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THE TREATMENT OF NATIONAL MEASURES INTRODUCING TRADE RESTRICTIONS ON ENVIRONMENTAL GROUNDS UNDER WTO LAW

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1. Introduction

In the era of economic globalisation, the World Trade Organization (WTO), which promotes the development of a freer and fairer trade between its Members, has become the main forum in which product-related issues are discussed and where State measures which introduce product or product-related standards aiming at the protection of public policy interests, such as for instance the protection of the environment, may be challenged in the name of the liberalisation of trade.

Despite the general preference of WTO rules for internationally agreed provisions on product and product-related standards, there are still several circumstances in which States have in principle the right to determine their own national standards, in order to afford an adequate level of protection to certain important public policy interests, for instance when internationally agreed rules do not exist or when States do not consider them to be sufficiently protective.

The specific aim of the present paper in to show which are the boundaries of such a right of the WTO Members to introduce their own national standards. To this end, in the next paragraphs we will briefly analyse the most relevant WTO case-law, with specific reference to those cases falling within the so-called 'trade and environment' sphere, in order to determine under which circumstances a product or product-related standard set by a State, by a number of States or for instance by the European Community, which is also a WTO Member together with its Member States, may be justified under the applicable WTO rules.[1]

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[1] On the case-law in the 'trade and environment' sphere in the GATT/WTO context see CAMERON, DEMARET, GERADIN, *Trade and the Environment: the Search for a Balance*, London, 1994, and in particular the following contributions: JACKSON, *Greening of the GATT: trade rules and environmental policy*, p. 39 ff.; DEMARET, *Trems, Multilateralism, Unilateralism and the GATT*, p. 52 ff.; PETERSMANN, *Trade and Environmental Protection: Practice of GATT and the EC compared*, p. 147 ff. See also PETERSMANN, *International and European Trade and Environmental law after the Uruguay Round*, London, 1995; SANDS, *Principles of International Environmental Law*, Manchester, 1995, p. 690 ff.; MONTINI, *The Nature and Function of the Necessity and Proportionality Principles in the Trade and Environment Context,* in *RECIEL*, 1997, p. 121 ff.; MIGLIORINO, *Le eccezioni ambientali ai principi del GATT nella prassi dei Panels*, in *RCI*, 1997, p. 673, ff.; FRANCIONI, *La tutela dell'ambiente e la disciplina del commercio internazionale*, in AA.VV., *Diritto ed organizzazione del commercio internazionale dopo la creazione dell'Organizzazione Mondiale del Commercio*, (Atti del Convegno SIDI del 1997), Napoli, 1997, p. 147 ff.; SCHOENBAUM, *International and European Trade and Protection of the Environment. The Continuing Search for Reconciliation*, in *AJIL*, 1997, p. 268 ff.; WIERS, *Regional and Global Approaches to Trade and Environment: the EC and the WTO*, in *LIEI*, 1998, p. 93 ff.; FRENCH, *The Changing Structure of environmental protection: recent developments regarding trade and the environment in the European Union and the World Trade Organization*, in *NYIL*, 2000, p. 1 ff.; CHEYNE, *Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles*, in *JEL*, 2000, p. 293 ff.; FRANCIONI, *Environment, Human Rights and the Limits of Free Trade*, in FRANCIONI (ed.) *Environment, Human Rights and International Trade*, Oxford, 2001, p. 1 ff.; MONTINI, *The Necessity Principle ad an instrument to balance trade and the protection of the environment*, *ibidem*, p. 135 ff.; SANDS, *Principles of International Environmental Law*, II ed., Cambridge, 2003, p. 952 ff.

2. The applicable provisions: from the GATT to the WTO

As it well known, the GATT Treaty has been since 1947 one of the main driving forces behind the outstanding growth of the world economy in the second half of the XX century, which has been characterised by the progressive liberalisation of international trade achieved through a generalised abolition of non-tariff barriers to trade and a trend towards the lowering down and/or removal of tariff barriers to trade.

In 1994, at the conclusion of the Uruguay Round, the last of the several periodical rounds held by the GATT Contracting parties in order to update the international rules governing global trade, the Parties decided to set up an international organization, namely the WTO, with the aim of administering the GATT Treaty and a whole series of other international trade agreements so as promote an increased undisturbed trade flow across the borders of the Contracting Parties worldwide.

The WTO, in fact, now administers several multilateral agreements on world trade law, which beside the GATT now include for instance the GATS (*General Agreement on Trade in Services*), the TRIPS (*Agreement on Trade-Related Aspects of Intellectual Property Rights*), the SPS (*Agreement on the Application of Sanitary and Phytosanitary Measures*) and the TBT (*Agreement on Technical Barriers to Trade*).

The GATT Treaty is, however, among all such agreements, still the most important one insofar most of the international trade is still regulated by its rules and most controversies still arise on the application of its provisions. For this reason, in the next paragraph, we will start with an analysis of the most relevant case-law on the 'trade and environment' sphere arisen in the framework of the application of the GATT, before proceeding in the subsequent paragraphs to analyse the impact of some of the other international trade agreement on the right of the Parties to determine under certain conditions their own environmental standards.

