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PROPORTIONALITY AND DISPUTE RESOLUTION BETWEEN WTO AND ICSID [1]

PROPORCIONALIDAD Y RESOLUCIÓN DE DISPUTAS ENTRE LA OMC Y EL CIADI

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Summary: The present work focuses on the consideration of some substantive principles that play a primary role both in the context of multilateral trade and in the international investment sector. Specifically, the principle of proportionality represents a fundamental tool in the national legal systems and in many international contexts for balancing competing rights and interests. This qualification, including the assessment of the intensity of the investigation conducted by the bodies involved in the resolution of the dispute which forms an integral part of it, leads us to question the configurability not only of a role for the principle of proportionality within the two systems considered, but in particular also of a correspondence between them, in its interpretation and concrete application

Key words: principle of proportionality, WTO, ICSID, BIT, AB, TBT.

Resumen: El presente trabajo se centra en la consideración de algunos principios sustantivos que juegan un papel principal tanto en el contexto del comercio multilateral como en el sector de inversión internacional. Específicamente, el principio de proporcionalidad representa una herramienta fundamental en los sistemas legales nacionales y en muchos contextos internacionales para equilibrar derechos e intereses en competencia. Esta calificación, incluida la evaluación de la intensidad de la investigación realizada por los organismos involucrados en la resolución de la disputa que forma parte integral de la misma, nos lleva a cuestionar la configurabilidad no solo de un papel para el principio de proporcionalidad dentro de los dos sistemas considerados, pero en particular también de una correspondencia entre ellos, en su interpretación y aplicación concreta.

Palabras Clave: principio de proporcionalidad, OMC, CIADI, TBI, AB, OTC.

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1.Introduction

Our analysis implies a creative approach of the principle of proportionality. The deciding body to which the measure is subject is required to examine the existence of alternative policies that could have led to a better optimization of interests or rights involved conflicts[2]. This is a phase involving an evaluation of values. The answers to the questions raised depend on implicit assumptions and opinions of a political, moral, ideological and economic nature held by the judging bodies[3]. The consequent risk is constituted by the possibility that the judging body, with an excessively intrusive approach, replaces its own judgment with that of the authority in assessing the importance of avoiding damage to the protected right or interest, with respect to the need to reach the goal.
The principle of proportionality can be considered as a specific procedural obligation. In fact, it requires public or judicial authorities to justify decisions on the basis of rational legal arguments and in a structured way. What must be taken into consideration and justified is the importance attributed to each interest, the degree of interference and the way in which the conflicting interests are balanced with each other[4].
In fact, the importance of principles and the proportionality is of primary importance in a system in which there is no precise hierarchy of rules and if the resolution of a dispute cannot be based simply on clear legislative provisions.

2.Revision standards

The examination of the principle of proportionality brings with it the assessment of the investigation intensity conducted by the judging bodies against the measure subject to the dispute. The consideration of "review standards"[5], although frequently treated as autonomous, constitutes an aspect necessarily inherent in the application of the principle

[2]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest-the concept of proportionality, in S.W. SCHILL (ed.), International investment law and comparative public law, Oxford University Press, New York, 2010, pp. 78ss. J. ARATO, The private law critique of international investment law, in American Journal of International Law, 111 (1), 2019, pp. 22ss.
[3]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, in Chicago Journal of International Law, 4, 2013, pp. 93ss. W. BURKE-WHITE, A. VON STADEN, The need for public law standards of review in investor-state arbitrations, in S.W. SCHILL, (ed.), International investment law and comparative public law, Oxford University Press, New York, 2010, pp. 689-690. B. MERCURIO, K. JUNG NI, Science and technology in international economic law. Balancing competing interest, ed. Routledge, London & New York, 2013, pp. 125ss. Z. DOUGLAS, J. PAUWELYN, J.E.VIÑUALES, The foundations of international investment law: Bringing theory into practice, Oxford University Press, Oxford, 2014. M. AKBARA, G. CAPURRO, Investing challenges in investment arbitration, ed. Routledge, London & New York, 2018.
[4]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, in Texas International Law Journal, 42, 2007, pp. 372ss. H. ZÚÑIGA SCHRODER, Harmonization, equivalence and mutual recognition of standards in WTO law, Kluwer Law International, New York, 2011, pp. 102. Y. LEVASHOVA, The right of states to regulate in international investment law: The search for balance between public interest and fair public equitable treatment, Kluwer Law International, New York, The Hague, 2019. V. VADI, Proportionality reasonableness and standards or review in international investment law and arbitration, Edward Elgar Publishers, Cheltentham, 2018. N. MUHAMMAD, A comparative approach to margin of appreciation in international law, in The Chinese Journal of Comparative Law, 7 (1), 2019, pp. 114ss.
[5]S. ZLEPTNIG, The standards of review in WTO law: An analysis of law, legitimacy and the distribution of legal and political authority, in European Business Law Review, 13, 2002, pp. 456ss. J. SHI, Free trade and cultural diversity in international law, Bloomsbury Publishing, New York, 2013, pp. 293ss. R. BECROFF, The standard of review in WTO dispute settlement: Critique and development, Edward Elgar Publishers, Cheltenham, 2012, pp. 72ss.

under examination. The degree of intensity of the analysis not only determines how rigorously the judging bodies evaluate the conformity of the measure with the substantive requirements[6], but also reflects and influences the allocation of powers between the latter and the national authorities that adopted the contested decision[7].
The revision standard that must be applied by the single international judicial body can be expressly indicated within the treaty governing its powers. If this indication is not present, it is believed that the determination of these standards constitutes an implicit power of the courts involved in the dispute, necessary for the exercise of the functions attributed to them[8].
In the context of the WTO dispute resolution system and according to the Convention of International Center for the Settlement of Investment Disputes (ICSID), the determination of the "review standards"[9] constitutes an aspect of the power of the judging bodies not expressly indicated respectively within the Agreement relating to the resolution of disputes, let alone in the ICSID Convention, in line with the strictly procedural nature of the discipline contained in the latter. The lack of this indication has led, in both systems (WTO, ICSID), to the need to identify the applicable standards in the disputes submitted to the judging bodies, considering the use of the application of the proportional analysis as a possible answer to the question.
This issue is of particular relevance in the context of disputes between private investors and host States of the investment, given the absence of a degree of appeal on the merits of the decisions taken by the arbitral tribunals. This resulted in the cruciality of identifying the most appropriate audit standards. Issue whose relevance also emerges in the context of the resolution of commercial disputes within the WTO, in which, however, the existence of a degree of appeal that allows the review on the merits of the decision, whose judgment is attributed to a centralized body and permanent, it allows to limit the risk of analysis excessively or insufficiently intrusive or to correct its scope.

3.Revision standards in the WTO system

In the WTO dispute resolution system, the concept of revision standard refers to the nature and intensity of the examination of the national measure submitted to the judgment conducted by the Panels and the Appellate Body (AB).
Searching within the WTO agreements, of which the understanding for the resolution of disputes constitutes a part, the presence of an indication regarding the auditing standards, reveals the lack of express discipline of the same. The only exception found is article 17.6 of the Agreement[10] relating to the implementation of article VI GATT (Anti-Dumping Agreement)[11].

[6]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 672ss.
[7]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 395ss. A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit.
[8]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit.
[9]V. VADI, Proportionality reasonabliness and standards or review in international investment law and arbitration, op. cit.
[10]D. BETHLEHEM, D. MCRAE, R. NEUFELD, The Oxford handbook of international trade law, Oxford University Press, Oxford, 2009, pp. 388ss. R.M. BOLTON, Anti-dumping and distrust. Reducing anti-dumping duties under the WTO through heightened scrutiny, in Berkeley Journal of International Law, 29 (1), 2011, pp. 70ss.
[11]In particular see the case: EC-Measures Concerning Meat and Meat Products (EC-Hormones), WT/DS26/AB/R e WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, para. 114. G. MARCEAU, J.P. TRACHTMAN, A map of the World Trade Organization law of domestic regulation of goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade, in Journal of World

This shortcoming led the Appellate Body to consider itself equipped with the authority to determine the auditing standards applicable by virtue of the implicit powers deriving from the same in the WTO Agreements[12]. The need to fill this gap, in fact, was perceived by the Appellate Panel, which, in the EC-Hormones case, took the opportunity to define a general revision standard. First of all, AB considers the nature of these standards with reference to the Agreement on sanitary and phytosanitary measures (SPS Agreement), believing that they must reflect "the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves"[13]. Secondly, it does not consider the lack of an explicit provision in this regard as a shortcoming of the system, with the consequent inapplicability of any revision standards; on the contrary, in article 11 of the Dispute Settlement Understanding (DSU)[14] we find the generic forecast that allows the resolution of the question. As regards the activity of the Panels, the applicable standard can be neither a de novo review, nor a total deference, but an objective assessment both with reference to the facts and with regard to the legal issues involved in the measure subject to the procedure[15].
Indeed, through the de novo revision, the panel's assessments would be replaced by those of the national authorities, with a consequent excessive intrusion into the competence of the Member State. Conversely, the total deference is also inappropriate as a violation of both the jurisdictional powers attributed to the WTO by the States and, in particular, of the provisions of article 11 DSU[16].
The indication of the "objective assessment" contained in article 11 appears to be somewhat generic and in need of further substantial clarifications, in order to effectively apply the standard identified to the individual concrete cases. In this regard, the Appellate Body revision along two lines: On the one hand, the Panel invested with the question is required to verify whether the factual aspects have been correctly and sufficiently demonstrated; on the other, with reference strictly to elements of law, a certain margin of discretion is believed to exist in to the Member States, subject to the condition that their conclusions have been adequately illustrated and justified[17].
The Appellate Body makes a further clarification relating to the distinction in the identification of the revision standard according to whether the disputed measure is analyzed at first instance or is made an appeal. In fact, the same judicial body stops to clarify that the subject of review on appeal can only be aspects of law addressed and legal interpretations adopted by the Panel, while questions of fact remain precluded from the possibility of review[18]. Once this clarification has been made, the performance by the Panel of the objective assessment required by article 11 DSU is considered a matter of law which, if raised, can be subject to review on appeal; while, they cannot be qualified as such aspects

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Trade, 48 (2), 2014. M.M. DU, Standard of review under the SPS agreement after EC-Hormones II, in The International and Comparative Law Quarterly, 59 (2), 2010, pp. 444ss. M. KENDE, The trade policy review mechanism. A critical analysis, Oxford University Press, Oxford, 2018.

[12]EC-Hormones, AB Report, para. 114-117.

[13]EC-Hormones, AB Report, para. 115

[14]D. LIAKOPOULOS, Evolutionary, dynamic or contemporary interpretation in WTO system?, in The Chinese Journal of Global Governance, 5, 2019, pp. 22ss.

[15]EC-Hormones, AB Report, para 117-118

[16]D. LIAKOPOULOS, Evolutionary, dynamic or contemporary interpretation in WTO system?, op. cit.

[17]M. OESCH, Standards of review in WTO dispute resolution, in Journal of International Economic Law, 6, 2003, pp. 635, 640-641. K. KULOVESI, The WTO dispute settlement system: Challenges of the environment, legitimacy and fragmentation, Kluwer Law International, New York, 2011, pp. 137ss. Y.S. LEE, Safeguard measures in world trade: The legal analysis, Edward Elgar Publishers, Cheltenham, 2014.

[18]EC-Hormones, AB Report, para. 13.

pertaining to the evaluation of the evidence that has been provided in relation to the measure submitted to the judgment.
Although abstractly the distinction may appear clear, in its concrete application the boundary becomes rather blurred: The duty to carry out an objective assessment of the facts entails the obligation to screen and evaluate the evidence presented. It follows that the lack of consideration, as well as the voluntary distortion or misrepresentation, also conflict with the need for an objective assessment, in addition to being able to possibly also constitute a violation of the principle of fair trial[19]. Therefore, the aspect indicated constitutes a problem of no small importance in the concrete application of the general revision standard identified by the AB which again translates, on the one hand, into the need to identify and delimit the scope of the revision that can be conducted in the appeal phase; on the other, in the need to ensure respect for the balance between the competence attributed to the WTO and that which, however, remains with the States.
Also in the case of the Argentina-Footwear Safeguard case, the Appellate Body confirms that for all WTO agreements, with the exception of the Anti-dumping Agreement, article 11 DSU establishes the appropriate revision standard to which the Panels must comply[20]. The AB, in fact, considers the same reasoning applied with reference to the EC-Hormones case applicable, although the agreement involved is different, specifically relating to the safeguard measures. In taking up the concept enshrined in the previous ruling and with reference to the provisions of article 4 of the Agreement in question, the Appellate Body considers part of the "objective assessment" not only the verification of the examination of the relevant facts by the state authorities and the consequent necessary presence of a reasonable justification of the same, but also the assessment of the applicability and compliance with the relevant agreements[21]. There remains the firm exclusion of the opportunity for a de novo review of the measure, as well as the possibility for the Panel to replace its own analysis and judgment with those of the state authorities.
The issue is resumed in the US-Lamb Meat case, with specific reference to the Agreement on safeguard measures, where the Appellate Body breaks down the objective assessment on the basis of two characters: A formal one relating to the assessment of all the relevant factors to by the competent authorities, and the other substantive involving the verification of the reasonableness and adequacy of the justification provided by the authorities in relation to the respective determination[22].
In re-emphasizing the lack of ownership by the Panels of the power to carry out a de novo review, or to replace their findings to those of the state authorities, the AB goes a step further by stressing that, as just stated, it does not have the consequence the obligation of the first instance body to limit itself to accepting such conclusions. The assessment of the reasonableness and adequacy of the justifications can only be carried out correctly with a critical approach. There is an obligation for the Panels to review whether the justification provided fully addresses the nature and complexity of the data or responds to other plausible interpretations of the same. It follows from this the possible presence of explanations of

[19]EC -Hormones, AB Report, para. 133.
[20]Argentina-Safeguard Measures on Import of Footwear (Argentina-Footwear Safeguard), WT/DS121/AB/R, Report of the Appellate Body, 14 December 1999, para. 116-122.
[21]Argentina -Footwear Safeguard, Appellate Body Report, para. 121-122.
[22]US-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US-Lamb Meat), WT/DS177/AB/R, WT/DS178/AB/R, Report of the Appellate Body, 1 May 2001, para. 103. For further details see: J. TOLE MARTİNEZ, Soluciòn de controversias en los TLC. Aportes del derecho de la OMC, U. Externado de Colombia, 2014. V.D. DYE, Deference as respect in WTO standard of review, in Journal of International Trade Law and Policy, 18 (3), 2013.

alternative facts that are equally plausible or that make what the national authorities have said inadequate. This consideration leads the AB to identify a duty for the opening panels towards a possible lack of reasonableness or adequacy of the justification provided by the competent authorities. Therefore, through an overall reading of the legislation that is in evidence, the exclusion of a de novo revision cannot be interpreted in an impediment to the duty of the judging body to ascertain the lack of reasonableness or adequacy in the justification of the measure. Nor can this fulfilment be read as a substitution by the Panel of its own conclusions to those of the competent national authority[23].

It is with the ruling relating to the US-Cotton Yarn case that the AB summarizes all the aspects addressed in the previous decisions in relation to the audit standard. The Panels must ascertain whether all the relevant factors have been assessed, if the competent authorities have examined the facts and if adequate justification was given of how they support the determination, as well as whether this justification corresponds entirely to the nature and complexity of the information or if it responds to other plausible interpretations. In any case, it further reiterates the impossibility of conducting a de novo review or of replacing the Panel's judgment with that of the competent authority[24].

Despite the apparent clarity of the configuration of the revision standards elaborated by the WTO jurisprudence, the concrete application of the same, as well as the doctrinal opinions related to it, acknowledge the persistence of disputes. The same definition of objective assessment provided by the AB, in fact, does not determine the specific nature and intensity of the review that the Panels are required to carry out. In addition, the same is suitable for lending itself to different variations due to the specific WTO agreement that is relevant with reference to the disputed measure.

In WTO law, the concept of revision standards has been defined as hybrid by reason of the interaction between procedural and substantive rules which, as a whole, specify the role of the Panels in the review of decisions of national authorities[25]. In addition, the nature and intensity of the same depends, as has been specified, on various factors that influence each other or are in a relationship of dependence on each other. The intensity of the review that is carried out by the judging body has a significant impact on the assessment of the conformity of the measure subject to the procedure with the requirements prescribed by the reference agreement[26]. The application of the principle of proportionality, as the revision method used by the Panels and the AB, therefore, is not only governed by the relationship examined between aspects of a substantial nature and purely procedural features, but constitutes a concrete and representative expression of the way in which the dispute resolution bodies have applied the objective assessment examined.

4.The revision standards in the resolution of disputes according to the ICSID Convention

The issue of the standard of revision applicable by arbitration courts in the context of disputes between private investors and host states is anchored in the not strictly private

[23]US-Lamb Meat, Appellate Body Report, para 106-107.
[24]US-Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan (US-Cotton Yarn), WT/DS192/AB/R, Report of the Appellate Body, 8 October 2001, para 74. See also in argument: L. GRUSZCZYNSKI, W. WERNER, Deference in international courts and tribunals: Standard of review and margin of appreciation, Oxford University Press, Oxford, 2014.
[25]H. SPAMANN, Standard of review for World Trade Organization panels in trade remedy case: A critical analysis, in Journal of World Trade, 38, 2004, pp. 503, 514ss.
[26]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 398ss.

nature of the same. In fact, unlike commercial arbitrations, where this question does not arise, based on a contractual relationship of a private nature, investment arbitrations involve a relationship not between equal entities, but a hierarchical relationship between governor and governed[27]. It follows, in fact, that arbitral tribunals are called to judge not only on the contractual rights and obligations existing between the parties, but also with reference to the obligations of a public nature weighing on sovereign state entities.

Indeed, in the context of ICSID arbitration, it frequently happens that the Courts, in examining the specific case, have the task of reviewing and controlling the exercise of powers expressing state sovereignty. This aspect, which can also be seen in the WTO dispute resolution system, takes on particular characteristics due to both the nature of the body called to judge the matter and with reference to the parties involved. The consideration of the ad hoc creation of the arbitration panel called to resolve the single and specific controversy devolved, whose components, moreover, are generally chosen directly by the parties involved, together with the non-existence of a constraint of the previous one, as well as the absence of an appeal mechanism, led to the adoption of considerably different approaches in the investigation of the national measure, by the ICSID courts. The nature of the opposing parties, public the one and private the other, has added, according to some theses, an element of disorientation in the definition of the matter with reference to the identification of the system, of an internal rather than an international nature, to which the arbitrators must refer, preventing the development of a constant and consistent review standard[28].

Through the ICSID dispute resolution mechanism, the control of the exercise of public powers in relation to investments has the potential to affect a wide range of economic activities.

The investment treaties constitute the main guide for the identification of auditing standards aimed at protecting the investor from regulations or other types of state interference, with the consequence that it is through the reference to the same Bilateral Investment Treaty (BIT) that the courts judge the conduct of states[29]. Specifically, in order to protect investments, these treaties sometimes contain provisions aimed at delimiting or allowing state actions that interfere with the rights of investor. Their formulation, as well as the terminology used, constitute a guide for the arbitration panels that allows the identification of the revision standard applicable in the specific case. By applying the standards thus identified, the arbitrators define and limit state sovereignty, establishing the extent and ways in which the public authority can negatively interfere with investments. However, forecasts of this type are not always detectable within the Treaties.

The analysis of the principle of proportionality in the investment field cannot be separated from its consideration as a revision standard, suitable for resolving conflicts between opposing interests of different nature that emerge in the investment discipline. The problem that arises concerns not so much the existence of the power to examine the national measure

[27]A. ROBERTS, The next battleground: Standards of review in investment treaty arbitration, in International Council for Commercial Arbitration Congress Series, 16, 2011, pp. 170, 174ss. E. SHIRLOW, Deference and indirect expropriation analysis in international investment law: observations on current approaches and frameworks for future analysis, in ICSID Review: Foreign Investment Law Journal, 29 (3), 2014, pp. 598ss.

[28]W. BURKE-WHITE, A. VON STADEN, The need for public law standards of review in investor-State arbitrations, in S.W. SCHILL (ed.), International investment law and comparative public law, op. cit., pp. 689, 690ss. In the same opinion see also: G. VAN HARTEN, Investment treaty arbitration and public law, Oxford University Press, New York, 2007, pp. 70-71. I.A. LAIRD, G.F. SOURGENS, T.J. WEILER, B. SABAHI, Investment treaty arbitration and international law, Juris Publishing, New York, 2015, pp. 215ss.

