not add to or take away from the authority of precedents and their contribution to the creation of le-

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[112] Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law after Korea – Beef, EC – Asbestos and EC – Sardines*, 37 JOURNAL OF WORLD TRADE 199 (2003); Desmedt (note 88), 475-476.

[113] Appellate Body Report, *Korea – Beef* (note 90), para. 162.

gal normativity. This is common knowledge among the actors and explains the interest of third parties in the proceedings as well as the concern with the reasoning that adjudicators employ. In the discussion of the *United States – Shrimp* Appellate Body Report in the DSB the Brazilian representative illustratively stated that:

> It was well-known that in practice any decision of a panel or the Appellate Body with regard to a specific case would go beyond such a specific case. Although no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement. Therefore, in light of these systemic implications of decisions and recommendations pertaining to a specific case, Brazil wished to state its position with regard to certain findings of the Appellate Body.[114]

Even if the outcome of a report might be shared, members still scrutinize the reasoning because it feeds into later practice.[115] As happened in both *Japan – Alcoholic Beverages (II)* and *EC – Asbestos*, they might appeal even if they had won the case at first instance in all practical matters.[116]

Such concern is not without cause. A number of decisive steps in the Appellate Body's work towards developing the law have first been paved in statements that were not necessary for resolving the case. It has made general statements that were not decisive, only to later build on its general pronouncements in decisive steps. One may then wonder about (and be wary of) the constant reiteration that adjudicators should take into consideration the importance of the value pursued in the process of balancing that is required for determining whether a measure is necessary. So far the Appellate Body has never said that the objective a member pursues is unimportant – but the arguments are out there and might, at one point in time, support the finding that a measure is not necessary because the trade restrictions are not proportionate to the importance of the goal pursued.

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[114] Dispute Settlement Body, Minutes of the Meeting held on 6 November 1998, WT/DSB/M/50, 12 (the meeting concerned the adoption of the Appellate Body Report in *US – Shrimp*).

[115] *Cf.* Abi-Saab (note 90), 455 (suggesting that members readily exercise their right to express their views on reports).

[116] Appellate Body Report, *Japan – Alcoholic Beverages II* (note 51); Appellate Body Report, *EC – Asbestos* (note 79).

It has been suggested, with good reasons, that this should not happen. Many argue that adjudicators in the WTO do not have the legitimate authority to engage in a fully-fledged proportionality test that would intrude far into members' regulatory autonomy and that would contradict the assertion that members are free to choose their own level of protection.[117] The balancing that might be sensible would not extend to the importance of the goal, but rather to the costs of alternatives that are no less suited to meet the same level of protection.[118]

I wish to close by placing this debate about what international adjudicators can legitimately do in a context of multilevel governance within the general framework on the legitimacy of judicial lawmaking. First of all, it merits emphasis that the spell of precedents in international trade law is neither all curse nor cure. While it might distance the law from the reach of political legislation, a body of case-law that aims at coherence and serves the imperatives of legal certainty and stability.[119] The stabilization of legitimate expectations is a central function of law and judicial practice needs to be embedded in the past in order to instruct the future.[120]

Second, the asymmetry between judicial lawmaking and politico-legislative processes is one of the decisive elements in the debate surrounding what adjudicators in the WTO can and cannot legitimately do.[121] One way of taking away some of the legitimatory weight that international adjudicators need to shoulder in the WTO might lie in a strategy of reviewing the process that has lead to a regulatory decision and to strengthen procedural elements in this process rather than to add to the substance of Art. XX. To illustrate the point, when trade mea-

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[117] That a fully-fledged proportionality analysis would encroach upon member state autonomy is well acknowledged also by those who argue in its favor, *see*, *e.g.*, Eeckhout (note 107).

[118] *Cf*. TREBILCOCK & HOWSE (note 26), 543-544 (arguing that *Korea – Beef* did not introduce any additional requirement of proportionality into the adjudicators' assessment but rather opened up more leeway on part of member state regulation and reversed the restrictive trend that took off with *Thai Cigarettes*).

[119] *See* Appellate Body Report, *Japan – Alcoholic Beverages II* (note 51), 15; Appellate Body Report, *US – Stainless Steel (Mexico)* (note 54), para. 162.

[120] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010).

[121] Bogdandy (note 1); Howse & Nicolaïdis (note 111).

sures are the result of a decision-making process that meets certain criteria, when it includes meaningful participation and reason-giving, then it might be presumed to be justified.[122] A complementary strategy would look at avenues of politicization that contribute to the creation and better use of fora in which judicial lawmaking may be politically embedded.[123]

Lastly, a particularly intricate issue concerns the repercussions of fragmentation. The isolation of trade law from non-trade objectives reached its problematic peak at the end of the GATT era with the *Tuna – Dolphin* cases. The Appellate Body has since done a lot to surmount this isolation and to open up to competing perspectives.[124] Apart from the extensive quarrels in terms of judicial methodology and possible confines placed on adjudicators by positive trade law, political considerations about the wisdom and likely effects of further introducing non-trade objectives like environmental or human rights protection into the WTO system and adjudication persist and need to be explored in further detail.[125]

There are many other elements to the legitimacy debate that are pertinent and that would need to be taken into account: considerations of due process, the use of amicus curiae briefs, and also more substantive considerations of what good has actually come out of judicial lawmaking, to name just a few. The point is that large parts of the legal dispute concerning what Art. XX means in its central elements can hardly be decoupled from considerations of legitimacy. The practice of the legal discourse testifies to how semantic struggles extend to debates about the legitimacy of international adjudication. The reign of the Appellate Body over general exceptions should be understood in the context of a scheme of multilevel governance. This demands above all due regard of

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[122] This thought is further pursued by Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, in this issue. *Cf*. Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, IILJ Working Paper 2009/7.

[123] Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests*, 20 EJIL 615 (2009).

[124] *See* Kleinlein (note 85).

[125] This has of course been done to a considerable extent; yet there remain large areas not only of disagreement but also of uncertainty and lack of empirical as well as conceptual clarification.

the repercussions that interpretations have for the purposes of international law just as well as for municipal legal orders.