

WTO “CHAPEAU” JURISPRUDENCE AND ITS DISCONTENT

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Abstract

This Article examines WTO’s jurisprudence on the introductory clause (the “chapeau”) of the general exceptions in the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). These general exceptions allow WTO members to depart from GATT and GATS obligations in order to pursue specific nontrade policies, such as public health and the environment. In practice, it has proven difficult for countries to invoke the general exceptions successfully. One major obstacle has been the chapeau requirement of nondiscrimination, which, under jurisprudence developed by WTO’s Appellate Body (AB), has become the final barrier for the availability of policy exceptions. Despite such difficulty, new free trade agreements have routinely adopted the same chapeau language in their general exceptions, raising issues of policy space available for a broader range of subject matter under these agreements.

This study makes three major findings. First, the chapeau language was originally included in GATT by a drafting oversight; and its inclusion has created an incoherent order of values under the treaty. Second, the chapeau is largely unnecessary for its originally intended purpose of preventing abuse of the general exceptions. A survey of all relevant WTO cases supports this finding. Third, as a matter of treaty interpretation, the purpose of the chapeau is not necessarily limited to that originally intended. This finding validates the AB’s expansive interpretive approach; but conversely, it also opens the door for the chapeau to play an exculpatory function of excusing measures with legitimate policy objectives not specified in the general exceptions, thereby expanding the policy space of regulating states.

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INTRODUCTION

Since its inception in 1995, the World Trade Organization (WTO) has generated a large body of jurisprudence contributing to the development of international law.¹ Central to this contribution is the work of the Appellate Body (AB), which during the twenty-five years of its existence

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1. See GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES (Cambridge U. Press, 2015) (containing “a structured review of nearly one thousand statements by WTO panels and WTO Appellate Body on topics of general public international law.” Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence* 1, 4 (Feb. 12, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731144 [<https://perma.cc/NWY4-LUSS>]).

issued a total of 148 reports covering a wide range of trade law issues.² Although the AB has become non-functional,³ its interpretations of WTO treaties remain effective as part of WTO case law and continue to influence the practice of WTO Members and beyond.⁴

Among the most influential WTO jurisprudence is the AB's interpretation of Article XX of the General Agreement on Tariffs and Trade 1994 (GATT),⁵ which contains a list of general exceptions under GATT, and of similar provisions of general exceptions under Article XIV of the General Agreement on Trade in Services (GATS).⁶ The general exceptions of GATT and GATS permit a WTO Member to adopt measures for certain non-trade objectives, notwithstanding any other provisions of GATT and GATS. Such objectives include, among other things, the protection of public morals, the protection of human, animal or plant life or health, the enforcement of certain domestic laws, and the conservation of exhaustible natural resources.⁷ Textually, invocation of each of the general exceptions is subject to two sets of conditions. One set is prescribed in the specific subparagraphs of the exceptions. For example, a measure adopted for the protection of public morals under GATT Article XX(a) or for the protection of public health under Article XX(b) must be "necessary" for that purpose, and a measure taken for the conservation of exhaustible natural resources under Article XX(g) must be "made effective in conjunction with restrictions on domestic production or consumption." The other set of conditions applies to each of the exceptions under GATT Article XX and GATS Article XIV. These conditions are contained in the introductory paragraph, known as the "chapeau," of GATT Article XX and GATS Article XIV. The chapeau requires that the measure taken for the listed nontrade objectives not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions

2. WORLDTRADELAW.NET, <https://www.worldtradelaw.net> [https://perma.cc/Q5GK-TEN7].

3. As a result of the U.S. blocking selection processes to fill vacancies, the Appellate Body has not been able to review appeals since December 2019. See *13th WTO Ministerial Conference Briefing Note: WTO Reform, Dispute settlement*, https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/reform_e.htm [https://perma.cc/T4E4-C6DR].

4. See generally JAMES BACCHUS & SIMON LESTER, OF PRECEDENT AND PERSUASION: THE CRUCIAL ROLE OF AN APPEALS COURT IN WTO DISPUTES (Cato Inst., Free Trade Bulletin No. 74, Sept. 12, 2019), <https://www.cato.org/free-trade-bulletin/precedent-persuasion-crucial-role-appeals-court-wto-disputes> [https://perma.cc/QY2P-DFA3].

5. *Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement], Annex 1A [hereinafter GATT 1994].

6. WTO Agreement, *id.*, Annex 1B [hereinafter GATS].

7. See Appendix A.

prevail or a disguised restriction on international trade.”⁸ In accordance with the analytical sequence established by the AB, a Member invoking the general exceptions must first satisfy the specific conditions set out in the subparagraphs, and then meet the generally applicable requirements of the chapeau.

In practice, it has been very difficult for WTO Members to invoke the general exceptions of GATT and GATS successfully. Appendix B-1 identifies 36 cases in which WTO adjudicators issued decisions on defenses based on these general exceptions.⁹ In 19 of these cases, the adjudicators rejected the defenses under subparagraphs of GATT Article XX without engaging the chapeau. In the other 17 cases, the chapeau was analyzed but the defense under the chapeau prevailed in only three of them. The overall success rate in invoking the general exceptions, therefore, is less than ten percent.

The difficulty for Members to successfully invoke nontrade policy exceptions has become a major concern over the proper role of the WTO.¹⁰ As the United States Trade Representative Katherine Tai reportedly stated:

While countries can avail themselves of what amounts to an affirmative defense, that defense has proven difficult to invoke successfully. This is part of the reason why, today, the WTO is considered by many as an institution that not only has no solution to offer on environmental concerns but is part of the problem.¹¹

At present, concern over the role of the WTO is most acute regarding climate policies. Whether it be a measure designed to deal with carbon leakage by a single Member—such as the carbon border adjustment

8. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 194, art. XX [hereinafter GATT 1947]. GATS contains identical language except for the replacement of “same conditions” by “like conditions.” GATS, *supra* note 6, art. XIV.

9. *WorldTradeLaw.net*; *WTO Dispute Settlement: One-Page Case Summaries (1995-2022)*, https://www.wto.org/english/res_e/publications_e/dispu_settlement_e.htm [<https://perma.cc/74HL-FZVZ>].

10. See, e.g., Daniel Rangel, *WTO General Exceptions: Trade Law’s Faulty Ivory Tower* (Public Citizen’s Global Trade Watch 2022), https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf [<https://perma.cc/Q48Q-CX8Z>]; Emily Lydgate, *Is It Rational and Consistent? The WTO’s Surprising Role in Shaping Domestic Public Policy*, 20 J. INT’L ECON. L. 561–82 (2017).

11. See Timothy Meyer & Todd N. Tucker, *A Pragmatic Approach to Carbon Border Measures*, 21 WORLD TRADE REV. 109, 118 (2022) (quoting OFFICE U.S. TRADE REPRESENTATIVE, *Remarks from Ambassador Katherine Tai on Trade Policy, the Environment and Climate Change* (Apr. 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/april/remarks-ambassador-katherine-tai-trade-policy-environment-and-climate-change> [<https://perma.cc/Q9WM-UGPE>]).

mechanism (CBAM) adopted by the European Union¹²—or by a group of Members—such as the carbon club proposed by the United States¹³—the consensus seems to be that such a measure is unlikely to pass the scrutiny of WTO law.¹⁴ Among other things, the AB has construed the nondiscrimination requirement of the chapeau provision as requiring a Member to take account of different conditions prevailing in different countries, and to cooperate with all affected countries equally, in the application of its environmental measures.¹⁵ Such an exacting standard renders practically impossible for Members to implement their carbon policies in a WTO-consistent manner. In response to this reality, some have proposed that individual WTO Members should take a “pragmatic approach” to carbon border measures, regardless of current understandings of WTO rules.¹⁶

Meanwhile, despite the difficulty in invoking the general exceptions under WTO law, an increasing number of newly concluded free trade agreements (FTAs) have adopted policy exceptions modeled after GATT Article XX/GATS Article XIV. Examples include the U.S.-Australia FTA,¹⁷ the U.S.-Korea FTA,¹⁸ the EU-Japan Economic Partnership

12. See EUR. COMM’N, *Carbon Border Adjustment Mechanism*, https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en [<https://perma.cc/Z6SB-RC8L>].

13. Under the Global Arrangement on Sustainable Steel and Aluminum (GASSA) proposed by the Biden Administration as part of the settlement with the European Union on the U.S. steel and aluminum tariffs, nations would cooperate on reducing carbon emissions by levying tariffs on steel and aluminum products imported from high-emission countries. See OFFICE U.S. TRADE REPRESENTATIVE, *Fact Sheet: U.S.–EU Arrangements on Global Steel and Aluminum Excess Capacity and Carbon Intensity*, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2021/october/fact-sheet-us-eu-arrangements-global-steel-and-aluminum-excess-capacity-and-carbon-intensity> [<https://perma.cc/NZQ2-65NE>].

14. See Giulia Claudia Leonelli, *Anti-Deforestation npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis*, 26 J. INT’L ECON. L. 415, 415–34 (2023); Ilaria Espa, *Reconciling the Climate/Industrial Interplay of CBAMs: What Role for the WTO?*, 116 AJIL UNBOUND 208, 212 (2022); Gracia Marin Duran, *Carbon Border Adjustments: Ensuring Compatibility with the International Climate and Trade Regimes* (Oct. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218832 [<https://perma.cc/XCY7-APNP>]; Meyer & Tucker, *supra* note 11, at 116; James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism* (Cato Inst., Briefing Paper No. 125 Aug. 9, 2021); Reinhard Quick, *Carbon Border Adjustment: A dissenting view on its alleged GATT-compatibility*, ZEuS 4/2020, at 549, 583–86 (2020), https://www.nomos-elibrary.de/10.5771/1435-439X-2020-4-549.pdf?download_full_pdf=1 [<https://perma.cc/J7A6-QRNN>]. *Contra*, EUR. COMM’N, *supra* note 12 (claiming that the CBAM “is designed to be compatible with WTO rules”).

15. See *infra* Part II.B.2.

16. Meyer & Tucker, *supra* note 11.

17. U.S.–Australia Free Trade Agreement, Aug. 3, 2004, 118 Stat. 919, art. 22.1, <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> [<https://perma.cc/HJ6V-L8SG>].

18. U.S.–Korea Free Trade Agreement, Jan. 1, 2019, art. 23.1, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [<https://perma.cc/A9BJ-GX7Y>].

Agreement,¹⁹ the EU-Vietnam FTA,²⁰ and the Japan-Australia Economic Partnership Agreement.²¹ Major multilateral FTAs, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),²² and the Regional Comprehensive Economic Partnership (RCEP),²³ have also incorporated GATT Article XX and GATS Article XIV, *mutatis mutandis*, into the general exceptions of certain chapters. Thanks to the broader coverage of such agreements, the application of the GATT/GATS-style general exceptions has expanded from the traditional areas of trade in goods and services to fields of foreign investment, financial services and digital trade. While each of the FTAs is an independent treaty with its own dispute settlement mechanism, the interpretation of similar rules and concepts is likely to be guided by relevant WTO jurisprudence.²⁴

Given the potential impact of WTO jurisprudence on a wide range of issues in international economic relations, it is desirable to reassess the AB's legacy on the construction of the general exceptions. Over the years, the AB's interpretations of GATT Article XX/GATS Article XIV

19. Agreement between the European Union and Japan for an Economic Partnership, 2018 O.J. (L 330), arts. 2.22; 8.3; 12.9 and 13.8.

20. Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, 2020 O.J. (L 186), art. 8.53.

21. Japan–Australia Economic Partnership Agreement, 2015, arts. 1.9 and 14.15, <https://www.dfat.gov.au/trade/agreements/in-force/jaepa/full-text/Pages/full-text-of-jaepa> (last visited Apr. 9, 2025).

22. The agreement was originally negotiated among 12 countries as the Trans-Pacific Partnership (TPP). After the United States withdrew from TPP in 2017, the agreement was re-concluded among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Feb. 4, 2016, art. 29.1, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources#bookmark0> [<https://perma.cc/YWR5-EP4Q>].

23. RCEP was concluded among Australia, China, Japan, South Korea, New Zealand and the 10 members of the Association of the Southeast Asian Nations (ASEAN), which took effect in January 2022. *See* Regional Comprehensive Economic Partnership, Nov. 15, 2020, art. 17.12, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/regional-comprehensive-economic-partnership-rcep/rcep-text-and-resources/> [<https://perma.cc/4P5N-UXHK>].

24. E.g., in a dispute arising from the Association Agreement between the European Union and Ukraine, the arbitral tribunal followed WTO jurisprudence in rendering its decision on the availability of the general exceptions to Ukraine's ban on wood export. *See* Final Report of the Arbitration Panel, Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union (Dec. 11, 2020). *See generally* Andrew D. Mitchell, James Munro & Tania Voon, *Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks*, Y.B. INT'L. INV. L. & POL'Y 305 (2017).

have generated much analysis, but systematic assessment of the chapeau jurisprudence remains scant.²⁵ This study seeks to help fill that void.

A central issue in the interpretation of the chapeau provision is how to define the relationship between the nondiscrimination requirement of the chapeau and the substantive obligations of nondiscrimination under GATT and GATS. Nondiscrimination is a fundamental principle of the world trading system. The concept is embodied in numerous provisions of the WTO Agreements. The two basic obligations of nondiscrimination are those of most-favored-nation treatment (MFN), contained in Article I:1 and various other provisions of GATT²⁶ and Article II of GATS, and national treatment (NT) in Article III of GATT and Article XVII of GATS. Essentially, the MFN and NT provisions prohibit a WTO Member from discriminating between “like products” or “like services/service suppliers” based on their national origins. Measures in violation of MFN or NT obligations may be excused by the general exceptions of GATT Article XX/GATS Article XIV, provided that they also comply with the nondiscrimination requirement under the chapeau. Textually, however, it is unclear how the two layers of nondiscrimination rules relate to each other. The AB’s position on this issue has evolved significantly over time, from differentiating the chapeau requirement from MFN and NT obligations, to effectively combining the two types of discrimination requirements into one, and to expanding the chapeau requirement beyond the scope of MFN and NT provisions. The end result is the reduction in the policy space of the regulating Members.

In the final analysis, how the chapeau provision should be interpreted depends on the understanding of its function within the treaty structure of GATT/GATS. It is generally accepted that the purpose of the chapeau is to prevent abuse of the general exceptions. Yet, the AB’s interpretations of the chapeau have given the chapeau provision a role well beyond that of abuse prevention. What the proper function of the chapeau should be remains a critical issue to be analyzed.

25. To date, the most comprehensive analysis of the AB’s chapeau interpretation is Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 AM. J. OF INT’L L. 95–125 (2015). Other focused analyses of AB’s chapeau interpretation include: Leonelli, *supra* note 14; Emily Lydgate, *Do the Same Conditions Ever Prevail? Globalizing Regulation for International Trade*, 50 J. WORLD TRADE L. 971–96 (2016); Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the “New” Approach in Brazil–Tyres*, 43 J. WORLD TRADE L. 507–39 (2009); Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739–858 (2001); T. Alana Deere, *Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX’s Preamble*, 10 INT’L LEGAL PERSP. 1–38 (1998); Author E. Appleton, *GATT Article XX’s Chapeau: A Disguised “Necessity” Test? The WTO Appellate Body’s Ruling in United States–Standards for Reformulated and Conventional Gasoline*, 6(2) REV. OF EUR. COOP. & INT’L ENV’T L. 131 (1997).

26. See, e.g., GATT arts. II:1, V, XIII and XVII.

In light of these considerations, this study sets three goals. First, it seeks to uncover the underlying rationale of the chapeau provision. In this context, it traces the origin of the chapeau language and reviews its drafting history. Second, it seeks to understand the actual functions of the chapeau in WTO practice. For this purpose, it surveys all WTO cases involving the interpretation of the chapeau. Third, it will explore alternative functions of the chapeau. The goal is to identify interpretive approaches that can potentially overcome the constraints of the GATT/GATS general exceptions on the policy space of WTO Members.

