Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?

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AUTONOMY IN SETTING APPROPRIATE LEVEL OF PROTECTION UNDER THE WTO LAW: RHETORIC OR REALITY?

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ABSTRACT
In the World Trade Organization (WTO) jurisprudence, the Appellate Body (AB) has repeatedly affirmed that WTO Members have the prerogative right in setting any level of protection that they deem appropriate (ALOP). At the same time, WTO Agreements provide for disciplines that a WTO Member must respect when it selects regulatory measures to fulfill its ALOP. Thus, a WTO Member’s autonomy in setting its ALOP, on the one hand, and the full force of other disciplines, on the other hand, are in a constant state of tension. Then, exactly how does a panel balance a Member’s right of setting its ALOP with a myriad of other trade obligations? To what extent is this right respected in the WTO dispute settlement processes? This article argues that the case law has confirmed that a Member’s obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) must be read in light of the Member’s chosen ALOP, and that the AB has also demonstrated sensitivity and deference to a Member’s ALOP under the SPS Agreement. The same conclusion, however, cannot be easily applied to Article XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Indeed, the case law under Article XX has demonstrated inconsistencies as to when WTO Members’ right to set their ALOP will be respected. I argue that such inconsistencies may be explained by a value-based, pragmatic approach adopted by the AB.

I. INTRODUCTION
Ever since the attention of the international trade community has shifted from the tariff barriers that lie at the national borders to non-tariff domestic regulations that exist behind the border, leading experts in the General

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Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have been struggling with an inherent puzzle permeating almost all multilateral trade-governance structures. This puzzle was succinctly put by John H. Jackson in his 1969 masterpiece on GATT law:

The perpetual puzzle . . . of international economic institution is . . . to give measured scope of legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare. ¹

Whether the evolving GATT/WTO jurisprudence in the past 40 years has struck a proper balance between national regulatory autonomy and trade liberalization remains controversial.² Indeed, it is rare for a WTO student to open a leading international law journal without noticing criticisms, mild or harsh, on WTO tribunals’ arguably inappropriate intrusion into Members’ domestic regulatory priorities.³

This article is not intended to provide a comprehensive review on whether WTO tribunals have stood for interference with or deference to domestic regulatory autonomy. Such scholarship is readily available elsewhere.⁴ Instead, I will focus on one single concept key to Members’ regulatory freedom under WTO law, i.e. WTO Members have full autonomy in setting any level of protection that they deem appropriate. ‘Appropriate level of protection’ (ALOP) is defined in Paragraph 5 of Annex A to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) as ‘the level of protection deemed appropriate by the Member establishing a

sanitary and phytosanitary measure to protect human, animal or plant life or health within its territory'. In *Australia – Salmon*, the Appellate Body (AB) affirmed that it is the ‘prerogative’ of a WTO Member to determine its own ALOP, which may differ from one Member to another. Through WTO dispute settlement processes, this concept has also migrated to Article XX of the GATT 1994, where it is not explicitly mentioned. In *Korea – Beef*, the AB confirmed 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’.

Although WTO Members retain full autonomy to choose their ALOP, the WTO Agreements provide for disciplines that a Member must respect when it selects regulatory measures to fulfill its ALOP. Thus, autonomy in setting the ALOP, on the one hand, and the full force of other disciplines, on the other hand, are in a constant state of tension. If, as the WTO AB repeatedly confirmed, WTO Members retain full regulatory autonomy in setting their ALOP, this would have profound implications for WTO jurisprudence. First, it effectively makes clear that the mandate of WTO panels is a limited one. It is limited to the evaluation of whether the disputed measures are necessary in order to achieve the ALOP. Second, since the ALOP cannot be questioned, other obligations that a Member needs to bear must be read in light of this Member’s ALOP. Exactly how does a panel balance a Member’s inviolable right of setting its ALOP with a myriad of other trade obligations? To what extent is this right respected in the WTO dispute settlement processes? Do WTO tribunals only pay lip service to the Member’s inherent right to set its ALOP? How does this inviolable right of Members inform the interpretation of other trade obligations?

This article intends to explore these questions. Section II examines how ALOP has informed the interpretation of WTO Members’ obligations under the SPS Agreement. I will show that, first, the recent WTO case law has confirmed that a Member’s chosen ALOP has a bearing on how a risk assessment is conducted, as well as on the panel’s evaluation of whether scientific evidence is insufficient so that a precautionary measure may be adopted. Second, the AB has demonstrated sensitivity and deference to a Member’s ALOP in interpreting the internal consistency requirement and the least trade restrictive (LTR) test under the SPS Agreement. Section III examines the role of the ALOP in Article XX of the GATT 1994, focusing on the relationship between the ALOP and the weighing and balancing test crafted by the AB. I argue that it is difficult to reconcile the weighing and

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7 For example, Articles 5.5 and 5.6 of the SPS Agreement.
balancing test with the WTO Members’ prerogative right to determine their ALOP. Indeed, the WTO jurisprudence under Article XX has demonstrated inconsistencies as to when and how WTO Members’ right to determine their ALOP will be respected. I further argue that such inconsistencies may be explained by a value-based, pragmatic approach adopted by the AB. Section IV concludes.

II. ALOP UNDER THE SPS AGREEMENT

In *Australia – Salmon*, the AB has found that the SPS Agreement contains an implicit obligation for WTO Members to determine the ALOP. This is because determination of the ALOP is an element in the decision-making process that logically precedes, and is separate from, the establishment or maintenance of the SPS measure. In other words, the ALOP determines the SPS measure to be introduced or maintained, rather than the ALOP being determined by the SPS measure. Otherwise, the existing SPS measure would always achieve the ALOP set by the Member, which is clearly not always the case.

Although a WTO Member need not determine the ALOP in quantitative terms, a more explicit and, in particular, a quantitative expression of a Member’s ALOP would greatly facilitate the consideration of compliance with the SPS Agreement. At least, the ALOP cannot be determined ‘with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement becomes impossible’. In *Australia – Salmon*, the AB accepted Australia’s description of the ALOP as ‘a high or very conservative level of protection aimed at reducing risk to very low levels, while not based on a zero-risk approach’. In cases where a Member does not determine its ALOP, or does so with insufficient precision, the ALOP may be established on the basis of the level of protection reflected in the SPS measure actually applied.