3. The GATT case-law

3.1 General remarks on the applicable GATT provisions

We have already mentioned above that the main objective of the GATT Treaty is the promotion of a freer and fairer trade among the Contracting Parties, which should finally lead to the ultimate goal of furthering economic development through the expansion of international trade.

To this end, the main principle upon which the GATT is based is the principle of non-discrimination, which is enshrined in two clauses: (1) the "most-favoured nation" clause (MFN clause), according to which all tariff concessions accorded to one State must be automatically extended to all other GATT Contracting Parties (article I GATT); (2) the "national treatment" clause" (NT clause), on the basis of which imported goods, once they have entered into the national market of a given State, must not be subject to a less favourable treatment than national products (article III GATT). Moreover, the MFN and NT clauses are supplemented by a general provision which prohibits all restrictions on imported products other than tariffs (article XI GATT).

On the basis of such provisions, obviously, an unrestricted freedom of trade is the main goal and the main concern of the GATT Treaty. However, this does not mean that international trade must

remain unrestricted in all circumstances. The GATT Treaty itself in fact contemplates some circumstances in which trade in goods can be legitimately restricted in order to afford an adequate protection to important interests of the Contracting Parties, provided that certain requirements are met. Such circumstances are listed in article XX GATT, which is named "general exceptions".[2]

Pursuant to the provision of article XX GATT, in order for a Party to justify the adoption of some national measures, by giving priority to its national environmental interests over the general interest of the promotion of free and undisturbed international trade, two conditions must be fulfilled.[3] Firstly, it must be demonstrated that the national measures in question fall under one of the two following exceptions: (1) article XX(b), which deals with national measures *"necessary to protect human, animal or plant life or health*"; (2) article XX(g), which refers to national measures "*relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restriction on domestic production or consumption*". Secondly, once ascertained that the national measures at stake fall under article XX(b) or XX(g) exceptions, they must be assessed in the light of the introductory clause of article XX, the so-called *chapeau*, which states that they can be held compatible with the GATT provided 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*".[4]

On the basis of the above mentioned "general exceptions", the GATT/WTO dispute settlement authorities have tried to find a balance between the conflicting environmental and trade interests at stake in a variety of cases. Before analysing some of the most important cases decided on the basis of the GATT's provisions, it should be recalled here that in all the cases concerned the WTO dispute settlement authorities have settled the "trade and environment" issues by applying a balancing instrument composed of two tests, namely the necessity and the proportionality tests, which can be named "necessity principle", as I explained in greater detail elsewhere.[5]

3.2 The application of article XX(b) GATT

As regards the application of the exception contained in article XX(b) GATT, which refers to national measures "*necessary to protect human, animal or plant life or health*", the following cases are going to be analysed here: the *Thai Cigarettes case* and *Tuna / Dolphins case* I and II, decided before the institution of the WTO in 1995, and the *Gasoline* case and the *Asbestos* case, decided after that date.

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[2] The rational behind the "general exceptions" listed in article XX GATT as been aptly explained by PETERSMANN, which held that: "*the 'general exceptions' in Article XX are designed to allow Contracting Parties to give priority to the "public policies" listed in Article XX over trade liberalisation by authorising trade restrictions necessary for the pursuit of overriding public policy goals, including protection of life, health and environmental resources*". See PETERSMANN, *International and European Law after the Uruguay Round*, London, 1995, p. 29.

[3] The correct method of application of the "general exceptions" contained in article XX GATT for the justification of national measures aiming at the protection of the environment has been summarised as follows by the Appellate Body (AB) in the 1996 *Gasoline* case: "*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 characterisation of the measure under XX - paragraphs (a) to (j); second, further appraisal of the same measure under the introductory clauses of Article XX.*"

[4] See CHARNOVITZ, Exploring the environmental exceptions in GATT article XX, in *Journal of World Trade*, 1991, p. 5.

[5] See MONTINI, *The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment*, cited supra note 1, p. 135 ff.

The first relevant case, which was decided by the GATT dispute settlement authorities some years before the institution of the WTO, is the *Thai Cigarettes case* (1990).[6] The case concerned restrictions on import and export of tobacco and tobacco products applied by Thailand, which were mainly applied against the import of US produced cigarettes. When the USA claimed the unlawfulness of the Thai national measure before the GATT dispute settlement authorities, Thailand sought justification for such an unilateral measure under the exception of article XX(b) GATT, holding that it was taken for health concerns, on the basis of the fact that chemicals and other additives contained in foreign, particularly US, cigarettes made them more harmful than Thai cigarettes.

The Panel called on to examine the compatibility of the Thai national measure with the exception contained at GATT article XX(b) "*accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes feel within the scope of article XX(b)*" and also noted that "*this provision clearly allowed Contracting Parties to give priority to human health over trade liberalisation; however, for a measure to be covered by article XX(b) it had to be 'necessary'* ".