The rest of this Article will proceed as follows. Part I studies the origin and the relevant drafting history of the chapeau provision. This research yields an important insight: the chapeau was included in the GATT general exceptions by a drafting oversight. Part II focuses on WTO jurisprudence. It examines the evolution of the AB's chapeau jurisprudence through the several landmark cases and analyzes the major issues in the AB's interpretations. Part III explains why the traditionally accepted function of the chapeau is a myth. It identifies the incoherent order of values created by the chapeau, critiques the AB's theory about the function of the chapeau, and examines the actual functions of the chapeau in all WTO cases in which noncompliance with the chapeau is found. Part IV explores alternative functions of the chapeau against the existing framework of WTO jurisprudence. It proposes new interpretive approaches capable of preserving the policy space of the Members while achieving doctrinal coherence.

I. THE ORIGIN OF THE CHAPEAU LANGUAGE

The chapeau provision of GATT Article XX was taken directly from the draft Charter for the International Trade Organization (the Havana Charter),²⁷ but had its origin in the 1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions (the 1927 Convention).²⁸ It appears that the framers of the Havana Charter, in "borrowing" the chapeau language from the 1927 Convention, overlooked a critical difference between the two agreements. That is, unlike the Havana Charter, the 1927 Convention did not prescribe any substantive obligation of nondiscrimination.

27. Final Act of the United Nations Conference on Trade and Employment: Havana Charter for An International Trade Organization, Mar. 24, 1948, E/CONF 2/78 U.N.T.S.

28. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 97 L.N.T.S. 393. The 1927 Convention consists of three agreements: (1) the Convention and protocol done on November 8, 1927; (2) the supplementary agreement and protocol, dated July 11, 1928; and (3) the protocol concerning entry into force of the Convention, dated December 20, 1929 (the 1929 Protocol).

A. *The 1927 Convention*

Though barely remembered today, the 1927 Convention has been credited by WTO adjudicators as the first multilateral trade agreement.²⁹ Negotiated under the auspices of the League of Nations, the Convention had an important influence on the General Agreement on Tariffs and Trade (1947) (GATT 1947),³⁰ especially through its provisions of general exceptions.³¹

During the course of World War I, various countries imposed severe restrictions on imports and exports. Many such restrictions were kept in place after the cessation of hostilities, especially in central Europe.³² Because individual countries were disinclined to remove their restrictions without other countries taking similar actions, the League of Nations called an international economic conference to address the issue.³³ The conference led to the conclusion of the Convention among twenty-eight countries on November 8, 1927, which took effect on January 1, 1930 for the seventeen countries that had ratified it, including the United States.³⁴ Unfortunately, the Convention was short-lived, after most of the ratifying countries withdrew within a few years.³⁵

As indicated by its title, the Convention aimed at abolition of import and export prohibitions and restrictions. Specifically, the contracting parties undertook to abolish, within six months from the date of the entry into force of the Convention, all import and export prohibitions or restrictions, and not to impose any such prohibitions or restrictions thereafter.³⁶ The target was quantitative restrictions (QRs), similar to

29. See Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998, as modified by the Appellate Body report, see *infra* note 66) [hereinafter Panel Report, *US-Shrimp*].

30. GATT 1947, *supra* note 8. The provisions of GATT 1947 have been incorporated into GATT 1994, *supra* note 5.

31. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25(5) J. WORLD TRADE 37, 41 (1991).

32. James Grueff, *The United States and the International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, 163, 164, https://www.waseda.jp/inst/oris/assets/uploads/2015/10/2-1-3_20150803184118_vvrjnm6036sj6umgf0lu8q7h50.pdf (last visited Oct. 20, 2024).

33. For history of the conference, see W. Leslie Runciman, *The World Economic Conference at Geneva*, 37 THE ECON. J. 465–72 (1927), <https://www.jstor.org/stable/2223577> [<https://perma.cc/Q9L5-M9ZM>].

34. The Convention did not receive the required eighteen ratifications to enter into force, but did take effect among the seventeen ratifying countries in accordance with art. 17 of the Convention and para. 4 of the 1929 Protocol. For history of the U.S. participation, see Grueff, *supra* note 32.

35. In accordance with paragraph 6 of the 1929 Protocol, countries could withdraw on June 30th of 1931, 1932, 1933 or 1934, unless the requisite number of ratifications was received. The United States withdrew as of June 30, 1933. See *id.*

36. See The Convention, *supra* note 28, art. 2.

what is prohibited under GATT Article XI *General Elimination of Quantitative Restrictions*. Unlike GATT, however, the Convention did not regulate customs tariffs. The contracting parties therefore remained free to levy any level of tariffs on imports and exports. Also, unlike GATT, the Convention did not prescribe any general obligation of nondiscrimination, such as MFN and NT. Thus, the Convention was an agreement on QRs only.

Unsurprisingly, the sweeping obligation to eliminate all quantitative restrictions was subject to numerous exceptions. In addition to the specific reservations made by individual countries, Articles 4 and 5 of the Convention provided certain general exceptions. While Article 5 allowed the restrictions taken to protect "the vital interests of the country" in extraordinary and abnormal circumstances, Article 4 set out a list of eight classes of prohibitions and restrictions imposed for public policy reasons, with a preambular provision imposing a condition of nondiscriminatory application of the exceptions:

Article 4.

The following classes of prohibitions and restrictions are not prohibited by the present Convention, *on condition, however, that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade:* (italics added)

1. Prohibitions or restrictions relating to public security.
2. Prohibitions or restrictions imposed on moral or humanitarian grounds.
3. Prohibitions or restrictions regarding traffic in arms, ammunition and implements of war, or, in exceptional circumstances, all other military supplies.
4. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites.
5. Export prohibitions or restrictions issued for the protection of national treasures of artistic, historic or archaeological value.
6. Prohibitions or restrictions applicable to gold, silver, coins, currency notes, bank notes or securities.
7. Prohibitions or restrictions designed to extend to foreign products the regime established within the country in respect of the production of, trade in, and transport and consumption of native products of the same kind.

8. Prohibitions or restrictions applied to products which, as regards production or trade, are or may in future be subject within the country to State monopoly or to monopolies exercised under State control.

Apparently, the format of Article 4 exceptions was followed in GATT,³⁷ and its preambular provision became the model for the chapeau of Article XX.³⁸ In essence, the conditions imposed by the preamble of Article 4 are two types of nondiscrimination requirements. The first is a qualified MFN requirement, as expressed in the explicit prohibition of “arbitrary discrimination between foreign countries.” The second is an equivalent of national treatment requirement, which is implied in the prohibition of “disguised restriction on international trade.” Conceptually, what constitutes “a disguised restriction on international trade” for the Convention would depend on the types of trade restriction it aimed to remove. Since the Convention had a single aim of abolishing all restrictions on imports and exports, which restrictions would create differential treatment between domestic and foreign like products, by abolishing such restrictions, the Convention aimed to eliminate all such differential treatment. In this sense, the preamble’s prohibition of “disguised” trade restrictions is also a requirement of nondiscrimination between foreign and domestic like products.³⁹

What is the reason for the preambular provision? According to Charnovitz, by the late nineteenth century it had become customary for countries to reserve in their commercial treaties the right to impose import and export restrictions for sanitary reasons.⁴⁰ Such exceptions had led to abuse, as it was easy to introduce economic protection under the guise of biological protection. To prevent abuse, countries began to impose conditions on such exceptions in their bilateral agreements, and the Convention was the first multilateral effort to do the same.⁴¹

37. The Panel in *US-Shrimp* discussed in length the relevance of Art. 4(4) of the Convention. See Panel Report, *US-Shrimp*, *supra* note 29, ¶¶ 212–30.

38. The AB referred to the 1927 Convention in its very first report, noting that unlike Article 4 of the Convention, the term “countries” in the chapeau of GATT Article XX is textually unqualified by the word “foreign” and clarifying that the Convention was not the travaux préparatoires of GATT. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996), n.46 [hereinafter AB Report, *US-Gasoline*].

39. Before the “disguised restriction” proviso was agreed to, the draft Convention had required that measures not be “applied in such a way as to constitute a form of economic protection in favor of national production.” Charnovitz, *supra* note 31, at 42. Note that tariffs remained a legal form of discrimination under the Convention.

40. *Id.* at 40 (citing examples including the 1882 Commercial and Maritime treaty between France and Great Britain).

41. *Id.* at 41.

For purposes of this study, the most relevant feature of the Convention is its single layer of nondiscrimination requirements. The Convention prescribed no primary obligation of nondiscrimination; its nondiscrimination requirements applied exclusively to the policy exceptions listed in Article 4.

B. *The Havana Charter*

GATT 1947 is mostly based on Chapter IV *Commercial Policy* of the Havana Charter.⁴² Compared to the 1927 Convention, Chapter IV of the Charter not only prohibited QRs, but also made reduction of customs tariffs a central goal. Furthermore, it prescribed two primary obligations of nondiscrimination: general most-favored-nation treatment (Article 16) and national treatment on internal taxation and regulation (Article 18). These two provisions became Articles I and III of GATT 1947, respectively.

All the obligations under Chapter IV were subject to the general exceptions set out in Article 45. Paragraph 1 of Article 45 contained a number of subparagraphs and an introductory clause, which were subsequently adopted as the provisions of GATT Article XX.⁴³ The drafting history of the paragraph shows the following:

The U.S. Draft. The article of *General Exceptions to Chapter IV* was originally proposed by the United States. The U.S. version did not contain any introductory clause. Instead, it began simply with the sentence: "Nothing in this Chapter of the Charter shall be construed to prevent the adoption and enforcement by any Member of measures"⁴⁴

The British Proposal. In subsequent discussions, several delegates raised concerns about potential abuse of the general exceptions, and the practice of previous international agreements was mentioned, including that of the League of Nations.⁴⁵ In response to such concerns, the British delegate proposed a proviso to be included as the preamble of the article. The proposed language was almost identical to the preamble of Article 4 of the 1927 Convention, except that the discrimination prohibited therein would no longer be limited to that between "foreign countries."⁴⁶ Like

42. See DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* (2008); Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25 INT'L HIST. REV. 282-305 (2003).

43. Art. 45(1) contains 14 subparagraphs, ten of which are essentially the same as the subparagraphs of GATT art. XX.

44. *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, E/PC/T/33 (Oct. 31, 1946) Annexure 11. United States Draft Charter. Art. 32.

45. UN ESCOR, E/PC/T/C.II/50, at 6-7 (Nov. 13, 1946).

46. The language proposed by the British delegate reads: "The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the

Article 4 of the 1927 Convention, the British Proposal limited the applicable scope of the general exceptions to import and export restrictions.⁴⁷ The British Proposal was generally accepted, subject to later review of its precise wording, particularly as to the applicable scope of the general exceptions.⁴⁸

The New York Draft. At the meeting of the drafting committee in Lake Success, New York, the preamble of the general exceptions to the commercial policy Chapter took the shape of its final version:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in [this Chapter] shall be construed to prevent the adoption or enforcement by any Member of measures.⁴⁹

The draft made two substantive changes to the British Proposal. First, it expanded the applicable scope of the general exceptions to the entire Chapter (“nothing” in this Chapter shall be construed ...), which was the scope originally proposed by the U.S. Draft. As a result of this expansion, however, the policy exceptions to the MFN and NT obligations became subject to the preambular requirements of nondiscrimination, thus creating a structure of double-layered nondiscrimination rules. Second, the New York Draft added the word “unjustifiable” as an alternative character of the discrimination prohibited under the preamble. The negotiation records contain no explanation for this addition.

The version of the New York Draft was subsequently adopted by the General Agreement on Tariffs and Trade, which was concluded on October 30, 1947.⁵⁰ The only changes made in GATT 1947 are technical: “this Chapter” was changed to “this Agreement”; and “any Member” changed to “any contracting party.”

An Overlooked Question. The drafting history shows that the framers of the Havana Charter had modeled the preamble of the general exceptions of Chapter IV after the preamble of Article 4 of the 1927 Convention. However, while the framers of the Charter paid attention to potential abuse of the policy exceptions, they completely overlooked the issue of relationship between the nondiscrimination requirements for

adoption and enforcement by any Member of the following measures, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” *Id.* at 7.

47. *Id.*

48. UN ESCOR, E/PC/T/C.II/54 Rev.1, at 36 (Nov. 28, 1946).

49. UN ESCOR, E/PC/T/34, at 31 (Mar. 5, 1947). This version was also adopted by the final text of the Havana Charter dated March 24, 1948, and became the preamble of art. 45(1).

50. *Supra* note 30.

invoking the general exceptions and the primary obligations of MFN and NT under the Charter, an issue non-existent under the 1927 Convention. It seemingly did not occur to the framers that when the general exceptions were made not only to the elimination of QRs, but also to the MFN and NT obligations, a question would arise as to how the two layers of nondiscrimination requirements should relate to each other. As John Jackson recognized early on, the preamble of GATT Article XX contains "a modified form" of both MFN and NT obligations, "but it is not easy to ascertain exactly what it means."⁵¹ History would show that this oversight in the drafting process sowed the seeds for interpretive problems encountered in the WTO era.

II. WTO JURISPRUDENCE

Before the establishment of the WTO, a total of 316 disputes were brought to the GATT dispute settlement during the GATT era (1947-1994).⁵² Out of these disputes, Article XX defenses were raised in twenty-four cases, but were addressed by GATT dispute panels only in fifteen cases.⁵³ Of the fifteen panel reports (including unadopted ones), only two contained interpretation of the chapeau language (referred to as "preamble" during the GATT era).⁵⁴ "[E]arlier GATT panels had kept their distance from that language, probably because they wished to avoid the more obviously judgmental sorts of decisions its very general language would seem to require."⁵⁵ The reasons for such avoidance aside, for purposes of this study, it is sufficient to note that in neither of the two cases in which the preamble was interpreted did the GATT panel find the challenged measure in violation of the preamble of Article XX.⁵⁶ Even

51. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 743 (Indianapolis: Bobbs-Merrill Co., Inc., 1969).

52. See GATT DISPUTES: 1948-1995 VOL. 1: OVERVIEW AND ONE-PAGE CASE SUMMARIES, 379, https://www.wto.org/english/res_e/publications_e/gatt4895vol12_e.htm [<https://perma.cc/J669-57YS>].

53. *Id.* Notably, 14 of the 15 cases in which art. XX defenses were addressed in panel reports were brought after 1980.

54. See Panel Report, *United States–Prohibition on Imports of Tuna and Tuna Products from Canada*, L/5198 (adopted Feb. 22, 1982), GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD) 29S/108 [hereinafter Panel Report, U.S.–Prohibition on Tuna]; Panel Report, *United States–Imports of Certain Automotive Spring Assemblies*, L/5333 (adopted May 26, 1983), BISD 30S/107 [hereinafter Panel Report, U.S.–Automotive Springs]; see also GATT Analytical Index, Article XX General Exceptions, at 563–95, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm [<https://perma.cc/CHY4-EGDM>].

55. Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAWYER 619, 638 (1998).

56. See Panel Report, U.S.–Prohibition on Tuna, *supra* note 54; Panel Report, U.S.–Automotive Springs, *supra* note 54. For comments on the two cases, see ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 141–43 (1993).

though these two panel reports are part of the GATT *acquis*,⁵⁷ neither of them has been referenced in subsequent WTO jurisprudence.

In contrast with the GATT era, the WTO era witnessed a boom in “chapeau” jurisprudence. The newly established Appellate Body grappled with interpreting GATT Article XX’s chapeau in its very first decision. From then on, the AB rendered a number of decisions construing the chapeau, turning the provision into a final battleground for the application of the general exceptions. In its interpretation of GATS Article XIV, the AB essentially followed its approach to the interpretation of GATT Article XX.⁵⁸

A. *The AB’s General Interpretive Approach to the General Exceptions*

WTO’s chapeau jurisprudence has evolved over time, but the Appellate Body has maintained several basic positions that have shaped its interpretation of the chapeau. These positions are the distinction between a measure and its application, varying standards under subparagraphs of Article XX, and the purpose and function of the chapeau.

1. Distinction Between a Measure and its Application: A Two-Tier Test

In its first decision, *US–Gasoline*,⁵⁹ the AB drew a distinction between a measure and its application under GATT Article XX. The distinction was based on the chapeau text, which states:

Subject to the requirement that such *measures* are not *applied* in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*: (emphasis added)

Drawing the distinction between a measure and its application has turned out to be highly consequential. Previously during the GATT era, it had been generally accepted that it was the violation of a substantive GATT rule that should be tested under Article XX.⁶⁰ In contrast, the AB took the position that it is the measure as a whole, not its violation of a

57. See Appellate Body Reports, *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, at 14–15 (adopted Nov. 1, 1996) (stating that “[a]dopted panel reports are an important part of the GATT *acquis*. . . . They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute”).