[29]G. VAN HARTEN, Investment treaty arbitration and public law, op. cit., pp. 70-71.

in the arbitral tribunal, a power that cannot be denied because of the consent given by the State to submit the dispute to resolution in this manner, but rather to the delimitation the incisiveness of the same in order to avoid an excessive intrusion in areas properly attributable to state sovereignty.
Since the concept of audit standard refers to the degree of scrutiny granted to the judging body in examining the measure adopted by a different body, in the context of investment arbitration it intrinsically involves a balance between ascertaining the fulfilment of obligations of international law enforcement and respect for its autonomy with specific reference to legislative power. In this regard, the definition of the concept of deference, understood as containment, put in place by the same body invested with the task of resolving the dispute, by issuing a judgment relating to the measure adopted by a different body, legitimated for this purpose[30]. The use of deference involves a reduction in the intensity of the review of the measure subject to scrutiny, with the consequent reduction in the interference of the judging body with the choices made at national level[31]. The former will limit its union to verifying compliance with internationally sanctioned requirements, without affecting the assessments made by state bodies.
The power to make choices does not fall within the judgment body, but to judge those submitted to its scrutiny, within the limits of the powers that are attributed to it.
The concept of deference is part of the proportional analysis as it delimits the investigation that can be conducted by arbitration courts. In the first place, the state public authority is recognized the discretionary power to choose the level of achievement of a legitimate objective and the decision-making ability of the choice made by the judicial body is excluded to the extent that the measure adopted is necessary for the identified purpose. Secondly, with reference to the existence of a plurality of measures that comply with the proportionality requirement, the assessments that led to the choice in favor of one by the national body do not also fall within the union of the arbitral tribunal.
The existence of state discretion is implicit in the proportional analysis and also emerges with reference to ascertaining the effectiveness of the measure adopted by the State for the achievement of the legitimate objective according to the chosen level, in the event that there are a plurality of alternative measures equally effective for this purpose[32]. There are numerous pronouncements in which the ICSID Courts have delimited the intrusiveness of their analysis, sanctioning the non-unionization of choices made by the states, as they do not fall within the powers attributed to them. This deference appears not so much due to the simple acceptance of the judgment of others, but rather to the sufficient reliability of the assessment made by the body that adopted the measure itself[33]. It follows that recourse to the principle of proportionality does not exclude or contrast with the configurability of discretionary powers for states or even with the delimitation of the investigation carried out by the judging body due to the existence of non-negotiable choices by the latter. Also in light of the rulings of the arbitration courts, a gradation of intensity in the application of the principle of proportionality appears configurable. Such an approach makes it possible to

[30]C. HENCKELS, Proportionality and deference in investor-State arbitration, Cambridge University Press, Cambridge, 2015, pp. 34-35.
[31]J. RIVERS, Proportionality and variable intensity of review, in Cambridge Law Journal, 65, 2006, pp. 174ss. J. ARATO, The margin of appreciation in international investment law, in Virginia Journal of International Law, 54, 2014, pp. 545ss. D. PEAT, Comparative reasoning in international courts and tribunals, Cambridge University Press, Cambridge, 2019, pp. 113ss.
[32]J. RIVERS, Proportionality and variable intensity of review, op. cit., pp. 199ss.
[33]J. RIVERS, Proportionality and variable intensity of review, op. cit., pp. 204ss.

respond to the need, expressed by a thesis[34], to temper a totally deferential mechanism with the guarantee of procedural equality of the parties, as well as the protection of the rights previously granted to investors and the impartiality of the courts in the decision-making process. However, the boundary line between the different intensity in the application of the principle of proportionality and the configurability of a different revision standard does not appear so clear and uniform in doctrine.

The issue of the audit standard applicable in the resolution of investment disputes, in fact, is opposed to the application of the principle of proportionality, the thesis of the margin of appreciation. The latter revision standard, according to a different approach, would be the best solution for the analysis that must be carried out by the ICSID Courts, as it offers a tool for the resolution of conflicts of rights and interests without placing the arbitration panel, created ad hoc, in the position of legislative power, through the attribution of the task of directly balancing or questioning that previously carried out by the national authorities. This gives the arbitral tribunal the appropriate space within which national authorities can take regulatory action without their respective decisions being questioned. The task of the arbitration panel would be limited to that of mere supervisor, aimed at checking that the exercise of state power remains within the configured margin and is sufficiently justified. However, albeit residually, the carrying out of a balance by the Court between state interests and interference with individual rights. The inadequacy of the principle of proportionality in the ICSID arbitration is justified by the lack of legislative capacity in the courts to conduct a direct balance, as well as knowledge, skills and resources that allow to question national choices, also considering the non-rooting of the same judging body within the regulatory, political and social context whose policies are subject to judgment. Otherwise, the Panels that decide at first instance the WTO disputes are not only rooted and created specifically within the multilateral system of trade, but, moreover, the function they perform is precisely that of guaranteeing the conformity of national measures with the WTO agreements to which states have joined. Although the Panels are also created specifically for the resolution of the specific controversy that has arisen, they are part of a uniform and univocal international regulatory framework, ensuring knowledge of the defined context in which they operate.

The last consideration could be limited, first of all, in the light of the analysis carried out with reference to the composition and choice of the ICSID Courts arbitrators, underlining in particular the possibility for the parties to select judges with the appropriate skills needed with reference to the concrete case. Secondly, the structure itself and the nature of the proportional analysis allow the judging body to have a pre-established tool available that does not prevent the attribution and performance of functions attributable to national legislative power[35].

In fact, one of the main arguments in favor of the use of proportional analysis as the standard of revision in investment disputes is identified in the characteristic of the principle of allowing the rationalization of the decision-making process by predetermining an analytical structure that allows delimiting the reasoning and arguments[36].

In addition, the application of the same principle allows to make explicit value judgments, simultaneously reducing the perception of an ideological predisposition of the judging body, as well as increasing the transparency of the decision by using the same motivational

[34]A. ROBERTS, The next battleground: Standards of review in investment treaty arbitration, op. cit., pp. 180ss.
[35]A. ROBERTS, The next battleground: Standards of review in investment treaty arbitration, op. cit., pp. 182ss.
[36]A. STONE SWEET, Investor-State arbitration: Proportionality's new frontier, in Law & Ethics of Human Rights, 4, 2010, pp. 46, 76ss. M. SORNARASAH, Resistance and change in the international law on foreign investment, Cambridge University Press, Cambridge, 2015.

scheme. The criticality that emerges in the application of this standard is the excessive discretion that the use of the principle of proportionality risks configuring for the arbitrators in carrying out the judgment of values relating to the definition of the concrete case, due to its structure.
From a substantial point of view, moreover, the principle of proportionality, including a certain degree of deference, also constitutes a rational tool for optimizing the interests that come into play in the delicate relationship between state sovereignty and the protection of investments, guaranteeing respect for the division of competences between national bodies and arbitrators called to resolve the dispute. The reference to the deference in the application of this principle is appropriate due to the involvement of value judgments or particularly sensitive or controversial issues in the analysis of the measure[37]. The extent of the degree of deference depends on the nature of the question submitted to arbitration and therefore requires a case-by-case assessment, in line with the operating mechanism of the principle of proportionality.

5.The use of proportionality in the resolution of WTO disputes

In the WTO system, the subject of disputes submitted to the Panels and, at second instance, to the AB, measures can be taken individually by the Member States. The proportionality principle plays an important role in the resolution of disputes according to the WTO system. In fact, it provides the body involved in the matter with an application method for resolving issues where conflicting principles, interests or values are raised which are not linked by a hierarchical relationship, but which have their origin on different regulatory levels. In order to resolve the controversial issue, it follows the need for the judging body to make choices that directly affect the values involved, attributing to them different relevance in terms of balances made by the same.
The proportionality principle provides a method that allows the Panels to address and resolve the dispute, not only ensuring transparency in the analysis carried out, but also allowing to rationally justify the preference given to certain values or interests and consequently increasing the coherence of the multilateral trading system[38].
Even within the WTO system there are conflicting opinions regarding the principle being analyzed. A certain skepticism that cannot be shared, in fact, leads some to affirm the absence of a general requirement of proportionality in WTO law, nor of a generic test applicable by the respective dispute resolution bodies[39]. The reasons for this thesis are primarily related to the fear of attributing excessive power to the international judge, as well as to the intrusion that such an analysis would produce towards autonomy and state sovereignty[40]. Proportionality would be one of the fundamental principles that form the basis

[37]C. HENCKELS, Proportionality and deference in investor-State arbitration, op. cit., pp. 38ss.
[38]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 426ss.
[39]J. NEUMANN, E. TÜRK, Necessity revisited: Proportionality in World Trade Organization law after Korea-Beef, EC-Asbestos and EU-Sardines, in Journal of World Trade, 37, 2003, pp. 200ss. M. SORNARASAH, Resistance and change in the international law o foreign investment, op. cit.
[40]G. MARCEAU, J. TRACHTMAN, The technical barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A map of the World Trade Organization law of domestic regulation of goods, in Journal of World Trade, 36, 2002, pp. 811ss. G. KAPTERIAN, A critique of the WTO jurisprudence on "necessity" in The International and Comparative Law Quarterly, 59 (2), 2010, pp. 98ss. G. CARLONE, An added exception to the TBT agreement after Clovew, Tuna II and Cool, in Boston College International and Comparative Law Review., 37 (1), 2014, pp. 108ss.

of the multilateral trading system[41]. This principle should govern the interpretation and application of the WTO law as it allows to obtain the correct relationship between the different interests involved.
Another thesis, differently, believes that the balance of rights, principles, values and interests within the WTO system is a fact that cannot be avoided[42]. The question, if any, concerns the modality with which to undertake this balance: The existing relationship between the different principles and values enshrined in the WTO agreements is relative; it follows that proportional analysis constitutes a method through whose application it is possible to achieve a balance between the different competing objectives. The need to perform a balancing operation would also emerge directly from some rules contained in the agreements, first of all the provision of article XX of the GATT[43]. Although the concept of proportionality as such is not mentioned, according to this thesis, it supports and inspires many of the specific rules of the WTO agreements.
According to the opinion mentioned above, the principle under examination would be applied in two possible ways: As a general principle of international law, it inspires the interpretation of individual provisions of the agreements; secondly, it constitutes a specific obligation enshrined in WTO rules requiring balances, as well as the entrustment to it in order to determine obligations for Member States[44]. According to this view, the principle of proportionality is part of the WTO system, but would need to a definition of its structure in such a way as to allow consistency and make the procedure more rational and predictable. The further effect that would be achieved in this way is the limitation of the discretion of the judicial bodies, through the use of a predetermined structure of the decision-making procedure.
Although the principle of proportionality, in accordance with the thesis mentioned above, appears to permeate the entire system of agreements that regulates multilateral trade within the WTO, it is possible to identify some well-defined sectors in which it is most specifically focused: the suspension of concessions, the general exceptions enshrined in article XX GATT[45], the Agreement relating to sanitary and phytosanitary measures and the one governing technical barriers to trade (SPS) and Technical Barriers to Trade (TBT Agreements). Specifically, the investigations of these four sectors, in addition to constituting illustrative examples that allow the examination of the different elements and the consideration of the approaches to proportionality developed by the WTO jurisprudence in the application of the agreements, also allow the carrying out of a comparative analysis of the configuration the proportionality principle in the multilateral trading system and in the investment sector, which will be examined below.

6.The suspension of concessions

[41]M. HILF, Power, rules and principles-which orientation for WTO/GATT Law?, in Journal of International Economic Law, 4, 2001, pp. 111ss. A. GOURGOURINIS, Equity and equitable principles in the World Trade Organization. Addressing conflicts and overlaps between the WTO and other regimes, ed. Routledge, London & New York,. 2015. A. SLADE, The objectives and principles of the WTO TRIPS agreement. A detailed anatomy, in Osgoode Hall law Journal, 53 (3), 2016, pp. 952ss. C. CARMODY, Theory and theoretical approaches to WTO law, in Manchester Journal of International Economic Law, 13 (2), 2016.
[42]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 424ss.
[43]C.J. CHENG, A new international legal order, ed. Brill, The Hague, 2016.
[44]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 426ss.
[45]Q. GUANGLIN, The balance between "public morals" and trade liberalization: Analysis of the application of article XX (a) of the GATT in the EC-SEAL products dispute, in Amsterdam Law Forum, 10 (2), 2018.

The proportionality principle plays a key role in countermeasures. The purpose of adopting a countermeasure in international law is to induce the party who committed the offense to comply with its obligations, ceasing the behavior contrary to them. International law, in fact, prohibits arbitrary or excessive countermeasures due to the damage suffered and the seriousness of the offense. The proportionality principle acts as a tool for controlling the exercise of decentralized power conferred on States to react individually to illegal acts at the international level[46]. According to international law, the determination of proportionality must be carried out on the basis of two elements: One quantity determined by the damage suffered, one qualitative connected to the seriousness of the offense and the rights involved.
A similar purpose is recognized for countermeasures also in the context of the WTO system[47]. In this system, the same receive a specific discipline that differs from that provided for by customary international law. The first difference is terminological: the Agreement for the resolution of disputes within the WTO does not use the term countermeasures, but "suspension of concessions". Although in practice the coincidence between the two measures is affirmed, the diversity of the terminology used does not constitute a merely literary datum[48].
In fact, in this regard, the consideration of paragraph 4 of article 22 DSU is relevant, where these measures are regulated. In prescribing that the level of suspension of concessions must be equivalent to the level of cancellation or compromise, the provision indicates what are the elements that must be considered in authorizing such suspension. Therefore, the irrelevance of both the seriousness of the offense and the rights involved is evident. In fact, no gradation of the violation committed is carried out within the WTO; therefore, the seriousness of the offense does not affect the level of the countermeasures. Otherwise, the concept of "level of nullification or impairment" appears to be attributable to the consideration of the damage suffered by the State that undergoes the violation, which is a central element of the analysis.
Secondly, the relationship between the violation committed and the countermeasure is indicated in terms of equivalence, unlike the provision contained in the draft article regarding the responsibility of states[49].
The question that emerges is the possibility of tracing the assessment of the equivalence requirement, required by the rule governing countermeasures, to the application of the

[46]E. CANNIZZARO, The role of proportionality in the law of international countermeasures, in European Journal of International Law, 12, 2001, pp. 889, 916ss. T.M. FRANK, On proportionality of countermeasures in international law, in American Journal of International Law, 102 (4), 2008, pp. 717ss. A. KULICK, Global public interest in international investment law, Cambridge University Press, Cambridge, 2012, pp. 180ss.
[47]P. MAVROIDIS, Remedies in the WTO legal system: Between a rock and a hard place, European Journal of International Law, 11, 2000, pp. 763ss. A. DESMEDT, Proportionality in WTO law, in Journal of International Economic Law, 4, 2001, pp. 441-447. D. LOURIC, Deference to the legislature in WTO challenges to legislation, Kluwer Law International, New York, 2010, pp. 56ss.
[48]See European Community-Regime for Importation, Sales and Distribution of Bananas (EC-Bananas III), WT/DS27/ARB, Recourse to Arbitration by the European Community under Art. 22.6 of the DSU, 9 April 1999, para. 6.3. For further details see: H. RUIZ-FABRI, The relationship between negotiations and third-party dispute settlement at the WTO, with an emphasis on the EC-Bananas dispute, in L. BOISSON DE CHAZOURNES et al. (eds), Diplomatic and judicial means of dispute settlement, Martinus Nijhoff Publishers, Leiden, 2013, pp. 88ss. S. SHLOMO AGON, Non-compliance recognition and justice in international adjudication: WTO perspective, in Global Constitutionalism 5 (2), 2016 pp. 240ss. M. TREBILOCK, R. HOWSE, A. ELIASON, The regulation of international trade, ed. Routledge, London & New York, 2013, pp. 820ss. A. BAHRI, Public-private partnership of WTO dispute settlement. Enabling developing countries, Edward Elgar Publishers, Cheltenham, 2018.
[49]For further details see also: C. AHLBORN, Remedies against International Organizations. A relational account of international responsibility, in K. WALLENS, Remedies and responsibility for the actions of international organizations, ed. Brill, Hague, 2014, pp. 545ss. M. FORTEAU, Régime général de responsabilité ou lex specialis?, in Revue Belge de Droit International, 117 (1), 2013, pp. 147-160. K. KLEIN, Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, in Annuaire Français de Droit International, 58, 2012, pp. 15ss.

scheme envisaged by the proportional analysis. To this question, a first thesis gave a negative answer, in the light of the literary data: The countermeasures adopted following the provisions of the DSU must be equivalent, rather than proportionate, to the commercial damage that occurred as a result of the default. It follows that the relevance of the principle of proportionality in the context of countermeasures according to customary international law is not reflected in the discipline dictated by the DSU in international trade[50]. However, this opinion believes that the principle of proportionality maintains its own function in the context under analysis, as an interpretative criterion in the light of which the DSU rules must be read, in order to avoid conflicts with the discipline dictated by customary international law[51].

A different thesis answers the question in the affirmative, considering the requirement of equivalence as representative of the principle of proportionality within the DSU. The principle in analysis would be found in the concrete comparison between the level of suspension of concessions and the level of cancellation or compromise, in order to allow the identification of the equivalence relationship between the two terms[52]. It follows that the character that this relationship assumes is more focused on the quantitative element, rather than on the qualitative factor, unlike what is prescribed with reference to countermeasures in international law.

A consequence that derives from the discipline dictated by the provision of the DSU leads to the exclusion of the possibility of authorizing states to adopt punitive countermeasures, due to the requirement of equivalence requested[53]. Already at a first reading, it is clear that the discipline of countermeasures dictated by the DSU is more precise than that prescribed by customary international law.

The concept of equivalence pursuant to article 22.4 DSU was addressed by the first arbitration panel established pursuant to article 22.6 DSU, in the EC-Bananas III (US) case[54]. In their analysis, the referees adopted a rigorous approach, considering the connotating term "a correspondence, identity or balance between two related levels", that is, the level of concessions that must be suspended and that of cancellation or compromise[55]. Specifically, it distinguishes the term under analysis from that of "appropriateness" envisaged in the previous formulation of the 1947 GATT, believing that the ordinary meaning of "equivalent" implies a greater degree of correspondence, identity or rigorous balance between the two levels indicated with respect to what is required by appropriateness.

Furthermore, in confirming the meaning attributed to the term in the aforementioned

[50]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 450ss. J. PAUWELYN, Enforcement and countermeasures in the WTO: Rules are rules, in The American Journal of International Law, 94 (2), 2000, pp. 335-341. R. RAJESH BABU, Remedies under the WTO legal system, Martinus Nijhoff Publishers, The Hague, 2012. W.J. DAVEY, The WTO dispute settlement system: How have developing countries is fared?, in Z. DRABEK, Is the World Trade Organization attractive enough for emerging economies?, Palgrave Macmillan, London, 2010, pp. 298ss.

[51]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 450ss.

[52]S. SHADIKHODJAEV, Retaliation in the WTO Dispute Settlement System, Wolters Kluwer Law & Business, The Netherland, 2009.

[53]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 448ss. S. SHADIKHODJAEV, Retaliation in the WTO Dispute Settlement System, op., cit., United States-Transitional Safeguard Measure on Combed Cotton yarn form Pakistan (US-Cotton Yarn), WT/DS192/AB/R, Report of the Appellate Body, 8 October 2001, para. 120.

[54]G.Z. MARCEAU, Open hearings in the WTO dispute settlement mechanism: The current state of play, in F. BELLANGER, J. DE WERRA, Genève au confluent du droit interne et du droit international: Mélanges offerts par la Faculté de droit de l'Université de Genève à la Société suisse des juristes à l'occasion du congrès 2012, ed. Schulthess, Zurich, 2012. pp. 112ss.

[55]EC-Bananas III, Art. 22.6 Arbitration Report, para. 4.1 and 6.5.

pronunciation, the arbitrators involved in the suspension request in the EC-Hormones case also believe that the provision of article 22.4 DSU requires the determination of the equivalence ratio in a quantitative and non-qualitative sense[56].
The arbitration panel established pursuant to article 22.6 in the US-1916 Act (EC), summarizes the interpretation of the concept, believing that the suspension level appears to meet the requirement of equivalence, pursuant to article 22.4 DSU, if it is equal to or below the level of cancellation or impairment of the benefit, therefore limiting it to the damage suffered by the applicant who invokes the suspension[57]. If, otherwise, it exceeds the indicated level, the suspension assumes a punitive nature and, therefore, is inconsistent with article 22.4 DSU[58].
The equivalence requirement was also interpreted by the arbitration panel, established pursuant to article 22.6 DSU, in the US-Gambling case[59]. Starting from the consideration of the function of the countermeasures to induce the State to fulfil its obligations, since the suspension of the concessions cannot be authorized beyond what is equivalent to the level of cancellation or compromise, the arbitrators believe that article 22.4 DSU "requires a degree of "correspondence or identity" between the level of the suspension to be authorized and the level of the nullification or impairment of benefits"[60]. Therefore, there would appear to be no room for any flexibility in ascertaining the relationship. The two terms of the comparison are clearly identified, the relationship between which must be correspondence or identity. In determining this equivalence, the arbitrators believe that they must ensure that the level of suspension is not lower than the level of cancellation or impairment of the benefit against the appellant, so as to prejudice his rights, nor exceed this level, since in this way the suspension would be punitive[61]. The application of the equivalence standard, therefore, leads to excluding the use of the principle of proportionality.
The general provisions for the suspension of concessions from the understanding are subject to an exception constituted by the regime concerning the prohibited or punishable subsidies, according to the Agreement on Subsidies and Countervailing Measures-SCM Agreement. The requirement prescribed by this Agreement for the adoption of countermeasures, in fact, consists not so much of equivalence, but of appropriateness. Unlike article 22.4 DSU, the provision contained in article 4.10 of the SCM Agreement takes up the formulation of GATT 1947.

[56]European Community-Measures Concerning Meat and Meat Products (EC-Hormones (US)), WT/DS26/ARB, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrators, 12 July 1999, para. 20. For further analysis see also: P. VAN DEN BOSSCHE, W. ZDOUC, The law and policy of the WTO, Cambridge University Press, Cambridge, 2013. M. MATSUHITA, T.J. SCHOENBAUM, P.C. MAVROIDIS, The World Trade Organization. Law, practice, and policy, Oxford University Press, Oxford, 2015, pp. 5ss. C. HEIDFELD, Die denzentrale Durchsetzung des WTO-Rechts in der EU, ed. Nomos, Baden-Baden, 2012.
[57]United Stated-Anti-Dumping Act of 1916 (US-1916 Act (EU)), WT/DS136/ARB, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrators, 24 February 2004, para. 5.21. Y. NGANGJOH HODU, Theories and practices of compliance with WTO law, Kluwer Law International, New York, 2012.
[58]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, Martinus Nijhoff Publishers, Leiden-Boston, 2007. M. HERDEGEN, Principles of international economic law, Oxford University Press, Oxford, 2016. A. BARRIOS VILLARREAL, International standardization and the agreement on technical barriers to trade, Cambridge University Press, Cambridge, 2016.
[59]United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling), WT/DS285/ARB, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrator, 21 December 2007. S.E. ROLLAND, D.M.TRUBEK, Emerging powers in the international economic order. Cooperation, competition and transformation, Cambridge University Press, Cambridge, 2019. N. PIRES DE CARVALHO, The TRIPS regime of trademarks and designs, Kluwer Law International, New York, 2018.
[60]US-Gambling, Art. 22.6 Arbitration Report, para. 2.7.
[61]US-Gambling, Art. 22.6 Arbitration Report, para. 3.24.