A. ALOP and Risk Assessment

Article 5.1 of the SPS agreement requires Members to ensure that their SPS measures are based on an assessment of the risks to human, animal or plant life or health. In *EC – Hormones I*, the panel identified risk assessment and

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9 Ibid, para 203.
10 Ibid, para 203.
11 Ibid, para 206.
14 Ibid, para 197.
15 Ibid, para 207.
risk management as two distinct stages of risk regulation. Risk assessment is defined as a *scientific* examination of data and factual studies and not a political exercise involving social value judgment made by political bodies. Risk management, on the other hand, is concerned with what to do about a risk once it is found to exist, which may involve social value judgments. At first blush, the SPS Agreement clearly distinguishes between risk assessment and how to deal with the risk, although it only refers to ‘risk assessment’ and not to ‘risk management’. Article 5.1 requires risk assessment as a basis of SPS measures. Article 5.6, on the other hand, makes clear that a WTO Member has the prerogative right to set for itself any level of protection that it considers ‘appropriate’ for its territory and can establish protective measures to achieve that level of protection. Nevertheless, the AB rejected the risk assessment/risk management distinction, pointing to the lack of textual basis and excessive restriction of the notion of risk assessment. Despite the AB’s dismissal of the risk assessment/risk management dichotomy, the AB in *EC – Hormones I* did not explicitly state whether, and to what extent, risk management considerations, such as the Member’s ALOP, may be taken into account in the risk assessment.

As a result, the confusion regarding the relationship between risk assessment and risk management has continued. Some WTO panels continued to read risk assessment as a purely scientific exercise. A WTO Member’s preferred ALOP, conventionally taken as a risk management measure, happens only after a proper risk assessment has been conducted and an ‘ascertainable risk’ was detected. In *EC – Biotech*, for example, the panel stated that the protection goals of a legislator may have a bearing on the question of which risks a Member decides to assess, and are also relevant to the determination of measures to be taken for achieving a Member’s level of protection against risk. Yet there is no apparent link between a legislator’s protection goals and the task of assessing the existence and magnitude of potential risks. In *EC – Hormones II*, the panel interpreted the AB’s holding in *EC – Hormones I* as saying that since risk management considerations find no textural support in the SPS Agreement, it has no role to play in risk assessment in the context of Article 5.1.

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The AB in *EC – Hormones II* criticized the panel’s rejection of considering the ALOP in risk assessment as resulting in a ‘restrictive notion of risk assessment’. The AB held that risk assessment cannot be entirely isolated from a Member’s ALOP. This is because the level of protection chosen by a Member in some circumstances may affect the scope or method of the risk assessment. For example, if a WTO Member decides to adopt a protection level higher than international standards, then it may perform its risk assessment differently from the parameters considered in the risk assessment underlying the international standard. Thus, the AB in *EC – Hormones II* confirmed that a risk assessment within the meaning of Article 5.1 includes a risk management component that is the responsibility of the national regulator to decide and not that of the scientific bodies. This approach recognizes that risk assessment and risk management partly overlap and that scientific and political considerations constantly infiltrate both phrases of risk regulation.

Even if the ALOP may affect how the risk assessment is conducted, the AB emphasized that the chosen level of protection must not affect the rigor or objective nature of the risk assessment, which must remain, in its essence, a process whereby possible adverse effects are evaluated using scientific methods.

**B. ALOP and ‘Insufficiency’ of Scientific Evidence**

Article 2.2 of the SPS Agreement requires WTO Members not to maintain SPS measures without sufficient scientific evidence. In practice, Article 2.2 is largely made operative through Article 5.1, which requires SPS measures to be based on risk assessment. In case there is insufficient scientific evidence, Article 5.7 permits Members to take precautionary measures on the basis of available pertinent information, albeit on a provisional basis. Thus, the applicability of Articles 2.2 and 5.1, on the one hand, and of Article 5.7, on the other hand, will depend on the sufficiency of the scientific evidence.

‘Insufficient scientific evidence’ is a relative concept and must be interpreted accordingly. In *EC – Hormones II*, the AB held that the determination of whether scientific evidence is insufficient must be understood in the light of a WTO Member’s predetermined ALOP. It is possible that scientific

22 Ibid, para 534.
23 Ibid.
evidence sufficient to conduct a risk assessment when a lower ALOP is set will become ‘insufficient’ when a WTO Member has set a higher ALOP.\textsuperscript{28} This is because different levels of protection may require analysis of different risk parameters and this, in turn, affects the scope and method of the risk assessment. Thus, the existence of a risk assessment by another WTO Member or an international organization, such as the Codex Alimentarius Commission, does not necessarily mean that the scientific evidence is absolutely sufficient, therefore excluding the invocation of Article 5.7 by a WTO Member. Such risk assessment only has probative value, but is not dispositive.\textsuperscript{29}

The AB’s position in \textit{EC – Hormones II} represents a significant departure from the previous panel rulings. In \textit{EC – Biotech}, the panel stated that there is no apparent link between a legislator’s protection goals and the task of assessing the existence and magnitude of potential risks, and refused to evaluate whether the scientific information is insufficient in the light of the WTO Member’s chosen level of protection.\textsuperscript{30} In \textit{EC – Hormones II}, the panel quoted \textit{EC – Biotech} approvingly and concluded that the ‘determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection’.\textsuperscript{31} The AB reversed the panel and stated that the determination of ‘insufficient scientific evidence’ must be evaluated in light of the Member’s predetermined ALOP. This approach is in line with the general understanding of risk assessment in social science literature, i.e. it is neither a pure science nor a single methodology based on sound science. Rather, risk assessment always incorporates policy and value judgments, and it is far from a one-size-fits-all science.

\textbf{C. ALOP and Internal Consistency Requirement}

Since states can freely choose their acceptable level of risk, theoretically, nothing would seem to prevent a state from selecting a level of zero risk.\textsuperscript{32} However, one cannot attach too much attention to this possibility.\textsuperscript{33} Article 5.5 of the SPS Agreement provides:

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with the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection... each Member shall avoid arbitrary or unjustifiable distinctions in the levels it
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\begin{footnotes}
\item[28] Ibid, para 685.
\item[29] Ibid, para 697.
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considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

With a view to clarifying the practical implications of the requirements of Article 5.5, the SPS Committee adopted ‘Guidelines to Further the Practical Implementation of Article 5.5’ (The Guidelines) on 18 July 2000. Thanks to the consistency requirement attaching to ALOP, it is likely to be prohibitively costly sometimes for a WTO Member to implement zero risk in a variety of different circumstances.