When interpreting the term "necessary" for the purpose of the application of article XX(b) exception, the Panel took inspiration from the interpretation of the same term "necessary" which had been previously given by another Panel within the context of GATT article XX(d), in the *Section 337 case* (1989).[7] In the such a case, the Panel when interpreting the term "necessary" had stated that:

> "*A contracting Party cannot justify a measure inconsistent with other GATT provisions as 'necessary' in terms of article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, 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*".[8]

According to such interpretation of the term "necessary" proposed by the Panel in the *Section 337 case* and endorsed by the Panel in the *Thai Cigarettes case*, a national measure can be held "necessary" within the meaning of GATT article XX(b) and thus justifiable under that exception only if it appears to have been "indispensable" to achieve the aim sought, in the sense that the measure actually chosen by the given Contracting Party was the only one which could be reasonably adopted in the circumstance at stake. To use the *Thai Cigarettes* Panel's own words:

> "*the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with, which Thailand could reasonably be expected to employ to achieve its health policy objectives*".[9]

On basis of such line of reasoning, the GATT Panel in the *Thai Cigarettes case* found that other measures consistent with the GATT provisions were in fact reasonably available to Thailand to control the quality and quantity of cigarettes smoked, including for instance non-discriminatory labelling regulations or a ban on advertisement. Therefore, the Thai unilateral measures could not be considered 'necessary' within the meaning of article XX(b) and could not be justified under the applicable GATT provisions.

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[6] See Thai Cigarettes case, Report of the Panel, BISD 37 S/200-228.
[7] See Section 337 case, Report of the Panel, BISD 36 S/345.
[8] See Section 337 case, Report of the Panel, BISD 36 S/345, at § 5.26.
[9] See Thai Cigarettes case, Report of the Panel, BISD 37 S/200-228, at § 75.

The application of the exception contained in article XX(b) came into play once again in the well-known two *Tuna / Dolphins cases*, also decided by the GATT dispute settlement authorities before the institution of the WTO. The *Tuna / Dolphins case* I (1991) [10] concerned restrictions adopted by the USA, pursuant the US 1972 Marine Mammal Protection Act, on import of yellow-fin tuna and yellow-fin tuna products from Mexico. The US authorities justified such import restrictions on the basis of animal health and life considerations, alleging that the harvesting methods adopted by Mexican fishermen in the Eastern Tropical Pacific Ocean, which included the use of purse-seine nets, resulted in high levels of dolphin mortality. The GATT Panel appointed to judge on that case, when interpreting article XX(b) exception, basically recalled the interpretative line which had been proposed by the Panel in *Thai Cigarette case*. As regards in particular the *ratio* of GATT article XX(b), the Panel in the material case argued that:

> "*article XX(b) was intended to allow contracting Parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable*".[11]

According to such interpretation, since the *ratio* of article XX(b) exception is to allow only unavoidable restraints to international trade, a GATT Contracting Party wishing to adopt unilateral measures aiming at affording an adequate protection to one of the important interests listed at article XX(b), in order to legitimately justify its provisions under the GATT rules, must prove either that the chosen measures were the only ones reasonable available to it or, in case various measures were theoretically available to achieve the aim sought, that it had chosen the measures which entailed the least inconsistencies with the international trade rules and which restricted trade only to the extent that this was really unavoidable. On the basis of such line of reasoning, in the *Tuna / Dolphins case* I the Panel found that the United States had not demonstrated that other measures consistent with the GATT were not available to it to pursue its dolphin protection objectives. Therefore the Panel held that the US import restrictions were not "necessary" and could not be justified under article XX(b).

The Report of the Panel in the *Tuna / Dolphins case* I was never adopted by the GATT Contracting Parties, thus remaining at the level of a 'potential' adjudication of the controversy. Moreover, notwithstanding the findings of the Panel against the compatibility of the US national measure with the GATT provisions, the US authorities did not lift the embargo on Mexican Tuna and indeed extended it also to tuna and tuna-products imported from intermediary nations. The intermediary nations embargo was therefore challenged jointly by the Netherlands and the European Community, in the *Tuna / Dolphins case* II (1994).[12]

In the *Tuna / Dolphins case* II, the appointed GATT Panel held that in general terms "*article XX as a provision for exceptions, should be interpreted narrowly and in a way that preserves the basic objectives and principles of the General Agreement"*. When analysing in particular the "necessity" of the US measure to protect animal life or health, the Panel confirmed that, in the light of the case-law of precedent GATT Panels, "necessary" in the context of article XX(b) should refer to measures taken in circumstances in which no alternative existed for the Party taking the unilateral measures.[13] The Panel, in fact, in the present decision endorsed the interpretation suggested by the European Community, according to which necessary meant "indispensable" or "unavoidable", and rebutted

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[10] See Tuna / Dolphins case I, Report of the Panel, BISD 39 S/155-205, 30 ILM 1991, p. 1594. For a comment see FRANCIONI, "Extraterritorial Application of Environmental Law", in MEESSEN (ed.), *Extraterritoriality in Theory and Practice*, The Hague, 1996, p. 112.

[11] See Tuna / Dolphins case I, Report of the Panel, BISD 39 S/155-205, at § 5.27.

[12] See Tuna / Dolphins case II, Report of the Panel, 33 ILM 1994, p. 839.