Recourse to the principle of proportionality in the last-mentioned rule cannot be denied, also considering the content of the explanatory note included in the Agreement where it is specified that the term used is not intended to allow countermeasures "disproportionate in light of the fact that subsidies dealt with under this provision are prohibited"[62].
The term used in the SCM Agreement allows less rigor in determining the countermeasure with respect to the equivalence requirement prescribed by the DSU, although even in this case the discipline does not reflect the provisions of customary international law, with reference to the proportionality of the same to the seriousness of the violation shop assistant.
According to a thesis, the principle of proportionality would be comparable with the standard prescribed by the SCM Agreement[63]. The provision contained therein, in fact, establishes respect for a relationship that can be assimilated more closely to the proportional one, rather than that of equivalence required in the DSU. In light of this consideration, this opinion comes to affirm the greater similarity of the requirement of appropriateness with the principle of proportionality prescribed for countermeasures in international law. However, the requirement of article 4.10 SCM would not respond to both elements required by customary international law, i.e. quantitative and qualitative, but to only one of the two, due to the type of approach used: The first if we consider the economic effect and commercial damage to the subsidy, the second if the reference is to its amount, therefore to the seriousness of the damage and the nature of the rights and obligations involved. However, this requirement would depart from the principle of proportionality enshrined in the ILC articles due to the greater discretion granted in its assessment by the use of negative terminology used by the note to the standard of the SCM Agreement.
According to a different thesis, on the contrary, even the requirement of appropriateness would not allow its assessment on the basis of the proportional analysis scheme, if not to the extent that the former contains the risk of a disproportionate countermeasure in the event that a plurality of complaints are involved[64].
Nonetheless, in the Brazil-Aircraft case, where the matter was expressly considered, the need was confirmed that the terms "equivalent" used in the DSU and "appropriate" prescribed in the SCM Agreement have a different meaning. With specific reference to the second requirement, "a countermeasure remains" appropriate "as long as it is not disproportionate, having also regard to the fact that the measure at issue is a prohibited subsidy"[65]. The other relevant aspect that is underlined in the pronunciation mentioned, properly pertains to the identification of the meaning to be attributed to the term "appropriate": First of all, through the application of article 31 of Vienna Convention on Law of Treaties (VCLT)[66], the body considers it appropriate to refer to the definition of

[62]Accord SCM, Art. 4.10.With similar terminology also with reference to the provision of the following paragraph of the same article, indicating the task of the arbitrators invested with the question of determining the appropriateness of the countermeasure pursuant to Article 22.6 DSU.
[63]S. SHADIKHODJAEV, Retaliation in the WTO Dispute Settlement System, op. cit., pp. 43-44.
[64]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 452ss.
[65]Brazil-Export Financing Programme for Aircraft (Brazil-Aircraft), WT/DS46/ARB, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision by the Arbitrators, 28 August 2000, para 3.51. M. MATSUHITA, T.J. SCHOENBAUM, P.C. MAVROIDIS, The World Trade Organization. Law, practice, and policy, op. cit.
[66]For further analysis see also: G. NOUTE, Treaties and subsequent practice, Oxford University Press, Oxford, 2013, pp. 224ss. M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on, Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUTE, Treaties and subsequent practice, op. cit., pp. 224ss. E. BJORGE, The evolutionary interpretation of treaties, Oxford University Press, Oxford, 2014. O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, Oxford University Press, Oxford, 2011. O. DÖRR, Article 31. General rule of interpretation, in O. DÖRR, K. SCHMALENBACH (ed. by), Vienna

countermeasure in general international law and, specifically, to the work carried out by the International Law Commission relating to states responsibility[67]. Since the countermeasures, on the basis of the aforementioned rules, are aimed at inducing the State that committed the offense to fulfil its obligations, a countermeasure is appropriate inter alia "if it effectively induces compliance"[68]. It follows that, in the application of article 4.7 of the SCM Agreement, effectively inducing compliance means causing the withdrawal of the prohibited subsidy[69]. Therefore, according to the referees, the level of the countermeasure simply corresponds to the level of the subsidy which must be withdrawn. Requiring, however, that the countermeasure is equivalent to the level of cancellation or compromise would be contrary to the principle of effectiveness, since it would significantly limit the effect of the former in the case of prohibited grants.

It seems possible to configure the existence of a proportionality relationship between the amount of the grant and the level of the countermeasure, also due to a further consideration made by the referees. In fact, in considering that a countermeasure assumes a punitive character if it is not intended only to induce the State to fulfilment, but contains the additional purpose aimed at sanctioning the action put in place by the latter, the college excludes this qualification with reference to the concrete case considering not to detect a disproportion in the calculation of its appropriateness[70].

In light of the two references made by the arbitrators to the concept under analysis, therefore, the connection and relevance of the principle of proportionality with reference to ascertaining the requirement of the appropriateness of the countermeasure within the scope of the SCM Agreement appears undeniable.

This relevance emerges more clearly in the subsequent arbitration ruling relating to the US-FSC case. It is already with reference to the literal meaning of "appropriate" that there is a connection with the principle of proportionality: The term refers to something that is "suitable" or "adapted to a use or purpose", suitability which also constitutes a structural element of the proportional analysis[71]. According to the referees, this reference introduces an element of flexibility since it requires that the countermeasure be adapted to the specific concrete case.

In consideration of the term "disproportionate" present in the note to article 4.10, after affirming that the expression used suggests the lack of an appropriate relationship between two elements, the college believes that it does not imply a mathematically exact equation but "soundly enough to respect the relative proportion at issue "in order to avoid manifest imbalances or inconsistencies, without, however, requiring an exact equivalence:" the relationship to be respected is precisely that of "proportion" rather than of "equivalence"[72]. This analysis therefore appears to confirm the relevance of the principle of proportionality in

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Convention on the Law of Treaties. A commentary, Springer, Heidelberg-New York 2012, pp. 536ss. M. SAMSO, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in Leiden Journal of International Law, 24, 2011, pp. 5ss. R. GARDINER, Treaty Interpretation, Oxford University Press, Oxford, 2008.

[67]K. KLEIN, Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, op. cit.

[68]G. NOUTE, Treaties and subsequent practice, op. cit.

[69]Brazil -Aircraft, Art. 22.6 Arbitration Report, para. 3.42-3.45, 3.58.

[70]Brazil-Aircraft, Art. 22.6 Arbitration Report, para. 3.55.

[71]United States-Tax Treatment for "Foreign Sales Corporations" (US-FCS), WT/DS108/ARB, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision of the Arbitrator, 30 August 2002, para. 5.9. S. CHARNOVITZ, The path for world trade law in the 21st century, World Scientific Publishing, Singapore, 2014, pp. 208ss.

[72]US-FCS, Art. 22.6 Arbitration Report, para. 5.18, 5.26.

the determination of countermeasures, although the same arbitrators emphasize the less rigidity of the approach due to the negative formulation of the requirement: "It does not require strict proportionality".
The conclusions made in the two arbitration decisions just mentioned are entirely taken up by the arbitration panel in the Canada-Aircraft Credits and Guarantees case, confirming in particular the position of the arbitrators of the US-FSC case: In ascertaining the appropriateness of the countermeasure pursuant to article 4.10 of the SCM Agreement, the college believes it must ensure that it is not disproportionate[73].
From the analysis of the requirement required to obtain authorization for the adoption of countermeasures, therefore, it appears possible to affirm the relevance of the principle of proportionality not so much in general, but rather in consideration of the requirement of appropriateness prescribed by article 4.10 of the SCM Agreement, as an exception to the provision contained in the DSU. Although, however, also in light of the jurisprudence, the negative wording of the note included in the SCM Agreement, necessarily leads to the adoption of a less rigid approach to this principle.

7.General exceptions pursuant to article XX GATT

Article XX of the GATT provides a list of general exceptions to the obligations imposed on states, enshrined in the Agreement. This provision is crucial for States to be able to put in place protective measures implementing national policies, per se in violation of international obligations, but which end up being compliant with GATT by virtue of their traceability to one of the exceptions governed by the mentioned article. The provision thus allows States to decide that certain policies, falling within those indicated, take precedence over the objective of liberalizing trade[74].
In any case, in order to be justified under article XX[75],the national measure must meet the conditions sanctioned by it. In order to ascertain this fulfilment, a two-step method has been developed: The first checks whether the measure falls within one of the areas of the exceptions indicated, ascertaining its necessity if it is prescribed by the relevant provision; the second concerns the assessment of its application in accordance with the introductory cap of the forecast[76].
Although the right of a WTO Member State to adopt a specific public policy and to choose the level of protection or implementation of the same has never been questioned[77], the margin of discretion attributed with reference to the assessment of the appropriateness of the purpose however, it finds a limitation in the need for it to fall among those listed in article XX[78].

[73]Canada-Export Credits and Loan Guarantees for Regional Aircraft (Canada-Aircraft Credits and Guarantees), WT/DS222/ARB, Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision by the Arbitrators, 17 February 2003, para. 3.14. W. MÜLLER, WTO agreement on subsidies and counter-railing measures. A commentary, Cambridge University Press, Cambridge, 2017.
[74]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit., pp. 455ss.
[75]I.C. SALINAS ALCARAZ, The concept of necessity under the GATT and national regulatory autonomy, in Revista Virtual: Via Inveniendi et Iudicandi, 10 (2), 2015, pp. 79ss. R. WOLFRUM, P.T. STOLL, H. HESTERMEYER, WTO trade in goods, ed. Brill, The Hague, 2010.
[76]United States-Standards for Reformulated and Conventional Gasoline (US-Gasoline), WT/DS2/AB/R, Report of the Appellate Body, 20 May 1996, p. 22. A.R. MAGGIO, Environmental policy, non product related process and production methods and the law of the World Trade Organisation, ed. Springer, Berlin, 2017.
[77]European Community-Measures Affecting Asbestos and Asbestos-Containing Products (EC- Asbestos), WT/DS135/AB/R, Report of the Appellate Body, 12 March 2001, para. 168.
[78]N. MOSUNOVA, Are non trade values adequately protected under GATT Art. XX?, in Russian Law Journal, 2 (2), 2014.

The relevance of the principle of proportionality in considering article XX appears configurable with reference to the need to identify the relationship between the purpose to which the measure is achieved and the measure itself[79]. This phase, subsequent to ascertaining the justification of the measure with one of the exceptions provided, coincides with one of the four elements through which the proportionality principle is applied.
The list provided in the text of the article under analysis contains a distinction: There are measures that must be necessary in order to protect the specific objective indicated, others must be "related to", or even "imposed for", "in pursuance of", "involving" or be "essential"[80]. This terminological difference necessarily involves a different approach in considering the individual measures submitted to judgment, depending on the purpose for which they are directed. For the purposes of this discussion, the consideration of the first two hypotheses mentioned appears to be relevant.
Measures that are aimed at protecting public morality (let. A), human, animal or plant life (lett. B) must be necessary, to ensure compliance with laws or regulations not contrary to the agreement itself (let. d).
On the contrary, it is sufficient that the measures are related to the objective if they are related to the import or export of gold or silver, to prison labour products and, to the conservation of exhaustible natural resources.

8.The necessary measures

The need for the measure, in the application of article XX, has been addressed by the WTO jurisprudence in particular with reference to letters b) and d). The ruling of the first instance body of the US-Gasoline case defines the concept of necessity, pursuant to the forecast in analysis, by means of a formulation that appears similar to that prescribed for the corresponding element of the proportional analysis. Recalling the decision made with reference to the US-Section 337[81] case and confirmed in the Thai Cigarettes case prior to the adoption of GATT 1994, the Panel states that "if there where consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met"[82]. The compliance with the requirement of necessity is determined considering the existence of alternative measures that comply with or are not in accordance with the obligations prescribed by GATT, which could reasonably be adopted by the State for the achievement of the objective indicated by the relevant forecast. The verification of the existence of alternatives implies that the measure cannot be justified in light of the exceptions sanctioned by article XX[83].
However, this formulation has undergone an evolution and completion in the light of the

[79]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 410ss.
[80]Art. XX GATT, lett. A-j. For further details see: N. MORAN, The first twenty cases under GATT article XX: Tuna or Shrimp dear?, in G. ADINOLFI, F. BAETENS, J. CAIARDO, A. LUPONE, A. MICARA, International economic law, ed. Springer, Berlin, 2017, pp. 14ss. M. CHI, Exhaustable natural resource in WTO law: GATT article XX (g) disputes and their implications, in Journal of World Trade, 48 (5), 2014, pp. 942ss. S.W. ANDEMARIAM, Can (should) article XX (b) GATT be a defense against inconsistencies with the SPS and TBT agreements?, in The Journal of World Investment & Trade, 7 (4), 2006, pp. 320ss.
[81]U.S-Section 337 of the Tariff act of 1930 report by the panel adopted on 7 November 1989 (L/6430-365/345) of 16 January 1989. See also: Y. YU, L. ZHANG, Analysis of enforcement of section 337 of the US Tariff act through perspectives in law and economics, in Journal of Intellectual Property Rights, 17, 2012, pp. 210ss.
[82]United States-Standards for Reformulated and Conventional Gasoline (US-Gasoline), WT/DS2/R, Report of the Panel, 29 January 1996, para. 6.24.
[83]A. FOLLESDAL, G. ULFSTEIN, The judicalization of international law: A mixed blessing?, Oxford University Press, Oxford, 2018.

ruling of the Appellate Body in the Korea-Beef case. The interpretation of the requirement of necessity, carried out in the light of article 31 VCLT[84], has as its starting point the literal meaning of the term: "Normally it denotes something that cannot be dispensed with or done without, requisite, essential, needful". However the expression must be considered in connection with which it is used, since it is susceptible of different meanings[85]. In the light of the context in which the term "necessary" is inserted, the measures that are indispensable or absolutely necessary are certainly considered to meet the requirement. inevitable for the achievement of the goal. Although "the term necessary refers (...) to a range of degrees of necessity"[86], so that measures that simply "contribute" to it are also included.

In particular, the Appellate Body believes that the assessment of the existence of the requirement under analysis pursuant to letter d) of article XX[87], must also be made taking into consideration the importance of the common interests or values that the law or the regulation that must be carried out is aimed at protecting. The more vital or important the former, the easier it is to accept the measure designed for their implementation[88]. In addition, the court continues, that there are other aspects that must be considered, such as the extent to which the measure contributes to the achievement of the aim pursued and the extent of the restrictive effects of international trade produced. The need for the measure appears to be determined mainly on the basis of a quantitative criterion, based on the restriction of trade caused by it, rather than on the degree of compliance with the WTO agreements[89].

The aforementioned pronunciation expressly refers to the "weighing and balancing" procedure typical of the application of the proportional analysis. In fact, the present case is the cornerstone of the reconstruction of the principle of proportionality applied within the WTO dispute resolution system, on which those theses that believe it constitutes one of the foundations of the multilateral trading system are based[90]. Taking a further step with respect to what was stated in the aforementioned rulings, according to the Appellate Body, the determination of the availability of an alternative measure compliant with WTO law or less restrictive, the adoption of which can reasonably be carried out by the State, includes the balancing procedure[91].

The interpretation of this formulation has been elaborated by the GATT Secretariat, which considered that the requirement prescribed by article XX has evolved from "a least-trade restrictive approach to a less-trade restrictive one, supplemented with a proportionality test"[92], the latter defined as a process of balancing a series of factors.

If on the one hand the last mentioned ruling involves an attenuation of the rigidity in ascertaining the requirement of necessity, on the other the balance that is described ends up giving the dispute resolution bodies a more invasive role in assessing the legitimacy of the measure subject to the procedure, requiring them to assess the relevance of interests and

[84]R. GARDINER, Treaty Interpretation, op. cit.
[85]Korea-measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea-Beef), WT/DS161/AB/R and WT/DS169/AB/R, Report of the Appellate Body, 11 December 2000, para. 160-161.
[86]WT/DS169/AB/R, Report of the Appellate Body, op. cit.
[87]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, Martinus Nijhoff Publishers, The Hague, 2014, pp. 167ss.
[88]Korea-Beef, Appellate Body Report, para. 162 and 163.
[89]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 468ss.
[90]M. HILF, Power, rules and principles-which orientation for WTO/GATT Law?, op. cit., pp. 112ss. A. DESMEDT, Proportionality in WTO law, op. cit., pp. 442ss. M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit.
[91]Korea -Beef, Appellate Body Report, para. 166.
[92]Korea -Beef, Appellate Body Report, para. 167.

values on which evaluations and choices made by Member States are based[93]. The gradability of the requirement under analysis led to the affirmation of the possibility of a diversification of the jurisprudence on the basis of the issue that is highlighted in the procedure, thus confirming the opening towards greater activism of the judicial bodies[94].
The relevance of the balance, as an aspect of the requirement of the necessity indicated in article XX, confirmed in subsequent rulings[95], leads the Appellate Body to specifically identify the factors that are relevant in determining the reasonable availability of an alternative measure. In particular, in the ruling of the EC-Asbestos case, the need to assess the existence of an alternative measure that allows the achievement of the same goal and that is "less restrictive on trade than a prohibition" is specified[96].
The determination of the need for a measure for the purpose of applying the exceptions of article XX GATT[97], in the light of the norm itself and of the jurisprudence cited, therefore entails a balance of different factors, whose traceability to the structure of the proportional analysis appears undeniable.
The interpretation elaborated with reference to the requirement of necessity acquires particular importance as it allows to exclude protectionist measures, which go beyond the scope of the forecast under analysis.

9.The "related to" measures

The other term used by the article mentioned in the formulation of allowed exceptions is "related to". The textual difference led the dispute resolution bodies to believe that there was a different degree of connection required between the measure and the policy pursued by the State[98]. As underlined by the Appellate Body in the ruling of the Korea-Beef case, the expression used is qualified as "more flexible textually than the" necessity "requirement"[99].
The question that emerges, therefore, concerns the possibility of detecting elements of the proportional analysis in the concrete application of the exceptions qualified with the term "related to".
In the search for the meaning attributed to the expression in question, two pronouncements of the Appellate Body are highlighted. In the US-Gasoline case, criticizing the reasoning followed by the Panel for the lack of clarity, the Appellate Body considers the application of article XX let. g) wrong, since the basic rule for the interpretation of the treaties, expressed in article 31 VCLT[100] has been neglected. Specifically, underlining the need to interpret the forecast in analysis included in the context of the Agreement, the AB affirms that the latter cannot be given an expansive reading such as to undermine the purpose and object of article III.4. GATT. The meaning to be attributed to the exception, continues the deciding body, must be sought on the basis of the specific case, investigating the factual and legal context relating to the specific dispute without neglecting the words used by individual states to

[93]According to M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 441ss.
[94]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 465ss.
[95]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[96]EC-Asbestos, Appellate Body Report, para. 172.
[97]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[98]US-Gasoline, Appellate Body Report, p. 18.
[99]Korea-Beef, Appellate Body Report, para. 161.
[100]R. GARDINER, Treaty Interpretation, op. cit.

express their intentions[101]. On the basis of the expression "related to", in the opinion of the AB, the correlation exists not only if the measure is primarily aimed at achieving the aim, but, in particular, a substantial relationship is configurable, such that the former cannot be considered incidentally or inadvertently directed to the second.
The second relevant ruling for the purposes of this analysis is that relating to the US-Shrimp case, where the Appellate Body, in taking up and confirming what was expressed in the decision cited above, believes that the forecast requires the existence of a close and authentic relationship between the means used and the purpose[102]. Specifically, the AB considers the requirement prescribed by the standard integrated as the measure subject to the procedure "is not disproportionately wide in its scope and reach in relation to the policy objective (...)"[103]. In particular, based on the interpretation given in this decision, the forecast in analysis requires the existence of a relationship between the means used and the aim pursued which is identified in the reasonable correlation, ascertained by analyzing the structure of the measure in question.
If from the reading of the previous pronunciation the applicability of the proportional analysis to the assessment of the requirement prescribed by article XX lett. c), e) and g)[104], the last mentioned decision seems to remove any uncertainty in this regard. Although in the light of the norm and of the jurisprudence cited, the requirement in question requires a less rigorous approach than the necessity previously analyzed, the opinion according to which the expression "related to" configures a more deferential standard is acceptable, which, however, includes elements of the proportional method[105]. Consequently, by comparing the two terms used and the concrete application of the exceptions, it seems possible to configure a diversity in the relevance of the values to whose protection each individual forecast listed in the standard is directed: The environment seems more easily protected than public health[106].
The uncontested reference to the existence of a substantial relationship between the means used and the purpose to which they are directed, qualified as reasonable, appears to be attributable to the element of the principle of proportionality identified in the suitability of the measure. Furthermore, the expressed reference made by the Appellate Body to the not disproportionate amplitude of the measure subject to the procedure with respect to the aim pursued seems to remove any doubt.

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[101]US-Gasoline, Appellate Body Report, par. 18, 19.
[102]United States-Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp), WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998, para. 136. D. KÖNIG, The enforcement of the international law of the sea by coastal and port States, in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 62, 2002, pp. 12ss. In this case, the United States had banned the import of shrimps and products derived from countries whose vessels were dedicated to fishing for such species using techniques that do not comply with US standards in force for the conservation of sea turtles. While admitting the possibility of invoking the art. XX of the GATT to justify unilateral measures implementing an internal environmental policy, the Appellate Body considered that in this case the conditions set forth in the chapeau of art. XX and thus rejected the US appeal (WTO, WT/DS58/AB/R, 12 October 1998, United States-Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, Report of the Appellate Body, in International Legal Materials, 38 (1), 1999, pp. 121ss). C.C. JOYNER, Z. TYLER, Marine conservation versus international free trade: Reconciling dolphins with tuna and sea turtles with shrimp, in Ocean Development & International Law, 31, 2000, pp. 142ss. G. MOON, GATT article XX and human rights. What do we know from the first twenty years?, in Melbourne Journal of International Law, 165, 2015, pp. 449ss. N. MOSUNOVA, Are non trade values adequately protected under GATT art. XX?, op. cit., pp. 104ss.
[103]C.C. JOYNER, Z. TYLER, Marine conservation versus international free trade: Reconciling dolphins with tuna and sea turtles with shrimp, op. cit.
[104]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[105]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 413ss.
[106]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 472ss.