The purpose of Article 5.5 is to avoid situations where a Member imposes a very high level of protection for one situation while at the same time it is very lenient in respect of another despite both being equally dangerous or the former is even more dangerous than the latter. In *EC – Hormones I*, the AB made two general observations in interpreting Article 5.5. First, Article 5.5 does not establish a general legal obligation of consistency in the application of the ALOP. This is because the consistency objective is a goal to be achieved *in the future*. Second, the goal of Article 5.5 is not one of absolute or perfect consistency, since governments establish their ALOP frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It merely regulates arbitrary or unjustifiable inconsistencies in the ALOP that give rise to discrimination or a disguised restriction on international trade.

In *Australia – Salmon*, the AB noted that three elements must be demonstrated cumulatively for a violation of the consistency requirement. First, the WTO Member adopts a different ALOP in several different situations. Second, those levels of protection exhibit differences that are arbitrary or unjustifiable. Third, the measure embodying those differences results in ‘discrimination or a disguised restriction on international trade’. For an SPS measure to run afoul of the consistency requirement, each element needs to be independently demonstrated.

In order to meet the first element, the situations exhibiting differing levels of protection must be ‘comparable’. In *EC – Hormones I*, the panel interpreted that situations involving the same substance or the same adverse health effect may be compared with each other. The Guidelines confirm that, for human health risks, ‘the same type of substance or pathogen, and/or the same type of adverse health effects could be compared to one another’.

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35 Joost Pauwelyn, above n 2, at 187.
37 Ibid, para 213.
40 G/SPS/15, above n 34, para A.2.
In *Australia – Salmon*, the AB stated that, with regard to plant or animal health measures, situations are comparable if these situations involve either a risk of entry, establishment or spread of the same or similar disease, or a risk of the same or similar associated potential biological and economic consequences.41 This position was also endorsed in The Guidelines.42

For the second element, it is not clear whether there is any difference of legal significance between ‘arbitrary’ and ‘unjustifiable’. In *EC – Hormones I*, the AB compared the levels of protection in respect of natural and synthetic hormones for growth promotion with carbadox and olaquindox given to piglets. Even though carbadox is a known genotoxic carcinogen and promotes cancer, the EC allows its use. On the other hand, the EC prohibits natural and synthetic hormones despite their unclear carcinogen effects.43 In *Australia – Salmon*, the AB compared the level of protection between ocean-caught pacific salmon which was subject to an import ban, and the herring used as bait and live ornamental fish which were not subject to any SPS measures. The AB found that the latter category actually represents ‘as high as, if not a higher risk, than the former category’.44 Based on these findings, the AB concluded in both cases that the different levels of protection are ‘arbitrary or unjustifiable’. In both cases, the AB seems to suggest that the relative magnitude of the risk involved is a relevant factor to consider. If a WTO Member establishes a higher level of protection for a risk of less magnitude, it is at least a warning signal that the difference in ALOP is arbitrary or unjustifiable.

A careful reading of the case law to date suggests that the AB is actually looking for reasonable and plausible justifications for different levels of ALOP in comparable circumstances. If the defending party is able to provide reasonable explanations, the AB will accept the explanation and conclude that differences in the ALOP are not arbitrary or unjustifiable. In *EC – Hormones I*, the AB found that the differences in levels of protection between the administration of hormones for growth promotion purposes and their administration for therapeutic and zootechnical purposes are not arbitrary or unjustifiable. Here, the EC put forth two solid reasons to justify the regulatory differences. First, the frequency and scale of the treatment was different for two different purposes. One was regular, continuous and non-selective (and thus much more difficult and costly to control), while the latter was occasional, selective and on a small scale. Second, the mode of administration of hormones for therapeutic and zootechnical purposes was strictly regulated to prevent abuse.45 Similarly, the AB ruled that the regulatory differences

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42 G/SPS/15, above n 34, para A.2.
between natural and synthetic hormones for growth promotion purposes and natural hormones occurring endogenously in meat and other foods were not arbitrary. The AB perceived a fundamental distinction between the two: ‘to limit the residues of naturally-occurring hormones in food and to require prohibition of production and consumption of such foods entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity’.

Here, the absurdity may simply mean the absence of a meaningful regulatory alternative. Absent a practical technique to remove naturally occurring hormones, the only potential regulatory move would be a ban on all beef.

With regard to the third element, the AB stressed that at issue was the manner in which the SPS measure was applied, and whether in its application it was discriminatory or gave rise to a disguised restriction on international trade. In Australia – Salmon, the AB identified three useful warning signals and two additional factors to conclude that the third element is fulfilled. The first warning signal was the arbitrary or unjustifiable character of the differences in levels of protection. The second one was the rather substantial differences in the levels of protection (import ban compared with no regulatory control). The third warning signal was the inconsistency of the SPS measure at issue with the scientific requirements embodied in Articles 5.1 and 2.2 of the SPS Agreement. Two additional factors include, first, substantial but unexplained change in conclusion between the final risk assessment report which recommended continuing the import prohibition, and a prior report which recommended allowing imports under certain conditions; second, the absence of controls on the internal movement of salmon products within the Australian territory compared with the prohibition of importation of ocean-caught pacific salmon from Canada. The AB did not suggest that these signals or factors are an exclusive list. Depending on the context or the facts of the case, other factors may also be considered.