[13] See Tuna / Dolphins case II, Report of the Panel, at § 5.35.

the interpretation proposed by the US, according to which necessary simply meant "needed". On this basis, then, it finally concluded that the US embargo could not be justified under the article XX(b) exception.

The first case decided after the institution of the WTO which involved the application of the exception contained in article XX(b) GATT was the *Gasoline* case (1996). [14] The *Gasoline case* arose from a US regulation which imposed on foreign gasoline refiners wishing to export their products into the US territory stricter environmental standards, as compared to those imposed on US national refiners. The WTO Panel, when examining the national measure under article XX(b), focused in particular on the "necessity" of the US measure. In this sense, in fact, the Panel recalled the interpretation of the term "necessary" already given by some previous GATT Panels in the *Section 337 case* (1989) and in *Thai Cigarettes case* (1990) and stated that, with regard to the US measure under scrutiny: "*If there were consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met*".[15]

The Panel therefore found the US measure unjustifiable under article XX(b), since there were alternative measures less restrictive for international trade which could have been adopted by the US authorities. The case was then appealed before the WTO Appellate Body (AB).[16] The AB did not explicitly deal with article XX(b) exception and with the interpretation of the term "necessary" contained thereto, but rather decided the case on the basis of article XX(g) only. However, from an *obiter dictum* of the decision, it seems that the AB substantially wished to endorse the line of reasoning proposed by the Panel, according to which a national measure could be considered "necessary" within the meaning of article XX(b) only if it was possible to demonstrate that there were no alternative measures reasonably available to the State, which could achieve the aim sought with less impact on international trade.[17]

In the subsequent case with "environmental" features decided under article XX GATT, namely the *Shrimps/Turtles* case (1998),[18] dealing with a US regulation imposing certain fishing technologies to prevent accidental take of sea turtles also to fishing activities occurring outside the jurisdiction of the United States, the US authorities sought justification both under article XX(b) and XX(g), but the Panel and the Appellate Body only addressed the issues under the article XX(g) exception, and did not provide any further interpretative contribution to the interpretation and application of the article XX(b) exception. Therefore, the case will be dealt with below, with reference to the article XX(g) exception.

The application of the article XX(b) exception was finally addressed again in the *Asbestos* case (2001).[19] Such a case arose from a French national regulation which banned "*the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres*" for the protection of workers and of consumers. The French regulation did, however, allow a limited exception to the general ban, in specific cases when no substitute for materials, products or devices containing chrysotile fibres was available.

Canada, which prior to the adoption of the national measure at stake was a major exporter of asbestos fibres and products to France, challenged the French Decree before the WTO Dispute

[14] See Gasoline case, Report of the Panel, WT/DS2/R, in 35 *ILM* 1996, p. 274.
[15] See Gasoline case, Report of the Panel, at § 6.24.
[16] See Gasoline case, Report of the Appellate Body, WT/DS2/AB/R, in 35 *ILM* 1996, p. 605.
[17] See Gasoline case, Report of the Appellate Body, at p. 620.
[18] See Shrimps / Turtles case, Report of the Panel, WT/DS58/R and Report of the Appellate Body, WT/DS58/AB/R.
[19] See Asbestos case, Report of the Panel, WT/DS/135/R, and Report of the Appellate Body, WT/DS/135/AB/R.

Settlement Body (DSB), claiming that the Decree: (1) constituted a technical regulation covered by the Agreement on Technical Barriers to Trade (TBT Agreement) and was incompatible with various provisions of the TBT Agreement; (2) amounted to a ban incompatible with Article III(4) GATT and was not justifiable under the exception contained in Article XX(b) GATT.

As regards, in particular, the claim regarding the compatibility of the French measure with the GATT's provisions, the issues under scrutiny were the following ones: firstly, it had to be determined whether "chrysotile asbestos fibres and products" and "PCG fibres and products" were "like products" within the meaning of GATT Article III(4)[20] and secondly it had to be assessed whether the French measure could be justified under article XX(b) exception.

For the purpose of the present paper we will deal here just with the latter issue. To this respect, the Panel firstly ascertained that, on the basis of the scientific evidence available, the asbestos fibres and products constituted a risk for public health and therefore the French regulation fell within the range of policies designed to protect human life or health, within the meaning of GATT Article XX(b), and secondly concretely assessed the justifiability of the national measure by applying the "necessity principle", as already developed by other Panels and the AB in previous cases.[21] In doing so, the Panel analysed in particular whether other measures "consistent or less inconsistent" with the prescriptions of the GATT were "reasonably available" to France and found that, in light of the "high degree" health policy objectives sought by France, no measures existed which could be considered a "reasonably available" alternative to the general ban adopted. [22] Therefore, the Panel concluded that the French measure was justifiable under the exception of Article XX(b) GATT, after having verified that it also satisfied the requirements of the *chapeau*.[23]

The Panel's decision was then reviewed by the AB. As to the issue of the justifiability of the French measure under Article XX(b) GATT, in particular, the AB substantially upheld the Panel's finding that the French Decree could be justified under Article XX(b), by underlying that since "*the chosen level of health protection by France was a halt to the spread of asbestos-related health risks*", the general ban on asbestos products was clearly designed to achieve the objective sought and there was no alternative measure "reasonably available" to France "*that would achieve the same end and that is less restrictive of trade than a prohibition*".[24]