58. See WTO Analytical Index, GATS – Article XIV (DS Reports), https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf [<https://perma.cc/9KXZ-VAG6>].

59. AB Report, *US–Gasoline*, *supra* note 38.

60. See Hudec, *supra* note 55, at 637.

substantive rule, that should be examined against the policy objectives of Article XX.⁶¹ Because a challenged measure is typically a regulation that encompasses both violative and non-violative elements, the AB’s approach has made it easier for the measure as a whole to pass the test of the policy objectives. If the measure as a whole is found to meet the test of the policy objectives under the subparagraphs of Article XX, the violative aspect of the measure will be examined under the chapeau as the “manner” in which the measure is applied. Consequently, the chapeau has become a final battlefield between trade and nontrade values under GATT and GATS.

A corollary of this interpretive approach is the order of analysis. According to the AB, GATT Article XX logically involves a two-tier test: first, an assessment of whether the measure falls under one of the exceptions listed in the subparagraphs, and second, an assessment of whether the measure satisfies the requirements of the chapeau.⁶²

2. Varying Standards Under Subparagraphs of Article XX

In *US–Gasoline*, the AB noted that subparagraphs (a) to (j) of GATT Article XX use different terms to describe the connection between the measure at issue and the particular policy objectives.⁶³ Thus, for a measure to fall within the scope of subparagraphs (a), (b), or (d), the measure must be “necessary” for the objective stated therein, whereas a measure invoking the environmental exception of subparagraph (g) merely needs to be “relating to” the objective thereof, provided that the measure also meets the other conditions set out in the subparagraph. Prior GATT panels recognized such textual differences, but managed to interpret “relating to” in such a way that it meant more or less the same thing as “necessary.”⁶⁴ Differentiation in the standards of the subparagraphs of Article XX means that it may be relatively easier for a measure to pass the test under (g) than under (a), (b) or (d).

3. Purpose and Function of the Chapeau

Citing the drafting history, the AB in *US–Gasoline* identified the purpose of the chapeau as follows: “[T]he purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [what was later to become] Article XX.’ This insight

61. AB Report, *US–Gasoline*, *supra* note 38, at 13, 16.

62. *Id.* at 22. The AB seemed to have loosened its position somewhat when it permitted a panel to analyze elements relevant to the chapeau analysis even though the sequence of analysis under Article XX had not been followed. See Appellate Body Reports, *Indonesia–Importation of Horticultural Products, Animals and Animal Products*, ¶ 5.100, WT/DS477, 478/AB/R (adopted Nov. 22, 2017).

63. AB Report, *US–Gasoline*, *supra* note 38, at 17.

64. Hudec, *supra* note 55, at 637.

drawn from the drafting history of Article XX is a valuable one.”⁶⁵

This understanding has been confirmed repeatedly in subsequent AB decisions.⁶⁶

Separately, the AB introduced the function of the chapeau as one of balancing the rights and obligations under the treaty. In *US–Gasoline*, the AB stated:

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.⁶⁷

In *US–Shrimp*, the AB further elaborated its view on the function of the chapeau. First, the AB linked the balance of rights and obligations under the chapeau to the general principle of good faith, which prohibits abusive exercise of rights.⁶⁸ Then, the AB stated:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.⁶⁹

65. AB Report, *US–Gasoline*, *supra* note 38, at 22 (citation omitted).

66. See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 180, WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter AB Report, *US–Shrimp*]; Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 224, WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter AB Report, *Brazil–Tyres*]; Appellate Body Reports, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.297, WT/DS400, 401/AB/R (adopted June 18, 2014) [hereinafter AB Report, *EC–Seal Products*].

67. AB Report, *US–Gasoline*, *supra* note 38, at 22.

68. AB Report, *US–Shrimp*, *supra* note 66, ¶ 158. Bartels believes the AB was mistaken in this regard because “the doctrine of abuse of rights does not serve as an analytical basis for delimiting the chapeau from the subparagraphs of the general exceptions.” Bartels, *supra* note 25, at 102.

69. AB Report, *US–Shrimp*, *supra* note 66, ¶ 159.

According to this understanding, the balance between the rights of Members under GATT would be determined under the chapeau,⁷⁰ and it would be up to the WTO judges to determine such balance on a case-by-case basis. This understanding has proven to be critical in the development of the AB's chapeau jurisprudence.

B. *Relationship Between the Chapeau and Substantive Rules of MFN/NT*

In contrast to the basic positions discussed above, the AB's understanding of the relationship between the chapeau and the substantive rules of MFN and NT changed significantly over time. It is submitted that the AB's jurisprudence on this critical issue has developed along a problematic path, resulting in doctrinal inconsistencies and reduction in policy space of the Members.

1. The Chapeau and MFN/NT Rules: From Differentiation to Conflation

a. The AB's Initial Position

In *US-Gasoline*, the AB made a clear distinction between the chapeau requirement of nondiscrimination and the substantive obligations of nondiscrimination under the GATT. At issue in this case was the United States' measure that explicitly discriminated between domestic and foreign products. In implementing the Clean Air Act of 1990, the United States permitted one method (individual baselines) to measure the cleanness of domestically produced gasoline and required another (statutory baselines) to measure that of imported gasoline. This distinction resulted in less favorable treatment of imported gasoline in violation of GATT Article III:4. The United States invoked Article XX(b), (d), and (g) in defense. The Panel rejected each of the U.S. defenses without engaging with the chapeau provision. On appeal, the AB reversed the Panel's ruling on Article XX(g) and found that the U.S. measure was "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g). Having made this finding, the AB proceeded to the chapeau analysis. There, the AB famously stated:

The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in [Article XX] paragraphs (a) to (j) of meaning. Such recourse would also confuse the

70. *Contra* Bartels, *supra* note 25, at 101–04 (giving a detailed critique of this position).

question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified.⁷¹

In this statement, the AB differentiated the chapeau requirement of nondiscrimination from the substantive rules of nondiscrimination and articulated the underlying rationale for such differentiation. From this position, the AB identified “two omissions” on the part of the United States, which went “well beyond what was necessary for the Panel to determine a violation of Article III:4 had occurred in the first place.”⁷² The two omissions were (i) the failure to explore adequately means of mitigating the administrative problems that the United States relied on as justification for rejecting individual baselines for foreign producers, and (ii) the failure to count the costs for foreign producers that would result from the imposition of statutory baselines. “The resulting discrimination,” said the AB, “must have been foreseen and was not merely inadvertent or unavoidable.”⁷³ Based on these findings, the AB concluded that the baseline rules, in their application, constitute “unjustifiable discrimination” and a “disguised restriction on international trade.”⁷⁴

It should be noted that the AB, in reaching its conclusion, did not examine whether “the same conditions” prevailed between the United States and the complainant countries, even though the difference in enforcement conditions was the main argument of the United States.⁷⁵ Rather, the AB took for granted that the relevant conditions were not the same, and faulted the United States for not having made an adequate effort to mitigate the differences in enforcement conditions. In essence, the AB did not consider the U.S. discriminatory baseline rules to be “necessary” for the implementation of the Clean Air Act.⁷⁶

b. The AB’s Subsequent Positions

In the next major case involving the application of the chapeau, the AB confirmed again that “the nature and quality” of the discrimination found under the chapeau should be “different from the discrimination” found under the substantive GATT obligations, “such as Articles I, III or

71. AB Report, *US–Gasoline*, *supra* note 38, at 23.

72. *Id.* at 28.

73. *Id.*

74. *Id.* at 29.

75. For a critique of the AB’s failure to address this issue, see Deere, *supra* note 25, at 6 (pointing out that “deciding if same conditions prevail should be the threshold issue” in any interpretation of the chapeau).

76. See *infra* Part III.C.3.a for further analysis.

XI.”⁷⁷ And “the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX.”⁷⁸ In subsequent cases, however, the AB departed from this initial position. Instead of differentiating the two standards of nondiscrimination, the AB accepted that the discrimination prohibited under the chapeau could be the same as that prohibited by the MFN/NT rules. This shift first occurred in *Brazil–Tyres* (2007) and was fully developed in *EC–Seal Products* (2014).

i. *Brazil–Tyres*⁷⁹

At issue, in this case, was Brazil’s ban on the import of retreaded tires and used tires. Retreaded tires are produced by reconditioning used tires. They have a shorter lifespan than new tires, hence can turn into waste tires faster than new tires. According to Brazil, millions of waste tires had been discarded in its territory, creating breeding grounds for dengue fever, malaria, and other mosquito-borne diseases. Because it was costly to collect discarded waste tires dispersed across its vast land and technologically difficult to dispose of waste tires properly, Brazil considered the import ban necessary to reduce the accumulation of waste tires in its territory. The import ban was subject to two exceptions. One exception exempted retreaded tires imported from members of MERCOSUR (the Southern Common Market), the trading bloc consisting of Argentina, Brazil, Paraguay, and Uruguay.⁸⁰ This exception was made pursuant to the ruling of a Mercosur arbitration tribunal in a dispute between Brazil and Uruguay, in which Uruguay successfully challenged Brazil’s ban on retreaded tires under the Mercosur treaty. The other exception exempted used tires imported by certain Brazilian producers of retreaded tires, which had secured domestic court injunctions against the import ban.

The European Communities (EC) challenged Brazil’s import ban as inconsistent with GATT Article XI, and the Mercosur exemption as inconsistent with the MFN provisions of GATT Articles I and XIII. Brazil successfully defended the import ban as “necessary to protect human, animal or plant life or health” under Article XX(b).⁸¹ In defense against the MFN claims, Brazil invoked Article XXIV, which allows regional free-trade agreements to deviate from the MFN provisions, and Article XX(d), which excuses measures “necessary to secure compliance” with GATT-consistent laws or regulations.

77. AB Report, *US–Shrimp*, *supra* note 66, ¶ 150.

78. *Id.* ¶ 149.

79. AB Report, *Brazil–Tyres*, *supra* note 66.

80. See *MERCOSUR in brief*, MERCOSUR, <https://www.mercosur.int/en/about-mercursosur/mercursosur-in-brief/> [https://perma.cc/22GN-7UKJ].

81. AB Report, *Brazil–Tyres*, *supra* note 66, ¶ 183.

The Panel, however, exercised judicial economy with respect to the MFN claims. Instead, it examined the Mercosur exemption as the manner in which the import ban was applied under the chapeau. The Panel found that the Mercosur exemption resulted in discrimination between Mercosur countries and other Members, in that retread imports from Mercosur countries were allowed while imports of like products from other Members were banned. (This discrimination is precisely what is prohibited by the MFN rules.) The Panel then found that such discrimination was not “arbitrary” since it arose from Brazil’s treaty obligation under Mercosur, which is a type of agreement expressly recognized by Article XXIV, nor was such discrimination “unjustifiable,” since the Mercosur imports had remained at a level insufficient to undermine Brazil’s policy objective under Article XX(b).⁸²

On appeal, the AB approved the Panel’s approach of treating the Mercosur exemption as the application of the measure to be analyzed under the chapeau, as well as the Panel’s finding of discrimination within the meaning of the chapeau. It, however, reversed the Panel on the characteristics of such discrimination. According to the AB, the analysis of “arbitrary or unjustifiable discrimination” should focus on the “cause” or “rationale” of the discrimination.⁸³ And the ruling of the Mercosur arbitral tribunal “is not an acceptable rationale” for the discrimination between Mercosur countries and other Members “because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree.”⁸⁴ The AB also rejected the Panel’s quantitative approach to the interpretation of “unjustifiable” discrimination, stating that the approach focused exclusively on “the effects” of the discrimination instead of the cause or rationale of the discrimination.⁸⁵

The AB’s interpretive approach has serious policy implications. The Mercosur exemption was designed to be an *exception* to the import ban, and as such, it was intended to serve a different purpose, i.e., to comply with Brazil’s treaty obligation under Mercosur. Therefore, the task of the AB should have been to examine whether this different purpose was otherwise justifiable under WTO law. Instead, the AB ruled that, in order for the Mercosur exemption to be justifiable, its rationale must not go against the objective of the import ban “to however small a degree.”

82. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.274; 7.287–289, WT/DS332/R (adopted Dec. 17, 2007, as modified by the Appellate Body report) [hereinafter Panel Report, *Brazil—Tyres*].

83. AB Report, *Brazil—Tyres*, *supra* note 66, ¶ 225.

84. *Id.* ¶ 228.

85. *Id.* ¶ 229.

Following this (il)logic, WTO Members would never be permitted to make any exception in their domestic regulations subject to Article XX.

With respect to the used-tire exception, the Panel found that it had resulted in discrimination between Brazil and other countries under the chapeau, in that it enabled retreaded tires to be produced in Brazil using imported used tires while prohibiting retreaded tires from other countries using the same used tires. This discrimination falls squarely within the scope of the NT provision under Article III.⁸⁶ The Panel then found that the discrimination was not "arbitrary," since the exception was created by Brazilian courts instead of being a capricious or unpredictable action, but was "unjustifiable" because the used-tire imports directly defeated the objective of the import ban and such imports had taken place in significant amounts.⁸⁷ The AB again upheld the Panel on the finding of discrimination, but reversed the Panel on the characteristics of the discrimination.⁸⁸

The relevant interpretive approach of the AB can be summarized as follows. First, the AB accepted the characterization of the exceptions to the import ban as the manner in which the ban was applied. This characterization allowed the violation of the MFN and NT rules to be examined under the chapeau, rather than the substantive provisions of GATT. Then, the AB applied the same policy objective for the justification of the import ban under Article XX(b) to determine whether the discrimination caused by the exceptions is arbitrary or unjustifiable under the chapeau. In this process, the chapeau definition of discrimination as being between "countries where the same conditions prevail" was completely ignored. In effect, what the AB conducted under the chapeau is a truncated Articles I:1/XX(b) analysis with respect to the Mercosur exemption and a truncated Articles III:4/XX(b) analysis with respect to the used-tire exception. In doing so, the AB in this case accomplished what the AB in *US–Gasoline* had opposed, i.e., "both to empty the chapeau of its contents and to deprive the exceptions in [Article XX] paragraphs (a) to (j) of meaning."⁸⁹

86. The EC did not make a separate Article III claim, and instead challenged the used-tyre exception under the chapeau. Since the used-tyre exception was created by domestic courts instead of being part of the Brazil import regulation, the EC might have considered it more appropriate to characterize the exception as the manner in which the Brazil regulation was applied.

87. Panel Report, *Brazil–Tyres*, *supra* note 82, ¶¶ 7.292–294, 7.295–7.306.

88. The AB reversal was based on the same grounds as those articulated in the context of the Mercosur exemption. AB Report, *Brazil–Tyres*, *supra* note 66, ¶ 247.

89. AB Report, *US–Gasoline*, *supra* note 38, at 23.

ii. EC–Seal Products⁹⁰

This is the latest major case involving the AB’s interpretation of the chapeau. At issue was the EU regulation on the sale of seal products in EU markets (the EU Seal Regime). The Regime consisted of a ban on the sale of seal products—out of public concern over the cruel manner in which seals were hunted and killed—and two major exceptions. One exception exempted seal products obtained from seals hunted by Inuit and other indigenous communities (IC exception); the other exempted seal products obtained from seals hunted for the purpose of marine resource management and sold on a nonprofit basis (MRM exception). The IC exception was intended to protect the traditional lifestyle of indigenous peoples, and the MRM exception to maintain a balanced population of marine resources. The EU Seal Regime, therefore, was designed to achieve divergent policy objectives through balancing the interest of protecting the welfare of seals with those of protecting the welfare of indigenous peoples and other marine resources.

Canada and Norway challenged the EU Seal Regime as discriminatory in violation of the MFN and NT provisions under the GATT, as well as Article 2.1 of the Agreement on the Technical Barriers to Trade (TBT).⁹¹ The Regime applied to all seal products irrespective of their national origins but had a disparate impact on different countries. Under the IC exception, most seal products from Canada and Norway were no longer eligible to enter the EU market, whereas almost all seal products from Greenland remained eligible, as nearly ninety percent of the Greenlandic population is Inuit.⁹² Under the MRM exception, certain EU countries (such as Sweden) would qualify, whereas Canada and Norway were unlikely to benefit as they did not have similar programs for managing marine resources. Based on such disparate impact, Canada and Norway claimed that the IC exception was *de facto* MFN-inconsistent and the MRM exception *de facto* NT-inconsistent.