In Australia – Salmon, when deciding whether a different ALOP in comparable circumstances results in a disguised restriction on international trade, the AB did not seek to obtain information to ascertain the protective intent of Australian regulatory authorities. Instead, it only looked at the various objective elements inherent in SPS measures. In contrast, the AB in

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46 Ibid, para 221.
50 Ibid, para 163.
51 Ibid, para 165.
52 Ibid, paras 173–76.
EC – Hormones I indicated that the protective intent of the national regulatory authorities may play an important role in determining whether the SPS measure is ‘disguised restriction on international trade’. In that case, the panel pointed to the substantial differences in the ALOP in comparable situations and the lack of scientific evidence as basis to conclude that the third element was satisfied. However, the AB agreed with the EC that no suggestion has been made that the import prohibition of hormone-treated beef was the result of lobbying by EC domestic producers. The AB pointed to the well-documented ‘depth and extent of the anxieties experienced within the EC concerning the results of the general scientific studies and the dangers of abuse... and the intense concern of consumers within the EC over the quality and drug-free character of the meat available in this internal market’ as the single most persuasive piece of evidence for rejecting the panel conclusion.54

Some commentators suggested that the consistency requirement attaching to ALOP represents the ‘real bite’ of the SPS Agreement as it demands a close scrutiny of national regulatory processes and in-depth interference by WTO panels.55 However, the analysis above shows that the consistency requirement, as interpreted by the AB, does not seem to unreasonably constrain the Members’ autonomy in setting their ALOP. Even if the panel casts a fairly wide net on what different situations are ‘comparable’,56 the real focus of the panel review is on whether the differences are ‘arbitrary or unjustifiable’. In making this decision, the AB is fully aware that regulatory decisions are made on an *ad hoc* basis and that Article 5.5 does not establish a general legal obligation of consistency with respect to the ALOP. As long as the defending Member is able to provide reasonable explanations, the AB seems to be willing to accept that the differences in ALOP are not arbitrary or unjustifiable, as shown in EC – Hormones I and Australia – Salmon Article 21.5 disputes.57 Moreover, even if it was found that there are ‘arbitrary and unjustifiable’ regulatory differences between comparable situations, it is not enough to violate the consistency requirement. Elements of discrimination between WTO Members or protection of domestic production need to be proven.58 As we see from EC – Hormones I, there will be no ‘disguised

54 Appellate Body Report, EC – Hormones I, above n 17, para 245.
57 Panel Report, Australia – Salmon 21.5, above n 12, para 7.93.
restriction on international trade' if there is a genuine legitimate regulatory interest, even if it is not scientifically based.59

D. ALOP and the Least Trade Restrictive Means

Article 5.6 provides that, when establishing or maintaining SPS measures to achieve the ALOP, Members shall ensure that such measures are not more trade-restrictive than required to achieve the ALOP, taking into account technical and economic feasibility. The footnote to Article 5.6 clarifies that a measure is not more trade-restrictive than required unless there is another measure that (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member’s ALOP; and (iii) is significantly less restrictive to trade than the contested SPS measure.60

As it is the ‘prerogative right’ of a WTO Member to set its preferred ALOP, no trade-off is demanded between trade-restrictiveness of SPS measures and achievement of a Member’s ALOP. This precondition presents a singular difficulty to WTO panels. As the Australia – Salmon 21.5 Panel Report recognized, the most controversial aspect of the LTR test is how to determine with confidence whether an alternative measure with less trade-restrictive effect would meet a WTO Member’s predetermined ALOP.61 Clearly, a decision on this matter often goes to the heart of a Member’s capacity to select the health regulation it considers to be appropriate to sufficiently protect its population, animals and plants.

The AB seems to be fully appreciative of the importance involved in achieving a WTO Member’s ALOP when evaluating possible alternative measures. In Australia – Salmon, it refused to accept Canada’s argument that an alternative measure was available on the basis that its ability to achieve Australia’s ALOP has not been scientifically established.62 In Japan – Varietals, the panel rejected the test by products as a viable alternative for the test by varieties as the scientific experts it consulted could not state with an appropriate level of certainty that the alternative measure would be able to achieve Japan’s ALOP.63 In Australia – Salmon 21.5 Panel Report, the panel considered the options of no consumer-ready requirements and different, less onerous consumer-ready options. The panel found that, based on the evidence submitted by the parties and scientific experts’ testimony, other protective measures, without imposing consumer-ready requirements, would reduce risk significantly and may achieve Australia’s ALOP. Even so, the

59 Ibid, para 245.
60 Appellate Body Report, Australia – Salmon, above n 5, para 194.
panel remained reluctant to hold out no consumer-ready requirements as a viable alternative and did not reach any conclusion. After the panel discussed two other alternatives, the panel concluded:

We referred above to several options without deciding that one of these would necessarily meet Australia’s ALOP. We have been convinced, however, that there are other measures available...that would achieve Australia’s ALOP. We leave it up to Australia, preferably in a close cooperation with Canada and other trading partners, to select and identify the details of such other measures.

It is important to note that, in all these cases, the panel relied heavily on scientific experts in determining whether the alternative measures were able to achieve the defending party’s ALOP. If scientific experts were highly confident of the feasibility and effectiveness of the alternative measure in achieving the defending party’s ALOP, the panel was more likely to endorse the alternative measure. Although there are various solid reasons to challenge whether science is indeed able to provide definitive answers to regulatory choices, the heavy reliance on science does show that the panel is fully aware of the need to respect both the Member’s ALOP and the choice of means to achieve the end.


Although a WTO Member’s autonomy in setting its preferred ALOP is not explicitly mentioned in Article XX of the GATT 1994, the concept has now become part of the established jurisprudence under Article XX through WTO dispute settlement processes. In EC – Asbestos, the AB stated that ‘it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’. In Korea – Beef, the AB reiterated that ‘[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’. In Brazil – Retreaded Tyres, the AB explicitly called WTO Members’ right to determine the level of

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65 Ibid, para 7.144.
68 Appellate Body Report, Korea – Beef, above n 6, para 176.
protection that they consider appropriate a ‘fundamental principle’ under Article XX.69

The purpose of Article XX is to permit a certain degree of justifiable discrimination against imports with respect to certain regulatory concerns of WTO Members.70 One such concern is the protection of human, animal or plant life or health, prescribed in Article XX (b). However, such discrimination is limited to the extent ‘necessary’ for the protection of these important non-trade interests. Through dispute settlement processes, the interpretation of ‘necessary’ has evolved from the LTR test to a more sophisticated weighing and balancing test. In this section, I first outline this jurisprudential evolution, and then analyze whether the Members’ autonomy in setting their ALOP can be reconciled with the weighing and balancing test.