The cases just analysed above show that the Panels and the AB, when judging on the possibility to justify a national measure under the article XX(b) have always applied the same sort of balancing instrument, which we have named above the "necessity principle". On the basis of such an instrument, according to the AB view, "*in order to determine whether a measure is necessary it is important to assess whether consistent or less inconsistent measures are reasonably available*". The rational behind such an instrument is therefore the following one: the national measure must try to achieve the legitimate objective sought by posing the least possible degree of restriction on international trade. If, however, there are no alternative measures "reasonably available" to achieve the same degree of environmental or public health protection, as for instance in the *Asbestos* case, even a quite burdensome restriction to trade, such as a general ban on certain goods, may be held justifiable under article XX(b).

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[20] See Article III(4) of the GATT reads, in the relevant part: "*The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use*".

[21] See for instance Gasoline case and Shrimps Turtles case, cited supra.

[22] See Asbestos case, Report of the Panel, § 8.208-8.223.

[23] See Asbestos case, Report of the Panel, § 8.241.

[24] See Asbestos case, Report of the Appellate Body, §§ 164-175.

3.3 The application of article XX(g) GATT

With reference to the application of the exception contained in article XX(g) GATT, which refers to national measures "*relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restriction on domestic production or consumption*", the following cases are going to be analysed here: the *Canadian Herring and Salmon case* and *Tuna / Dolphins case* I and II, decided before the institution of the WTO in 1995, and the *Gasoline* case and the *Shrimps/Turtles* case, decided after that date.

The first relevant case in which the exception of article XX(g) was invoked before the GATT dispute settlement authorities was the *Canadian Herring and Salmon case* (1988).[25] In that case, the US complained against a Canadian national measure which had made compulsory for the herring and salmon caught in Canadian waters to be processed in Canada before being exported. According to the Canadian authorities, such restriction on export were part of a management scheme of fisheries resources within Canadian waters and therefore were "related to the conservation exhaustible natural resources" within the meaning of article XX(g). The Panel appointed to define the controversy, proposed the following interpretation of the article XX(g) exception:

> "*The purpose of including article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded, for these reasons, that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of article XX(g). The Panel, similarly, considered that ... a trade measure could ... only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed at rendering effective these restrictions*".[26]

On the basis on such line of reasoning, the Panel concluded that the Canadian measure was not justifiable under article XX(g) exception, insofar it was not "primarily aimed at" the conservation of salmon and herring stocks and was "not primarily aimed at rendering effective these restrictions".

Such an interpretation of the wording of article XX(g) exception, according to which the term national measures "relating to" the conservation of an exhaustible natural resource is meant to refer to measures "primarily aimed at" the conservation of an exhaustible natural resource, was also endorsed by the Panels in *Tuna / Dolphins case* I and the *Tuna / Dolphins case* II (1991 and 1994) , already seen above. In the *Tuna / Dolphins case* II in particular, the GATT Panel explicitly affirmed to agree with the line of reasoning of the previous Panels "*on the understanding that the words 'primarily aimed at' referred not only to the purpose of the measure, but also to its effect on the conservation of the natural resource*".[27]

It is worth recalling here that in the two *Tuna / Dolphins* cases the US ban on the import of yellow-fin tuna and yellow-fin tuna products from Mexico and intermediary nations was finally held by the GATT Panels not justifiable both under the article XX(b) and under the article XX(g) exceptions. As regards the application of the article XX(g) exception in particular, in the *Tuna / Dolphins case* I, the analysis of the Panel relating to the possibility to justify the US embargo at stake on the basis of article XX(g) focused on the issue of the extra-jurisdictional applicability of the exception. To this respect, the Panel held that "*a country can effectively control the production or consumption of*

[25] See Canadian Herring and Salmon case, Report of the Panel, BISD 35 S/98.
[26] See Canadian Herring and Salmon case, Report of the Panel, BISD 35 S/98, at § 6.39.
[27] See Tuna / Dolphins case II, Report of the Panel, at § 5.22.

an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction" and argued that accepting the attempt of the United States to give an extra-jurisdictional application to the provision at stake would actually have meant that "*each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardising their rights under the General Agreement*". On this basis, the Panel concluded that the US national measure could not be justified under article XX(g), although it held that in any case such as measure, even if not applied in extra-jurisdictional way, would not be held justifiable under article XX(g) insofar it could not be regarded as being "primarily aimed at" the conservation of dolphins.[28]

Quite on the contrary, the Panel in the *Tuna / Dolphins case* II firmly rejected the interpretation of the previous Panel according to which the exception article XX(g) could not be applied extra-jurisdictionally and rather focused its attention on the analysis of the "primary aim" of the US embargo. To this respect, the Panel found that since the primary aim of the US measure seemed to be not so much to protect an exhaustible natural resource, but rather to force changes in the environmental policies and practices of other countries, such a measure could not be justified under article XX(g) insofar:

> "*If ... article XX were interpreted to permit contracting parties to take trade measure so as force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights among contracting parties, in particular the right of access to markets, would be seriously impaired*".[29]

The above analysis shows that in these early cases dealing with the interpretation and application of the exception of article XX(g), decided before the institution of the WTO, the GATT Panels limited themselves to a superficial and restrictive reading of the text of article XX(g), which reduced the possible scope of application of the exception by interpreting the term "relating to" the protection of an exhaustible natural resource as "primarily aimed at" such a protection, and by interpreting the term "made effective in conjunction with restrictions on domestic production or consumption" as "primarily aimed at rendering effective these restrictions", with specific reference to the concrete effect that the national measures at stake had on the natural resources they aimed at protecting. The situation partially changed in the subsequent cases, decided after the creation of the WTO.