The EU defended its Seal Regime as a whole under GATT Article XX(a), which excuses measures “necessary to protect public morals.” According to the EU, the public morality of the EU requires examination in each case whether the suffering inflicted on seals is outweighed by the

90. AB Report, *EC–Seal Products*, *supra* note 66.

91. Article 2.1 of the Agreement on Technical Barriers to Trade states: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.” WTO AGREEMENT ON TECHNICAL BARRIERS TO TRADE (Apr. 15, 1994), https://www.wto.org/english/docs_e/legal_e/tbt_e.htm [<https://perma.cc/WHL9-JLFL>] [hereinafter TBT Agreement].

92. See Encyclopedia Britannica, *People of Greenland*, <https://www.britannica.com/place/Greenland/People> [<https://perma.cc/6V5J-D8QH>].

benefit to indigenous peoples or to other animals.⁹³ Citing international instruments on the protection of indigenous peoples, the EU submitted that its legislators considered that the IC exception “provide[s] benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.”⁹⁴ Thus, the EU took the position that both the seal ban and its exceptions are necessary to protect public morals within the meaning of Article XX(a). The EU position was not accepted by the WTO adjudicators. They rejected the IC and MRM interests as independent policy objectives of the EU Seal Regime, and identified seal welfare as the only policy objective to be examined under Article XX(a).⁹⁵ Ultimately, the adjudicators found that the EU Seal Regime violated the GATT MFN and NT provisions due to the two exceptions, and that the violations could not be excused by Article XX(a) because the two exceptions were inconsistent with the chapeau requirement of nondiscrimination.⁹⁶

The AB decision in *EC–Seal Products* is particularly significant for its application of the double-layered nondiscrimination requirements under GATT. In interpreting the underlying MFN and NT provisions, the AB firmly adopted a pure market-impact approach. The AB clarified that the standard of nondiscrimination it developed under TBT Article 2.1—MFN or NT violation occurs only where the detrimental impact of the measure does not “stem exclusively from a legitimate regulatory distinction”—is not applicable under GATT Articles I and III.⁹⁷ Instead, violation of GATT MFN or NT obligation is to be established solely by the detrimental impact of a measure on the competitive opportunities for like products without regard to its regulatory purpose; and the regulatory

93. Panel Reports, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.299, WT/DS400, 401/R (adopted June 18, 201 as modified by the Appellate Body report) [hereinafter Panel Report, *EC–Seal Products*].

94. AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.143 (quoting EU’s submission).

95. The Panel did not determine the moral content of IC and MRM interests—“either alone or as part of a single moral standard”—nor did it accept the EU’s contention that “the benefits to Inuit communities ‘outweighed’ concerns in respect of seal welfare.” AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.148. The Panel’s approach was upheld by the AB. *See id.*

96. The AB decision has been widely commented on and critiqued. *See, e.g.*, Paola Conconi & Tania Voon, *EC–Seal Products: The Tension between Public Morals and International Trade Agreements*, 15 WORLD TRADE REV. 211–34 (2016); Alexia Herwig & Gregory Shaffer, *Editors’ Introduction: Trade, Animal Welfare, and Indigenous Communities: A Symposium on the WTO EC–Seal Products Case*, 108 AJIL UNBOUND 282 (2015) (introducing seven contributions to the Symposium).

97. The AB held that the Panel erred in applying the same legal test under TBT Agreement art. 2.1 to the analysis of Art. XX chapeau, and declared the Panel’s analysis “moot and of no effect” after reversing the Panel’s finding that the EU measure constituted a technical regulation. AB Report, *EC–Seal Products*, *supra* note 66, ¶¶ 5.310–313, 5.70, 6.1.

purpose is to be considered exclusively under Article XX.⁹⁸ Given that the impact of a domestic regulation is almost always disparate on like products from different countries, the pure market-impact approach renders all types of domestic regulations vulnerable to charges of MFN and NT violations under GATT.

In interpreting the chapeau, the AB, unlike in prior cases, approached the provision by first focusing on the term of “same conditions,” which defines the type of discrimination regulated by the chapeau. The AB noted that “only ‘conditions’ that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination” should be considered under the chapeau.⁹⁹ On the critical question of how to determine which conditions are “relevant”, the AB identified two factors: (1) the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified; and (2) the GATT provisions with which a measure has been found to be inconsistent.¹⁰⁰ Applying these factors, the AB decided that the *relevant conditions* for comparison in this case should be determined by the public concern for seal welfare. Since the same animal-welfare concerns arose from seal hunting anywhere, the AB found that the relevant conditions prevailing in all countries are the same.¹⁰¹ Having made this finding, the AB concluded that “the causes of the discrimination” found to exist under Article I:1 “are the same as those to be examined under the chapeau.”¹⁰²

Thus, the same market-impact-based discrimination arising from the IC exception and the MRM exception was found twice in this case: first under the substantive rules of Articles I and III, then under the chapeau of Article XX.¹⁰³ Previously in *Brazil–Tyres*, the substantive rule found to be violated was Article XI (QRs), and the discrimination in the nature of MFN or NT violation was found only under the chapeau. In *EC–Seal Products*, this formal distinction between the findings under the substantive rules and the chapeau was discarded. Instead, the AB

98. See *id.* ¶ 5.125 (stating that “the fact that, under the GATT 1994, a Member’s right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate legislative distinction”).

99. *Id.* ¶ 299 (emphasis original).

100. *Id.* ¶ 5.300.

101. *Id.* ¶ 5.317.

102. *Id.* ¶ 5.318.

103. The Panel had found that the IC and MRM exceptions each caused arbitrary and unjustifiable discrimination within the meaning of the chapeau, and such discrimination resulted from the discriminatory impact found in the two exceptions under GATT Articles I.1 and III.4. Panel Report, *EC–Seal Products*, *supra* note 93, ¶ 7.648. Because the EU did not appeal the Panel’s decision on the MRM exception, the AB decision focused on the IC exception only.

endorsed a complete conflation of the substantive rules and the chapeau provision with respect to the definition of discrimination under GATT.

As for whether the discrimination caused by the IC exception is "arbitrary or unjustifiable," the AB answered in the positive, citing three factors. The first is the EU's inability to show that the IC exception was "rationally related to" the policy objective under Article XX(a). Yet, using the policy objective of the seal ban to assess the justifiability of its exceptions merely creates a foregone conclusion. The second factor cited are the significant ambiguities and broad discretion in the application of the IC requirements, which the AB believed could allow seal products that should be characterized as "commercial hunts" to enter the EU market as "IC hunts". However, using the distinction between "IC hunts" and "commercial hunts" as the basis for defining "arbitrary or unjustifiable discrimination" is legally flawed, because the discrimination prohibited under the chapeau is between countries, not between types of seal hunt.¹⁰⁴ The third factor is the failure of the EU to make "comparable efforts" to facilitate the access of Canadian Inuit to the IC exception as it did for Greenlandic Inuit.¹⁰⁵ Similarly, it is questionable whether the Inuit-based discrimination amounts to the country-based discrimination prohibited under the chapeau.¹⁰⁶

Overall, the AB in this case adopted a rigid interpretive framework for GATT Article XX. Under this framework, the measure at issue, broadly defined, may only have one policy objective justifiable under the subparagraphs of Article XX. That policy objective will then be used as the criterion for determining relevant conditions for comparison between countries under the chapeau. Inevitably, the condition-based discrimination so determined will be found to be the same as the product-based discrimination in violation of MFN or NT obligations, which has been examined under the subparagraphs of Article XX. Then the same policy objective will be used again to assess whether such condition-based discrimination is arbitrary or unjustifiable under the chapeau. This last step essentially repeats the process of applying the subparagraphs of

104. The AB used "IC hunts" and "commercial hunts" as the surrogate for products of Greenland and Canada/Norway respectively, as seal hunts in Greenland are predominantly IC hunts, whereas seal hunts in Canada and Norway are primarily commercial hunts. The distinction between commercial and non-commercial hunts, however, is "illusory" since all seal hunts have commercial dimensions. See Panel Report, *EC–Seal Products*, *supra* note 93, ¶ 7.178. More importantly, the use of the surrogate is inherently misleading because it is based solely on the market impact of the IC exception without regard for its purpose.

105. AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.337 (citing as example that the Danish customs provided the Greenlandic Inuit with certain processing convenience). The AB, however, ignored the special relationship between the Danish government and Greenland, which remains an autonomous territory within the Kingdom of Denmark.

106. As Bartels pointed out, "on no reading of the chapeau is GATT 1994 concerned with discrimination between indigenous communities per se." Bartels, *supra* note 25, at n.125.

Article XX to the measure, except that the target of application under the chapeau is the violative aspect of the measure (i.e., the IC and MRM exceptions), instead of “the measure as a whole” that has been excused under the subparagraphs of Article XX.

c. Problems of Conflating MFN/NT Obligations and the Chapeau Requirements

Conflating MFN/NT obligations with the chapeau requirement of nondiscrimination creates several problems in WTO law:

(i) Doctrinal incoherence. The conflation results in the types of incoherence identified by the AB in *US–Gasoline*, i.e., it effectively empties the chapeau of its contents and deprives the exceptions in Article XX paragraphs (a) to (j) of meaning.¹⁰⁷

(ii) Loss of defenses. The conflation may deprive the respondent of defenses *outside* GATT Article XX or GATS Article XIV. As shown in *Brazil–Tyres*, when the Panel exercised judicial economy with the MFN claims and examined the Mercosur exemption under the chapeau of Article XX instead, Brazil lost the opportunity to invoke Article XXIV as the defense against the MFN claim under Article I:1.

(iii) Reversal of burden of proof. The conflation leads to a reversed burden of proof under GATT and GATS to the disadvantage of the respondent, raising the issue of procedural fairness.

It is well established in WTO jurisprudence that the burden of proof rests on the party that asserts the affirmative of a claim or defense.¹⁰⁸ Accordingly, under the substantive MFN and NT provisions, the burden is on the complainant to show that the respondent’s measure has resulted in discrimination in violation of the MFN or NT rules, whereas under the general exceptions of GATT/GATS, it is up to the respondent to prove that its measure at issue meets the conditions of the general exceptions, including the chapeau. However, when the chapeau is used to find discrimination in the nature of MFN/NT violations, the burden is reversed. Rather than requiring the complaining party to establish such violations, the burden is shifted to the responding party to show that no such violation has occurred.

The effect of such reversal of burden can be most acutely observed in the case of *US–Gambling*.¹⁰⁹ Antigua brought this dispute to challenge various US federal and state laws that prohibit online gambling, including cross-border gambling services. Antigua claimed that the U.S. measures violated the specific commitments in U.S. Services Schedule, GATS

107. AB Report, *US–Gasoline*, *supra* note 38, at 23.

108. COOK, *supra* note 1, at 122.

109. Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter AB Report, *US–Gambling*].

Article XVI *Market Access* and Article XVII *National Treatment*. The United States defended its measures under Article XIV(a) and (c), which respectively excuse measures "necessary" to protect public morals and to secure compliance with domestic law.

In this first case involving application of GATS Article XIV, the Panel and the AB essentially followed jurisprudence developed under GATT Article XX. The Panel found that the US measures violated its Services Schedule and GATS Article XVI, then exercised judicial economy with respect to the NT claim under Article XVII.¹¹⁰ These findings were upheld by the AB on appeal.¹¹¹ With respect to the US defense, the AB found that while the U.S. measures were "necessary to protect public morals or maintain public order" within the meaning of Article XIV(a),¹¹² they failed to meet the chapeau requirements. The finding under the chapeau was based on a comparison between the Internet-gambling services remotely supplied by Antigua, which were banned under the US federal statutes, and the remote supply of betting services for horse racing, which was permitted under the Interstate Horseracing Act (IHA).¹¹³ According to the AB, "the United States has not demonstrated that—in the light of the existence of the IHA—[the several US federal statutes] are applied consistently with the requirements of the chapeau."¹¹⁴

Hence, the AB's final ruling against the United States was based entirely on the failure of the United States to prove that the existence of the IHA did not cause the discrimination prohibited by the chapeau. The nature of this alleged discrimination, however, is the same as violation of the NT obligation under Article XVII, which requires that each Member, in sectors inscribed in its schedule, "shall accord to services and service

110. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.426, WT/DS285/R (adopted Apr. 20, 2004, as modified by the Appellate Body report) [hereinafter Panel Report, *US—Gambling*].

111. For critiques of the analytical approach adopted by the WTO adjudicators, see Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4(2) WORLD TRADE REV. 131–70 (2005); Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US—Gambling: A Critique*, 9 J. INT'L ECON. L. 117–48 (2006).

112. AB Report, *US—Gambling*, *supra* note 109, ¶ 327. In this regard, the AB reversed the Panel's finding that the US measures did not meet the "necessary" standard under either paragraph (a) or (c) of Article XIV because the United States had not resorted to consultations with Antigua as a less trade-restrictive alternative. The AB held that such consultations cannot qualify as a reasonably available alternative "because consultations are by definition a process, the result of which are uncertain." *Id.* ¶¶ 317, 321.

113. The United States argued that the IHA did not authorize any form of Internet gambling because the IHA as a civil statute could not amend pre-existing criminal statutes that banned the Internet gambling. Panel Report, *US—Gambling*, *supra* note 110, ¶ 6.595. The Panel concluded, however, that the US did not provide sufficient evidence to substantiate its claim. *Id.* ¶¶ 6.596–.597, 6.599–.600.

114. AB Report, *US—Gambling*, *supra* note 109, ¶ 369.

suppliers of any Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.”¹¹⁵ Had the Panel not exercised judicial economy with respect to Antigua’s claim under Article XVII, Antigua would have had the burden to demonstrate, *inter alia*, that the Internet-gambling services and remote-betting services for horse racing are “like services”. Under the chapeau, however, the burden of proof is placed on the party that invoked the general exceptions. In this instance, the likeness of the two types of services was simply assumed unless the United States could prove otherwise.¹¹⁶ Thus, even though the AB recognized that the US measures have a legitimate policy objective and are nondiscriminatory on their face,¹¹⁷ it ultimately ruled against the United States through shifting the burden of proof on the claim of discrimination.

The reversal of the burden of proof occurs not only with respect to the claim of discrimination, but also in the context of justifiability of discrimination. Under GATT Article XX/GATS Article XIV, it has been settled that while the burden to show that a measure is “necessary” to achieve the policy objective set out in the subparagraphs resides generally with the respondent, it is up to the complainant to identify any alternative measures that the respondent could have taken to achieve the same policy goal. According to the AB, “[A] responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and impossible burden.”¹¹⁸ Yet, “such an impracticable and impossible burden” is imposed on the responding party under the chapeau. In *EC–Seal Products*, for instance, the EU was found to have failed to demonstrate why it could not have done “anything further” to ensure that the welfare of seals is addressed in the context of IC hunts. This failure was cited to support the AB’s finding under the chapeau that the discrimination caused by the IC exception is unjustifiable.¹¹⁹

2. Creation of Super-NT and Extra-MFN Obligations

In addition to conflating the MFN/NT obligations with the chapeau requirement, the AB also read into the chapeau a standard of nondiscrimination that goes above and beyond the requirements of GATT

115. GATS, *supra* note 6, art. XVII:1.

116. The United States simply insisted that there was no discrimination of any kind in the application of its laws. AB Report, *US–Gambling*, *supra* note 109, ¶ 350 (stating further that the United States “could have, but did not, put forward an additional argument that even if such discrimination exists, it does not rise to the level of ‘arbitrary’ or ‘unjustifiable’ discrimination”).

117. AB Report, *US–Gambling*, *supra* note 109, ¶ 357.

118. *Id.* ¶ 309.

119. AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.320.

MFN/NT rules, thereby creating certain super-NT and extra-MFN obligations in WTO law. The AB did so in *US–Shrimp*, a landmark decision addressing the relationship between trade and the environment.¹²⁰

At issue in *US–Shrimp* was a U.S. law (Section 609 of Public Law 101-102) and its implementing regulations that prohibited shrimp imports unless the shrimp-exporting country obtained U.S. certification for compliance with the U.S. requirements for the protection of sea turtles in shrimp harvesting. Complainants in this case, India, Malaysia, Pakistan and Thailand, claimed that the US measure violated GATT Articles I and XIII (MFN), and Article XI (QRs). The United States defended its measure under Article XX(g).