A. The LTR Test
The term ‘necessary’ in Article XX (d) was first interpreted by the GATT panel in the US – Section 337 case, where the panel stated:

[A] contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provision is available to it...[I]n 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.71 (emphasis added)

Subsequently, a GATT panel in the Thailand – Restrictions on Importation of and Internal Tax on Cigarettes case concluded that the word ‘necessary’ in Article XX (b) should have the same meaning as that in the Article XX (d), and held that the purpose of both exceptions is ‘to allow contracting parties to impose trade restrictive measures inconsistent with the GATT to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable’.72 Such inconsistent measures could be considered to be necessary ‘only if there were no alternative measure consistent with GATT, or less inconsistent with it, which [the Member] could reasonably be expected to employ’.73 The requirement that WTO Member use the

73 Ibid, para 75.
‘least inconsistent’ measures reasonably available to it is generally known as the LTR test in WTO law.\footnote{Alan O. Sykes, ‘The Least Restrictive Means’, 70 University of Chicago Law Review 403 (2003), at 403.}

A careful reflection of the LTR test, as outlined in \textit{US-Section 337} and \textit{Thai – Cigarettes}, will reveal that its definition leaves many critical questions unanswered. Precisely how does one determine whether a given regulatory choice is a less restrictive alternative? When an alternative measure unquestionably achieves a Member’s ALOP with less trade-disruptive effects, the challenged measure surely fails the LTR test. But these conditions seem quite narrow. What if a proposed alternative may be somewhat more costly for a WTO Member to implement? What if the suggested alternative, although less burdensome on trade, is less effective at achieving a Member’s ALOP? In those circumstances, do those alternatives remain ‘reasonably available’ under Article XX?

The earlier GATT/WTO jurisprudence on LTR test was frequently criticized as demonstrating a strong ‘pro-trade’ bias.\footnote{Robert Howse, ‘Human Rights in the WTO: Whose Rights? What Humanity? Comments on Petersmann’, 13 (3) European Journal of International Law 651 (2002), at 657.} The panel seemed to be bent on finding a hypothetically available alternative measure with less adverse trade effects, while neglecting the regulatory prerogatives of the defending WTO Member.\footnote{Gisele Kapterian, above n 3, at 103.} Moreover, the panel was insensitive to the practical regulatory experiences of national governments and no consideration was given to whether alternatives were feasible in light of a Member’s particular social, political and economic conditions.\footnote{Deborah Akoth Osiro, ‘GATT/WTO Necessity Analysis: Evolutionary Interpretation and Its Impact on the Autonomy of Domestic Regulation’, 29 (2) Legal Issues of Economic Integration 123 (2002), at 127–128.} In \textit{Thailand – Cigarettes}, Thailand put a ban on imported cigarettes on the basis that the imports came with sophisticated Western marketing techniques that were persuading large numbers of young people to take up smoking, thereby triggering a future health crisis. The panel ruled against Thailand and found that there was the less restrictive alternative of stringent regulation of advertising and marketing methods. However, the panel ignored evidence before it from the World Health Organization suggesting that, in a number of cases, developing countries had discovered that, given their legal and monetary resources, tobacco multinationals were able to find their way around such restrictions once their products were on the market in the country concerned.\footnote{GATT Panel Report, \textit{Thailand – Cigarettes}, above n 72, paras 27, 51.}
Largely due to the perceived deficiencies of the LTR test discussed above, the GATT/WTO panels were charged with imposing hypothetically available alternatives, that they (rather than the defending WTO Member) deem desirable, on the Member governments. Whether an alternative measure with less trade-restrictive impact is ‘reasonably available’ becomes the key issue before the WTO tribunals.

B. The ‘Weighing and Balancing Test’

It was with Korea – Beef (2001) that the GATT/WTO jurisprudence on ‘necessary’ began its slow evolution from the LTM test. In Korea – Beef, the AB explained that determining whether a measure is ‘necessary’ within the meaning of Article XX (d) requires a ‘process of weighing and balancing’. In the AB’s words:

[T]he determination of ‘necessary’... 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. (emphasis added)

More specifically, the more vital or important those common interests or values are, the greater the contribution to the realization of the end pursued; the less trade-restrictive impact on imports, the easier a measure would be to accept as ‘necessary’.

It was not until the US – Gambling case that the AB laid out the detailed procedural steps to conduct the ‘weighing and balancing’ process. The US – Gambling case was decided under Article XIV of the GATS. Nevertheless, the AB found previous decisions under Article XX of the GATT 1994 relevant for its analysis under Article XIV of the GATS, in view of its similar structure and function played in the two Agreements. In the same vein, the US – Gambling also helped shed light on the interpretation of ‘necessary’ under Article XX of the GATT 1994. The AB in this case broke the determination of ‘necessary’ into two separate steps. The first step is the
three-factor ‘weighing and balancing’ process that the AB outlined in Korea – Beef:

The process begins with an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that... in most cases, will be relevant to a panel’s determination of the ‘necessity’... One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.84 (emphasis added)

Of course, the contribution of the measure to the policy objectives and the restrictive impact of the measure are not the only factors that a panel might consider.85 The AB stressed that the standard of ‘necessity’ is an objective standard. A Member’s characterization of a measure’s objectives and of the effectiveness of its regulatory approach, the structure and operation of the measure and contrary evidence proffered by the complaining party are all relevant.86

If the first step of the analysis yields a preliminary conclusion that the measure is ‘necessary’, the second step comes into play. 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.87 In US – Gambling, the AB stressed that the decision of whether there is a reasonably available, WTO-consistent alternative needs to take into account the practical implementation difficulties and the Member’s ALOP. In the AB’s words:

a ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective...88

The AB later applied the two-step ‘weighing and balancing’ process in Brazil – Retreaded Tyres. This case concerned Brazil’s measures relating to the prohibition on the importation of retreaded and used tyres, which Brazil claimed was necessary under Article XX (b) to reduce ‘exposure to the risks to

84 Ibid, para 306.
85 Ibid.
86 Ibid, para 304.
87 Ibid, para 306; Appellate Body Report, Brazil – Retreaded Tyres, above n 69, para 178.
human, animal and plant health arising from the accumulation of waste tyres'. The AB report generated therein is, so far, the most comprehensive report on how ‘necessary’ is interpreted in the WTO jurisprudence. It is, therefore, helpful to take a detailed look at how the panel performed its ‘weighing and balancing’ exercise in this case.

Following the first step outlined above, the panel first examined the interests that were furthered by Brazil’s import ban on retreaded tyres. The panel found that the objective of the measure is the reduction of ‘exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres’ and noted that ‘few interests are more “vital” and “important” than protecting human beings from health risks’. The panel also observed that Brazil’s chosen level of protection is ‘the reduction of the risks of waste tyre accumulation to the maximum extent possible’. Regarding the trade restrictiveness of the measure, the panel noted that it is ‘as trade-restrictive as can be, since it aims to halt completely the entry of retreaded tyres into Brazil’.