A different view, on the contrary, believes that the lack of the requirement that the state should choose the least trade restrictive measure could lead to the conclusion that there is no question of balancing between state policy and the restriction on trade. However, this opinion cannot lead to the conclusion that there is no configurability of a proportional approach to the question. The need for a balance appears configurable, although the terms of the comparison are different from the ones mentioned above: It is not so much the restriction on trade caused by the measure, i.e. the effect produced, but the means used, the measure itself, and the purpose to which they are directed. Since it is not the terms that characterize the proportional analysis, but rather the method it expresses, it does not seem possible, for this reason, to exclude its configurability in the forecast examined.
However, since the lower rigidity required in ascertaining the correlation requirement is also undeniable, there are no elements to be able to affirm the stringent application of all the elements of the proportional method, but only the reference to some of them, specifically the suitability of the measure and the assumption of its legitimacy.

10.The introductory hat of article XX GATT

Once the justification of the measure has been ascertained in the light of one of the exceptions listed in letters a-j, the second phase involves verifying its compliance with the introductory cap of article XX, i.e. the measure adopted must not be applied in such a way as to constitute by means of arbitrary or unjustified discrimination or a disguised restriction on international trade. The purpose of this provision, as defined in the ruling of the AB in the US-Gasoline case, to prevent the abuse of the listed exceptions, is not intended to question the measure as such, but rather the way in which it is applied[107]. In the interpretation of the Appellate Body, the need that the exceptions "must be applied reasonably", appears to have as a corollary the greater weight of the burden of proving that the measure does not constitute an abuse with respect to the proof of its compliance with one of the paragraphs listed in the forecast.
The conclusion relating to the function of the forecast under analysis is also confirmed in the pronouncement of the US -Shrimp case, where it is further specified that the introductory hat includes the recognition by the Member States of the need to maintain a balance between the right of a State of invoke one of the exceptions listed in article XX, on the one hand, and the substantive rights of the other States enshrined in GATT, on the other hand. The rationale and justification of the measure on the basis of the introductory hat of the mentioned forecast cannot be constituted by its political objective[108]. In the opinion of the Appellate Body, the beginning of the rule contains the recognition by states of the need to maintain a balance between the right of the State to invoke one of the listed exceptions and the duty of the same to respect the rights arising from the treated by other Member States[109].
With this last ruling, it is highlighted how the careful balance of different factors constitutes the mechanism that allows to avoid abuse in the use of exceptions. Each of the latter is limited and conditioned by the substantial obligations contained in the other provisions of the Agreement.
The abusive exercise of the rights contained in the Treaty constitutes a violation not only of the rights of the other members, but also of the obligations placed on the author State, by

[107]US-Gasoline, Appellate Body Report, p. 22.
[108]US -Shrimp, Appellate Body Report, para. 149.
[109]US-Shrimp, Appellate Body Report, para. 156.

virtue of the qualification of the provision under analysis, carried out by AB, as an expression of the principle of good faith of which the doctrine of abuse of law constitutes an application[110]. Therefore, the use of forecasting in analysis involves the search for a balance between the rights of the States Parties to the WTO: Respectively that of invoking the exception and the substantive ones provided for by the other rules. This line of equilibrium is not immutable, but varies with the variation of the measure in question and with the diversity of facts relating to the specific case.

Specifically, the provision prohibits the application of national measures with reference to three standards, if they constitute arbitrary or unjustified discrimination between states in which the same conditions apply or a disguised restriction on trade. According to a thesis, the last cited pronunciation shows that the interpretation and application of these three requirements is influenced and governed by the global restrictive approach focused on balancing the interests of the party invoking the exception and the other members, in the to have confirmation of their rights deriving from the Treaty[111]. The judgments cited, in this opinion, constitute the manifestation of the AB's preference for a procedure that involves balancing interests.

In order for one of the exceptions listed in article XX[112], to be invoked, therefore, the State is required to apply the measure in a reasonable manner, taking into account not only its own rights, but in particular those of other states. It is this balancing operation that ultimately determines arbitrary or unjustified discrimination or constitutes a disguised restriction on trade[113].

Nevertheless, given the initial distinction relating to the stages of ascertaining the conformity of the measure with article XX, a clarification is appropriate. The object of the first phase is the verification of the justifiability of the measure on the basis of one of the exceptions listed, in light of the specific connection required between the same and the purpose it is intended to achieve, therefore involving a balance of different factors. Otherwise, the balancing operation envisaged in the second phase sees the interest of states in the liberalization of trade on one hand and, on the other, that of one or more members in the protection of national values.

However, the traceability of the balance, required on the basis of the interpretation given to the forecast under analysis, to the principle of proportionality is not uniformly shared. A first thesis argues that the purpose of the incipit of the article under analysis is limited and the reference to the balance of interests is misleading[114]. By criticizing the Appellate Body's approach, the introduction of a balance would lead to the possibility of considering a measure that was legitimately applied on the basis of one of the exceptions listed in article XX as illegal, since it is overwhelmed by more important related interests of international trade. It would have been preferable that the AB had been content with the consideration of the limitation and conditionality of the exceptions: Limited because they are applicable only in defined circumstances and conditioned as acceptable in the light of the incipit only if they do not constitute a means of arbitrary or unjustified discrimination or a disguised restriction

[110]US-Shrimp, Appellate Body Report, para. 157-159.
[111]D. MCRAE, GATT Article XX and the WTO Appellate Body, in M. BRONKERS, R. QUICK (eds), New directions in international economic law: Essays in Honour of John Jackson, Kluwer Law International, Deventer, 2000, pp. 219, 230-231. K. DAWAR, E. RONEN, How necessary? A comparison of legal and economic assessments under GATT dispute settlements, article XX (b) TTBT 2.2. and SPS 5.6, in Trade Law and Development, 8 (1), 2016, pp. 9ss.
[112]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[113]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 414ss.
[114]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit., pp. 472ss.

on trade. This thesis, however, does not deny the interpretation given to the beginning of article XX by applying a balance by the AB, although this approach is criticized as it is considered unsupported by the structure of the forecast itself[115].
The reference made by AB to the abuse of the right does not require a balance where the conflicting interests are weighed against each other to establish a hierarchy, but a mere comparison between the individual rights in question in order to find an acceptable balance between the two parts[116]. However, this consideration seems to only formally exclude the applicability of the principle in question, since the analysis that is developed appears to follow some of the elements of proportionality. Secondly, this thesis would seem to ascribe to the proportionality principle a function that does not belong to it, namely that of allowing the development of hierarchies of values. On the contrary, through the use of this principle, the body invested with the question has at its disposal a tool aimed at identifying balances between the different interests and values not in an abstract way, but in light of the specificities of the concrete case, as underlined by the same pronunciations mentioned. In addition, the applicability of this principle does not automatically determine the indication of the terms that make up the subject of the analysis, the latter, rather, are identified from time to time by the judge in the light of the rules governing the case.
On the contrary, the need for balancing, as developed by the jurisprudence from AB, determines the traceability of the operation to the principle of proportionality, a fortiori if we consider its historical and conceptual essence as a principle aimed at balancing public policies and interests or individual rights[117]. Such an approach does not call into question the general policy pursued by the State as such, but is aimed at ascertaining whether the measure adopted for its implementation is disproportionate or unreasonable. This conclusion appears not only acceptable, but also in accordance with the structure of the WTO, as it allows for the maintenance of the separation of the national and internal plan from the supranational one, limiting the discretion of the deciding body in evaluating the measure subject to the procedure, with the consequence to avoid an excessively intrusive investigation into the internal policy choices of the State involved.
In conclusion, in the context of article XX, proportionality can be conceived in its generic function, as a flexible principle and tool that guides the legal investigation into the legality of the national measure.

11.The SPS and TBT agreements

The SPS Agreement and the one that governs the TBT are highlighted in the consideration and application of the principle of proportionality within the WTO dispute resolution system since, in establishing detailed positive obligations for national regulations, they are intended to mitigate the restrictive effect of trade generated by the latter, leaving a margin of discretion to states to pursue their internal policies. This function is carried out through the use of standards which, although not explicitly provided for in the agreements, are applicable as requirements of national legislation.

12.The SPS Agreement

[115]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[116]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 474, 476.
[117]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 415ss.

The SPS Agreement, which aims to avoid unnecessary or concealed restrictions on trade, in article 2.2 prescribes the duty of states to ensure that any sanitary or phytosanitary measure, with a scientific basis, is applied "only to the extent necessary to protect human, animal or plant life or health". In addition, article 5.6 provides that the same measures cannot be more restrictive of trade than required to achieve an appropriate level of sanitary and phytosanitary protection. This latter provision is explained by the note attached to it, according to which a measure "is not more trade-restrictive than required unless there is another measure, reasonably available (...) that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade". Despite their close relationship, a violation of the second article cited does not necessarily presuppose a discrepancy from article 2.2.

A measure is qualified as necessary for the protection of health and life if it meets two requirements: It must be suitable and required[118]. While the indispensability of the measure for health protection implies the presumption of its necessity, if the same is limited only to contributing to the purpose for which it is directed, other factors emerge for the purpose of ascertaining its compliance with the prescribed requirements, such as the relevance of the objective, the actual contribution made and the negative effects on trade. It follows that the greater the relevance of the objective and the contribution to the protection of interest, the more easily the measure will be deemed necessary, with less importance of the implications on trade.

The expression used by the standard, requesting that the measure adopted be applied "to the extent necessary", incorporates the principle of proportionality in particular with reference to the element of suitability[119]. First of all, it emerges implicitly from the norm, the need that the measure is suitable for the protection of life or human, animal or vegetable health[120]. The undeniable existence of a relationship between the measure itself and the purpose it is aimed at, finds its expression not only in the request for sufficient scientific evidence, but in particular in the need for it to be based on a risk assessment .

The requirement enshrined in article 2.2, requiring that the measure adopted finds its foundation on scientific principles and is not maintained in the absence of scientific evidence, reflects the general intent of the SPS Agreement to achieve a balance between the promotion of international trade and protection of life and health. The sufficiency of the tests, specifically, is directly connected to the necessity of the measure, requiring with the latter the configuration of a rational and objective relationship[121]. It follows that, if on the one hand the existence of tests contributes to the positive assessment of the need for the on the other hand, the sufficiency of the former depends on the nature and implications of the latter. Given the premise, a further element that must therefore be taken into consideration is the effects that the measure in question has on trade: the greater the obstacle it generates, the more rigorous the scientific justification of the same must be, determined on the basis of the risk to health or life involved[122].

The interpretation given to the standard, elaborated in the ruling of the AB relating to the

[118]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit.
[119]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 201ss.
[120]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 454ss. F. ORTINO, Basic legal instruments for the liberalization of trade: A comparative analysis of EC and WTO law, Hart Publishing, Oxford & Portland, 2004, pp. 445ss.
[121]Japan-Measures Affecting Agricultural Products (Japan-Agricultural Products II), WT/DS76/AB/R, Report of the Appellate Body, 22 February 1999, para. 84, confirmed in the next sentences: Japan-Apples, Appellate Body Report, para. 162. M. KENDE, The trade policy review mechanism: A critical analysis, op. cit.
[122]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit.

Japan-Apples case, leads to affirm the disproportion of the measure if there is no rational and objective relationship between it and the scientific evidence to justify it[123]. The following consideration, in the analysis carried out by the Appellate Body, expresses the relativity of the approach used by the Panel, the correctness of which pursuant to article 2.2 depends on the particular circumstances of the specific case.
Despite this last statement, the requirement enshrined in the standard does not appear to be called into question. Therefore, a peculiar formulation of the requirement of suitability emerges as an element of the principle of proportionality: Not only, in fact, is the existence of a causal link between the measure and the purpose to which its implementation is directed, but article 2.2 of the Agreement also prescribes a procedural requirement, relating to the consideration of the evidence. The terms of the comparison considered for the purpose of determining disproportionality, in the aforementioned pronunciation, are identified, on the one hand, in the measure adopted by the State and, on the other, in the risk that the same is aimed at facing demonstrated by the scientific evidence provided. Although this consideration, formulated by the Panel in the Japan-Apples case and subject to criticism, was not censored by the Appellate Body, which on the contrary gave confirmation of it, the same was, however, limited with reference to the specificity of the concrete case[124].
It seems possible to identify two different relationships: the first between the measure adopted and the aim pursued to protect life and health, properly attributable to the proportional analysis, and, the second, between the measure itself and the ascertained risk. It is with reference to the latter two terms that a rational connection must exist[125]; however, the same appears necessary for the purpose of determining the suitability of the measure for the realization of the purpose to which it is directed.
Article 5 of the same Agreement constitutes a specific application of the obligation contained in article 2.2. The consideration of the principle of proportionality is highlighted with reference to the provision of paragraph 6 which prohibits the adoption of more restrictive measures of trade than required for the achievement by the State of an appropriate level of sanitary or phytosanitary protection. This provision, including the explanatory notes, constitutes a specific expression of necessity as an element of the principle of proportionality, also called "less-trade restrictive requirement". This requirement has been assimilated to that prescribed by the exception of article XX, let. b) GATT, analyzed previously, with reference to the necessity test developed by the jurisprudence[126].
Resuming the ruling of the Australia-Salmon case[127], in the light of the definition included in the note to the aforementioned provision, there is a violation of the SPS Agreement only if the applicant demonstrates the presence of alternative measures that meet three requirements: The reasonable availability of the same considered technical and economic viability, the achievement of a similar level of protection, the significant lower trade restriction than the contested measure[128]. According to the interpretation given by the AB, the measure complies with the SPS Agreement if even one of the elements indicated is not integrated.

[123]Japan-Measures Affecting the Importation of Apples (Japan-Apples), WT/DS245/AB/R, Report of the Appellate Body, 26 November 2003, para. 163.
[124]Japan -Apples, Appellate Body report, para. 164.
[125]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 455ss. M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 418ss.
[126]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit., pp. 456ss.
[127]Australia-Measures Affecting Importation of Salmon (Australia-Salmon), WT/DS18/AB/R, Report of the Appellate Body, 20 October 1998. A.H. QURESHI, Interpreting WTO agreements, Cambridge University Press, Cambridge, 2015.
[128]Australia-Salmon, Appellate Body report, para. 194.

The existence of an alternative measure is not in itself sufficient to believe a violation exists, but it is further necessary that it be "reasonably available", considering its technical and economic viability.
The second element highlighted by the Appellate Body requires an analysis of the level of protection chosen by the State, to determine the appropriateness of the measure for its implementation. This assessment involves a judgment on the effectiveness of both the measure subject to the procedure and the alternative one identified, becoming an element that makes the task attributed to the body invested with the matter more difficult, since it entails the risk of an excessively intrusive analysis on internal policy choices. However, this possibility appears to be avoided thanks to the interpretation of the Appellate Body, according to which the consideration of this element does not interfere with the choice of the level of national sanitary and phytosanitary protection: The definition of the latter constitutes a prerogative of the State, not of the Panel nor of the AB[129]. The appropriate level of protection differs from the measure itself, constituting, the first, the objective and, the second, the instrument for its realization.
Specifically, the correlation between the two is identified by referring to article 5.6 of the SPS Agreement on the basis of which the determination of the level of protection appears to logically precede, in the decision-making process, the choice and maintenance of the sanitary or phytosanitary measure, not the other way around. It follows that the aforementioned forecast requires investigating the possible existence of alternative measures that achieve the appropriate level of protection, as determined by the State, not judging the appropriateness of the level that each member wishes to achieve.
In order for the last element to be integrated, it is necessary that the restriction on trade generated by the alternative measure is significantly lower than that caused by the disputed measure. The addition of the term "significantly" not only ensures that slightly more restrictive trade measures do not exceed the assessment[130], but also constitutes the means by which the principle of proportionality can be adapted to the specific needs of the forecast interpreted. In fact, the combined reading of the two standards mentioned leads to a peculiar vision of the principle of proportionality with reference to its elements: The suitability of the measure, indeed, also includes procedural aspects, relevant to the assessment of the evidence, with the consequence that, in spite of its compliance with the requirement of necessity, it could result in the unsuitability for the realization of the purpose to which it is directed[131].
A final provision that is highlighted in consideration of the principle of proportionality in the SPS Agreement is article 5.4, where states are required to determine the appropriate level of sanitary and phytosanitary protection[132]. The appropriateness requirement, already emerged in the consideration of the countermeasures, prescribed by the SCM Agreement, can be interpreted as a sort of balancing, requiring the states, specifically, to consider the objective of minimizing the negative effects for the trade in the choice of the measure. However, unlike the obligation prescribed with reference to countermeasures, the last mentioned rule does not provide for an obligation on the states, but, as analyzed by the AB in the EC-Hormones case, the use of the term "should" attributes to the simply exhortative value

[129]Australia-Salmon, Appellate Body report, para. 199-200 and 203-204.
[130]R. WOLFRUM, P.T. STOLL, A. SEIBERT-FOHR (eds), WTO-Technical barriers and SPS measures, op. cit., pp. 457ss.
[131]A.D. MITCHELL, Legal principles in WTO law, Cambridge University Press, Cambridge, 2008.
[132]F. ORTINO, Basic legal instruments for the liberalization of trade: A comparative analysis of EC and WTO law, op. cit., pp. 466ss.

prediction[133]. It follows that, the terminology used and the interpretation of the standard lead us to believe that a balance with possible negative effects on trade is not required, in determining the appropriate level of protection[134].
It seems possible to identify elements of the principle of proportionality that govern the determination of the conformity of the different levels of protection chosen individually by the states with the SPS Agreement, avoiding to cause discrimination or restrictions on trade not in line with the aim that the sanitary and phytosanitary measures allowed are intended to protect[135]. Although the configurability of a requirement of proportionality stricto sensu is to be excluded, the assessment of the suitability of the measure to achieve the objective to which it is directed, as well as the ascertainment of the absence of alternative measures less restrictive of trade, are elements present in the rules dictated by the Agreement examined.

13.The TBT Agreement

The objective of the TBT Agreement is, first of all, to ensure that technical regulations, standards and national procedures aimed at ascertaining compliance with internal requirements do not produce unnecessary obstacles to international trade[136].
Article 2.2 of the TBT Agreement prescribes an obligation for Member States to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. To this end, regulations should not be more restrictive than trade "than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create"[137]. The forecast continues by listing some purposes considered legitimate; in addition, unlike the SPS Agreement, elements that are relevant in the risk assessment are also indicated.
In the context of the Agreement in question, both the aims pursued and the level chosen for their implementation are considered the prerogative of the states[138]. In this regard, the non-exhaustiveness of the list of purposes that are considered legitimate, contained in the aforementioned provision has been affirmed[139]. It follows that, even with reference to the technical regulations pursuant to the TBT Agreement, the level of protection chosen by the State cannot be investigated. However, the latter's right to determine this level should be balanced with the requirement enshrined in the TBT Agreement. In highlighting the freedom of states with regard to the determination of objectives and levels of protection, the same Panel that pronounced itself in the EC-Sardines case stated that article 2.2 and the preamble of the Agreement impose limits on their regulatory autonomy[140].
The verification of the conformity of the internal measure with article 2.2 develops in two

[133]EC-Measures Concerning Meat and Meat Products (EC-Hormones (US)), WT/DS26/R, Report of the Panel, 18 August 1997, para. 8.166.
[134]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 417ss. F. ORTINO, Basic legal instruments for the liberalization of trade: A comparative analysis of EC and WTO law, op. cit., pp. 467ss.
[135]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 420ss.
[136]According to the preamble of TBT see: S. ZLEPTNIG, Non-economic objectives in WTO Law: Justification provisions of GATT, GATS, SPS and TBT Agreements, Martinus Nijhoff Publishers, Leiden-Boston 2010, pp. 104-105.
[137]S. ZLEPTNIG, Non-economic objectives in WTO Law: Justification provisions of GATT, GATS, SPS and TBT Agreements, op. cit.
[138]European Communities-Trade Description of Sardines (EC-Sardines), WT/DS231/R, Report of the Panel, op. cit.
[139]US-Measure Concerning the Importation, Marketing and Sales of Tuna and Tuna Products (US-Tuna II), WT/DS381/R, Report of the Panel, 15 September 2011, para. 7.437; in the same orientation see also the AB in case: US-Tuna II, WT/DS381/AB/R, Report of the Appellate Body, 16 May 2012, para. 313.
[140]EC-Sardines, Panel Report, para. 7.120.

phases[141]: First, the measure must be directed towards the realization of a legitimate aim, with the consequence that both the latter and its object can be submitted to the judgment of the WTO bodies, in order to determine their legitimacy. Second, the measure should not be more restrictive than trade than necessary. In this regard, the assessment must take into account the risk that failure to achieve the objective could create.

As for the first requirement, the expression used by the Agreement according to which the measure must be "necessary to fulfil a legitimate objective", establishes the need for a causal link between the same and the objective pursued, attributable to the method described proportional analysis[142]. The purpose, in fact, constitutes the fundamental reference for carrying out the second part of the assessment, aimed at determining whether the measure subject to the procedure is more restrictive than trade than is necessary for the achievement of the objective[143].

In conducting the first phase of the analysis, as confirmed by the AB in the US-Tuna II dispute, the Panel is not bound by the characterization of the purpose given by the State involved, but underlines how the conduct of this assessment must be conducted independently and objective, taking into consideration the text of the regulations, the legislative history and other evidence relating to the structure and operating methods of the measure[144] .

Although initially the attribution of the power to investigate the legitimacy of the aim pursued by the Panels and the AB was not uniformly shared, the jurisprudence developed with reference to the standard under analysis recognizes in a somewhat unequivocal way this prerogative for the organs of the system of WTO dispute resolution.

In the last cited ruling, in addition, the Appellate Body in continuing its analysis, sanctions the Panel's task of ascertaining to what extent the technical regulation subject to the procedure actually contributes to the legitimate aim pursued by the State, thus confirming the need for a correlation between the measure itself and the purpose[145].

The second requirement, on the other hand, is similar to that prescribed by the SPS Agreement, analyzed previously. States are required not to create barriers to trade which are unnecessary or whose application amounts to arbitrary or unjustified discrimination or to a disguised restriction on international trade[146]. The question that emerges in this regard consists in the applicability of the necessity test, as developed by the jurisprudence with reference to the SPS Agreement, also to the technical regulations pursuant to the TBT Agreement[147]. Therefore, in order to demonstrate the existence of an infringement, it would be necessary to prove that an alternative measure is reasonably available, achieves the legitimate aim pursued by the State and is significantly less restrictive of trade than that chosen. The similar formulation of the respective relevant provisions in each agreement in favor of a positive response, with the consequent possibility of affirming the existence of the

[141]United States-Measures Affecting the Production and Sale of Clove Cigarettes (US-Clove Cigarettes), WT/DS406/R, Report of the Panel, 2 September 2011, para. 7.333; US-Tuna II, Panel Report, para. 7.388.