In the *Gasoline* case (1996),[30] the first relevant case decided after the institution of the WTO, the US national measure at stake, after being analysed under article XX(b) as we have seen above, was examined also under article XX(g). To this respect, the Panel, when applying the article XX(g) exception, did not depart from the interpretation of the terms "relating to" the protection of an exhaustible natural resource as "primarily aimed at" such a protection, as well as from the interpretation of the term "made effective in conjunction with restrictions on domestic production or consumption" as "primarily aimed at rendering effective these restrictions", which had been constantly proposed by the previous GATT Panels.[31]

The Panel's decision, however, was appealed before the AB, which on the one side confirmed that the interpretation of the term "relating to" as meaning "primarily aimed at" the conservation of an exhaustible natural resource was correct, but on the other side when interpreting the term "made effective in conjunction with restrictions on domestic production or consumption" noted that it seems to require not so much that the national measures must be "*primarily aimed at rendering*

[28] See Tuna / Dolphins case I, Report of the Panel, § 5.31-5.33.
[29] See Tuna / Dolphins case II, Report of the Panel, at § 5.26.
[30] See Gasoline case, cited above.
[31] See Gasoline case, Report of the Panel, § 6.35-6.42.

effective these restrictions", as it had been hold by the Panel, but rather that "*the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline*".[32] Therefore, the AB concluded that the US national measure at stake was provisionally justifiable under the article XX(g) exception. However, the AB finally found that the measure, as it was concretely applied, did not satisfy the requirements of the *chapeau*, in so far it constituted an "unjustified discrimination" and a "disguised restriction to international trade". As a consequence, the said measure could not be justified under article XX(g) GATT.[33]

In the *Shrimps/Turtles* case (1998),[34] as mentioned above, the US regulation under scrutiny was examined only under the article XX(g) exception, although both article XX(b) and XX(g) had been invoked by the defendant. In this case, the issue of the interpretation and application of the article XX(g) exception was not explicitly addressed by the Panel, but the AB when examining the term "relating to" the conservation of an exhaustible natural resource, although formally did not depart from the traditional interpretation of the term as referring to measures "primarily aimed at" the conservation of an exhaustible natural resource, in practice gave some interesting suggestions on how to better address the "*relationship between the general structure and design of the measure at stake and the policy goal it purports to serve*".[35] The AB, in fact, found that the national measure at stake was justifiable under article XX(g) exception insofar it was "*not disproportionately wide in its scope and reach in relation to the policy objective of the protection and conservation of sea turtles species*" and "*the means [we]re in principle reasonably related to the ends*". [36]

With the above mentioned statement, the Appellate Body seems in fact to propose the adoption of a new interpretative test according to which the possibility to justify a national measure under article XX(g) ought to depend not so much from the assessment that the measure at stake is "primarily aimed" at the conservation of an exhaustible natural resource, but rather from the evaluation that the measure is not "disproportionately wide in its scope and reach in relation to the policy objective" or in other words is "reasonably related to the ends". The test proposed by the AB, in fact, seems to introduce a sort of necessity and proportionality dimension in the evaluation of a national measure under article XX(g) exception, which recalls the application of the balancing instrument of the "necessity principle" already seen above with reference to article XX(b).

We have now analysed how the "trade and environment" issue has been addressed and solved in various cases under the GATT. It is now time to spend some words on how the WTO dispute settlement authorities have approached the issue of the balance between conflicting trade end environmental interests in the framework of two other WTO multilateral agreements, namely the SPS and the TBT.

4. The SPS Agreement case-law

The SPS Agreement (*Agreement on the Application of Sanitary and Phytosanitary Measures*) contains a series of rules and procedures for the definition and application of national sanitary and phytosanitary standards by its Members, which are all the WTO Parties. In this sense, in general terms, the SPS Agreement sets a preference for the use of internationally agreed standards, whenever possible. However, it also recognises the possibility for Members to adopt, in certain circumstances, national sanitary and phytosanitary measures based on more restrictive standards

[32] See Gasoline case, Report of the Appellate Body, p. 22.
[33] See Gasoline case, Report of the Appellate Body, p. 29.
[34] See Shrimps / Turtles case, cited above.
[35] See Shrimps / Turtles case, Report of the Appellate Body, WT/DS58/AB/R.
[36] See Shrimps / Turtles case, Report of the Appellate Body, at § 141.

than those agreed at international level, provided that such standards are either based on a "scientific justification" or determined on the basis of a "risk assessment procedure" conducted pursuant to the provisions of article 5 of the SPS Agreement. To this respect, it is noteworthy that such a "risk assessment procedure" incorporates the proportionality principle (article 5.6) and the precautionary principle (article 5.7).