Then the panel assessed the contribution of the measure to the purported regulatory objective. In such an assessment, the AB stated:

> [S]uch a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure’s contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. (emphasis added)

After examining various items of evidence, the panel concluded that the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil. The EC appealed this finding and argued that the panel should have sought to establish ‘the actual contribution of the measure to its stated goals, and the importance of this contribution’. In other words, the panel erred by not quantifying the reduction of waste tyres resulting from the import ban. The AB rejected the EC’s argument and held that the assessment of the contribution could be performed either quantitatively or qualitatively.

So far, the first step of the analysis yields a preliminary conclusion that Brazil’s import ban is necessary. There is then the second step of confirming this result by comparing the measure with possible reasonably available alternatives, which may be less trade restrictive while providing an equivalent

90 Appellate Body Report, Brazil – Retreaded Tyres, above n 69, para 144.
91 Ibid, para 145.
92 Ibid, para 137.
93 Ibid, paras 146–47.
contribution to the regulatory objective. It is important to recognize that a reasonably available alternative must fulfill three conditions: first, it is less trade restrictive than the measure at hand; second, it allows the responding Member to achieve its ALOP and, finally, it is practical in the sense that it is not merely theoretical in nature and will not impose an undue burden on the Member.\(^\text{94}\) In *Brazil – Retreaded Tyres*, the EC argued that better waste management and disposal measures constituted reasonably available alternatives. The AB disagreed, pointing to the preventive nature of the import ban and the remedial character of other measures and concluded that all these measures constitute mutually supportive elements of a comprehensive policy to deal with waste tyres.\(^\text{95}\)

Despite the AB’s efforts to explain the weighing and balancing test in its case law, much uncertainty remains as to how the variables in the balancing test will be evaluated against each other, and how the conclusion will be drawn after the weighing and balancing test.\(^\text{96}\) In *Brazil – Retreaded Tyres*, the EC complained:

\[\text{S}i\text{nce the panel failed to establish... the extent of the actual contribution the [import ban] makes to the reduction of the number of waste tyres arising in Brazil... it was incapable of 'weighing and balancing' this contribution against any of the relevant factors.}\]

The AB dismissed the EC’s complaint, and concluded with the following ambiguous announcement: ‘[T]he weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment’.\(^\text{98}\)

The difficulty may be illustrated in the following scenario. After the first step of balancing, the panel found that (i) the interests and values protected by the disputed measure are vital and important; (ii) the disputed measure makes a material contribution to addressing the responding Member’s concerns; and (iii) the measure in question has a significant restrictive trade impact. After the second step of searching for the ‘reasonably available’ alternatives, the panel found that there was an alternative measure which was (i) significantly less trade restrictive and (ii) not as effective as the challenged measure in meeting the responding Member’s


\(^{95}\) Appellate Body Report, *Brazil – Retreaded Tyres*, above n 69, para 211.

\(^{96}\) Steve Charnovitz, ‘The WTO’s Environmental Progress’, 10 (3) Journal of International Economic Law 685 (2007), at 697. The method to be used in order to determine whether the challenged measure is necessary is difficult to outline succinctly because the jurisprudence is confusing.


\(^{98}\) Ibid, para 182.
ALOP. What is the panel supposed to do in such a scenario? Arguably, the panel may go either way in deciding the case. As one choice, the panel may rule that since the alternative is less effective in reaching the responding Member’s ALOP, there is no guarantee that the alternative is truly reasonably available. This was what happened in the EC – Asbestos case. Alternatively, the panel may make an arbitrary judgment, with little explanation, that the alternative measure, although clearly not as effective as the disputed measure, is able to meet the Member’s ALOP. The disputed measure is, thus, not necessary. Arguably, this was what happened in the Korea – Beef case. As the AB has never clarified how the elements of the weighing and balancing test would interact, the two contrary rulings are both legitimate.

Applying a legal standard to pass upon the legality of a disputed measure, while failing to spell out how it works, creates important repercussions to the world trading system. It enables the AB to keep maximum adjudicatory flexibility; but it leaves Member uncertain of the legality of their measures. As Bown and Trachtman criticized:

[Whilst] the WTO AB has spoken of a test that weighs and balances to some degree each of the four factors mentioned above, it has never documented in an opinion its application of this type of test...Most importantly, it has shown itself unwilling to evaluate for itself, or to require a panel to evaluate, in any but the most gross categories, any of these four factors. Yet, one might ask, if you consider these factors, but you do not compare them with each other...how do you determine which domestic measures are acceptable and which are not?...The result is on an opinion that is so incoherent as to leave states unsure as to what types of measures may withstand scrutiny.99

C. Can Members’ Autonomy in ALOP Reconcile with the Weighing and Balancing Test?

It remains unclear how the new weighing and balancing test would relate to the traditional LTR test, as in the WTO context, the two tests are inherently inconsistent and cannot be applied simultaneously.100 If, as the AB repeatedly insists, the WTO tribunals respect the ALOP set by a Member, then the only question to be asked is whether the measure adopted to achieve that level is the least restrictive in its trade effects. By contrast, the ‘weighing and balancing’ is to inquire whether the benefits obtained by the measure adopted by the state outweigh certain costs associated with that measure. If the WTO panels conclude that the cost–benefit aspect is disproportionate,

99 Chad P. Bown and Joel P. Trachtman, above n 3, at 88.
then the measure in question will be struck down as illegitimate. In doing this, however, the WTO panel is substituting its value judgment for that of the Member in determining the ALOP.101 Despite the incoherent logic, the AB highlighted both the Member’s right to set its ALOP and the balancing test to pass upon the legality of a trade-restrictive measure. It is thus worth asking whether the Members’ autonomy in setting its desired ALOP is real or rhetorical.

A review of the case law under Article XX reveals inconsistent rulings by the AB on the issue of the extent to which a Member’s autonomy in setting its ALOP should be respected. The legal uncertainty contained in the weighing and balancing test and the wide discretion enjoyed by the WTO tribunals can be best illustrated by a comparative study of Korea – Beef and EC – Asbestos, and Dominican Republic – Cigarettes and Brazil – Retreaded Tyres.