[142]In this regard, the Panel pronounced itself in the US-Clove Cigarettes dispute, stating that the identification of the aim pursued constitutes the logical starting point of the analysis to be conducted pursuant to Article 2.2.

[143]US-Clove Cigarettes, Panel Report, para. 7, 335; US-Tuna II, Panel Report, para is also placed on the same line. 7.436: taking up what was also sanctioned by the Appellate Body in the EC-Sardines dispute, the Panel, on the one hand, confirms the prerogative of the States in choosing the aims pursued by the measure adopted and, on the other, believes that this phase of the analysis the dispute implies conducting an examination with the consequent determination of the legitimacy of the purposes of the measure.

[144]US-Tuna II, Appellate Body Report, para. 314.

[145]US-Tuna II, Appellate Body Report, para. 317.

[146]EC-Sardines, Panel Report, para. 7.120.

[147]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 459ss.

same essence as the standard of necessity[148].
In the US-Clove Cigarettes dispute, in the face of the position of the United States affirming the need to interpret article 2.2 in accordance with the corresponding provision of the SPS Agreement, the Panel affirmed the absence of rulings by other Panels or by the AB that suggest a difference between the provisions of the SPS Agreement and the jurisprudence relating to article XX (b) GATT[149]. Therefore, this jurisprudence would be relevant for the interpretation of article 2.2 of the TBT Agreement to ascertain whether the measure at issue is more restrictive of trade than necessary[150].
A few days later, the ruling relating to the US-Tuna II case, where the Panel believes that the clarification contained in note n. 3 in article 5.6 of the SPS Agreement, with reference to the expression "not more trade-restrictive than required", is relevant for the purposes of the interpretation of article 2.2 of the TBT Agreement, although the latter regulation does not contain any requirement relating to the significant greater restriction on trade than necessary, with reference to the technical regulation[151]. The creation of an "unnecessary obstacle to trade" within the meaning of the first part of the standard can be ascertained by considering alternative measures that achieve the same result with a lower degree of restrictive trade. The first instance body, applying the case law developed with reference to article XX GATT, believes that the term "necessary" used in article 2.2 essentially means that the restriction on trade must be requested ("required") for the achievement of the legitimate objective pursued by the State, according to the level of protection chosen by the latter[152].
The Appellate Body to which the same dispute is referred, confirming the interpretation given by the Panel, identifies some factors that constitute the basis for determining the existence of the requirement of necessity: the restrictiveness of technical regulation to trade, the degree of contribution that it brings to the achievement of the legitimate goal and the risks that failure to achieve could create[153]. This interpretation of article 2.2 is confirmed in the subsequent ruling relating to the US-COOL dispute[154].
It therefore seems possible to identify the need for proportionality in the relationship existing between the factors indicated by the Appellate Body, in particular due to the reference to the comparative analysis with reasonably available alternative measures, as a tool aimed at ascertaining whether the measure subject to the procedure is more restrictive than necessary[155].
As regards the risk, an uncertainty regarding the meaning of the forecast is detectable. First of all, the risk that must be taken into consideration concerns the failure to achieve the

[148]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 423ss.of the same opinion, thus believing to guarantee uniformity in the interpretation, as well as in the light of the deemed compliance between the provision of the SPS Agreement, considered inclusive of note no. 3, with that of Article XX GATT is F. ORTINO, Basic legal instruments for the liberalization of trade: A comparative analysis of EC and WTO law, op. cit., pp. 464ss.
[149]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[150]US-Clove Cigarettes, Panel Report, para. 7.366, 7.368.
[151]US-Tuna II, Panel Report, para. 7.464.
[152]US-Tuna II, Panel Report, para.7.458-7.463, para. 7.465.
[153]US -Tuna II, Appellate Body Report, para. 318, 322.
[154]United States-Certain Country of Origin Labelling (COOL) Requirements (US-COOL), WT/DS384/AB/R and WT/DS386/AB/R, Report of the Appellate Body, 29 June 2012, para. 468-469. M. MATSUHITA, T.J. SCHOENBAUM, P.C. MAVROIDIS, The World Trade Organization. Law, practice, and policy, op. cit.
[155]US-Tuna II, Appellate Body Report, para. 320.

legitimate objective pursued, not that determined by the absence of a technical regulation[156]. Secondly, the expression "taking into account" does not establish a strict obligation, but leaves a margin of discretion to the judging body in appreciating the indicated risk.
The expression contained in the standard appears similar to a balancing operation between the relevance of the protected value and the degree with which the regulation contributes to the achievement of the purpose, with the consequence that ascertaining the risk of failure to achieve the objective would be part of analysis related to the requirement of necessity. On the other hand, the expression would also justify the application of the proportional analysis in its entirety, authorizing the Panel to determine whether the negative effects on trade are excessive or disproportionate to the risk of not achieving the objective pursued, with the consequence that a measure could be disproportionate even if it constitutes the least restrictive of trade[157]. In any case, regardless of the approach used, the existence of an implicit obligation, enshrined in the law, certifying the need for a rational connection between the measure and the assessed risk appears shareable[158].
The application of the principle of proportionality with reference to the standard under analysis, however, appears to find confirmation in the interpretation developed by the AB with reference to the consideration of the risk. The latter, in fact, leads the Appellate Body to consider "a further element of weighing and balancing" in the determination of the need for the restriction on trade generated by the technical regulation or, alternatively, of the presence of a reasonably available measure, less restrictive trade, which makes an equivalent contribution to the legitimate purpose[159].
From the analysis of the text of the TBT Agreement and in particular of article 2.2 it seems possible to affirm the use of the principle of proportionality. Not only, in fact, is it expressly required to ascertain the lack of less restrictive trade measures, attributable to the element of the need for proportional analysis, but the forecast also prescribes a balance between the obstacles to trade created by the national measure and the risk of not achieving the objective pursued, following the balance of interests that characterizes the principle in question.
The proportionality requirement pursuant to the SPS and TBT Agreements, most recently analyzed, differs from the one detectable in article XX GATT only on a procedural level, with reference to the distribution of the burden of proof and not as regards the meaning of the forecasts[160]. In fact, in article XX GATT, proportional analysis is applied to a measure that violates provisions contained in the Agreement, if it falls under one of the exceptions listed in the standard. Otherwise, in the SPS and TBT Agreements the measure that is taken into consideration by the rules does not constitute an exception to the general regime, but is the direct object of the discipline, therefore, the need for proportionality acquires its own

[156]See the case: European Community-Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos), WT/DS135/R, Report of the Panel, 18 September 2000, para. 3.279 and 3.290. See in argument: R. WOLFRUM, P.T. STOLL, H. HESTERMEYER, WTO. Trade in goods, ed. Brill, The Hague, 2010, pp. 510ss.
M. [157]M. ANDENAS, S. ZLEPTNIG, Proportionality: WTO law in comparative perspective, op. cit., pp. 423ss. In favour of the latter interpretation lays down the history that led to the drafting of the current TBT Agreement: in one of the drafts, in fact, a note was added to Article 2.2 where it was specified that the forecast was aimed at ensuring proportionality between the regulations and the risk that failure to achieve the legitimate goal would have created. However, according to a thesis, the consideration that the aforementioned note has not been reproduced in the definitive version, constitutes proof that the analysis required by the forecast is not attributable to full proportionality, in this regard see J. NEUMANN, E. TÜRK, Necessity revisited: Proportionality in World Trade Organization law after Korea-Beef, EC-Asbestos and EU-Sardines, op. cit., pp. 221ss.
[158]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 460ss.
[159]US-Tuna II, Appellate Body Report, para. 321.
[160]US-Clove Cigarettes, Panel Report, para. 7.363.

autonomy[161].

14.The use of proportionality in the resolution of disputes according to the ICSID Convention

One of the characteristics that determined the success of the ICSID Convention is the purely formal discipline for the resolution of disputes prescribed by it and the total absence of substantial provisions relating to the protection of foreign investments[162]. This character justifies the absence of provisions where it is possible to find express references to the principle of proportionality. However, the use of this principle can be found in some decisions of the arbitral tribunals established under the Convention. In particular, if there is no express reference to the proportional analysis in its complexity, there is a growing trend in applying the intrinsic concept to it or some of its constituent elements.
The areas in which references to this principle are detectable are various, in particular they are found in the application of the FET (Fair and Equitable Treatment) clause[163], in the assessment of non-discrimination, which is the subject of a specific chapter, in the system exceptions to treaties and indirect expropriations. Of these, the last two areas mentioned are of particular interest for the purposes of this discussion, since they allow the configuration of a parallelism in the application of the principle of proportionality in the context of investments with the corresponding sectors related to the relevant multilateral trading system, respectively, to general exceptions and technical barriers. Furthermore, a comparison can be made with reference to the quantification of damages by arbitration courts in the resolution of disputes relating to investments and the assessment aimed at authorizing the suspension of concessions in the WTO, where the principle of proportionality can act as a guide in the conduct analysis by the bodies involved in the respective issues.

15.The quantification of damages

The typical remedy within the dispute resolution system between private investors and host states is compensation. Having ascertained the violation committed, the ICSID Court in most cases, in correspondence with the request made by the parties, condemns the unsuccessful party to the payment of a sum of money. As already clarified, the compensatory remedy does not constitute a constraint for the arbitration panel, which could conclude the award with a different type of judgment, but depends on the request of the parties, in

[161]A. DESMEDT, Proportionality in WTO law, op. cit., pp. 461ss. J. NEUMANN, E. TÜRK, Necessity revisited: Proportionality in World Trade Organization law after Korea-Beef, EC-Asbestos and EU-Sardines, op. cit., pp. 217ss.
[162]S.W. SCHILL, The multilateralization of international investment law, Cambridge University Press, Cambridge, 2009, pp. 62ss.
[163]For further analysis see: E. TRUJILLO, Balancing sustainability, the right to regulate, and the need for investor protection: Lessons from the trade regime, in Boston College Law Review, 59, 2018, pp. 2740ss. T. LIN, Inter mingling TRIPS obligations with an FET standard in investor-State arbitration: An emerging challenge for WTO law?, in Journal of World Trade, 50 (1), 2016, pp. 74ss. J. MUNRO, T. WOON, A.D. MITCHELL, Importing WTO general exceptions into international investment agreements: Proportionality myths and risks, in Yearbook of International Investment Law & Policy, 2016-2017. J. KURZ, The WTO and international investment law: Converging systems, Cambridge University Press, Cambridge, 2016. R. ISLAM, The fair and equitable treatment (FET) standard in international investment arbitration: Developing countries in context, ed. Springer, Berlin, 2018. N. BUTLER, S. SUBEDI, The future of international investment regulation: Towards a world investment organisation?, in Netherlands International Law Review, 64 (1), 2017, pp. 68ss.

accordance with the typical structure of the arbitration[164].
Under general international law, the Commission of offenses entails the arising of the violation of the obligation of full reparation against the injured party by the State. This reparation, pursuant to the draft State Responsibility Articles, includes the return, compensation and satisfaction, alternatively or contextually, depending on the possibility of each of them and the ability to individually integrate the fulfilment of the obligation sanctioned[165].
In particular, compensation, subject to restitution, consists in the obligation to compensate the damage caused to the extent that the same does not obtain reparation through the first method. It covers any damage that can be assessed economically, including also the loss of profit insofar as it is determined[166]. This remedy is kept separate from the compensation due to an expropriation carried out by the State[167]. The difference, in particular, is connected to the different reference standards for the purpose of calculating the sum due: In the case of expropriation in the legitimate exercise of the powers of the State, in fact, the compensation standard is objective and impersonal, consisting of the market value the expropriated property whose most frequently used calculation method is the DCF (Discounted Cash Flow); otherwise, compensation for damage due to violations of international obligations consists of full reparation aimed at restoring the situation that would have existed if the offense had not been committed, in accordance with the provisions of the aforementioned articles on state responsibility[168].
The question relating to redress due to unlawful conduct also arose before the ICSID courts, symptomatic of the problem deriving from it appears the ruling of the arbitration panel of the LG&E v. Argentina case. In fact, as the most important consequence of the wrongful act is unquestionable is the onset of the obligation of the State to repair the damage caused, however, "the questions arise as to the applicable standard and measure of compensation and the method to quantify it"[169]. In particular, in the college's opinion, the issue becomes more complex when it comes to defining the standard and the extent of compensation applicable to violations of treaties other than expropriations, due to the absence of provisions relating to it within the relevant Treaty, as well as the scarce jurisprudence on the subject[170]. The Court recognizes, in fact, the need to differentiate compensation as a consequence of a lawful act, from damages resulting from the commission of an illegal act, a distinction that has been sanctioned in various arbitration decisions.
In taking up what stated in the UNCITRAL ruling of the S.D. Myers v. Government of Canada of 20 July 1999, the college notes in the absence of a provision expressed in the

[164]C. SCHREUER, Non-pecuniary remedies in ICSID arbitration, in Arbitration International, 20, 2004, pp. 325ss.
[165]Project of Articles on the Responsibility of States for International Illicit Acts ILC, 2001, artt. 34-39.
[166]ILC, art. 36.
[167]I. MARBOE, Compensation and damages in international law. The limits of fair market value, in Journal of World Investment and Trade, 7, 2006, pp. 723, 768ss. This distincction was mentioned by jurisprudence in the case: Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan (Caratube v. Kazakhstan), ICSID Case n. ARB/13/13, Award, 27 September 2017, para. 1082. K. DIEL-GLIGOR, Towards consistency in international investment jurisprudence. A preliminary ryling system for ICSID arbitration, ed. Brill, The Hague, 2017, pp. 238ss. Y. DERAINS, J. SICARD-MIRABAL, Introduction to investor-State arbitration, Kluwer Law International, The Hague, 2018.
[168]K. KLEIN, Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, op. cit.
[169]LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc, v. Argentine Republic (LG&E v. Argentina), ICSID Case n. ARB/02/1, Award, 25 July 2007, para. 29. I. MARBOE, Damages in investor-State arbitration. Current issues and challenges, ed. Brill, The Hague, 2018, pp. 10ss.
[170]LG&E v. Argentina, Award, para. 30 and 38.

treaty, the indication of the will of the parties "to leave it open to the Tribunals to determine a measure of compensation appropriate to the specific circumstances of the case"[171], taking into account the principles of international law and the provisions of the relevant treaty[172]. The discretionary nature of the power of the Court in determining the compensation measure is therefore underlined.

On the methods applied for the determination of compensation due for violations of international obligations, an analysis can be found in the ICSID Court ruling on the CMS v. Argentina dispute[173]. In fact, the methods used by the courts in relation to the circumstances are various; however, the concept on which the commercial evaluation of capital is based, as the primary element for the compensatory calculation, is constituted by the market value of the same.

On the compensation owed due to legal expropriations, otherwise, the definition of the obligation is known by adopting the Hull formula according to which it is required that it be "prompt, adequate and effective", thus sanctioning its determination not only in a quantitative sense, but also qualitative and timing[174]. In fact, the compensation must be made without any unreasonable delay, equivalent to the market value of the property immediately prior to the requisition, as well as performed through the use of a freely transferable currency.

The calculation of the amount due as compensation is made by quantifying the damage suffered by the party due to the violation ascertained. The methods used to calculate the compensated damage vary from the DCF to more sophisticated and detailed analyzes, likewise different approaches are also detectable in the attribution of interest[175].

The principle of proportionality can take on a relevance in the calculation of the damages suffered by the investor, in order to quantify the compensation to which the investor is entitled, under different profiles detectable in different rulings of the ICSID Courts.

The application of the principle of proportionality directly in the assessment of the compensation calculated by the Court, due by the host State in favour of the injured investor, is found in the Lemire v. Ukraine case. The recourse to this principle is made by the ICSID Court due to the violation of the FET clause by Ukraine, for the conduct by the same with reference to the investment made by Mr. Lemire. After determining the amount of damage suffered by the investor by applying the DCF method, the Court considers that it must test the result achieved, considering other parameters in order to confirm the reasonableness of the calculation made[176]. The first of the parameters indicated requires a comparison of the

[171]For further analysis see: Z. DOUGLAS, The international law of investment claims, Cambridge University Press, Cambridge, 2009, pp. 204ss. C. GIORGETTI, The rules, practice and jurisprudence of international courts and tribunals, Martinus Nijhoff Publishers, 2012, pp. 466ss.

[172]LG&E v. Argentina, Award, para. 40.

[173]CMS Gas Transmission Company v. The Argentine Republic (CMS v. Argentina), ICSID Case n. ARB/01/8, Award, 12 May 2005, para. 401-403. D. BENTOLILA, Arbitrators as lawmakers, Kluwer Law international, New York, 2017. D. COLLINS, An introduction to international investment law, Cambridge University Press, Cambridge, 2016.

[174]G.H. HACKWORTH, Digest of international law, United States Government Printing Office, Washington, 1942, vol. III, pp. 658-659. See also: WORLD BANK (ed.), Legal framework for the treatment of foreign investment. Report to the development committee and guidelines for the treatment of foreign direct investment, in International Legal Materials, 31, 1992, pp. 1363, 1982-1383.

[175]A brief analysis of the methods used to calculate the compensation due for an expropriation can be found in B. SABAHI, N. J. BIRCH, Comparative compensation for expropriation, in S.W. SCHILL (ed.), International investment law and comparative public law, Oxford University Press, Oxford, 2010, pp. 755ss.

[176]Joseph Charles Lemire v. Ukraine (Lemire v. Ucraina), ICSID case n. ARB/06/18, Award, 28 March 2011, para. 298, 303-306. For further analysis see also: C.L. BEHARRY, Contemporary and emerging issues on the law of damages and valuation in international investment arbitration, ed. Brill, The Hague, 2018. J.E. KALICKI, A. JOUBIN-BRET, Reshaping the investor-State dispute settlement system. Journeys for the 21st century, Hotei Publishing, The Hague, 2015, pp. 704ss.

compensation to be assigned with the amount invested. Secondly, the Court assesses the risk assumed, taking into consideration the actual loss suffered by the investor, inquiring about the reasonable proportionality of the amount calculated in relation to the investment made. With reference to this aspect, the arbitrators believe there is an adequate proportionality between the calculated compensation and the investment of Mr. Lemire, not only considering the money, but a combination of the latter, the risk assumed, the personal commitment and the essential contribution provided by the investor as a pioneer in the sector. The principle of proportionality, in this case, is applied in relation to the result of the DCF analysis, of the specific circumstances of the case and in order to verify whether there is a fair balance between the compensation and the characteristics of the investment.
The analysis developed in the cited case does not appear to be attributable to the typical structure of the principle of proportionality, aimed at assessing the conduct of the State in relation to the individual interest of the investor on which it affects[177]. The latter approach is not detectable in the application of the same principle in the determination of the compensation quantum. Rather, the principle of proportionality assumes a peculiar configuration, aimed at guaranteeing the correctness of the calculated compensation, not so much because of a balance between the conflicting interests of the State and the private individual respectively, but in order to avoid excesses or defects in the amount of the compensation for damage suffered by the investor. Therefore, the connotation in the quantitative meaning assumed by the principle of proportionality applied to this phase of the procedure appears to emerge and confirm. The proportional analysis in the determination of the quantum seems, in fact, aimed at ensuring the restoration and respect of the balance determined in the previous stages of the arbitration procedure, in which the referees proceeded to ascertain the alleged violation.
Proportionality in the aforementioned context is used in order to ensure that the determined compensation reflects the specific characteristics of the investor, as well as his conduct and the investment made. The application of purely mathematical methods for the calculation of the sum due by reason of the commission of the offense, indeed, does not appear sufficient to guarantee the correct restoration of the ascertained balance. To this end, the need arises to resort to supplementary tools and criteria, variously identified by the individual arbitration boards involved in concrete issues, in the exercise of their discretionary powers[178].
The same issue is also addressed by the ICSID Court in the CMS v. Argentina dispute, where, similarly to the aforementioned ruling, there is a lack of an indication within the reference Treaty in relation to the applicable standard to determine the compensation due for violations of the same, in the absence of expropriation. The college therefore believes that it

[177]S. FACCIO, The application of the principle of proportionality to assess compensation: Some reflection arising from the case of Joseph Charles Lemire v. Ukraine, in Law and Practice of International Courts and Tribunals, 13, 2014, pp. 199, 209-210.
[178]See for example: American Manufacturing & Trading, Inc. v. Republic of Zaire (AMT v. Zaire), ICSID Case n. ARB//93/1, Award, 21 February 1997, para. 7.16-7.21; CMS v. Argentina, Award, para. 249, 443-446; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary (ADC v. Ungheria), ICSID Case n. ARB/03/16, Award, 2 October 2006, para. 521; Enron Corporation Ponderosa Assets L.P. v. Argentine Republic (Enron v. Argentina), ICSID Case n. ARB/01/3, Award, 22 May 2007, para. 232, 407. For further analysis of the above cases see: J.W. SALACUSE, The law of investment treaties, Oxford University Press, Oxford, 2015. S.P. SUBEDI, International investment law: Reconciling policy and principle, Bloomsbury Publishing, New York, 2016. A. RAJPUT, Protection of foreign investment in India and investment treaty arbitration, Kluwer Law International, New York, 2016. T. TREVES, F. SEATZU, S. TREVISANUT, Foreign investment international law and common concerns, ed. Routledge, London & New York, 2013. T. GAZZINI, E. DE BRABAMNDERE, International investment law. The sources of rights and obligations, Martinus Nijhoff Publishers, The Hague, 2012. P. DUMBERRY., The formation and identification of rules of customary international investment law, Cambridge University Press, Cambridge, 2016, pp. 427ss.

must identify the suitable standard in relation to the nature of the violation ascertained, by exercising its discretion[179]. However, in the judgment cited above, the Court does not consider the possibility of using the principle of proportionality for the assessment of the due compensation.