The first circumstance in which the application of the SPS Agreement was invoked before the WTO dispute settlement authorities was the *Beef Hormones* case (1998). [37] The case arose from a ban imposed by the European Community on the production, sale and importation of meat and meat products taken from cattle treated with hormones. The ban on import, in particular, blocked US and Canadian importation of meat in Europe and, after the failure to solve the dispute by means of negotiations among the Parties, the case ended up before the WTO dispute settlement authorities.

For the purpose of the present paper, it is not the case to deal extensively with the outcome of the *Beef Hormones* case, which finally focused on the issue of the correct application of the precautionary principle, as enshrined under article 5.7 of the SPS Agreement, and ended up with the condemnation of the ban on hormones meat and meat products treated with hormones adopted by the European Community. It is important to stress, instead, that according to the procedure established under the SPS Agreement, when a Member wishes to adopt a national sanitary or phytosanitary measure based on more restrictive standards than those agreed at international level the following requirements must be fulfilled: (1) firstly, all national measures aiming at the protection of human, animal or plant health or life must be based on a "risk assessment" based on available scientific evidence; (2) secondly, when determining the appropriate level of SPS protection, Members should "take into account the objective of minimising negative trade effects"; (3) thirdly, the national measures chosen should not be "more trade-restrictive than required, to achieve their appropriate level of SPS protection, taking into account technical and economic feasibility"; (4) fourthly, in case full scientific certainty does not exists, Members may provisionally adopt "precautionary measures" which must be temporary and should be reviewed as soon as possible.

On the basis of the four requirements described above, it can be argued that in order to determine whether a national measure setting higher standards than those internationally agreed can be upheld under the SPS Agreement it must be previously assessed that: (1) the national measure is necessary to afford an adequate protection to human, animal or plant health or life and (2) the national measure is not more trade-restrictive than required to achieve the aim sought. This is, in fact, nothing but another application of the "necessity principle", composed by the necessity and the proportionality tests, which we have already seen in the case-law under the GATT.

5. The TBT Agreement case-law

The TBT Agreement (*Agreement on Technical Barriers to Trade*) deals with the application of technical measures by Members, which may negatively interfere with international trade. In general terms, the TBT Agreement encourages Members to adopt internationally agreed technical standards, whenever possible. However, Members are not totally prevented from taking national measures necessary to protect human, animal and plant life or health or the environment. Quite on contrary, in principle each Member has the right to determine the level of protection that it deems more appropriate, provided that "*technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade*". Moreover,

[37] See Beef Hormones case, Report of the Panel, WT/DS26/R/USA and WT/DS26/R/CAN; Report of the Appellate Body, WT/DS26-DS48/AB/R.

"*technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking into account the risk non-fulfilment would create*".[38]

As one can see, the TBT Agreement fully embodies the necessity principle, by imposing upon Members wishing to adopt their own national technical standards the burden to ensure that their measures satisfy both the necessity test, in the sense that they fulfil a legitimate objective, such as the protection of the environment, and the proportionality test, in the sense they are not "*more trade restrictive than necessary to fulfil a legitimate objective*" nor adopted or applied "*with a view to or with the effect of creating unnecessary obstacles to trade*".

Up to now, the TBT Agreement was invoked twice in WTO controversies related to the 'trade and environment' sphere. In the first case, namely the *Gasoline case* (1996),[39] the issue of the compatibility of the national measure at stake with the TBT Agreement was not analysed by the Panel and the AB. Conversely, in the second case, namely the *Asbestos* case (2001), the Panel and the AB partially addressed the Canadian claim regarding the alleged violation of some provisions of the TBT Agreement by the French ban, but unfortunately did not deal with the most interesting issue of the justifiability of the national provision under article 2(2) of the TBT Agreement. In fact, the Panel and the AB limited themselves to investigate whether the national measure under scrutiny was a "technical regulation" within the meaning of Annex 1(1) to the TBT Agreement.[40]

Since the national measure at stake in the *Asbestos* case was not examined under article 2(2) of the TBT Agreement, a basic question remained unanswered. The question is the following one: in the absence of any case-law on the topic, is its possible to envisage a further extension of the same *acquis* elaborated by the Panels and the AB, with regard to article XX(b) and XX (g) GATT and to article 5 SPS Agreement, to the realm of Article 2(2) TBT Agreement?