In Korea – Beef, the value protected by Korea’s ‘dual-retail’ system is consumer protection, i.e. preventing fraudulent businessmen passing off imported beef as Korean domestic beef. It should be noted that this protection is not related to human health or safety but is concerned with dishonest commercial practices. The panel agreed that, in Korea, people generally view domestic beef as superior to imported foreign beef and are willing to pay a premium for it. The panel also agreed that the dual-retail system contributed significantly to the prevention of fraud. Nevertheless, the panel still ruled that the Korean measure was unnecessary as there were reasonably available, less trade-restrictive alternatives like fines, record-keeping and policing.102

In defending its measure, Korea argued that its regulatory objective was to eliminate fraud in the beef retail market; and that this ex ante dual retail system served its regulatory goal more effectively than other traditional ex post enforcement measures.103 Korea also asserted that its regulatory purpose should not be sacrificed for the sake of free trade when deciding whether there is an alternative measure available. Significantly, the AB did not compare the effectiveness of its suggested traditional measures with the ‘dual retail system’ in achieving Korea’s regulatory purpose. Instead, the AB first questioned the regulatory goal of Korea’s measures. In the AB’s words:

We think it unlikely that Korea intended to establish a level of protection that totally eliminates fraud with respect to the origin of beef sold by retailers…We assume that in effect Korea intended to reduce considerably

103 Ibid, para 175.
the number of cases of fraud occurring with respect to the origin of beef sold by retailers.\textsuperscript{104}

Literally, the AB restated Korea’s regulatory objective from elimination of fraud to ‘reduce considerably’ the number of cases of fraud.\textsuperscript{105} This explicit modification of Korea’s regulatory objective is unacceptable as the AB has repeatedly reassured that a WTO Member has autonomy in pursuing legitimate regulatory policy and setting its own ALOP. Moreover, even if Korea’s regulatory objective is to reduce fraud as much as possible, or achieve maximum reduction of fraud in the retail beef market,\textsuperscript{106} the question remains as to which method is more effective to achieve Korea’s ALOP. There is every reason to believe that the traditional measures that the AB suggested will not be as effective as the dual-retail system to better realize the Korean regulatory objective, even if more governmental resources are devoted to prevent passing off. There is clearly no guarantee that the alternative measure is able to achieve the Korean government’s ALOP.

The ruling in \textit{Korea – Beef} is in sharp contrast to the AB’s position in \textit{EC – Asbestos}. In this last case, the underlying legitimate value that the French measure sought to protect was human health and safety. In articulating the regulatory purpose, the EC stated that the purpose of the ban was to ensure zero risk from Asbestos, i.e. a ‘halt’ to the spread of Asbestos-related health risks. In response, Canada made a persuasive argument and, as I see it, the panel and the AB responded quite vaguely. Canada argued that the panel inappropriately characterized the regulatory objective as a zero-risk baseline as France did allow some substitute products (PCG fibers) that also created health risks. Canada further argued that ‘controlled use’ of asbestos-containing products was a reasonably available alternative unless it has been demonstrated that the substitutes that the French allowed posed less risk than the ‘controlled use’ of asbestos.

Canada’s argument actually prompts the panel to perform the task of determining whether the residue hazard with controlled use of asbestos is greater than the hazard from its substitutes. Interestingly, in this case, the AB refused to restate the regulatory goal propounded by the EC, as it did in \textit{Korea – Beef}. The AB reasoned that if the stated goal is zero risk from asbestos, then WTO law merely inquires whether the measure at issue is necessary for that objective, even if the overall level of health risk is not zero due to the risks from substitutes, and even if some less restrictive

\textsuperscript{104} Ibid, para 178.
\textsuperscript{105} Gabrielle Marceau and Joel P. Trachtman, ‘A Map of the World Trade Organization Law of Domestic Regulation of Goods’ in George A. Bermann and Petros C. Mavroidis (eds), above n 2, at 34.
\textsuperscript{106} This regulatory goal is perfectly legitimate as it is similar to the ALOP of Brazil’s measure in \textit{Brazil – Retreaded Tyres}. See Appellate Body Report, \textit{Brazil – Retreaded Tyres}, above n 69, para 134.
alternative policy arguably could achieve a comparable overall level of risk. In the AB’s words:

[In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.]

Then the AB insisted that it was enough that the health hazard was real and that the proposed alternative, i.e. controlled use of asbestos, was not established to be as effective as a complete ban according to the available scientific evidence. Therefore, it was not a reasonably available alternative.

A similar dichotomy occurs if we compare Dominican Republic – Cigarettes with Brazil – Retreaded Tyres. In Dominican Republic – Cigarettes, the Dominican Republic required that tax stamps be affixed to cigarette packets in the territory of the Dominican Republic under the supervision of its tax authorities (the ‘tax stamp requirement’). Even though it was found that such a requirement was inconsistent with Article III:4 of the GATT 1994, the Dominican Republic argued that such a measure was justified by Article XX (d) of the GATT 1994. The panel referred to the weighing and balancing test that the AB articulated in US – Gambling and found that (i) tax stamps may be a useful instrument to monitor tax collection on cigarettes and, conversely, to avoid tax evasion and the collection of tax revenue is a most important interest for any country and particularly for a developing country such as Dominican Republic; (ii) the tax stamp requirement has not had any intense restrictive effects on trade as imports had increased significantly over the years; and (iii) as to the contribution of the tax stamp requirement to the regulatory objective, i.e. to prevent tax evasion and cigarette smuggling, the panel found that the tax stamp requirement was of limited effectiveness. Other factors, such as security features incorporated into the tax stamps or police control on roads and at different commercial levels, would play a more important role in preventing forgery of tax stamps, tax evasion and smuggling of tobacco products. Then the AB moved on to the second step of finding whether there were any reasonably available alternatives to fulfill the Dominican Republic’s regulatory objectives. With little analysis on how it balanced the various factors, the AB opined that the alternative of providing secure tax stamps to foreign exporters, so that

those tax stamps could be affixed on cigarette packets in the course of their own production process and prior to importation, would be equivalent to the tax stamp requirement to secure the high level of enforcement it pursued. It was not entirely clear how the AB has arrived at the conclusion that the Dominican Republic’s measure was not ‘necessary’. It seems that the AB has placed particular emphasis on the fact that the tax stamp requirement was of limited effectiveness in preventing tax evasion and cigarette smuggling. But what is the rationale of highlighting the contribution factor while neglecting the other two? Recall in EC – Asbestos that the AB highlighted the important value protected by the French ban, while the restrictive nature of the French measure was not mentioned at all in the AB’s analysis. Furthermore, similar to Korea’s position in the Korea – Beef case, the Dominican Republic contended that the affixation of tax stamps in the presence of a tax inspector contributes more to the prevention of tax evasion than the panel-proposed alternative—affixing the stamp abroad. Again, the AB did not engage this argument head-on. Instead, the AB questioned the Dominican Republic’s regulatory goal as it stated that there was ‘no evidence to conclude that the tax collection requirement secures a zero tolerance level of enforcement . . .’ and endorsed the panel’s finding that the alternative was reasonably available in meeting the Dominican Republic’s level of protection.110