A second profile in which the use of proportional analysis is detectable concerns the consideration of any negligent contribution generated by the negligent behaviour of the same investor in the cause or aggravation of the damage. An approach of this type emerges in the ICSID Court ruling on the Occidental Petroleum v. Equador[180]. Although the application of the principle of proportionality is carried out with reference to the assessment of the compliance of the sanction adopted by the State based on the investor's conduct, it appears possible to detect a space for its appeal also for the purpose of quantifying the damage[181]. In determining the amount of the latter, in fact, the arbitration panel recognizes the existence of a defined risky behaviour of the investor, who would have violated the investment contract stipulated with the host State, as well as the national law of the latter. last. This behaviour facilitated the adoption of the state measure, namely the decree of "caducidad" relating to the investment contract; therefore, the expectations of generating future income for the private investor would need to be adjusted downwards, in order to take this risk into account, by means of a proportional reduction of the sum itself due to the culpable contribution of the injured party.

The need to take into consideration the voluntary or negligent conduct of the actor who contributed to the damage is confirmed by commentators and jurisprudence, according to which this assessment must entail an appropriate reduction of the amount ascertained for this purpose[182]. This requirement is also enshrined in article 39 of the draft article on state responsibility[183] and, in the dispute in question, the assessment of the contribution to damage is interpreted by one of the arbitrators as "fair and reasonable apportionment of responsibility"[184].

The need just expressed is also detectable in the ICSID award relating to the MTD v. Chile dispute, where the arbitration panel acknowledges that the investor's conduct has increased the risk of the transaction, the responsibility of which remains with him[185]. Consequently, the plaintiff must independently sustain part of the damage suffered, the assessment of which made by the college, equal to half, is based on factual considerations and in the exercise of his discretion[186]. This ruling makes no reference to the principle being analyzed, although it seems possible to believe that the use of the same could have given greater consistency and transparency to the assessment carried out.

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[179]CMS v. Argentina, Award, para. 409.

[180]Occidental Petroleum Corporation, Occidental Exploitation and Production Company v. The Republic of Ecuador (Occidental Petroleum v. Equador), ICSID case n. ARB/06/11, Award, 5 October 2012.

[181]B. SABAHI, K. DUGGAL, Occidental petroleum v. Ecuador (2012). Observation on proportionality, assessment of damages and contributory fault, in ICSID Review-Foreign Investment Law Journal, 28 (2), 2013, pp. 279, 282-283.

[182]B. SABAHI, Compensation and restitution in investor-State arbitration. Principles and practice, Oxford University Press, New York, 2011, pp. 175-176. J. CRAWFORD, The International Law Commission Articles on States responsibility: Introduction, text and commentaries, Cambridge University Press, Cambridge, 2003, pp. 2402ss.

[183]J. CRAWFORD, A. PELLET, S. OLLESON, The law of international responsibility, Oxford University Press, Oxford, 2010. F.L. BORDIN, Reflections of customary international law. The authority of codification Conventions and ILC draft articles in international law, in International & Comparative Law Quarterly, 63 (3), 2014, pp. 537ss. A. HENRIKSEN, International law, Oxford University Press, Oxford, 2019.

[184]Occidental Petroleum v. Ecuador, Dissenting Opinion, prof. Brigitte Stern, para. 7.

[185]MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (MTD v. Chile), ICSID Case n. ARB/01/7, Award of 25 May 2004. U. FRANKE, A. MAGNUSSON, J. DAHIWIST, Arbitrating for peace. How arbitration made a difference, Kluwer Law International, New York, 2016.

[186]MTD v. Chile, Award, para. 243-246.

Proportionality is also referred to in the ruling relating to the Caratube v. Kazakhstan dispute with reference to the determination of the possibility of obtaining repair for the loss of opportunity. Specifically, the plaintiff believes that "reparation for loss of opportunity is to be awarded in proportion to the probability of its occurrence", compensations of this type have been awarded by the arbitral tribunals in order to achieve a fair and reasonable result, which the recourse to mathematical calculations would not have allowed to achieve[187]. However, the ICSID arbitration panel does not use the proportionality principle in this context. First of all, he believes that any damage, in order to obtain compensation, must be sufficiently certain, including that relating to the loss of opportunity. Secondly, in ascertaining the existence of such damages, the Court uses a probability criterion, namely "whether their (the claimants) claim is more probable than not, by a preponderance of evidence"[188], recognizing the existence a margin of discretion in determining the quantum of such damages, which however can be exercised only on the assumption of the existence of sufficient evidence provided by the injured party, not integrated in the present case[189].
The reference to proportionality in the determination of damages for loss of opportunity is also found in a previous ICSID arbitration ruling, relating to the Gemplus v. Mexico dispute. In this case, the arbitral tribunal dealing with the matter refers to the UNIDROIT principles relating to international commercial contracts, where it is expressly recognized that "compensation may be due for loss of chance in proportion to the probability of its occurence"[190]. Also in this case, for the purpose of determining the loss of opportunity, the primary reference remains that of probability. The possibility of using the principle of proportionality, which would have a merely quantitative value in determining damages, is not further analyzed.
It is in the Teinver v. Argentina dispute that the respondent State notes the existence of a role for the principle of proportionality in determining the compensation relating to the damages caused, by referring to the draft articles on state responsibility[191]. Specifically, the defendant believes that "the ILC considered the significance of proportionality of compensation in relation to damage caused, which the respondent impacts the principle of full reparation" as articulated in the leading Chorzów Factory case[192]. In particular, as reported in the decision, the defendant refers to the Report of the Commission of International Law where he questions the opportunity to articulate the principle of proportionality as an aspect of the obligation of full reparation, noting that this principle permeates each form in which this last one is perfected. However, the possibility of applying the principle of proportionality, as recalled by the State, is not considered relevant in the determination of the due compensation due to state expropriation behaviour. The ICSID Court, in fact, distinguishes

[187]Caratube v. Kazakhstan, Award, para. 1143.
[188]MTD v. Chile, Award, par. 248.
[189]Caratube v. Kazakhstan, Award, para. 1152-1553, 1561.
[190]Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexic States, Talsud S.A. v. The United Mexican States (Gemplus v. Messico), ICSID case n. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, para. 13.87ss, where it is called art. 7.4.3(2), UNIDROIT Principles on International Commercial Contracts. See for further analysis: M. PAPARINSKIS, The international minimum standard and fair and equitable treatment, Oxford University Press, Oxford, 2013. S. MANTILOLA BIANCO, Full protection and security in international investment law, ed. Springer, Berlin, 2019. C. LENG LIM, B. HO, M. PAPARINSKIS, International investment law and arbitration. Commentary, awards and other materials, Cambridge University Press, Cambridge, 2018.
[191]K. KLEIN, Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, op. cit.
[192]Teinver S.A., Transportes de Cecanias S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (Teinver v. Argentina), ICSID Case ARB/09/1, Award, 21 July 2017, para. 1083. B. DEMIRKOL, Judicial acts and investment treaty arbitration, Cambridge University Press, Cambridge, 2018.

between full reparation for the violation of an international obligation and the State's right to expropriate private property which, otherwise, generates a compensation obligation. The question raised by the respondent State with reference to the principle of proportionality concerns the full reparation, not the compensation and, therefore, is limited to the profiles relating to the determination of damages in international law, in reference to which there is an agreement of the parties[193]. In light of this consideration, the conclusion of the arbitration panel does not seem to exclude the possibility of resorting to the principle of proportionality in the determination of the full reimbursement due by the offender to the private investor, excluding the possibility of resorting to it for the purposes of calculation of compensation for expropriation measures. Specifically, it is precisely with reference to the damages requested by the private investor that the arbitration panel, believes that "if claimants were serious that restitution of their corporate rights was their primary claim for damages, then they were under an obligation to establish that right in the circumstances of this case and demonstrate that such an award was reasonable and proportionate"[194]. In this way, the need to demonstrate the existence of a proportionality relationship between the damages requested, including the return, and the benefit obtained by the defendant, fulfilment not carried out by the plaintiff in the present case, appears to be sanctioned by the Court.
The brief analysis of the pronouncements in which the possibility of applying the principle of proportionality was advanced highlights according to pure opinion that it is not possible to identify a uniform approach, nor a coherent trend line. Despite this, it seems possible to affirm that the consideration of the principle being analyzed by the ICSID Courts is not qualitative, but rather quantitative, connected to the determination of the damage and not implying, otherwise, an assessment of the seriousness of the offense committed and of the rights involved, similarly to what is argued by a thesis in the field of countermeasures in the WTO system, analyzed previously.
In the light of the analysis carried out, it does not seem possible to identify a uniform interpretation and application of the principle of proportionality in the phase of determining the compensation by reason of the damages caused by the established offense. The lack of specific indications within the BITs generates a case study approach by the referees, who in order to guarantee the correctness and reasonableness of the decision make use of variable criteria, unlike what appears to emerge within the resolution system WTO disputes, where the criteria to which the deciding body must appeal are expressly prescribed and identified within the DSU. It follows that the principle of proportionality has been variously used by the ICSID Arbitration Courts, both with reference to the single aspect of the decision relating to the compensation in which it has been used, and considering the ways in which it has been applied. If, on the one hand, these different approaches seem to be attributable to the aim of ensuring that the compensation determined is not only correct from a substantial point of view, but also balanced, on the other hand they necessarily hinder the predictability of the decision.

16.The exceptions to the Treaties

The exceptions included in the investment treaties allow the government to adopt actions aimed at achieving a specific regulatory objective which, otherwise, would be in contrast with the substantial obligations imposed on the State, on the basis of the same Treaty. In

[193]Teinver v. Argentina, Award, para. 1089, 1097.
[194]Teinver v. Argentina, Award, par. 1090.

fact, the function they perform is similar to that provided for under article XX GATT in the multilateral trading system regulated by WTO[195].

Forecasts of this type have become common in more recent treaties, symptomatic, according to a thesis, of the fear of states that the investment courts have paid insufficient attention to the autonomy of national regulatory power[196]. In fact, a peculiarity of many investment treaties is consisting of the provision of investor rights without fully addressing the relationship between the latter and the persistent state regulatory powers[197]. Indeed, there is no doubt that the States, in the adoption of these treaties, do not intend to strictly obstruct these powers, but in the light of an interpretation in accordance with article 31 VCLT[198], it is appropriate to strike a balance between the protection of investments and the state regulatory power. The principle of proportionality is therefore a coherent tool for the interpretation and application of the substantive provisions contained in the treaties, in order to allow the achievement of the necessary balance.

An example relating to the clauses inserted in the treaties aimed at regulating the relationship with state regulatory power is constituted by article XI of the BIT between the United States and Argentina[199]. The provision mentioned expressly establishes that the Treaty does not preclude the application of measures, by each party, necessary for the maintenance of public order, the fulfilment of obligations relating to the maintenance or restoration of international peace and security or the protection[200] of their fundamental security interests[201].

Although the aforementioned provision is not expressly formulated as an exception, it responds to the illustrated need to ensure the exercise of state regulatory power, regardless of the application of the Treaty itself, with reference to the achievement of specific purposes indicated in the standard. The assimilability of the provision to the general exceptions of article XX GATT emerges both with reference to the structure of the standard in its literal formulation, and as regards the objective it is intended to safeguard.

The aforementioned rule has been the subject of interpretation in some of the numerous disputes that have arisen in connection with the adoption of emergency measures by Argentina, aimed at addressing the economic crisis of the years 2001-2002. In the Continental Casualty v. Argentina dispute[202], the ICSID Court dealing with the issue resorted to a form of proportional analysis in the interpretation of article XI of the BIT US-Argentina, distancing itself from the highly criticized position taken by the previous courts and subject

[195]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.

[196]S.A. SPEARS, The quest for policy space in a new generation of international investment agreements, in Journal of International Economic Law, 13, 2010, pp. 1037, 1043ss.

[197]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 88ss.

[198]R. GARDINER, Treaty Interpretation, op. cit.

[199]J.W. SALACUSE, The law of investment treaties, op. cit., K. CLAUSSEN, The casualty of investor protection in times of economic crisis, in Yale law Journal, 118, 2019, pp. 1550ss. C. BROWN, Commentaries on selected model investment treaties, Oxford University Press, Oxford, 2013. A. STONE SWEET, F. GRISEL, The evolution of international arbitration: Judicalization, governance, legitimacy, Oxford University Press, Oxford, 2017.

[200]US Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, 11 November

[201]Art. XI. A. STONE SWEET, F. GRISEL, The evolution of international arbitration: Judicalization, governance, legitimacy, op. cit.

[202]Continental Casualty Company v. The Republic of Argentine (Continental Casualty v. Argentina), ICSID, case n. ARB/03/9, Award, 5 September 2008. P. DUMBERRY, Fair and equitable treatment. Its interaction with the minimum standard and its customary status, ed. Brill, The Hague, 2018, pp. 5ss. S.D. FRANK, Arbitration costs: Myths and realities in investment treaty arbitration, Oxford University Press, Oxford, 2019. S. FRANKEL, M. LEWIS, Trade agreements at the crossroads, ed. Routledge, London and New York, 2013.

to annulment by the ad hoc committees[203]. The subject of the dispute is the alleged violation of the BIT by Argentina by adopting the measures called "corralito", restrictions on withdrawals and transfers from bank current accounts, and "weighing" of the dollar and public debt[204].

Argentina develops two general defenses: The first based on article XI of the BIT, the second based on the doctrine of the state of necessity according to customary international law, codified in article 25 of the Project of articles on state responsibility of the ILC states[205].

In the aforementioned rulings, the ICSID Courts, all chaired by Prof. Francisco Orrego Vicuña, had not recognized any autonomy in article XI, but the interpretation of the latter rule was incorporated into the defense of necessity according to customary international law. This approach was strongly criticized, in particular, by the ad hoc Committee appointed in the CMS v. Argentina dispute, who among the manifest errors of interpretation committed by the arbitration panel, qualified that of merging article XI of the BIT and article 25 of the ILC article Project[206]. Otherwise, the Court of the case under examination, in the analysis of the first defense, interpreting the provision of the Bilateral Treaty in the light of article 31 VCLT[207], considers that the conduct of the parties does not violate their respective obligations if the measure has been correctly adopted, as necessary for the maintenance of public order or for the protection of fundamental interests related to security[208]. It follows that, pursuant to article XI, measures of this type would not fall within the scope of the Treaty; therefore, the party that adopted them did not commit a violation of the relevant BIT provision. According to the Court, the aforementioned article restricts or derogates the substantial obligations assumed by the parties to the Treaty insofar as the conditions for its application are respected: If article XI is applicable, being the necessary measure in order to safeguard security interests essential, then the treaty is inapplicable to it; otherwise, if a State is forced to resort to a measure in violation of its international obligations, but in accordance with article 25 of the ILC Project, it will be exempt from the liability that otherwise would result from it[209].

The arbitration panel, therefore, differentiates this defense from that relating to the state of necessity, admissible only in exceptional cases, considering that recourse to article XI is not necessarily subject to the same condition, but constitutes lex specialis, distinct from customary law[210]. The elaborated consideration confirms the similarity stated above between the standard contained in the BIT and the general exceptions governed by the GATT. In fact,

[203]The reference is to disputes: CMS Gas Transmission Company v. The Republic of Argentine (CMS v. Argentina), ICSID Case n. ARB/01/8, Award, 12 May 2005 e Decision on Annulment, 25 September 2007; Enron Corporation and Poderosa Assets L.P. v. The Argentine Republic (Enron v. Argentina), ICSID Case n. ARB/01/3, Award, 22 May 2007 and Decision on Annulment, 30 June 2010; Sempra Energy International v. the Argentine Repubblic (Sempra v. Argentina), ICSID Case n. ARB/02/16, Award, 28 September 2007 e Decision on Annulment, 29 June 2010. for further details see: D. COLLINS, An introduction to international investment law, op. cit., J.H. DALHUISEN, Dalhuisen on transnational comparative, commercial, financial and trade law, Bloomsbury Publishers, New York, 2019, pp. 642ss.

[204]W.W. BURKE-WHITE, The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system, in Asian Journal of WTO & International Health Law & Policy, 3, 2008, pp. 199ss. A. TANZI, A. ASTERITI, R. POLANCO LAZO, International investment law in Latin America. Problems and prospects, ed. Brill, The Hague, 2016, pp. 373ss. S.E. ROLLAND, D.M. TRUBEK, Emerging powers in the international economic order. Cooperation, competition and transformation, op. cit., pp. 80ss.

[205]Continental Casualty v. Argentina, Award, para. 160.

[206]CMS v. Argentina, Decision on Annulment, para. 128-136.

[207]R. GARDINER, Treaty Interpretation, op. cit.

[208]Continental Casualty v. Argentina, Award, para. 164.

[209]Continental Casualty v. Argentina, Award, para. 164-165.

[210]Continental Casualty v. Argentina, Award, para. 167, 168, 192.

both the defense of necessity and the one last analyzed are aimed at allowing some flexibility in the concrete application of international obligations, in order to protect national interests of primary importance and, secondly, the practical result to which they lead is the itself, i.e. to justify conduct that would otherwise be illegal and, consequently, to eliminate state responsibility. The correspondence between the provision contained in the BIT and article XX GATT is expressly referred to also by the Arbitral Tribunal, which notes the existence of a historical model common to the two forecasts[211].

As regards specifically the interpretation of the term "necessity" contained in article XI BIT, the aforementioned analogy induces the arbitration panel to resort to the jurisprudence elaborated in the WTO dispute resolution system with reference to the application of the general exceptions[212]. Specifically, the ruling of the AB in the Korea-Beef dispute, as well as that of the Panel in the Brazil-Retreated Tires case, summarizing the previous processing, is expressly referred to. The Arbitral Tribunal, in fact, affirms that it is well known how the term "necessity" refers to a range of different degrees of necessity, included between what is indispensable and what contributes to the achievement of a goal.

Although the analysis of the WTO rule carried out by the ICSID Court is contested during the annulment by the investor, the ad hoc Committee rejects the plea invoked as it considers that, even if it were admitted that the Court erred in the interpretation of article XI on the basis of an incorrect understanding of WTO law. It would possibly be in the presence of an error of law, not included among the reasons that legitimize the cancellation pursuant to article 52 of the ICSID Convention[213].

It follows that, to ascertain the conformity of the measures with article XI BIT, the Court, after verifying that the Argentine crisis falls within the scope of the rule, proceeds to investigate whether the measures themselves materially contribute to the achievement of the aim to which are directed[214]. He concludes the examination in a favourable sense, considering the latter partly inevitable, partly indispensable and in any case decisive for reacting positively to the crisis.

In the subsequent phase of the analysis, the Court proceeds to consider the adoption of reasonably available alternative measures that would have led to an equivalent result, as well as the possibility for Argentina to resort to policies that would have avoided or prevented the crisis itself, underlining, similarly to what was done by the WTO dispute resolution bodies, the non-unionization of the state's economic policy. The analysis carried out, reflecting one of the phases of the proportional analysis, leads the Court to conclude that the measures were sufficient to face the Argentine crisis and applied "in a reasonable and proportionate way", except for the restructuring of some government bonds. Therefore, the conduct of the State complies with the conditions required to derogate from its obligations pursuant to article XI BIT.