The Panel found that the U.S. measure violated Article XI, and exercised judicial economy with respect to the MFN claims. Under Article XX, the Panel examined the chapeau first and found that the U.S. measure does not meet the chapeau requirements because its unilateral action undermines the WTO multilateral trading system.¹²¹ On appeal, the AB reversed the Panel with respect to the sequence of analytical steps under Article XX and the reasoning under the chapeau. The AB held that the U.S. measure was “provisionally” justified under paragraph (g), but failed to meet the nondiscrimination requirements under the chapeau. Specifically, the AB found that the U.S. import ban was applied in a manner that constituted “arbitrary” and “unjustifiable” discrimination between countries where the same conditions prevail. The AB reached this conclusion upon making two comparisons: one between the United States and shrimp-exporting countries (the NT-type comparison), and the other between the various shrimp-exporting countries (the MFN-type comparison).

a. The NT-Type Comparison: Creation of a “Super” NT Obligation

It is important to note that the complainants in this case did not make any claim under GATT Article III. Despite the absence of any NT claim under Article III, the AB made an NT-type comparison under the chapeau and found that the U.S. measure was applied in a manner that constituted arbitrary and unjustifiable discrimination between the United States and other countries. In its NT-type comparison, the AB recognized that the United States applied a uniform standard throughout its territory, regardless of particular conditions existing in particular parts of the country. Yet, the AB stated that, while such a single standard may be quite acceptable domestically,

120. See Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US–Shrimp Case*, 20 MICH. J. INT’L L. 819, 822 (1999).

121. Panel Report, *US–Shrimp*, *supra* note 29, ¶¶ 7.29–.62.

it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force in that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members. . . .

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.¹²²

This AB finding is remarkable, for it read into the chapeau a nondiscrimination obligation that goes above and beyond the scope of the national treatment obligation of Article III. Under Article III, a Member is required to afford products of other Members treatment “no less favorable” than that accorded to like domestic products in respect of “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”¹²³ The U.S. measure in this case accorded identical treatment to shrimp of foreign and domestic origins. In theory, formally identical treatment may result in less favorable treatment if it modifies the conditions of competition in favor of domestic products compared to like foreign products.¹²⁴ Whether the U.S. measure falls into this category, however, is an issue to be determined under Article III. Here, the AB found that the formally identical treatment resulted in “unjustifiable discrimination” because the United States failed to take into account particular *conditions* prevailing in the foreign countries. Compared to “like products” under Article III,¹²⁵ what constitutes “the same conditions” in the context of Article XX is largely an open-ended question.¹²⁶ The AB did not clarify what particular

122. AB Report, *US-Shrimp*, *supra* note 66, ¶¶ 164–65 (emphasis original).

123. GATT, *supra* note 8, art. III:4.

124. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 135–37, WT/DS161/AB/R (adopted Jan. 10, 2001) [hereinafter AB Report, *Korea—Beef*]. This understanding is explicitly reflected in GATS Art. XVII:2 and 3. See GATS, *supra* note 6.

125. In determining “like products” under Article III, the AB recognized four traditional criteria developed in the GATT era: physical properties, end-uses, consumer tastes, and tariff classification. In addition, it stated that a determination of “likeness” under Article III:4 is fundamentally “a determination about the nature and extent of a competitive relationship between and among products.” Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 99, WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter AB Report, *EC—Asbestos*].

126. See *infra* Part IV.A.2.b.

conditions in the shrimp-exporting countries should have been taken into account by the United States. By requiring a Member to take into account unspecified "particular conditions" prevailing in other countries before it can implement a regulatory program that otherwise falls within the scope of an Article XX exception, the AB created a "super" NT requirement under the chapeau.¹²⁷

This super-NT requirement exists irrespective of whether the measure at issue violates the NT obligation under Article III. Furthermore, violation of this super-NT requirement was found to constitute "unjustifiable" discrimination without the benefit of any policy exceptions. The same violation was found also to constitute "arbitrary" discrimination due to "the rigidity and inflexibility" in the administration of the measure at issue.¹²⁸

b. The MFN-Type Comparison: Creation of Extra-MFN Obligations

Similarly, the AB's findings based on the MFN-type comparison went far beyond what is required by GATT's MFN provisions. In this regard, the AB identified three differences in the treatment of shrimp-exporting countries by the United States: (i) it had negotiated with some shrimp-exporting countries on the conservation of sea turtles but not with others; (ii) it had granted some shrimp-exporting countries a longer "phase-in" period for complying with the U.S. requirements than that granted to others; and (iii) it had made greater efforts to transfer technology for sea-turtle protection to some shrimp-exporting countries than to others.¹²⁹ The AB found that the three differences in treatment resulted in "unjustifiable" discrimination among shrimp exporting countries.

Of the three differences identified by the AB, only that concerning "phase-in" periods might fall within the scope of GATT Article I:1. Arguably, the phase-in periods may fall under the category of "rules and formalities in connection with importation."¹³⁰ Indeed, the complainants

127. According to Gaines, the Appellate Body turned the "same conditions" proviso on its head, in that the AB found the U.S. inflexible approach impermissible under the chapeau, not because it discriminated between countries where the same conditions prevail, but because it refused to discriminate between countries where different conditions may prevail. Gaines, *supra* note 25, at 783.

128. AB Report, *US-Shrimp*, *supra* note 66, ¶ 177.

129. *Id.* ¶¶ 172–76.

130. Article I:1 states: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally

did claim that the U.S. measure—in particular, the differences in the phase-in periods offered to shrimp-exporting countries—violated Article I:1.¹³¹ But the Panel exercised judicial economy with respect to the Article I claim. Thus, when the AB identified the differences in phase-in periods as a basis for the chapeau violation, it implicitly found an MFN violation under the chapeau. The AB then labeled the resulting discrimination as “unjustifiable” without further explanation.

In contrast with the phase-in periods, negotiation with exporting countries and technology transfer can hardly be considered “rules and formalities in connection with importation and exportation.” Instead, these are mostly a matter of U.S. foreign policy. Even though the differences in the level of U.S. efforts to negotiate and transfer technology had resulted in differential treatment between exporting countries, such treatment is outside the scope of Article I. Notably, the complainants did not include these two items in their Article I claim. Thus, by finding that the differences in the U.S. efforts to negotiate and transfer technology resulted in “unjustifiable discrimination” among exporting countries, the AB interpreted the chapeau as containing a type of MFN obligation that goes beyond the primary MFN obligation under GATT.

In the subsequent compliance proceedings, the AB further articulated the extra-MFN obligation with respect to negotiations. The AB stated that negotiations must be “comparable” in the sense that “comparable efforts are made, comparable resources are invested, and comparable energies are devoted to secure an international agreement.”¹³² Note that in articulating this standard, the AB did not impose a duty to negotiate;¹³³ instead, what it imposed is a duty to offer equal opportunities to negotiate. Thus, if the United States had not negotiated with any country in the implementation of its import ban, it would not have violated this extra-MFN obligation. But if it were ever to engage in negotiation with one country, it must be prepared to devote “comparable” efforts, resources and energies to negotiating with all countries that desire such an opportunity. The same logic would apply to the effort to transfer technology. In imposing this “equal opportunity” requirement, the AB clearly intended to encourage international cooperation in the

to the like product originating in or destined for the territories of all other contracting parties.” GATT, *supra* note 8, art. I:1.

131. The complainants also claimed in general that the US measure violated GATT Art. I in that it allowed the import of shrimp from certain countries but prohibited the import of like product from other countries. Panel Report, *US–Shrimp*, *supra* note 29, ¶ 3.135.

132. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (adopted Nov. 21, 2001), ¶ 122 [hereinafter AB Report, *US–Shrimp (Article 25.1)*].

133. See generally Bradley Condon, *Does International Economic Law Impose a Duty to Negotiate?*, 17(1) CH. J. INT’L L. 73–110 (2018).

environmental policymaking of the Members. Yet, it might have exactly the opposite effect if Members take this requirement seriously in conducting their foreign relations.

Following its decision in *US–Shrimp*, the AB in *EC–Seal Products* created yet another extra-MFN obligation. Recall that the AB faulted the EU for not having made “comparable efforts” to help Canadian Inuit utilize the IC exception, and cited such failure as one of the factors in finding that the IC exception constituted unjustifiable discrimination under the chapeau.¹³⁴ Like the obligations of making “comparable efforts” to negotiate and transfer technology, the requirement that the EU make comparable efforts to help Canadian Inuit is beyond the rule coverage of GATT Article I:1.¹³⁵

c. Problematic Implications of Super-NT and Extra-MFN Obligations

The policy implications of such super-NT and extra-MFN obligations can be profound. For example, these requirements make it almost impossible for the EU’s CBAM, or any climate club proposed,¹³⁶ to become WTO-compliant, since any Member adopting such a carbon policy would be required to take into account different conditions prevailing in different countries (the super-NT obligation) and to first engage in good faith negotiations with all the countries affected (the extra-MFN obligation). Therefore, the effort to hammer such a climate policy into a shape that is sure to pass WTO scrutiny has been described as “a fool’s errand”.¹³⁷

The question, however, is whether the chapeau *should* be interpreted to impose any requirement of nondiscrimination that goes beyond the scope of the MFN and NT provisions under GATT or GATS. In the early days of the WTO, John Jackson suggested that the chapeau requirements “can be characterized as ‘softer’ obligations” of MFN and NT, meaning that they allow departure from the strict language of the MFN and NT rules to the extent necessary to pursue the goals listed in the general

134. AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.337.

135. The AB cited its report in *US–Shrimp (Article 25.1–Malaysia)* as support. AB Report, *EC–Seal Products*, *supra* note 66, at n.1611.

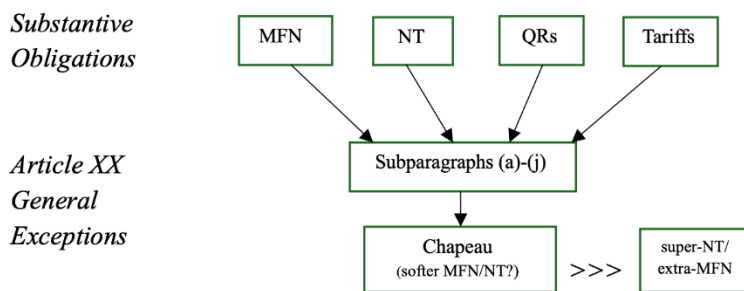
136. *See supra* text at notes 12–14.

137. J. Benton Heath & Timothy Myer, *Bold Climate Action Means Seizing WTO Law’s “Policy Space,”* ROOSEVELT INST. BLOG (July 18, 2023), <https://rooseveltinstitute.org/2023/07/18/bold-climate-action-means-seizing-wto-laws-policy-space/> [https://perma.cc/3HQV-RYSV]. Notably, although CBAM may cause “climate injustice” to poor countries, the proposal to fix the problem has not been to abandon CBAM, but for the EU to provide financial aid to the countries that are adversely affected by the policy. *See* Joel Trachtman & Dr. Jan Yves Remy, *The EU’s Carbon Border Tax is a Blow to Climate Justice. Here’s How to Fix It*, REUTERS (Nov. 15, 2023, 7:24 AM), <https://www.reuters.com/sustainability/boards-policy-regulation/comment-eus-carbon-border-tax-is-blow-climate-justice-heres-how-fix-it-2023-11-15/> [https://perma.cc/9RK7-UPSF].

exceptions, “but not to the extent of non-MFN discrimination or protection of domestic production”¹³⁸ He did not provide any example of potential violation of such softer obligations. But it is conceivable that such “softer” MFN and NT requirements may be imposed in cases in which the general exceptions are invoked to excuse a measure that violates a GATT/GATS provision other than the MFN or NT rules, e.g., GATT Article XI (QRs) or Article II (tariff bindings), and in which the measure at issue is applied in a somewhat discriminatory manner without technically violating the MFN and NT rules. Conceptually, such “softer” MFN/NT requirements under the chapeau would be in the same category as the requirement of “even-handedness” under GATT Article XX(g)¹³⁹ and the “equitable” principle under GATT Article XX(j),¹⁴⁰ which impose NT-like and MFN-like condition respectively, but do not rise to the level of GATT NT/MFN obligations.

The super-NT and extra-MFN obligations created by the AB are qualitatively different from the kind of “softer” MFN or NT requirement suggested by Jackson. Instead of being less demanding than the MFN and NT obligations, the super-NT and extra-MFN requirements impose obligations above and beyond the requirements of MFN and NT obligations. Their differences can be illustrated by the diagram below.

General Agreement on Tariffs and Trade (GATT)



138. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997), at 233–34. is also interesting to compare this notion with Jackson’s prior assessment of the chapeau). JACKSON, *supra* note 51. Thanks Steve Charnovitz for alerting me of this source.

139. Article XX(g) excuses measures “relating to the conservation of exhaustible natural resources *if* such measures are made effective in conjunction with restrictions on domestic production or consumption.” (italics added). This NT-like condition was interpreted by the AB as “a requirement of even-handedness”, which did not rise to the level of national treatment under Article III:4. AB Report, *US–Gasoline*, *supra* note 38, at 20–21.

140. See Appendix A. The MFN-like condition in Article XX(j) has not been interpreted in WTO cases.

This diagram also reveals a problem in legal logic. If the purpose of the chapeau is to prevent abuse of the general exceptions, as is generally accepted in WTO jurisprudence, the chapeau cannot logically contain any requirement that is more stringent than those imposed by the substantive rules of GATT or GATS. For, when a measure does not violate the substantive rules of GATT or GATS, it shall not enter the purview of the general exceptions of GATT or GATS in the first place; consequently, there cannot be any issue of "abuse" by the measure of the general exceptions.

Thus, the AB's interpretation of the chapeau requirement has gone beyond the generally assumed function of the chapeau. Instead, it has expanded the scope of GATT substantive obligations. This practice would appear to be inconsistent with the mandate of the Dispute Settlement Understanding (DSU) that "the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."¹⁴¹ Since the AB's interpretation has been adopted by the Dispute Settlement Body (DSB), the super-NT and extra-MFN obligations are now part of WTO case law. Considering that the scope of DSB rulings is similarly constrained by the DSU,¹⁴² the legality of the super-NT and extra-MFN obligations can only be explained by possible alternative functions of the chapeau.¹⁴³

C. A Special Role of the Chapeau Carved Out by the Appellate Body

The AB approached GATT Article XX by first drawing a distinction between the measure at issue, which is to be examined under the subparagraphs, and the application of the measure, which is to be examined under the chapeau.¹⁴⁴ While this distinction may be a mere "fiction,"¹⁴⁵ drawing the distinction has allowed the AB to create new jurisprudence for Article XX. This new jurisprudence, on the one hand, has helped to reorient the world trading system in support of non-trade values of the environment and public health, and on the other, has expanded WTO governance by constraining the regulatory autonomy of the Members beyond the scope of GATT substantive rules.

141. WORLD TRADE ORG., UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [https://perma.cc/75E9-97K7], art. 19.2 [hereinafter DSU].

142. *Id.* art. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

143. *See infra* Part IV.A.1.

144. *See supra* Part II.A.1.

145. Bartels, *supra* note 25, at 98–101.

With respect to the support of non-trade values, *US-Shrimp* was a milestone.¹⁴⁶ In that case, the AB characterized the broad U.S. statute that prohibited shrimp imports without U.S. certification for sea-turtle protection as the “measure” and its implementing guidelines as the manner in which the measure was “applied.” Based on this distinction, the AB was able to find that the U.S. statute fell within the environmental exception of Article XX(g), and it was merely the implementing guidelines that were problematic under the chapeau. The AB’s finding that the US statute is GATT-consistent was highly significant during the heyday of trade/environment debate, as it helped project the WTO as an organization sensitive to the environment, in sharp contrast with the image of its institutional predecessor.¹⁴⁷ A similar scenario can be observed in *Brazil-Tyres*. There, the AB characterized Brazil’s import ban on retreaded tires as the “measure” and the Mercosur and used-tire exceptions as how the ban was applied. Applying a highly deferential standard of review, the AB found the measure to be “necessary” to protect public health within the meaning of Article XX(b).¹⁴⁸ It then invalidated the Mercosur exception and the used-tire exception under the chapeau. The effect of the AB rulings was for Brazil to tighten its import ban on retreaded tires,¹⁴⁹ a remarkable result for the WTO, whose main mission is to liberalize international trade.