Such an extension was in fact envisaged by Canada in its pleadings in the *Asbestos* case. However, neither the Panel, nor the AB specifically addressed the issue. This notwithstanding, the claimed extension seems to be perfectly possible, since the analysis conducted above has shown that the "purpose" of the four treaty provisions considered (namely article XX(b) and XX(g) GATT, article 5 SPS Agreement, article 2(2) TBT Agreement) is essentially the same one. Of course, this does not mean that the four provisions under scrutiny are identical ones, as each one clearly differs from the others with regard to its specific scope. However, the existence of a different specific scope, if counterbalanced by the presence of the same "purpose", should not prevent the four provisions from being considered together as an expression of the "necessity principle". Therefore, in more concrete terms, nothing should preclude the four provisions from having substantially the same role as a "balancing instrument" to be applied by the WTO dispute settlement authorities in order to find, on a case-by-case basis, the best solutions in "trade and environment" disputes.[41]

5. The distinction between product requirements and PPM's

We have seen in the preceding paragraphs how the GATT and WTO dispute settlement authorities have dealt with national measures of the Parties which unilaterally introduced national standards in order to afford an adequate protection to important interests, often related to the protection of the environment or of public health, not sufficiently protected by the existing international standards.

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[38] See Article 2.2 TBT Agreement, reprinted in ILM, Vol. 33, 1994, p. 28 ff.
[39] See Gasoline case, cited above.
[40] See Asbestos case, cited above.
[41] See MONTINI, *La necessità ambientale nel diritto internazionale e comunitario*, Cedam, Padova, 2001.

It is now time to deal briefly with a basic distinction which has been proposed by several trade law scholars and shared by many GATT and WTO Panels for a better assessment of the justifiability of the national measures of the Parties with reference to the relevant provisions contained in the GATT, SPS and TBT treaties seen above. Such a distinction is premised on the consideration that once a WTO Party decides to determine and apply its own national standards in order to give priority to one of its essential national interests, such as for instance the protection of the environment, over the general international trade interest, most likely an import restriction on products lawfully produced and marketed in another Party arises. Such an import restriction may be sometimes found not to comply with the basic applicable GATT, SPS and TBT provisions, but even if this is the case under certain circumstances it may be justified under the exceptions foreseen by such treaties.

The basic distinction to which we intend to refer here is the one between import restrictions based on products characteristics, which directly refer to the physical characteristics of a product itself, and import restrictions based on process and production methods (PPM's), which relate to the manner in which a product is produced in the country of origin.[42]

The endorsement of such a distinction, to be employed in the assessment of the justifiability of a national measure taken by a WTO Party with the relevant rules of the applicable international trade agreements, requires the interpreter to distinguish between those import restrictions which directly pertains to the product itself, such as for instance restrictions which relate to the enforcement of emission standards for motor vehicles or safety standards for machinery, from those restrictions which only indirectly pertains to the product, insofar they just concern the manner in which it is manufactured, such as for instance restrictions which relate to the way a certain fish species is harvested or a certain food speciality is produced.

The analysis of the relevant case-law in the trade and environment sphere conducted above has shown that the GATT and WTO dispute settlement authorities have been dealing in recent years both with cases dealing with products characteristics, such as in the *Thai Cigarettes case,* in the *Gasoline* case, in the *Beef Hormones* case and in the *Asbestos* case, and with cases dealing with process and production methods (PPM's), such as in the *Canadian Herring and Salmon case*, in the *Tuna / Dolphins case* and in the *Shrimps/Turtles* case.

The early GATT and WTO practice seemed in fact to give a certain preference to the adoption of national standards which refer to product characteristics and to look with disfavour at the introduction of PPM's , but this approach may be no longer valid if one considers the AB decision rendered in the second phase of the *Shrimps / Turtles* case, the so-called *Shrimps/ Turtles Case II* (2001),[43] in which the AB affirmed the justifiability under article XX(g) of the US measure which had introduced an embargo on the import of shrimps fished in the some Eastern Asian States which could not demonstrate to apply regulatory programmes 'comparable in effectiveness' with those enforced by the United States for the protection of the endangered species of sea turtles. In such a circumstance, in fact, the US measure at stake clearly consisted in a 'process and production method', insofar it did not pertain to the product itself (shrimps), but rather to the manner in which it was harvested. This notwithstanding, such a measure was upheld by the AB, which declared its justifiability under the exception contained in GATT article XX(g), thus hopefully starting to set

[42] See SCHOENBAUM, *International and European Trade and Protection of the Environment. The Continuing Search for Reconciliation*, cited supra note 1; FRANCIONI, *Environment, Human Rights and the Limits of Free Trade*, cited supra note 1; CHARNOVITZ, *The Law of Environmental PPM's in the WTO: Debunking the Myth of Illegality*, in 27 *Yale J. Int'l L.*, 2002, p. 59.

[43] See Shrimps / Turtles case II, Report of the Appellate Body, WT/DS58/AB/RW.

aside the artificial, although up to now widely accepted, distinction between products characteristics and process and production methods.[44]

In my opinion, in fact, such a formal and rigid distinction between products characteristics and process and production methods should be dismissed and the attention of the WTO dispute settlement authorities when examining the justifiability of a national measure introduced by a WTO Party should rather focus on the concrete scope and reach of the measure and on the manner in which it is concretely applied, irrespective of the fact that it pertains directly to the characteristics of a product or rather indirectly to the way in which it is manufactured.[45]

[44] See Shrimps / Turtles case II, Report of the Appellate Body, § 144.
[45] See CHARNOVITZ, *The Law of Environmental PPM's in the WTO: Debunking the Myth of Illegality*, cited supra.