The analysis carried out by the Court develops in two phases, typical of the application of the principle of proportionality: The first aimed at ascertaining the traceability of the measure to the provision of article XI, the second attributable to what is also identified with the expression "least-restrictive-means test". This approach differs from that used in the application of article 25 of the ILC Article Project, where the measure must be the only

[211]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[212]Continental Casualty v. Argentina, Award, para. 193-195.
[213]Continental Casualty v. Argentina, Decision on Annulment, 16 September 2011, para. 133.
[214]Continental Casualty v. Argentina, Award, para. 196-197, 232-233.

available means aimed at safeguarding an essential interest of the State[215]. The distinction between article XI BIT and defense based on the state of necessity according to customary international law, is confirmed by the ad hoc Committee invested with the request to cancel the arbitration award pursuant to article 52 of the ICSID Convention[216].
This ICSID Tribunal ruling demonstrates how some approaches to WTO dispute resolution bodies are borrowed in resolving disputes between private investors and states in the ICSID system. In particular, the proportional analysis constitutes, for the arbitral tribunal involved in the dispute, a tool that allows you to verify whether the host State of the investment has made a reasonable balance between the protection of foreign investment and the protection of other national interests[217].
In the specific case mentioned, the contamination between the two systems is, in part, certainly attributable to one of the elements identified as points of contact between them, consisting of the composition of the bodies responsible for resolving disputes.
The analysis carried out by the ICSID Court in the aforementioned ruling, developed according to the two phases examined, was taken up and confirmed by the subsequent arbitration panel established according to the ICSID Convention, to which one of the other disputes arising from the crisis faced by Argentina was devolved[218].
The decision of the ICSID Court has been criticized with reference to several issues. One of the disputes raised specifically concerns the use of WTO law by international investment law. According to a thesis, this trespassing would not be justified by the rules that regulate the interpretation, codified in the VCLT: The balancing system proper to the international trade regime is not a relevant rule that can be used in the interpretation of the BIT pursuant to article 31 (3) (c) VCLT, nor a fundamental rule of international law applicable in the case of lacunae of the pact law[219]. In particular, the balancing system drawn from the jurisprudence relating to article XX GATT, according to this thesis, does not in no way concerns the interests protected by the BIT provision. Despite this criticism, however, Alvarez confirms the need to balance the rights of investors and those of the state in the interpretation of the BIT, albeit with a more stringent application using the FET clause, i.e. ascertaining the violation of substantial rights of fair and equitable treatment of investor ownership.
The criticism that the same wording of the relevant BIT article would totally differentiate from the general exceptions of the GATT, also intervenes on the same theme, in particular with reference to the absence of a real list of exceptions. In fact, the ICSID Court not only misinterpreted the rule in question, but also provided an incorrect reading of its historical origins, and failed to consider the structural differences of the two dispute resolution

[215]A. STONE SWEET, G. DELLA CANANEA, Proportionality, general principles of law, and investor-State arbitration: A response to José Alvarez, in Yale Law School, Faculty Scholarship Series, Paper n. 4994, 2014, pp. 928ss.
[216]Continental Casualty v. Argentina, Decision on Annulment, para. 127-128. See also in argument for further details and analysis: J. FOURET., R. GERBAY, G.M. ALVAREZ, The ICSID Convention: Regulations and rules. A practical commentary, Edward Elgar Publishers, Cheltenham, 2019, pp. 664ss. P. FRIEDLAND, P. BRUMPTON, Rabid redux: The second wave of abusive ICSID annulments, in American University of International Law Review, 27 (4), 2012, pp. 734ss. N. JUANSEN CALAMITA, The challenge of establishing a multilateral investment Tribunal at ICSID, in ICSID Review, 32 839, 2017, pp. 613ss.
[217]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 101ss.
[218]See El Paso Energy International Company v. The Argentine Republic (El Paso v. Argentina), ICSID Case n. ARB03/15, Award, 31 October 2011, para. 552-555. M. PAPARINSKIS, The international minimum standard and fair and equitable treatment, op. cit.
[219]J.E. ALVAREZ, Beware-boundary crossing, in T. KAHANA, A. SCOLNICOV (eds), Boundaries of State, boundaries of rights, Cambridge University Press, Cambridge, 2016, pp. 43, 61-68.

systems[220].
However, these two theses do not appear to be acceptable in the first place, with reference to the consideration of the interests involved. In fact, as previously highlighted, the exceptional provisions included in both systems are aimed at achieving a similar purpose, determined by the need to safeguard the interests of the State higher than those regulated by the respective agreements, guaranteeing the possibility of exercising the state regulatory power without incurring violations thereof. Nonetheless, the state interests which the rules of an exceptional nature are aimed at protecting are often found to coincide in the two systems with the consequence that reciprocal influences in the methods of approach to their application do not appear to be unjustified.
A second criticism relates to the distinction made by the Arbitral Tribunal between the defense of customary international law based on the need and the provision of article XI BIT. The correct application of the rules on the interpretation of the treaties should have led, according to this opinion, to consider the clause contained in the BIT compliant and not as a derogation from the concept of necessity, but rather aimed at preserving the existing customary defenses[221].
Another criticism was also raised directly in relation to the application of the principle of proportionality: Despite the reference made, the ICSID Court would not have carried out any balancing aimed at explicitly ascertaining whether the effectiveness of the measures compensated the impact on investment, nor would it have explicitly considered the importance of the objective of the measures themselves[222]. However, it is the same reading of the arbitration award pronounced that denies what is said by this thesis. As for the first criticism, it is clear that the arbitration panel proceeded to analyze each alternative measure proposed by the applicant investor, in order to carry out the required balance. As regards, however, the second, the analysis that the Court must carry out, according to the interpretation given to the rule, explicitly excludes the assessment of the importance of the objective pursued, what the Court must ascertain is the traceability of the measure to the forecast contained in the BIT.
In the opinion of Mitchell and Henckels, moreover, the assessment of the need for the measure should suitably include the assessment of the importance of the purpose to which it is directed[223]. However, this consideration cannot be shared for two reasons: Firstly, the assessment of the importance of the objective is previously carried out through the same provision contained in the BIT which admits the adoption of measures limited to the realization of specifically indicated interests. Therefore, to believe that the Court should proceed to ascertain the importance of the purpose, means duplicating an evaluation already carried out. Another issue is the level of protection referred to that objective: Once the relevance of its protection in a conventional way is admitted, the State remains the choice of the latter. Secondly, if the expressed position were accepted, it would end up allowing an

[220]J.E. ALVAREZ, T. BRINK, Revisiting the necessity defense: Continental casualty v. Argentina, in K.P. SAUVANT (ed.), Yearbook on international investment law and policy 2010-2011, Oxford University Press, New York, 2012, pp. 319, 335ss.
[221]J.E. ALVAREZ, T. BRINK, Revisiting the necessity defense: Continental casualty v. Argentina, in K.P. SAUVANT (ed.), Yearbook on international investment law and policy 2010-2011, op. cit., pp. 333-334. J.E. ALVAREZ, K. KHAMS, The Argentine crisis and foreign investors: A glimpse into the hearth of the investment regime, in K.P. SAUVANT (ed.), Yearbook on International Investment Law and Policy 2008-2009", Oxford University Press, New York, 2009, pp. 379, 427-430.
[222]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 116ss.
[223]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 148ss.

excessive intrusion into the sphere of the regulatory autonomy of the State, an expression of sovereignty, not only not admissible, but also in contrast with the structure and overall functioning of the dispute resolution system in the investment area. It is presumable to believe, in fact, that the forecast contained in the article analyzed, as well as those of the same kind present in other BITs, is the result of a negotiation between the states, carried out with the aim, on the one hand, of preserving and, on the other, to determine and delimit the scope of the regulatory autonomy of each, the adoption of which is justified precisely by the voluntary assumption of the obligation that derives from it. It therefore appears to exceed the analysis of the nature of the necessity of the measure, a new assessment of the importance of the purpose, escaping the application of the principle of proportionality as it cannot be traced even to the element of suitability or that of legitimacy.

The last mentioned thesis, however, shares the choice of the arbitral tribunal to consider the WTO jurisprudence as a guide in the interpretation and application of the requirement of necessity[224].

On the other hand, the opinion of those who not only considers that there is no contradiction in the appeal made to the WTO jurisprudence by the ICSID arbitrators, is particularly different, but in particular it positively evaluates the proportional approach as it constitutes the best available structure with which to deal with the challenges imposed by the ICSID and BIT systems[225]. In fact, in some of the latter there is a clause of necessity, legitimizing the adoption by the states of measures which, otherwise, would infringe substantial rights attributed by the same treaties; the use of proportionality fits with this structure, allowing the referees to objectively address the most controversial issues from a political point of view.

Clauses of the type found in the BIT between the United States and Argentina are found in numerous other investment treaties[226]. They constitute the only way in which these treaties address the relationship between the substantial standards of investor protection and the persistence of the State of the power to take actions in the public interest[227]. Also called "Non Precluded Measures Clauses" (NPM clauses)[228], they are aimed at preserving the regulatory autonomy of the host State of the investment, reversing the general allocation of the risk of the state action which therefore passes from the State to the investor. The policy areas affected by these provisions may relate to various circumstances, however, they generally relate to areas that touch the central core of state governmental functions. The same historical origin of the negotiation of so-called clauses NPM within the BIT, in particular those stipulated by the United States, is in line with the use of the principle under analysis. The latter, in fact, were conceived as intended to achieve the delicate balance

[224]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 164ss.
[225]A. STONE SWEET, Investor-State arbitration: Proportionality's new frontier, op. cit., pp. 46ss.
[226]W.W. BURKE-WHITE, A. VON STADEN, Investment protection in extraordinary times: The interpretation and application of non-precluded measures provisions in bilateral investment treaties, op. cit., pp. 307ss.
[227]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 104ss.
[228]For further details see: C. LENG LIM, B. HO, M. PAPARINSKIS, International investment law and arbitration. Commentary, awards and other materials, op. cit., L. SABANOGULLARI, General exception clauses in international investment law. The recalibration of investment agreements via WTO-based flexibilities, ed. Nomos, Baden-Baden, 2018, pp. 8ss. D.A. DESIERTO, Necessity and "supplementary means of interpretation" for non precluded measures in bilateral investment treaties, in University of Pennsylvania Journal of International Law, 31 (3), 2010, pp. 832ss. T. GRAENERT, Conflicting laws and jurisdictions in the dispute settlement process of regional trade agreements and the WTO, in Contemporary Asia Arbitration Journal, 1 (2), 2008, pp. 294ss. T.R. SAMPLES, Winning and loosing in investor-State dispute settlement, in American Business Law Journal, 56 (1), 2019. D.A. DESIERTO, The modern international law of necessity with and beyond economics, in Houston Journal of International Law, 38 (3), 2016, pp. 718ss.

between protecting the flexibility of state action, aimed at realizing the public interest, and guaranteeing an adequate level of protection for citizens of the same who have invested abroad. The correct interpretation of the requirement specifically sanctioned by article XI BIT between the United States and Argentina, but also extendable to the standards of other BIT having the same nature, in light of its purpose, cannot be traced back to the concept of necessity as the only one means available to the State, as required by the use of article 25 of the Draft Article relating to state responsibility[229]. Indeed, the opposite conclusion would lead to depriving the BIT forecast of much of its meaning.

The possibility of considering the meaning to be attributed to the requirement of necessity prescribed by article XI BIT in the light of the principle of proportionality, is confirmed also considering the listing in the same provision of the public interests that justify the adoption of the contested measures, relevant in the analysis to be conducted. The latter, therefore, do not constitute a violation of the Treaty if they are adopted for the implementation of the former. Proportional analysis is the appropriate tool to conduct the assessment required by the application of the rule: It provides transparency, obliging the arbitrators to identify the different factors that are relevant for the decision, and allows the illustration of the relationship between each of them in based on the specific circumstances of the specific case, ensuring that none of the interests involved is sacrificed more than necessary for the benefit of others[230].

The clauses of this type contained in the various treaties prescribe the existence of a connection between the measure that the State is entitled to adopt and the purpose to which it is directed, although the wording of the same differs in the BIT, taking up part of the terminology used in article XX GATT. In addition to the requirement of necessity, as prescribed in the case examined, it may be required that the measure be, by way of example, "related to", "appropriate to", "directed to", or expressly "proportionate to"[231].

The expression used to indicate the link between the measure and the objective to which it is directed determines, in addition to the relationship that must exist between them as previously analyzed, also the level of incisiveness of the ballot that a judge is required to carry out , in order to ascertain the conformity of the measure with the respective BIT standard[232]. Therefore, each of them requires an autonomous interpretation, in the light of the rules of international law codified in article 31 VCLT[233].

The use of the principle of proportionality in the context of the exceptions to the treaties appears to be a useful tool not only for the correct interpretation of the rule, but also for its effective application to the concrete case. In the light of the analysis and the considerations developed, it appears consistent with the purpose to which the exceptions are directed as well as with the structure of the same, not only the configurability of an analogy between the proportional approach used by the ICSID Courts and that developed within the WTO jurisprudence in the interpretation of article XX GATT, but also the existence of mutual influences and express references of the former to the rulings of the dispute resolution bodies of the latter.

[229]K. KLEIN, Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, op. cit.
[230]G. BÜCHELER, Proportionality in investor-State arbitration, op. cit., pp. 242-243.
[231]F. BAETENS, J. CAIARDO, Frontiers of international economic law: Legal tools to confront interdisciplinary challenges, op. cit.
[232]A.D. MITCHELL, C. HENCKELS, Variations on a theme: Comparing the concept of necessity in international investment law and WTO law, op. cit., pp. 106ss.
[233]R. GARDINER, Treaty Interpretation, op. cit.

17.Indirect expropriations

Expropriation means the complete acquisition of private property by the state. In international law, this phenomenon constitutes one of the areas in which the tension between the protection of investments and conflicting national interests and rights emerges and crystallizes[234]. The expropriation, indeed, recognized as an intrinsic power of the State in relation to properties located within its territory, does not constitute as such an offense under customary or pact international law, however it saves the presence of additional conditions that affect the legitimacy of the act done.

These acts rarely take place directly, through nationalizations or through the transfer of the title from the foreign investor to the State or to a third party, in both cases through the physical acquisition of the property. On the other hand, indirect or de facto expropriations are decidedly more frequent, involving state measures that do not interfere with the title of the property, but which negatively affect the substance of the right or empty the control of the owner over it. The latter are not so much characterized by physical acquisition, but rather produce the actual loss of management, use or control or a significant decrease in the value or assets of a private investor[235].

Many investment treaties do not expressly consider the issue of indirect expropriations or provide a definition of them, but contain general clauses that establish the conditions under which an expropriation is considered legitimate, considering the same applicable also with reference to the former[236].

According to customary international law, expropriations, whether direct or indirect, being generalized, are legitimate on the basis of the investment treaties to the extent that they are aimed at pursuing a public interest, are implemented in a non-discriminatory way and respect the due process guarantees, furthermore, both require compensation[237].

The consideration and discipline of this kind of state measures under the investment treaties is the result of a balance between the rights of private investors and the state regulatory power. The lack of a generally accepted definition of the concept of indirect expropriation, as well as the distinction between the latter and state regulatory measures not subject to the obligation of compensation, has led to the development of a wide and different jurisprudence on the subject by the courts and international courts that have been dealt with in matters pertaining to these phenomena[238]. It is precisely with reference to the matter mentioned that the principle of proportionality comes into focus, specifically for the purpose of distinguishing between legitimate regulations that do not involve the obligation of compensation and indirect expropriations which, on the contrary, require it.

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[234]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 89ss.

[235]UNCTAD, Taking of property, Series on Issues in International Investment Agreements, United Nations, New York, Geneve, 2000, pp. 4; see also: OECD, Indirect expropriation and the right to regulate, in international investment law, OECD Working Paper on International Investment, 2004/04, OECD Publishing, Paris.

[236]A. REINISCH, Expropriation, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER (eds.), The Oxford handbook of international investment law, Oxford University Press, New York, 2008, pp. 407, 422ss. S. HINDELANG, M. KRAJEWSKI, Shifting paradigms in international investment law. More balanced, less isolated increasingly diversified, Oxford University Press, Oxford, 2016. R. GLÄGER, R. KI GER, Fair and equitable treatment in international investment law, Cambridge University Press, Cambridge, 2011.

[237]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 90ss.

[238]R. DOLZER, C. SCHREUER, Principles of international investment law, Oxford University Press, Oxford, 2012, pp. 104ss.

According to international law, in fact, not every state regulation that negatively interferes with property rights can be qualified as expropriation involving the obligation of compensation[239]. The qualification of the measure therefore assumes considerable importance since, if its expropriation nature is ascertained, the private investor's right to be fully compensated for the loss suffered arises, to protect the investment made; otherwise, this right does not exist if the measure falls within the exercise of state regulatory power, not subject to the obligation of compensation[240]. The distinction in question appears rather delicate, since, on the one hand, the investigation into the nature of the measure may lead to excessive intrusion into the sphere of state sovereignty, as well as the further consequence of hindering the exercise of many state functions by putting on the other hand, the regulatory power, cannot be excluded a priori that some national regulations may integrate expropriations.

In this regard, certain criteria that allow the qualification of the disputed measure in one or the other sense[241] can be identified in the vast jurisprudence on the matter. First, the degree of interference of the measure with the right of property is considered: In order for it to be possible to assert the existence of an expropriation, the disputed measure must deprive the investor of the fundamental rights relating to the property or interfere with the investment for a considerable period of time. Indeed, mere restrictions on property rights do not constitute expropriation. According to this doctrine, called "sole effect", for the purposes of classification as indirect expropriation, it notes the consideration of the only effect produced by the national measure on the investment, regardless of the aim pursued[242].

The second criterion identified concerns the consideration of the purpose and context of the government measure: For the purpose of qualifying the latter as indirect expropriation, its traceability to the State's right to promote a recognized social purpose or general well-being is assessed. Specifically, the existence of generally recognized considerations relating to public health, safety and morality leads to the conclusion of the absence of any requisition. The doctrine of "police power", in fact, recognizes the existence of the power of the State to restrict private property rights without compensation for the pursuit of a legitimate goal[243]. The application of this doctrine leads to excluding the existence of an expropriation, and consequently also the obligation to compensate, due to the purpose pursued by the national measure[244].

Intermediate positions, in the qualification of a measure, consider both the effects produced and the objectives pursued. Finally, the interference of the measure with reasonable investment expectations is also sometimes considered. In this sense, the investor is asked for

[239]I. BROWNLIE, Principles of public international law, Oxford University Press, New York, 2008, pp. 531-533.

[240]U. KRIEBAUM, Regulatory takings: Balancing the interests of the investor and the State, in The Journal of World Investment and Trade, 8, 2007, pp. 717, 720. U. KRIEBAUM, Indirect expropriation: A comparative approach" in A. GATTINI, A. TANZI, F. FONTANELLI (eds.), General principles of law and international investment arbitration, ed. Brill, Leiden, 2018, pp. 429, 436-437. F. BAETENS, Investment law within international law. Integrationist perspectives, Cambridge University Press, Cambridge, 2013, pp. 331ss.

[241]OECD, Indirect expropriation and the "right to regulate" in international investment law, OECD Working Paper on International Investment, 2004/04, OECD Publishing, Paris, p. 10ss. See also: C. TITI, Police powers doctrine and international investment law, in A. GATTINI, A. TANZI, F. FONTANELLI (eds.), General principles of law and international investment arbitration, ed. Brill, Leiden, 2018, pp. 323, 328ss.

[242]R. DOLZER, Indirect expropriation: New developments?, New York University Environmental Law Journal, 11, 2002, pp. 64ss. In this sense see also: Metalclad Corp. v. United Mexican States (Metalclad v. Mexico), NAFTA, ICSID Case n. ARB(AF)/97/1, Award, 30 August 2000. D. COLLINS, An introduction to international investment law, op. cit.

[243]B. KINGSBURY, S.W: SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest-the concept of proportionality, op. cit., pp. 90-91.

[244]The pronunciation of the case is an example of the application of this doctrine Methanex Corp. V. United States of America (Methanex v. USA), UNCITRAL, Final Award, 3 August 2005.

objective proof that his investment is based on a state of affairs that does not include changes in the regulatory regime[245].
The qualification of national measures is explicitly considered in some BIT models, with different degrees of detail. There are many models that only contain a reference to the concept of indirect expropriation or equivalent measures, sanctioning the prohibition on the contracting parties to take measures due to the effect they produce. Examples of this type are found in the models of France, Germany and the United Kingdom: The first prohibits measures with a direct or indirect dispossession effect of foreign investment; the second and, in similar terms, the third refer to measures whose effect is equivalent to expropriation or nationalization[246]. The degree of detail is decidedly greater, otherwise, in the US model. Not only that, the latter contains a provision aimed at specifying some of the factors that must be taken into consideration in order to determine whether or not a state action constitutes indirect expropriation, but expressly excludes from this qualification non-discriminatory national regulatory actions, designed and applied in order to protect public welfare objectives[247]. Among the examples of legitimate objectives indicated in the same model are public health, safety and the environment[248].
The qualification of a measure as indirect expropriation, if its legitimacy has been ascertained, determines the obligation on the State that has adopted the same to compensate the private investor for the loss suffered.
The principle of proportionality is relevant in the conduct of the analysis relating to the second criterion mentioned[249]. This consideration was elaborated by the arbitral tribunals starting from the rulings of the European Court of Human Rights (ECtHR), according to which in order for a requisition to be legitimate, the presence of a reasonable and foreseeable legal basis is necessary, moreover, there must be a proportion between the measure adopted for the pursuit of a general interest and the violation suffered by the private victim of the requisition. However, the identification of the factors that must be specifically considered in this balance, according to the ECtHR jurisprudence, vary with reference[250] to

[245]Y.L. FORTIER, S.L. DRYMER, Indirect expropriation in the law of international investment: I know it when I see it, or caveat investor, in ICSID Review-Foreign Investment Law Journal, 19, 2004, pp. 293ss.
[246]French Model BIT 2006, Art. 5(2); German Model BIT 2008, Art. 4(2); UK Model BIT 2008, Art. 5(1) and in the same spirit see also: Canada Model BIT 2004, Art. 13(1). For further details and analysis see: C. BROWN, Commentaries on selected model investment treaties, op. cit., pp. 337ss.
[247]US Model BIT 2012, Annex B, para. 4, lett. a) and b). C. BROWN, Commentaries on selected model investment treaties, op. cit.
[248]A peculiar formulation is contained in the Italian BIT model where, in prescribing the prohibition of indirect expropriations with a formulation similar to that of the French model, it establishes an exception aimed at allowing national measures that produce the prohibited effect, but which pursue a purpose advertising or a national interest; therefore, in this case national regulations aimed at achieving the objectives mentioned fall under the qualification of indirect expropriations, with the obligation, expressly sanctioned, to compensate the private investor; see Italy Model BIT 2003, Art. V (2).
[249]He believes that the use of the principle of proportionality is compatible with a mitigation of the doctrine of "police power", underlining in particular their non-coincidence C. TITI, Police powers doctrine and international investment law, in A. GATTINI, A. TANZI, F. FONTANELLI (eds.), General principles of law and international investment arbitration, op. cit., pp. 334ss.
[250]With reference to the jurisprudence of the ECHR the principle has been advanced primarily in the pronunciation Sporrong and Lönnroth v. Sweden of 23 September 1982, para. 69. In the same spirit the case of James and Others v. The United Kingdom of 21 February 1986; Mellacher and others v. Austria of 19 December 1989. For further analysis see also: F. SPIELMANN, Following the right margin: The European Court of Human Rights and the national margin of appreciation doctrine: Waiver or subsidiarity of european review?, in Cambridge Yearbook of European Legal Studies, 14, 2012, pp. 384ss. S. GREER, J. GERRARDS, R. SLOWE, Human rights in the Council of Europe and the European Union: Achievements, trends and challenges, Cambridge University Press, Cambridge, 2018. W.A. SCHABAS, The European Convention on Human Rights: A commentary, Oxford University Press, Oxford, 2015, pp. 1755ss.

the concrete case[251].

The use of the principle of proportionality in the qualification of a measure as indirect expropriation by the ICSID arbitration courts is clearly identifiable in the Tecmed v. Mexico case, although done through the Additional Facilities Rules[252]. The college, in detecting the lack of both the definition of expropriation within the relevant Agreement, and the identification of actions or conduct equivalent to it, taking up what sanctioned by the previous Arbitral Tribunal in the Metalclad v. Mexico case, qualifies the former as "a forcible taking by the government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect (...)"[253]. The term is also extended to situations defined as de facto expropriations, if such actions or laws transfer the assets to third parties or deprive the owners of property rights over the assets themselves, without assigning them to third parties or to the government[254]. In particular, the college recognizes that forms of indirect expropriation materialize through actions or conduct that do not expressly indicate the objective of depriving anyone of the right or property, but which produce this effect.

In order to establish whether a measure qualifies as indirect expropriation, the Arbitral Tribunal considers that it carries out a multi-stage analysis. The first requires determining whether the investor, due to the disputed measure, has been radically deprived of the use and economic enjoyment of his investment, that is, whether the assets involved have lost their value or possible economic use for the owner, as well as the extent of the loss. In addition, under customary international law, there is an indirect expropriation if the economic value of the use, enjoyment or disposal of the goods or rights affected by the measure is neutralized or destroyed[255]. The jurisprudence has settled in considering that this requirement is integrated if there is a "substantial deprivation" of the value, use or enjoyment of the investment, determining for this purpose is the intensity and duration of the economic deprivation suffered by the investor[256] as a result of the measure[257]. This first phase therefore requires consideration of the effects produced against the investor by the measure adopted by the State, regardless of the government's intentions.