In contrast with the lenient standards applied in its application of the subparagraphs of Article XX, the AB exercised a relatively strict scrutiny in its application of the chapeau. Thus, in *US-Shrimp*, the AB characterized the U.S. implementation of its environmental statute as arbitrarily and unjustifiably discriminatory by reading into the chapeau super-NT and extra-MFN requirements. In *Brazil-Tyres* and *EC-Seal Products*, the AB insisted that the regulatory exceptions to be examined under the chapeau must be “rationally related to” and may “not go

146. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27:1 EUROPEAN J. INT’L. L. 9, 36 (2016) (stating that “[n]o jurisprudence is more significant than the *Shrimp-Turtle* dispute for marking the evolution of the Appellate Body as a judicial system independent of, and operating at a distance from, the WTO as an institution and from the ideological and policy orientations that tend to drive it”).

147. In the two GATT cases brought in the early 1990’s that involved almost identical disputes as that in *US-Shrimp*, the GATT panels found that US law, which banned the imports of tuna harvested using technology that resulted in incidental killing of many dolphins, could not be excused under Art. XX(b) or (g). See Panel Report, *United States-Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991) (unadopted); Panel Report, *United States-Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) (unadopted). Although these panel reports were not adopted, the Tuna-Dolphin decisions have damaged GATT’s reputation as being anti-environmental.

148. The AB stated that an import ban can be considered “necessary” under Article XX(b) upon demonstration that it “is apt to produce a material contribution to the achievement of its objective.” AB Report, *Brazil-Tyres*, *supra* note 66, ¶ 151.

149. See Status Report by Brazil, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/19/Add.6 (15 Sept. 2009).

against" the objective of the regulation that had been provisionally justified under a subparagraph of Article XX. The effect of these rulings is to outlaw any exception a Member may adopt in its regulatory scheme that falls under one of the subparagraphs of Article XX, irrespective of whether the exception serves a separate legitimate objective on its own.

In the view of some commentators, the AB's chapeau interpretation signals a new vision about WTO's nondiscrimination rules. According to Lang, the AB has invented something new: "Non-discrimination is now imagined rather differently from the way it was imagined in post-war embedded liberalization, not as a tool to stamp out "cheating" and to constrain protectionist forces but, rather, as a means of disciplining regulatory arbitrariness and promoting better designed, tightly focused and more efficient regulation."¹⁵⁰

In this vein, the AB can be understood to have transformed the nondiscrimination principle from a tool for negative integration to positive integration.¹⁵¹ Under the substantive MFN and NT rules, which embody the policy of negative integration, a Member is free to adopt any domestic regulation so long as it does not discriminate between like products on the basis of their national origin or destination; whether the domestic regulation is rational or otherwise "good" or "bad" is not the concern of these rules.¹⁵² In contrast, under the new chapeau requirements, a domestic regulation is expected to meet certain standards of economic rationality or reasonableness even if it does not violate the MFN or NT rules. In this sense, the chapeau has become a tool for promoting positive integration of domestic regulations.¹⁵³

Whether or not the AB consciously pursued this vision,¹⁵⁴ one thing seems clear: the AB has carved out a special role for the chapeau. Rather than being part of the conditions on the exercise of general exceptions, the chapeau has been applied to impose a separate set of requirements. In

150. Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27:4 EUROPEAN J. INT'L L. 1095, 1099 (2016).

151. Positive integration is where common rules are provided by a higher authority to iron out differences between countries, whereas negative integration refers to barriers between countries being removed. See *Integration and Integration Theories*, EUABC.COM, <http://en.euabc.com/word/572> [<https://perma.cc/H3FN-2MPF>].

152. Domestic regulations are of course subject to all other rules of the WTO, including in particular the transparency requirements under GATT and GATS.

153. The world trading system is predominantly based on the policy of negative integration. Nonetheless, the WTO has a few rules of positive integration whereby the Members are required to meet specific regulatory standards. Major examples include the TRIPS Agreement (setting minimum standards for IP protection), the TBT Agreement (requiring technical regulations to be no more trade-restrictive than necessary to fulfil a legitimate objective), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) (harmonizing Members' sanitary and phytosanitary measures on the basis of international standards).

154. See Howse, *supra* note 146, at 45–53 (characterizing AB's chapeau jurisprudence as one of its judicial policies).

doing so, the AB “has re-cast itself as public policy watchdog” for the domestic regulations of WTO Members.¹⁵⁵

III. THE MYTH ABOUT THE FUNCTION OF THE CHAPEAU

In light of the evolution of WTO jurisprudence, one wonders why the relationship between the chapeau provision and the substantive MFN/NT rules should be so confusing and what the proper function of the chapeau should be. This Part delves into these puzzles. First, it finds that the chapeau provision introduces an incoherent order of values under the treaty, which is the source of the confusion. Second, it challenges the AB’s notion that the function of the chapeau is to balance the right of a Member to invoke the general exceptions against the right of other Members under the substantive rules. Third, it questions whether the chapeau is needed for the prevention of abuse. To that end, it examines the actual function of the chapeau in all fourteen WTO disputes in which noncompliance with the chapeau was found by the adjudicators.

A. *An Incoherent Order of Values*

In Part II, we have identified an oversight in the drafting process of the Havana Charter: when adding the chapeau language modeled after the 1927 Convention to the general exceptions, the drafters overlooked the relationship between the chapeau requirement and the substantive rules of MFN and NT, an issue non-existent under the 1927 Convention. This oversight has turned out to be consequential under the AB’s textualist approach to treaty interpretation.

As a matter of treaty structure, adding the chapeau language to the general exceptions has created an incoherent order of values. Conceptually, when a law provides an exception to a rule, the exception is given priority over the rule. Assuming the rule and the exception each reflects a certain value, the value embodied in the exception is given priority over the value represented by the rule. The exception may be subject to various conditions, which may limit the applicable scope of the exception, but the presence of conditions does not change the basic order of values.

GATT Article XX and GATS Article XIV each set out certain policy reasons for which a WTO Member can be excused from all substantive rules of GATT and GATS. Accordingly, the value protected by each of such general exceptions is given priority over the values of liberal trade and nondiscrimination (in the form of MFN and NT), the two basic principles of the world trading system. As the main sentence of GATT Article XX/GATS Article XIV declares, “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of

155. Lydgate, *supra* note 10.

measures" that conform with the subparagraphs of these articles.¹⁵⁶ This main sentence thus prescribes the hierarchy of values under GATT and GATS. As Farber and Hudec noted: "The carefully stated exceptions found in GATT Article XX represent an acknowledgement by the GATT's drafters that certain national regulatory goals have a high enough priority to override GATT's free trade goals in cases of true conflict."¹⁵⁷

Now consider the effect of the conditions on the values protected by the general exceptions. Setting aside the chapeau provision, each exception under GATT Article XX is subject to a particular set of conditions contained in the relevant subparagraph. Depending on the policy objectives, some subparagraphs contain more elaborate conditions than others. These conditions define the scope of each exception, but they do not alter the basic order of values declared by the main sentence of Article XX.

Take for example paragraphs (g), (i) and (j) of Article XX, each of which contains a condition relevant to the principle of nondiscrimination.¹⁵⁸ Article XX(g) requires that the measures relating to the conservation of exhaustible natural resources be "made effective in conjunction with restrictions on domestic production or consumption". This NT-like condition embodies "a requirement of even-handedness," which does not rise to the level of national treatment under Article III:4.¹⁵⁹ As such, the condition does not affect the basic order of values prescribed by Article XX—the protection of exhaustible natural resources within the meaning of paragraph (g) shall have a priority over the protection of imported products under Article III:4. Similarly, Article XX(j) excuses measures "essential to the acquisition or distribution of products in general or local short supply", provided that "any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products. . . ." The "equitable-share" principle is an MFN-like condition for invoking paragraph (j), but it is a softer requirement than the MFN obligations contained in Articles I and XIII, hence does not affect the basic order of values declared by Article XX. A somewhat different case is Article XX(i), which excuses measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry", provided that such restrictions "shall not depart from the provisions of this Agreement relating to non-discrimination". This proviso carves out the entire group of MFN and NT provisions from the application of this exception. The

156. See Appendix A.

157. Daniel Farber & Robert Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1421 (1994).

158. See Appendix A.

159. AB Report, *US-Gasoline*, *supra* note 38, at 20–21.

drafting history shows that this proviso was added in response to concerns about potential abuse of this exception.¹⁶⁰ The carveout notwithstanding, the value order remains clear: export restrictions within the meaning of paragraph (i) shall prevail over all substantive rules of GATT except the MFN and NT provisions.

This otherwise clear order of values is muddled by the introduction of the chapeau requirement of nondiscrimination. Conceptually, the chapeau requirement is merely another condition that applies horizontally to all subparagraphs of Article XX. However, unlike the NT-like and MFN-like conditions in subparagraphs of Article XX(g) and (j), which can be readily distinguished from the MFN and NT obligations, the chapeau requirement of nondiscrimination may be understood to encompass the MFN and NT obligations, since the condition-based discrimination is conceptually broader than the product-based discrimination. (Hence the AB could conflate the chapeau requirement with the MFN and NT obligations.) To further confuse the value order, the discrimination prohibited by the chapeau must be “arbitrary” or “unjustifiable” in character, suggesting that the chapeau recognizes another set of values that are higher than the value of nondiscrimination. Yet, beside non-arbitrariness, this set of higher values is unspecified. Consequently, it is unclear whether the values justifying the discrimination under the chapeau are supposed to be the same as the values represented by the subparagraphs. And the AB’s position on this issue has flipped.¹⁶¹

In short, to the extent that the chapeau requirement may duplicate the MFN/NT obligations, it has created an incoherent order of values under the treaty. This incoherent order of values appears to be the source of the inconsistencies and incoherence manifested in the AB’s chapeau jurisprudence.

B. *The Fallacy of Balancing Rights Under the Chapeau*

Contrary to the above understanding, the AB believed that the relationship between the values embodied in the general exceptions and those in the substantive rules of GATT is not hierarchical, but rather one

160. GATT Analytical Index (pre-1995), Article XX, at 592, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm [<https://perma.cc/DWT5-LCV7>]. There has been no reported dispute involving paragraph (i). Arguably, this proviso renders the chapeau redundant in the context of paragraph (i).

161. The AB initially took the position that “the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX.” AB Report, *US–Shrimp*, *supra* note 66, ¶ 149. In subsequent cases, the AB reversed this position, insisting instead that the measure to be examined under the chapeau must be “rationally related to” and may “not go against” the objective of the regulation that had been provisionally justified under a subparagraph of Article XX. AB Report, *Brazil–Tyres*, *supra* note 66, ¶ 228.

of “balance” between “competing rights” of the Members under the treaty. According to the AB, the chapeau is where such balance is struck, and the task of the treaty interpreter is to locate and mark out “a line of equilibrium” between such competing rights on a case-by-case basis.¹⁶²

It is submitted that this view of the AB is seriously mistaken. First, the order of values between the substantive rules and the general exceptions is unequivocally declared by the main sentence of Article XX—“nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures” as set out in the subparagraphs. Textually, the chapeau is merely a *horizontal* condition on the exercise of the general exceptions; as such, its function should not be different from that of the specific conditions contained in the subparagraphs. Logically, no condition on the exercise of the general exceptions, whether horizontal or specific, may alter the basic order of values between GATT substantive rules and its general exceptions.

Second, at the time of treaty negotiation, there was certainly a need to strike a proper balance between the right under GATT substantive rules (trade value) and the right to invoke the general exceptions (nontrade values). The final balance struck by the negotiators is reflected in the treaty text. For instance, the balance between trade and the protection of public health is set by the “necessity” requirement under Article XX(b). And the balance between trade and the conservation of exhaustible natural resources is struck by the requirement of the presence of comparable “restrictions on domestic production or consumption” under Article XX(g). Thus, each subparagraph of Article XX plays the function of maintaining the equilibrium between the GATT obligations and the right to invoke the specific exception under that subparagraph. There is no textual basis for singling out the chapeau as the place for performing that function.

Third, the authority to set the balance between trade and nontrade values is vested in WTO Members, not the adjudicators. The Members set that balance by the treaty text, and the task of the adjudicators is to construe the treaty provisions in accordance with the interpretive principle of the Vienna Convention on the Law of Treaties (VCLT).¹⁶³ Indeed, WTO adjudicators are specifically prohibited from altering the rights and obligations provided in the treaty.¹⁶⁴ Thus, despite the “weighing and balancing” process that the AB articulated for applying

162. AB Report, *US–Shrimp*, *supra* note 66, ¶ 159. See also AB Report, *EC–Seal Products*, *supra* note 66, ¶ 5.301 (stating that “the function of the chapeau is to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each subparagraph of Article XX”).

163. Vienna Convention on the Law of Treaties (May 22, 1969), 1155 U.N.T.S. 331.

164. DSU, art. 19.2.

the necessity test under the subparagraphs of Article XX,¹⁶⁵ the AB did not engage in the balancing between trade and nontrade values thereunder.¹⁶⁶ For such balancing would be logically inconsistent with the well-recognized principle that WTO Members have the right to choose their own level of protection.¹⁶⁷ As Regan noted, there is “no textual warrant” for the AB to judge the relative importance of various nontrade values pursued by the Members, and to do so would be “a serious intrusion on the Members’ regulatory autonomy.”¹⁶⁸ Likewise, just as the adjudicators are not authorized to rank the values under the subparagraphs of Article XX, they are not authorized to judge the relative importance of trade and nontrade values under the chapeau.

At this juncture, it must be clarified that while certain “weighing and balancing” is present in almost all judicial processes, such weighing and balancing does not necessarily mean that the balancing is between interests of the litigants. Rather, it may refer to the process of evaluating evidence and determining facts relevant to the applicable law.¹⁶⁹ In the WTO context, given that the adjudicators have no authority to judge the relative importance of the values under the treaty, any judicial weighing and balancing should be done solely for the purpose of evaluating evidence and determining facts relevant to the applicable treaty provisions. Such judicial balancing is often inevitable in “hard” cases, in which the challenged measure is non-origin-based, and pursues a legitimate objective, but has substantial adverse effects on trade.¹⁷⁰ The purpose of such judicial balancing, however, is not to decide which value should prevail—the nontrade value should always prevail—but to identify the true nature of the measure, that is, whether the measure is a disguised restriction on trade.¹⁷¹

165. According to the AB, the determination of whether a measure is “necessary” under Article XX involves “a process of weighing and balancing a series of factors”, including (i) the “contribution” made by the measure to the policy objective at issue, (ii) the “importance of the common interests or values” protected by the objective, and (iii) the impact of the measure “on imports or exports”. AB Report, *Korea–Beef*, *supra* note 124, ¶ 164.

166. See Donald H. Regan, *The Meaning of “Necessity” in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV.* 347–69 (2007).

167. The principle has been recognized since the GATT era, including by the Appellate Body itself. *Id.* at 366.

168. *Id.* at 349.

169. For a taxonomy of balancing and a critical analysis of various balancing tests, see Patrick M. McFadden, *The Balancing Test*, 29 *BOSTON COLL. L. REV.* 585–656 (1988).

170. See Farber & Hudec, *supra* note 157, at 1431–40.

171. For example, as Regan pointed out, despite all its discussion about “weighing and balancing” in *Korea–Beef*, the AB struck down Korea’s measure not because it believed that fraud prevention (the declared purpose of the measure) is relatively unimportant, but rather because it suspected that the actual purpose of the measure is not origin-neutral fraud-prevention. Regan, *supra* note 166, at n.18.