In Brazil – Retreaded Tyres, by comparison, the AB changed back to its tone similar to that in the EC – Asbestos. As Brazil’s level of protection was the ‘reduction of the risks of waste tyre accumulation to the maximum extent possible’. The only question left was whether other alternative measures could meet Brazil’s desired level of protection. Then, the AB found that alternatives either carry their own risks or ‘complement’ rather than ‘substitute’ the import ban and, therefore, cannot qualify as reasonably available alternatives under Article XX.111

D. A Value-Based Interpretation of the Weighing and Balancing Test
From these two comparisons, it seems clear that the regulatory value protected by the disputed measure weighs heavily in the AB’s judgment. If the value at stake is high, e.g. human health and safety or protection of the environment, the AB tends to respect the Member’s judgment and to consider necessary very strict enforcement aimed at zero risk, even if that means a very heavy burden on imports. In other words, the challenged measure is more likely to be upheld if there is any doubt as to the ability of the proposed alternative to achieve a Member’s chosen ALOP. EC – Asbestos, US – Gambling and Brazil – Retreaded Tyres are typical examples. By contrast, where the regulatory objective relates to some less important interests, and

109 Ibid, para 60.
110 Ibid, para 72.
111 Appellate Body Report, Brazil – Retreaded Tyres, above n 69, para 211.
the proposed alternative is considerably less restrictive of trade, the AB will condemn a challenged regulation even when the efficacy of the proposed alternative may be less than the efficacy of the challenged regulation. Thus, the rationale behind the ruling in Korea – Beef is that the harm caused by passing off different kinds of beef is modest. Compared with the adverse trade effects imposed on imported beef, Korea’s regulatory purpose in this case must give way to trade liberalization, even if this means that Korean consumers will be less well protected and Korea’s preferred ALOP is likely to be compromised.

If this is indeed the AB’s logic behind the balancing test, then it needs to be emphasized that neither the panel nor the AB has a legitimate role in evaluating the importance of domestic policy goals that fall within the scope of the Article XX provisions. There is no textual warrant for such judgments of importance by the AB and it is a serious intrusion on the Members’ regulatory autonomy. Indeed, our comparisons of two pairs of cases highlight the extent to which the preservation of a Member’s autonomy in setting its preferred ALOP lies in the discretionary hands of the WTO adjudicating bodies.

Although the AB’s approach raised concerns as to its consistency with the WTO texts and the AB’s legitimacy in ranking the importance of values, arguably, it puts the AB in a highly flexible and strategic position. Recall that WTO tribunals need to keep a delicate balance between Members’ regulatory autonomy and their WTO obligations. This is no easy task. The AB’s approach is pragmatic in the sense that it both retains de jure regulatory autonomy, but de facto allows balancing scrutiny to root out indefensible, haphazardly set risk levels. After all, it does not make much sense to stipulate a very low level of tolerance to any worthy non-trade values, such as reduction of consumer confusion of domestic/foreign beef if the cost is seriously impeding an imported product from the market place.

IV. CONCLUSION
The evolution of the GATT/WTO system has been accompanied by a persistent uncertainty regarding the proper delineation of power between Members and the WTO adjudicating bodies, with immense consequences for the trade/non-trade debate. Due to the inherent uncertainty, different commentators tend to focus on different parts of the AB reports and

112 Alan O. Sykes, above n 74, 416.
113 Robert Howse and Elisabeth Turk, ‘The WTO Impact on Internal Regulations: A Case Study of the Canada–EC Asbestos Dispute’ in George Bermann and Petros C. Mavroidis (eds), above n 2, 77–117, at 113; Steve Charnotitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’, 27 Yale Journal of International Law 59 (2002), at 101. (The WTO has no institutional competence for weighing incommensurate values, such as the exporting interests of one country against the environmental interests of another.)
114 J. H. H. Weiler, above n 101, at 144.
arrive at different conclusions on whether a proper balance has been struck between domestic regulatory autonomy and trade liberalization obligations. For example, some criticized that the GATT/WTO regime has unreasonably constrained the ability of democratic communities to make unfettered choices about policies that affect the fundamental welfare of keep as it is now citizens, and WTO Members are prevented from offering a desirable level of protection to their citizens against unwanted harm.115 These concerns further raised the question of the legitimacy of the WTO as a powerful global trade regulator in an emerging international governance system.116 Others, however, refuted such criticisms and argued that the WTO jurisprudence has shown adequate deference to the sovereign regulatory choices and generally acted within the boundaries of its authority.117

This article has contributed to this debate by focusing on the concept of ALOP. I intend to answer two interrelated questions in this article. First, how has the concept of ALOP informed the interpretation of WTO Members’ obligations under the GATT 1994 and the SPS Agreement? Second, to what extent the WTO tribunals have respected this prerogative right in setting their ALOP? It is submitted that, the recent SPS case law has confirmed that a Member’s obligations must be read in light of the Member’s chosen ALOP, and the AB has also demonstrated sensitivity and deference to a Member’s ALOP under the SPS Agreement. The same conclusion, however, cannot be easily applied to the case law under the GATT 1994. It is difficult to reconcile the weighing and balancing test developed by the AB with the WTO Members’ prerogative right to set their ALOP. Indeed, the WTO jurisprudence under Article XX of the GATT 1994 has demonstrated inconsistencies as to when and how WTO Members’ right to ALOP will be respected. I further argue that such inconsistencies may be explained by a value-based, pragmatic approach adopted by the AB. Whether this pragmatic approach to balance Members’ regulatory autonomy in setting their ALOP and their trade-liberalization obligations under the WTO regime is the best way forward is, of course, subject to debate.