Secondly, the ICSID Court considers to verify whether the measure adopted falls within the exercise of sovereign powers by the State, within the framework of the "police power", since in this case the cause of damage to those subjected to these powers does not attribute to them the right to obtain compensation. Although the ascertainment of the legitimacy of the exercise of this power must be determined only in accordance with national law and before internal courts, the college recognizes that the function attributed to it involves examining the conformity of the measure with the agreement invoked, in light the rules contained

[251]See the case of Beneficio Cappella v. San Marino, European Court of Human Rights, Application n. 40789/98, Judgment of 13 July 2004, para. 33. J. CHRISTOFFERSEN, Fair balance: Proportionality, subsidiarity and primarity in the European Convention on Human Rights, Martinus Nijhoff Publishers, The Hague, 2009, pp. 44, 127-128. Y. ARAI-TAKAHASHI, The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, ed. Intersentia, Antwerp, Oxford, New York, 2002, pp. 193-194. A. MOWBRAY, A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights, in Human Rights Law Review, 10, 2010, pp. 289, 308ss.

[252]Tecnica Medioambientales Tecmed S.A. v. The United Mexican States (Tecmed v. Messico), ICSID Case n. ARB(AF)/00/2, Award, 29 May 2003.

[253]ICSID, Case n. ARB(AF)/00/2, op. cit.

[254]Tecmed v. Messico, Award, para. 113, 114.

[255]Tecmed v. Messico, Award, para. 115-116

[256]see: CMS v. Argentina, Award, para. 262; El Paso Energy International Company v. The Argentine Republic (El Paso v. Argentina), ICSID Case n. ARB/03/15, Award, 31 October 2011.

[257]Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Philip Morris v. Uruguay), ICSID Case n. ARB/10/7, Award, 8 July 2016, Award, para. 192.

therein and international law[258]. Also in this ruling emerges the will of the Court not to interfere excessively intrusively with the exercise of sovereign prerogatives by the State party to the dispute, expressly excluding the examination of the reasons that led the latter to the adoption of a measure internal in order to determine its legitimacy in the light of national law.

According to the ruling, in order to qualify state conduct as expropriation, the third phase of the analysis requires an assessment of the proportionality of the contested measures with the public interest presumably protected by them and with the legally guaranteed protection of investments, considering that the meaning this impact plays a key role in determining proportionality[259]. Although also in this ruling the autonomy of States in defining issues pertaining to public policies or the interests of society, as well as actions aimed at implementing them, is emphasized, the Court establishes that this consideration does not prevent examination of the same in the Agreement. In particular, the evaluation is aimed at determining the reasonableness of the measures in relation to the objective, the deprivation of economic rights and the legitimate expectations of those affected by the deprivation itself. Specifically, there must be a reasonable proportionality relationship between the weight imposed on the foreign investor and the objective to be achieved with the expropriation measure.

In resorting to the principle of proportionality, the ICSID Court makes a balance between the public interest of the host State in the interference caused and the effects of the same on the investor and the interest of the latter in the protection of the investment[260].

The term "police power" is an expression of the sovereign power to promulgate all the necessary and appropriate laws in order to protect security, order, morality, public health and justice, the concrete exercise of which allows the expropriation of private property for public utility purposes[261].

The reference made by the ICSID Court to the so-called "police power" is aimed at recognizing the existence of the power to restrict private property rights, without compensation, in order to pursue a legitimate goal. The ascertainment of the traceability of the measure to the exercise of this power does not automatically determine the non-compensability of the expropriation suffered, but rather constitutes the prerequisite for the passage to the last phase of the procedure. Specifically, the Court requires that the effects produced by the measure adopted are proportionate to the power exercised, with reference to the objective that the State intends to pursue.

The ECtHR uses the principle of proportionality in the analysis of the public interest underlying the issue of the rule that affects ownership. In particular, according to the Court, each State enjoys a margin of discretion in deciding which measures are in the public interest; it follows that the Court itself, in examining the disputed measure, will be required to comply with the judgment conducted by the legislator in relation to the identification of the public interest, except for the manifest lack of a reasonable foundation[262]. The subsequent application of the proportionality principle, however, entails the possibility of denying the legality of the national measure even if the purpose for which it was adopted is legitimate.

The reasoning made by the arbitration panel in the delivery of the Tecmed v. Mexico case,

[258]Tecmed v. Messico, Award, para. 119-120.
[259]Tecmed v. Messico, Award, para. 122.
[260]ECtHR, In the case of James and Others v. The United Kingdom, Judgment of 21 February 1986, n. 50, para. 46-47.
[261]See the voice: “police power” in B.A. GARNER (ed), The black’s law dictionary, West Group, 2007.
[262]ECtHR, In the case of James and Others, para. 46ss.

which follows this approach, is analyzed by a thesis according to which the diversity of the contexts of reference of the two different judges has completely different consequences. It follows that, subjecting the legality of an expropriation act to the requirement of proportionality in the context of investments, restricts the regulatory freedom of the host State in an excessive way compared to the provisions contained in the BIT[263]. This same thesis believes that the Court, in the case cited, inserts the principle of proportionality in the process of identifying an indirect expropriation, producing a result totally opposite to that reached by the ECtHR. Specifically, on the basis of the jurisprudence of the Court of Strasbourg, even if a substantial deprivation of property is non-discriminatory and accompanied by compensation, it can still be illegal if it does not comply with the principle of proportionality. Otherwise, a discriminatory and uncompensated deprivation of property would not qualify as expropriation on the basis of BIT forecasts provided that the contested measure is proportionate to the aim pursued.

However, this view does not appear to be acceptable, specifically with reference to the qualification of the national measure. Indeed, it ends up considering proportionality as the exclusive requirement that a national measure is required to respect in order not to be considered indirect expropriation. It is the same sentence referred to that denies the possibility of reaching such a conclusion by indicating a much more complex procedure, where consideration of proportionality constitutes its final stage.

The principle of proportionality is used by the ECtHR in order to decide the justifiability of an expropriation, while the ICSID Court uses it directly to qualify the measure as expropriation[264]. It follows that, if the application of the principle of proportionality leads to assert that the state measure does not constitute an indirect expropriation, no compensation will be due on the basis of the BIT forecasts; while, the application of the principle of proportionality by the Court of Strasbourg affects the determination of the legality of the measure, without changing its qualification as expropriation. In particular, in the context of the protection of human rights, the principle in question is used to ascertain whether a balance between the interest of the State and that of the protection of the individual's property has been carried out adequately, without contesting the nature expropriation of the measure, but by affecting the compensation.

The pronunciation cited leads to some considerations. Preliminarily, the possibility is admitted that the rights pertaining to private property may be limited as a consequence of the exercise of sovereign power by the State, without this possibility being mentioned within the relevant BIT[265].

Furthermore, the use of the principle of proportionality leads to affirm the existence of an indirect expropriation that can be compensated only if the national measures lead to disproportionate restrictions on the right of property. Therefore, completing the above, private property yields before the exercise of sovereign power, only if the latter is exercised proportionately. The application of the principle of proportionality allows, consequently, to draw a boundary line between legitimate national regulatory measures and, therefore, not subject to the compensation obligation, on the one hand, and countervailable indirect expropriations, on the other.

What has just been said would also be confirmed in the most recent treaties concluded by

[263]G. BÜCHELER, Proportionality in investor-State arbitration, Oxford University Press, Oxford, 2015, pp. 146-147.
[264]U. KRIEBAUM, Regulatory takings: Balancing the interests of the investor and the State, op. cit., pp. 728ss.
[265]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 92, 95ss.

the United States which admit the possibility for the State to take non-discriminatory actions for the protection of legitimate public interest objectives, not constituting the same indirect expropriations. According to a thesis, forecasts of this type import the use of proportional analysis in the application of the concept of indirect expropriation[266].

The distinction between indirect expropriations and non-countervailable limitations sanctioned by the Tecmed Court, is taken from the subsequent ICSID rulings. The arbitration panel of the Telenor v. Argentina case recognizes as well established the concept that the mere exercise by the government of the regulatory power, which implies impediments to trade or implies the payment of taxes or other levies, does not in itself constitute expropriation[267]. Continuing along these lines, the Arbitral Tribunal of the Continental Casualty v. Argentina[268] qualifies non-countervailable limitations as typical governmental property laws, mostly involving unavoidable restrictions imposed in order to secure the rights of others or generals; these measures do not require compensation, provided that "they do not affect property in an intolerable, discriminatory, or disproportionate manner (...)"[269].

The ICSID arbitration judgment relating to the Tecmed case, with reference to the application of the proportional analysis, is also taken up in the Azurix v. Argentina case, where express reference is made to the pronunciation of the EctHR referred to by the first mentioned ruling[270]. The need for the existence of a reasonable proportional relationship between the means used by the State and the purpose to which they are directed constitutes an element that must be ascertained, together with the legitimacy of the objective, in order to determine the nature of the disputed measure. This proportionality relationship is lost if the investor involved "bears an individual and excessive burden"[271].

With the ruling of the Azurix case, the intention of the ICSID Court to clearly find a balance between the host State's right to act in the public interest and the protection of the investor's rights clearly emerges. The use of the principle of proportionality constitutes the instrument, identified by the judging body, which allows the best way to proceed with this balancing, due to its very nature.

The use of proportional analysis for the purpose of proceeding to the aforementioned balancing is explicitly sanctioned in the ruling shortly after, relating to the LG&E v. Argentina dispute. In this case, in fact, the ICSID Court is clear in believing that in order to determine whether a measure constitutes expropriation within the meaning of the reference BIT, it must proceed, on the one hand, to balance the degree of interference of the measure

[266]B. KINGSBURY, S.W. SCHILL, Public law concepts to balance investors' right with State regulatory actions in the public interest -the concept of proportionality, op. cit., pp. 95ss. S.W. SCHILL, Fair and equitable treatment, the rule of law, and comparative public law, in S.W. SCHILL (ed), International investment law and comparative public law, Oxford University Press, New York, 2010, pp. 151-159

[267]Telenor Mobile Communications S.A. v. The Republic of Hungary (Telenor v. Hungary), ICSID Case n. ARB/04/15, Award, 13 September 2006, para. 64;

[268]ICSID case n. ARB/03/9. For further details see also: E. BJORGE, The evolutionary interpretation of treaties, op. cit., pp. 83ss. M. MISRA, The necessity defence and continental casualty importation of WTO principles at the ICSID, in McGill Journal of Dispute Resolution, 2 (1), 2015-2016. A. JOSÉ, Revisiting the necessity defence. Continental casualty v. Argentina, in Transnational Dispute Management, 3, 2012. G. VAN HARTEN, Sovereign choices and sovereign constraints. Judicial restraint in investment treaty arbitration, Oxford University Press, Oxford, 2013, pp. 67ss. J. CHAISSE, China's international investment strategy: Bilateral, regional and global law and policy, Oxford University Press, Oxford, 2019, pp. 89ss. K. DIEL-GLIGOR, Towards consistency in international investment jurisprudence. A preliminary ruling system for ICSID arbitration, op. cit., pp. 325ss. M. KINNEAR, G.R. FISCHER, Building international investment law: The first 50 years of ICSID, Kluwer Law International, New York, 2015. A. PELLET, The case law of the ICJ in investment arbitration, in ICSID Review, 28 (2), 2013, pp. 227ss.

[269]Continental Casualty v. Argentina, Award, para. 276.

[270]Azurix Corp. v. The Argentine Republic (Azurix v. Argentina), ICSID Case n. ARB/01/12, Award, 14 July 2006.

[271]M. KINNEAR, G.R. FISCHER, Building international investment law: The first 50 years of ICSID, op. cit.

with respect to the law owned and, on the other, the state power to adopt its own policies. Recognized that the State has the right to take actions having a social or general well-being purpose, only where it is disproportionate to the need faced by the measure cannot be accepted without the arising of the compensation obligation[272].

Interesting for the purposes of this analysis is the way in which the question of the qualification of a measure as indirect expropriation is addressed in the El Paso v. Argentina dispute[273]. First of all, the Court denies the possibility that a general regulation promulgated by the State and interfering with the rights of private investors can never be considered expropriating, due the consideration according to which the same should be analyzed as an exercise of sovereign power or of the "police power". The arbitration panel, in fact, believes that the correct approach is to admit that the general regulations do not amount to indirect expropriations, however, due to their content, it is possible to ascertain the existence of exceptions that determine the expropriating nature of the national measure[274]. The State, indeed, is free to act in the public interest through the pursuit of objectives that constitute its expression, such as, for example, environmental protection, the tax system and, the granting of state subsidies. This power would run counter to the obligation to grant compensation to any activity that is negatively affected by the legislation itself[275]. In principle, "general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation"[276]. However, the ICSID Tribunal classifies those unreasonable general regulations as indirect expropriations, i.e. arbitrary, discriminatory, disproportionate or otherwise unjust, resulting in a neutralization of the foreign investor's property rights. In particular, taking up what stated in previous ICSID awards, the college underlines the need for reasonableness and proportionality of the state measure interfering with private property.

The disproportionality of the national measure is an indication of its indirect expropriation nature; specifically, the balancing carried out involves, on the one hand, interference with the property rights of investors and, on the other, the public interest promoted by general regulations, as sanctioned in the Tecmed award. General disproportionate regulations can potentially be considered expropriating to the extent that there is sufficient interference with the rights of the investor.

Also in the ICSID Court ruling in the Philip Morris v. Uruguay case, compliance with the proportionality requirement is sanctioned as a condition that allows to exclude the qualification of state conduct in the exercise of its "police power" as indirect expropriation[277]. The arbitration panel believes that in the recent trade and investment treaties the doctrine according to which the possibility of adopting measures aimed at maintaining public order or protecting health or morality, in the exercise of powers is confirmed by the state. The doctrine of police power excludes not only the countervailability of the damage caused to investors, but also the classification of the measure as

[272]LG&E Energy Corp, LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic (LG&E v. Argentina), ICSID Case n. ARB/02/1, Decision on Liability, 3 October 2006, para. 195.
[273]El Paso Energy International Company v. The Argentine Republic (El Paso v. Argentina), ICSID Case n. ARB/03/15, Award, 31 October 2011, para. 233ss.
[274]El Paso v. Argentina, Award, para. 136.
[275]Marvin Roy Feldman Karpa v. United Mexican States (Feldmand v. Mexico), ICSID Case n. ARB(AF)/99/1, Award, 16 December 2002, para. 103, 105.
[276]El Paso v. Argentina, Award, para. 240, 241, 243.
[277]Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Philip Morris v. Uruguay), ICSID Case n. ARB/10/7, Award, 8 July 2016, para. 305.

expropriation[278].
The ICSID Court, in the last mentioned ruling, ascertains the proportionality requirement with reference to the objective that the national measures are aimed at achieving, considering the same "not arbitrary or unnecessary but (...) potentially effective means to protecting public health (...)"[279].
The analysis clearly shows the possibility of drawing a parallel between the interpretation and application of the concept of indirect expropriation in the context of foreign investments and the legislation enshrined in the TBT agreement negotiated within the WTO with reference to the possibility for States to take measures that constitute technical barriers to trade. Not only was the use of proportional analysis carried out by the bodies in both sectors, which ruled on the contestation of national measures, but the methods of application of the same, as well as the developed stages, appear to be superimposable.
On closer inspection, in fact, the need underlying the recognition of the possibility of adopting national measures that respectively constitute restrictions on trade and interference with foreign investments, are similar. In the commercial sector, the ratio underlying the technical barriers is precisely that of protecting national public interests of primary importance; similar interests also constitute the justification for state measures that interfere with the property rights of investors. The legitimate objectives that are listed as an example in the TBT Agreement, correspond to those that justify the adoption of state measures that cannot be qualified as indirect expropriations, in the presence of the additional requirements elaborated on the matter. Public safety, health and morality are found in both systems as general interests whose protection legitimizes the adoption of national measures not in line with the liberalization of trade and the protection of foreign investments.

18.Concluding remarks

The analysis carried out shows that the proportionality principle constitutes a tool not only known in both dispute resolution systems covered by this analysis, but also applied in ways that can be assimilated to the whole of corresponding contexts.
The consideration of the regime of exceptions, the general ones governed by Article XX of the GATT and those provided by some BITs within clauses called NPM, demonstrates the existence of a parallelism in ascertaining the conformity of the concrete measure by the bodies called to judge the matter. The provision of clauses that allow exceptions in the two systems, in fact, responds to the same need to ensure a balance between the exercise of state regulatory power and the fulfilment of obligations assumed at international level. Specifically, the implementation of the former is allowed to the detriment of the latter only for the achievement of specific legitimate objectives, indicated directly by the respective agreement. The principle of proportionality is part of this assessment to limit the exercise of state power to the adoption only of the measures that are proportionate to the objective pursued. Furthermore, these objectives coincide for the most part in the two different systems.
The latter aspect is also found in the consideration of the justifications that allow the adoption of the measures governed by the TBT Agreement, which can be qualified as technical barriers, in parallel with those that lead to the verification of the existence of indirect expropriations, according to the dispute resolution system ICSID. The power to

[278]Philip Morris v. Uruguay, Award, para. 291, 300.
[279]Philip Morris v. Uruguay, Award, para. 306.

adopt state measures that hinder trade or affect the property rights of foreign investors is an aspect that has been the subject of express negotiation within the WTO, but also detectable in the application of the BIT. The adoption of this discipline is determined by the will of states to maintain the power to adopt regulations aimed at protecting interests of nations higher than the will to liberalize trade and protect foreign investments. Recourse to the principle of proportionality emerges in both systems, with reference to this area, as an instrument that allows to distinguish measures that comply with the discipline prescribed by the respective agreements, and therefore legitimate and admissible, from those which, on the contrary, constitute violations of the obligations international contracts assumed by individual states, with the consequent rise of the responsibility of the latter.

The approach used in the two systems aimed at ascertaining the legitimacy of the disputed national measure also has symmetries. As the WTO dispute resolution bodies have limited the possibility of investigating the purpose that the measure is aimed at achieving, identified by the State, so also in the decisions of the ICSID Courts is the will not to interfere in an excessively intrusive way with sovereign prerogatives states, excluding the investigation of the reasons that led to the adoption of the national measure. In both systems, however, this delimitation does not exempt the deciding body from the prerogative of verifying the legitimacy of the national conduct in light of the obligations imposed on the international level towards the authoring State of the same.

This phase of the analysis conducted in both WTO and ICSID disputes, is followed by ascertaining the proportionality of the contested measure with the objective pursued and with the restrictive effect caused. The factors that are specifically taken into consideration by the panels and arbitration courts differ not only from each other, but also because of the specificity of the specific case. In fact, in both systems it has been stated that the assessment should be conducted on a case-by-case basis.

The assessment of the existence of less intrusive alternative measures that allow the achievement of the objective pursued constitutes the phase of the proportional analysis applied in both systems with some clarifications. In the WTO jurisprudence, the assessment of the need understood as "least-restrictive means test" is expressly required both with reference to the application of the general exceptions and to the SPS and TBT agreements, where it is expressly sanctioned in article 2.2. The same phase is also detectable in the interpretation conducted by the ICSID courts in the application of the BIT rules which provide for exceptions. However, in the analysis carried out by the same courts in the context of indirect expropriations, the verification of the existence of alternative, less intrusive alternative measures with reference to the property rights of the investor with respect to that subject of the procedure, which would also allow the realization of the legitimate objective. The assessment of the need for the national measure to achieve the legitimate objective pursued, however, appears implicit in the assessment of proportionality as formulated in the ICSID rulings. The comparison of the weight imposed on the foreign investor with the objective pursued allows, in fact, to exclude the proportionality of the national legislation if an alternative measure appears to be configurable whose degree of interference with property rights is lower than the one contested. The lack of an explicit reference to this element in the ICSID rulings, therefore, is not suitable to exclude its assessment in the conduct of the proportional analysis with reference to the specific case. The reference to the inevitability of the measure carried out by the ICSID Court in the award relating to the Continental Casualty v. Argentina dispute confirms what has just been said[280].

[280]M. KINNEAR, G.R. FISCHER, Building international investment law: The first 50 years of ICSID, op. cit.

However, the results to which the assessment leads are necessarily different: If the disproportionality of the measure is ascertained, this determines, in the WTO system, the pronouncement of the recommendation of reconversion in accordance with international obligations; in the ICSID context, otherwise, it entails the qualification of the measure as a violation of the BIT or, specifically, as an indirect expropriation with consequent obligation for the State of compensation towards the foreign investor affected by the same.
Nonetheless, in both dispute resolution mechanisms, the use of proportional analysis constitutes a suitable tool for carrying out the requested assessment, allowing to stem the risk of excessive intrusion by the judging body within areas of national sovereignty. The application of the principle allows, therefore, to identify the areas of competence of the different systems that are involved: on the one hand, the state system and the exercise of the powers attributable to its sovereignty, on the other, the judging bodies to which the function is resolved to resolve the disputes that are referred to him, within the limits of the powers attributed to them.
Furthermore, not only does the approach that emerges in the application of the principle by the WTO dispute resolution bodies and ICSID courts presents numerous similarities and points of contact, but the mechanism used by the former is also explicitly recalled and applied by the latter, acknowledging a convergence of systems, although not without criticism.
The use of this principle allows, in fact, to contribute to the consistency in the resolution of disputes both within each system and in their overall consideration, favouring solutions that, although not coincident, are at least compliant with reference to the consideration of aspects significant that emerge in both systems, such as the delimitation of state sovereignty, as well as the identification of areas of the same that do not allow intrusion by external bodies.
The principle of proportionality, whose nature appears to be both substantial and procedural, also constitutes a tool that allows the judging body to rationalize the decision-making procedure, through the application of the analytical structure in which it is composed. The use of this structure also allows to increase the transparency of the decision and to avoid the possibility of ideological drifts in the resolution of concrete issues, by the members of the respective colleges, within each dispute resolution system.

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