It should also be clarified that the above is not to say that interpretive approaches do not affect the scope of Members' rights under the treaty. Of course they do, as will be further explained below.¹⁷² But it is one thing to appreciate the impact of treaty interpretation, and quite another to believe that it is up to WTO adjudicators to identify the "line of equilibrium" between the rights of Members on a case-by-case basis. The metaphor, as Bartels pointed out, is "unhelpful and potentially misleading" and "should be abandoned."¹⁷³

C. Is the Chapeau Necessary to Prevent Abuse?

It is generally accepted that the purpose of the chapeau is prevention of abuse of the general exceptions. As discussed above, the introduction of the chapeau language into the 1927 Convention was necessary because the Convention, while prohibiting all restrictions on import and export, did not impose any substantive obligation of nondiscrimination. Consequently, a contracting party might abuse the general exceptions by applying the exceptions selectively. In contrast, GATT and GATS each prescribes a robust set of substantive obligations of nondiscrimination, which makes it difficult for a Member to abuse the general exceptions by discriminatory means. Furthermore, the subparagraphs of the general exceptions set out specific conditions that are tailored to the specific policy objectives contained therein. These conditions provide "ample protection" against potential abuse of the exceptions.¹⁷⁴

WTO practice appears to support this understanding. Appendix B-1 shows that, of the thirty-six cases in which GATT/GATS general exceptions were invoked, nineteen did not involve application of the chapeau. Of the seventeen cases involving application of the chapeau, the adjudicators found noncompliance in fourteen of them. To better understand the actual function played by the chapeau, the fourteen cases can be divided into categories according to the three types of primary rules violated by the challenged measures: (1) quantitative restrictions (six cases), (2) tariff schedules (one case), and (3) MFN/NT rules (seven cases). A summary of these cases by the three categories is set out in Appendix B-2.

172. See *infra* Part IV.

173. Bartels, *supra* note 25, at 104 (arguing that if there is a "line of equilibrium", it is a line that does not entail any balancing between the rights of Members, nor could any such line be drawn between the chapeau and the subparagraphs of the general exceptions).

174. Davies, *supra* note 25, at 539.

1. In the Context of Quantitative Restrictions (GATT Article XI/GATS Article XVI)

Of the 14 cases in which noncompliance with the chapeau was found, six involved violation of GATT Article XI/GATS Article XVI. Of the six cases, the MFN-type of discrimination was found in two, and the NT-type found in all six, under the chapeau.

a. “Abuse” Through Non-MFN Application

Under GATT, a Member applying an import or export ban or any other form of QRs is obligated to comply with the MFN requirements of Articles I and XIII. While Article I:1 prescribes a general obligation of MFN, Article XIII:1 imposes a specific MFN obligation on the application of QRs. That article, entitled *Non-Discriminatory Administration of Quantitative Restrictions*, provides that “[n]o prohibition or restriction shall be *applied* by any Member” on imports or exports “unless the importation of the like product of all third countries or the exportation of the like product to all third countries is *similarly* prohibited or restricted.”¹⁷⁵ In each of the two cases involving an import ban and claims of its discriminatory application (*US–Shrimp* and *Brazil–Tyres*), the complainant filed an Article XIII claim, but the panel in each case exercised judicial economy with respect to the claim,¹⁷⁶ then addressed the issue of discriminatory application under the chapeau of Article XX instead. Thus, the chapeau effectively played the function of Article XIII in these cases.

Under GATS, a Member would not be able to impose a quantitative restriction on foreign services and service suppliers in a discriminatory manner without triggering the general MFN obligation under GATS Article II. No WTO case involving such a situation has been reported thus far.

b. “Abuse” Through Discrimination Between Domestic and Foreign Producers

Under GATT, QRs are technically border measures, which, by definition, discriminate against foreign producers. Border measures are not subject to the NT requirement of Article III,¹⁷⁷ which applies to internal measures only. Nonetheless, if the QR is applied to protect domestic production, rather than to achieve the non-trade objectives listed in Article XX, it is unlikely to pass the scrutiny under the subparagraphs

175. GATT art. XIII:1 (italics added).

176. Panel Report, *US–Shrimp*, *supra* note 29, ¶ 7.22; Panel Report, *Brazil–Tyres*, *supra* note 82, ¶ 7.456.

177. Except when the restriction on an imported product also applies to the like domestic product, that restriction is also subject to Article III. See GATT Ad Article III, headnote.

of Article XX. For instance, in *China–Raw Materials*,¹⁷⁸ China invoked Article XX(b) and (g) to defend its export quotas on various raw materials, arguing that it imposed the export restrictions to reduce the severe pollution caused by the production process of the raw materials. China's defense under Article XX(g) failed. The Panel found that China did not impose similar restrictions on domestic consumption of the raw materials, thus did not meet the requirement of "even-handedness" for the conservation of natural resources under Article XX(g).¹⁷⁹ China's defense under Article XX(b) also failed, as the Panel was not convinced that the export restrictions were designed for the purpose of reducing pollution and were otherwise "necessary" to protect human health under Article XX(b).¹⁸⁰

In each of the six cases in which the chapeau was applied in the context of QR violation, a discrimination claim was made on the treatment of domestic like-products. As already discussed, with respect to such a claim, the chapeau was interpreted to impose a super-NT obligation in *US–Shrimp*,¹⁸¹ and to deal with an NT violation in *Brazil–Tyres*.¹⁸²

A third case in this category is *China–Rare Earths*,¹⁸³ which involved a similar fact pattern as *China–Raw Materials*. Once again, China was unsuccessful in invoking Article XX(g) to defend its export quotas. In contrast to *China–Raw Materials*, the Panel in this case went on to apply the chapeau after rejecting China's defense under subparagraph (g).¹⁸⁴ Citing *US–Gasoline*, the Panel recalled that discrimination may be "arbitrary or unjustifiable in cases where it is avoidable and foreseeable" and stated that this will be the case "where the complainants are unable to demonstrate the availability of a WTO-consistent alternative

178. Panel Report, *China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394, 395, 398/R (adopted as modified by the Appellate Body report, Feb. 22, 2012).

179. *Id.* ¶ 7.465.

180. *Id.* ¶¶ 7.516, 7.569–590. The "necessity" test under Article XX(a), (b) and (d) has long been criticized for setting too high a bar for the non-trade objectives to prevail, since it requires that there be "no less trade-restrictive alternative" available for achieving those objectives. See e.g., Rangel, *supra* note 10. For a comprehensive assessment of the necessity test, see Ming Du, *The Necessity Test in World Trade Law: What Now?*, 15 CHINESE J. INT'L L. 817–47 (2016).

181. See *supra* Part II.B.2.a.

182. *Supra* text accompanying notes 86–89.

183. Appellate Body Reports, *China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431, 432, 433/AB/R (adopted Aug. 29, 2014) [hereinafter AB Report, *China–Rare Earths*].

184. The Panel concluded that China's export quotas on rare earths and other materials are not justified under either subparagraph (g) or the chapeau of Article XX. Panel Report, *China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431, 432, 433/R (adopted Aug. 29, 2014, as modified by the AB report), ¶ 8.2(c) [hereinafter Panel Report, *China–Rare Earths*].

measure.”¹⁸⁵ It further explained that for Article XX exceptions that apply to measures “necessary to” the achievement of a particular objective, “alternatives are considered during the analysis under the paragraph at issue”, but in the context of subparagraph (g), “alternatives may be considered during the chapeau analysis.”¹⁸⁶ Thus, the Panel construed the chapeau as imposing a necessity requirement for the invocation of Article XX(g). The Panel’s interpretation of the chapeau was not appealed.

A fourth case in this category is *Indonesia–Import Licensing Regimes*,¹⁸⁷ which involved various import measures of Indonesia that were found to violate Article XI:1. Indonesia invoked Article XX(a), (b) and (d) for defense, but none of the measures was found to meet the standards of these subparagraphs. Having made such findings, the Panel was not required to engage with the chapeau analysis, but it nonetheless proceeded to the chapeau on an *arguendo* basis.¹⁸⁸ The Panel found under the chapeau that “discrimination exists between domestic and imported goods with respect to the import licensing regimes as a whole and the individual measures therein” and that such discrimination is “arbitrary or unjustifiable” due to the lack of “a rational connection” between the discrimination and the policy objectives under Article XX(a), (b) and (d).¹⁸⁹ Thus, the Panel essentially recast the underlying violation of Article XI as discrimination between domestic and imported products within the meaning of the chapeau, then replicated its analysis under the subparagraphs of Article XX to find such discrimination unjustifiable. In so doing, the Panel accomplished exactly what the AB in *US–Gasoline* had warned—“both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning.”¹⁹⁰ The Panel’s chapeau analysis was not appealed.

The two GATS cases in this category are *US–Gambling* and *US–Gambling (Article 21.5)*.¹⁹¹ As already noted, after finding the US ban on internet gambling violated GATS Article XVI (QRs), the Panel in *US–Gambling* exercised judicial economy with respect to the NT claim under GATS Article XVII.¹⁹² Then, the same NT claim was examined under

185. *Id.* ¶ 7.354.

186. *Id.* ¶ 7.354 n.549.

187. Panel Report, *Indonesia–Importation of Horticultural Products, Animals and Animal Products*, WT/DS477, 478/R (adopted Dec. 22, 2017, as modified by the Appellate Body report).

188. *Id.* ¶ 7.804.

189. *Id.* ¶¶ 7.816, 7.824.

190. AB Report, *US–Gasoline*, *supra* note 38, at 23.

191. Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (adopted May 22, 2007).

192. *Supra* text accompanying note 110.

the chapeau of GATS Article XIV, with the burden of proof reversed.¹⁹³ In the compliance proceedings of *US–Gambling (Article 21.5)*, the United States attempted to present more evidence to sustain its burden of proof under the chapeau, but its effort to relitigate the case was rejected by the Panel.

2. In the Context of Tariff Schedules (GATT Article II)

a. “Abuse” Through Non-MFN Application

In contrast to QRs, import tariffs are a lawful means of protection for domestic producers. The levy of tariffs, however, is subject to the MFN requirement of Article I:1 as well as Article II:1.¹⁹⁴ A Member may defend a discriminatory application of tariffs by invoking the policy exceptions under Article XX, but it may be difficult to prove that discriminatory tariffs are designed for non-trade purposes, given that tariffs are typically used to protect domestic producers.¹⁹⁵

Of the fourteen cases involving a finding of noncompliance with the chapeau, *Colombia–Textiles*¹⁹⁶ is the only one falling in this category. In this case, Panama challenged certain special tariffs levied by Colombia on textiles that exceeded the level set out in its tariff schedule. Colombia invoked Article XX(a) and (d) for defense, claiming that the special tariffs were levied for the purpose of combating money laundering.¹⁹⁷ The defense failed, as Colombia was unable to demonstrate that the special tariffs were “necessary” to achieve those policy objectives.¹⁹⁸ In order to be “exhaustive” in its analysis, the Panel had proceeded to

193. See *supra* text accompanying notes 113–17.

194. GATT Article II:1(a) provides: “Each Member shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.”

195. For example, the United States was unsuccessful in invoking Article XX(a) to defend its discriminatory tariffs levied on Chinese imports, as the Panel was not convinced that there was a genuine relationship of ends and means between the tariffs levied and the public morals objective as invoked. Panel Report, *United States–Tariff Measures on Certain Goods from China*, WT/DS543/R (Dec. 15, 2020). The U.S. appeal of the Panel decision has been pending due to the non-function of the Appellate Body.

196. Appellate Body Report, *Colombia–Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R (adopted June 22, 2016) [hereinafter AB Report, *Colombia–Textiles*].

197. According to Colombia, the special tariffs were designed to combat money laundering in that they discourage imports at artificially low prices as a vehicle for money laundering. Panel Report, *Colombia–Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R (adopted June 22, 2016, as modified by the Appellate Body report), ¶¶ 7.199–200 [hereinafter Panel Report, *Colombia–Textiles*].

198. AB Report, *Colombia–Textiles*, *supra* note 196, ¶¶ 5.117, 5.150.

examine the chapeau requirement even though that step was not required.¹⁹⁹

On appeal, the AB considered it unnecessary to engage in the chapeau analysis.²⁰⁰ Nonetheless, it is instructive to observe how the Panel applied the chapeau in this instance. The Panel found that Colombia's special tariffs were applied in a manner inconsistent with the chapeau, due to two exclusions. The first exclusion applied to imports originated in countries with which Colombia had existing trade agreements, which the Panel found to have resulted in "arbitrary or unjustifiable discrimination between countries where the same conditions apply."²⁰¹ This discrimination is in the nature of an MFN violation under Article I:1, but Panama raised the issue only under the chapeau.²⁰² According to the Panel, Colombia failed to show that the reason for such discrimination was "related to" its declared objective of combating money laundering.²⁰³ The same reasoning, however, could have been used to dismiss Colombia's defense under Article XX(a) and (d), had Panama made its discrimination claim under Article I:1. The second exclusion applied to goods entering certain regions that Colombia designated as special customs regime zones. The Panel found that this exclusion constituted "a means of arbitrary or unjustifiable discrimination" as well as "a disguised restriction on international trade."²⁰⁴ While the exclusion may be an indication that the special tariffs were a disguised restriction on trade, it could not possibly constitute a means of "discrimination between countries", since the exclusion is not origin-based.²⁰⁵

b. "Abuse" Through Discrimination Between Domestic and Foreign Producers

There has been no report of WTO cases in this category. However, carbon tariffs imposed to combat climate change may trigger claims of this kind if the country imposing the tariffs does not have a comparable scheme to tax carbon emission by domestic production.²⁰⁶ In the event

199. Panel Report, *Colombia–Textiles*, *supra* note 197, ¶¶ 7.550–.551.

200. AB Report, *Colombia–Textiles*, *supra* note 196, ¶ 5.153.

201. Panel Report, *Colombia–Textiles*, *supra* note 197, ¶ 7.569.

202. As a result, Colombia lost the opportunity to invoke the Article XXIV exception for its free trade agreements. When Colombia attempted to invoke Article XXIV as defense under the chapeau, the Panel dismissed the attempt, stating that assessing this defense would go beyond its terms of reference. *Id.* ¶ 7.567.

203. *Id.* ¶¶ 7.560–.568.

204. *Id.* ¶¶ 7.579–.580.

205. Notably, with respect to this exclusion, Panama made only the "disguised restriction" claim. *Id.* ¶ 7.553.

206. For example, under the Foreign Pollution Fee Bill proposed in the United States, the United States would impose a fee on certain carbon-intensive imports without imposing similar

the country invokes GATT Article XX(b) and (g) for defense, it must demonstrate under paragraph (b) that such tariffs are “necessary” to protect human, animal or plant life or health, and under paragraph (g) that the measure is “made effective in conjunction with” the restrictions on domestic production or consumption. These conditions are high hurdles to overcome under existing jurisprudence.

3. In the Context of MFN and NT Rules

In seven of the 14 relevant cases, the general exceptions were invoked to excuse violations of MFN and NT rules. It appears that the chapeau has played four types of roles in these cases: (a) elevating the “relating to” standard under Article XX(g) to a “necessity” equivalent; (b) assessing violative aspects of the measure under the chapeau; (c) finding discrimination outside WTO rules; and (d) imposing regulatory standards beyond a “necessity” equivalent. With a possible exception for type (a), none of the roles can be said to be the prevention of abuse of the general exceptions.

a. Elevating the “Relating to” Standard Under Article XX(g) to a “Necessity” Equivalent

In *US–Gasoline*, the United States was found to have violated Article III:4 because it applied more stringent standards for measuring the cleanness of imported gasoline than that for domestically produced gasoline. The United States invoked Article XX(g) for defense. The Panel rejected the U.S. defense after examining whether the less favorable treatment of imported gasoline by the U.S. measure was “primarily aimed at” the conservation of natural resources under Article XX(g), and seeing “no direct connection” between them.²⁰⁷ The AB reversed this finding, criticizing the Panel for having applied the “necessary” test under Article XX(b) in the context of Article XX(g), which merely requires the measure to be “relating to” the policy objective thereof.²⁰⁸ The AB then found that the U.S. measure met the “relating to” standard under Article XX(g), but failed to comply with the chapeau requirements. Under the chapeau, the AB faulted the United States for not having made adequate efforts to mitigate the differences in enforcement conditions in foreign countries. The AB cited the Panel’s finding that the United States had

fees on domestic like products. The WTO legality of such a proposal is in serious doubt. See Simon Lester, *Is the Foreign Pollution Fee Bill WTO-Compliant?*, INT’L ECON. L. & POL’Y BLOG (Nov. 5, 2023), <https://ielp.worldtradelaw.net/2023/11/is-the-foreign-pollution-fee-bill-wto-compliant.html#:~:text=Because%20the%20FPF%20is%20WTO,to%20clean%20their%20supply%20chain> [https://perma.cc/8C9B-ERY4].

207. Panel Report, *United States–Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (adopted May 20, 1996, as modified by the Appellate Body report), ¶ 6.40.

208. AB Report, *US–Gasoline*, *supra* note 38, at 16.

various alternative means available to implement its gasoline rules in a non-discriminatory manner,²⁰⁹ and concluded that the discrimination resulting from the U.S. measure “was not merely inadvertent and unavoidable.”²¹⁰ Given that the availability of less trade-restrictive alternatives is the ultimate test for the necessity standard, the AB effectively applied the chapeau to impose a necessity requirement for the policy exception of Article XX(g).²¹¹

Notably, the Panel in this case had rejected the U.S. defense under Article XX(g) without resort to the chapeau. Although the Panel’s interpretive approach may appear to be less faithful to the treaty text, it does show that, as an interpretive matter, the chapeau is not indispensable for reaching the proper conclusion under Article XX(g).

b. Assessing Violative Aspects Under the Chapeau Instead of Subparagraphs

*Argentina–Bovine Hides*²¹² was the first case involving application of the chapeau after *US–Gasoline* and *US–Shrimp*. At issue was the higher tax burden imposed by Argentinian tax regulations on imported products than domestic like products, which violated GATT Article III:2. Argentina invoked Article XX(d) for defense, arguing that those regulations were necessary to secure compliance with its broad tax laws. The Panel examined the “general design and structure” of the measure (the regulations) and found that the measure was “necessary” for the purpose of Article XX(d). The Panel then examined the violative aspect of the measure, i.e., the extra tax burden on imported products, under the chapeau. After finding that the extra tax burden caused the discrimination within the meaning of the chapeau, the Panel further found that such discrimination is “unjustifiable” because the extra tax burden is not “unavoidable” for the operation of the regulations, as there were several alternative means available to Argentina.²¹³ The Panel’s report was not appealed. It appears that in order to be consistent with the AB’s interpretive approach in *US–Gasoline* and *US–Shrimp*, the Panel rather artificially divided the measure at issue into its general design, to be examined under Article XX(d), and its violative aspect, to be assessed

209. *Id.* at 26–27.

210. *Id.* at 28.

211. See Hudec, *supra* note 55, at 379 (stating that in this case “the Appellate Body concluded that the discriminatory element in the [US] regulation was not necessary to the attainment of its environmental objectives”). See also Author E. Appleton, *GATT Article XX’s Chapeau: A Disguised “Necessity” Test? The WTO Appellate Body’s Ruling in United States–Standards for Reformulated and Conventional Gasoline*, 6(2) RECEIL 131 (1997) (attempting to differentiate the AB’s chapeau interpretation from a pure necessity test).

212. Panel Report, *Argentina–Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (adopted Feb. 16, 2001).

213. *Id.* ¶¶ 11.323–.329.

under the chapeau. The violative aspect was found to be inconsistent with the chapeau because it was not necessary for the purpose of securing compliance with Argentina's tax law under Article XX(d). The Panel could have reached the same conclusion without engaging with the chapeau analysis.

EC–Seal Products is another case in this category. As already discussed, the adjudicators examined the EU Seal Regime as a whole under GATT Article XX(a), and the IC exception and MRM exception, which had been found to violate the MFN and NT rules respectively, under the chapeau. After these exceptions were found to have also caused discrimination within the meaning of the chapeau, the same policy objective of Article XX(a) that justified the Regime as a whole was applied to assess whether the exceptions to the Regime could be similarly justified. If the two exceptions, as the violative aspects of the Regime, had been assessed under the paragraph of Article XX(a), the adjudicators could have reached the same conclusion without engaging with the chapeau.

A third case is *US–Tuna II (Mexico)(Article 21.5)*,²¹⁴ which was the first compliance proceeding brought by Mexico in this dispute. At issue were the U.S. technical standards for labeling tuna as “dolphin-safe” on the U.S. market.²¹⁵ In the original dispute, the U.S. measure was found to be inconsistent with TBT Article 2.1, but no finding was made under GATT Articles I and III due to the Panel's exercise of judicial economy with the GATT claims.²¹⁶ In this compliance proceeding, the AB held that the amended U.S. measure violated GATT Articles I:1 and III:4 because it excluded most Mexican tuna products from access to the dolphin-safe label while granting conditional access to such label to like

214. Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW (adopted Dec. 3, 2015) [hereinafter AB Report, *US–Tuna II (Mexico)(Article 21.5)*].

215. The tuna-dolphin dispute between Mexico and the United States dates back to the early 1990's when Mexico brought a GATT dispute against the US embargo on imports of tuna caught with techniques particularly harmful to dolphin, which were widely used by Mexican producers. The resulting GATT panel report, though unadopted, became one of the most (in)famous GATT decisions on the conflicts between trade and the environment. See *supra* note 147. After the United States lifted the embargo and extended its dolphin-safe labeling requirements in 1997, Mexican tuna products could enter the U.S. market but could not compete on the U.S. market because they still had no access to the label. For a brief history of the saga, see Elisa Baroncini & Claire Brunel, *A WTO Safe Harbor for the Dolphins: The Second Compliance Proceedings in the US–Tuna II (Mexico) Case*, 19 WORLD TRADE REV. 196 (2020).

216. The AB criticized the Panel for having exercised “false judicial economy” because its decision was based on an “incorrect assumption” that the obligations under TBT Article 2.1 are substantially the same as those under GATT Articles I:1 and III:4. Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (adopted June 13, 2012), ¶ 405.

products from the United States and other countries.²¹⁷ While accepting that the U.S. measure was provisionally justified under Article XX(g),²¹⁸ the AB held that the United States failed to demonstrate that its measure met the chapeau requirement of nondiscrimination. In its chapeau analysis, the AB identified specific aspects of the U.S. measure that gave rise to the MFN and NT claims as causing the discrimination within the meaning of the chapeau.²¹⁹ In assessing whether such discrimination is arbitrary or unjustifiable, the AB applied the “rationally related” standard and found that those aspects of the measure “are difficult to reconcile with the objective of protecting dolphins from harm.”²²⁰ Given that the “relating to” standard in subparagraph (g) requires “a close and genuine relationship of ends and means”,²²¹ the AB could have reached the same conclusion if the violative aspects of the U.S. measure had been assessed under subparagraph (g) instead of the chapeau.

c. Finding Discrimination Outside WTO Rules

In *EC–Preferences*,²²² India challenged the EC’s program of tariff preferences for certain developing countries that suffered problems with drug production and trafficking. India claimed that the EC program is inconsistent with GATT Article I:1 and is not justified by the Enabling Clause, which systemically exempts preferential treatment of developing countries from the MFN obligation under GATT Article I:1.²²³ The key issue in this case was whether the EC program complied with the requirement of the Enabling Clause.²²⁴ Separately, the Panel found the EC program to be inconsistent with Article I:1 and that inconsistency is not justifiable under Article XX(b) because the program was not designed nor was it “necessary” to protect human life and health in the European

217. AB Report, *US–Tuna II (Mexico) (Article 21.5)*, *supra* note 214, ¶ 7.340.

218. The Panel’s finding that “the features” of the amended measure that gave rise to violations of Articles I and III “relate to” the goal of conserving dolphins under subparagraph (g) was not appealed. *Id.* ¶ 7.341.

219. The violative aspects so identified consisted of the distinctions drawn by the US measure between different fishing methods in different areas of the oceans, which resulted in disparate impact on Mexican tuna products. *Id.* ¶ 7.342.

220. *Id.* ¶ 7.360.

221. AB Report, *China–Rare Earths*, *supra* note 183, ¶ 5.90.

222. Panel Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (adopted Apr. 20, 2004, as modified by the Appellate Body report) [hereinafter Panel Report, *EC–Preferences*].

223. GATT: Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), BISD 26S/203 (1979), https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm [<https://perma.cc/L4X4-2ETS>].

224. The Panel’s negative finding on this issue was upheld by the AB, with modified reasoning. Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (adopted Apr. 20, 2004).

Communities as claimed by the EC.²²⁵ Having rejected the EC program under subparagraph (b), the Panel proceeded to the chapeau even though there was no need to do so.

Under the chapeau, the Panel found that discrimination existed in that the EC program did not include Iran, even though Iran suffered more serious drug problems than Pakistan, which was included in the program. The Panel concluded that “with the exclusion of Iran and the inclusion of Pakistan,” the EC program failed to satisfy the chapeau requirements.²²⁶ This reasoning is legally problematic, because the MFN obligation under Article I:1 is owed only to other Members of the WTO, and Iran is not a WTO Member. Finding discrimination based on less favorable treatment of Iran than Pakistan is to impose an extra-WTO obligation under the chapeau. The Panel’s finding was not appealed.

d. Imposing a Regulatory Standard Beyond a “Necessity” Equivalent

Two recent cases brought under GATS fall into this category. In both cases, the discrimination identified under the chapeau is the same as the underlying MFN/NT violation, but the standard applied to characterize such discrimination as “arbitrary or unjustifiable” is beyond the legal standard of necessity for achieving the relevant policy objective.

In *Argentina–Financial Services*,²²⁷ the measures at issue were additional taxes and other financial burdens imposed by Argentina on service suppliers from countries that did not exchange information with the Argentine tax authorities (the “non-cooperative” countries). Argentina used these measures to combat tax evasion by its own nationals through offshore financial centers. Panama, which was such a financial center and was classified by Argentina as a non-cooperative country, challenged the measures as inconsistent with GATS provisions.²²⁸ At the Panel stage, the Argentine measures were found to violate the MFN obligation under GATS Article II:1 on the ground that they accorded less favorable treatment to service and service suppliers from non-cooperative countries than “like service and service suppliers” from cooperative countries. The Panel then found the measures were “necessary” to secure compliance with Argentina law under Article XIV(c), but the application of the measures constituted arbitrary and unjustifiable discrimination within the meaning of the chapeau of Article XIV. In its chapeau analysis, the Panel followed AB’s finding in *EC–Seal Products* and identified the

225. Panel Report, *EC–Preferences*, *supra* note 222, ¶¶ 7.210; 7.223.

226. *Id.* ¶ 7.235.

227. Appellate Body Report, *Argentina–Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R (adopted May 9, 2016) [hereinafter AB Report, *Argentina–Financial Services*].

228. For an insightful analysis, see Panagiotis Delimatsis & Bernard Hoekman, *National Tax Regulation, Voluntary International Standards, and the GATS: Argentina–Financial Services*, 7 WORLD TRADE REV. 265–90 (2018).

discrimination under the chapeau to be exactly the same as the MFN violation under GATS Article II:1.²²⁹ The Panel then found such discrimination to be arbitrary and unjustifiable on the ground that the criteria used by Argentina to grant cooperative country status created “distortions” within the category and were “counterproductive” to its declared objective for making the distinction between cooperative and non-cooperative countries.²³⁰ The Panel’s chapeau analysis was not appealed.²³¹

In essence, the Panel invalidated the Argentine measure under the chapeau because the measure was not implemented in a rational and effective manner. However, whether a measure is carried out effectively to achieve its policy objective is an entirely different question from the question of whether the identified discrimination is necessary to achieve that policy objective. It would be farfetched to characterize an ineffective application of the measure that was found to be “necessary” to achieve the policy objective under one of the general exceptions as abuse of that general exception.

Similarly, the Panel in *EU–Energy Package*²³² also used the chapeau of GATS Article XIV to impose a regulatory standard that has little to do with the prevention of abuse of the general exceptions. At issue were the EU’s energy policies aimed at liberalizing its energy markets and securing its energy supply. Russia brought this dispute, because the EU policies adversely affected Russian companies that had a dominant position in the EU’s energy markets. While the Panel rejected most of Russia’s claims, it found the EU’s “third-country certification” requirement, as implemented by national laws of Croatia, Hungary and Lithuania, to be inconsistent with the NT provision of GATS Article XVII, in that the measure placed an additional burden on third-country service suppliers, which modified the conditions of competition in favor of domestic like service suppliers.²³³ The EU invoked Article XIV(a) as defense, which excuses measures “necessary . . . to maintain public

229. Panel Report, *Argentina–Measures Relating to Trade in Goods and Services*, WT/DS453/R (adopted May 9, 2016, as modified by the Appellate Body report), ¶¶ 7.747–.748.

230. *Id.* ¶ 7.755–.761.

231. On appeal, the AB reversed the Panel’s finding under GATS Article II:1 that the service and service suppliers of cooperative countries are “like” service and service suppliers of noncooperative countries. Without the underlying MFN violation, the Panel’s analysis under Article XIV(c) became moot. See AB Report, *Argentina–Financial Services*, *supra* note 227, ¶¶ 6.70–.71; 6.83.

232. Panel Report, *European Union and Its Member States–Certain Measures Relating to the Energy Sector*, WT/DS476/R (Aug. 10, 2018) [hereinafter Panel Report, *EU–Energy Package*].

233. *Id.* ¶¶ 7.1128–.1129. The Panel also found that one of the EU measures violated GATT Articles I:1 and III:4, and rejected EU defense under GATT Article XX(j). The Panel’s analysis of Article XX(j) did not involve the chapeau of Article XX.

order.”²³⁴ The Panel agreed with the EU, finding that the third-country certification measure is necessary to address the threat to the EU’s security of energy supply posed by foreign control over “transmission system operators” (TSOs) and therefore is “necessary” to maintain public order.²³⁵

However, the Panel rejected the EU defense under the chapeau of Article XIV. In its chapeau analysis, the Panel first found the existence of discrimination based on the violation of the NT obligation under Article XVII and then found such discrimination to be “arbitrary and unjustifiable” on the ground that the EU did not demonstrate that the threat to the EU security of energy supply could not come from domestically controlled TSOs under foreign influences. According to the Panel, while the level of such threat may be less than foreign-controlled TSOs, the EU has not demonstrated that “this risk or threat does not exist, nor that is entirely speculative or hypothetical.”²³⁶ “The lack of *any* assessment of threats posed by foreign governments requiring or inducing domestically controlled TSOs to undermine the European Union’s security of energy supply,” concluded the Panel, “is not compatible with the cause or rationale of the third-country certification measure”, hence “constitutes arbitrary and unjustifiable discrimination in violation of the chapeau of Article XIV of the GATS”.²³⁷ In essence, the Panel found a potential loophole in the EU regulation for energy security. But does the existence of a potential loophole in EU domestic laws constitute abuse of the public order exception under GATS? This Panel finding thus reached a new level of intrusiveness into domestic regulatory space. The EU’s appeal of the Panel decision has not been addressed due to the dysfunction of the Appellate Body.²³⁸

D. Successful Defenses Under the Chapeau

To date, there have been three cases in which the challenged measure survived the chapeau scrutiny.²³⁹ For the sake of completeness, the relevant decisions are summarized below, even though they are of limited significance in chapeau jurisprudence.

234. See Appendix A.

235. Panel Report, *EU–Energy Package*, *supra* note 232, ¶¶ 7.1239–.1240.

236. *Id.* ¶ 7.1251.

237. *Id.* ¶ 7.1253 (*italics original*).

238. See *European Union and Its Member States–Certain Measures Relating to the Energy Sector*, Communication from the Appellate Body, WT/DS476/8 (Nov. 21, 2018).

239. See Appendix B-2.

1. EC–Asbestos (2001)²⁴⁰

Canada brought this dispute to challenge France’s ban on asbestos, which contained an exception for chrysotile fiber, claiming that the ban violated GATT Articles III:4 and XI. EC invoked Article XX(b) for defense. The Panel found that Canadian asbestos and French chrysotile fiber are “like products” and that the French measure violated Article III:4 by giving less favorable treatment to imported like products. However, the Panel also found that the measure was excused by Article XX(b) because it was “necessary” to protect human life and health, and its application was not inconsistent with the chapeau provision. In its chapeau analysis, the Panel referred to the AB’s statement in *US–Gasoline* that the discrimination standard under the chapeau cannot be the same as that in Article III:4, and held therefore that its finding under Article III:4 was not relevant for establishing discrimination under the chapeau. Since Canada presented no evidence or argument beyond its claim of discrimination under Article III:4, the Panel concluded that the French measure did not violate the chapeau.²⁴¹ On appeal, the AB reversed the Panel’s finding on “like products”, hence also reversed the Panel’s finding on the violation of Article III:4.²⁴² Nonetheless, the AB upheld the Panel’s finding that the French measure is “necessary” to protect human health under Article XX(b).²⁴³ The Panel’s chapeau analysis, which closely followed the logic articulated by the AB in *US–Gasoline*, was not appealed.

2. US–Shrimp (Article 21.5) (2001)²⁴⁴

Malaysia, one of the complainants in *US–Shrimp*, brought this compliance proceeding under DSU Article 21.5, claiming that the United States had failed to comply with the DSB’s recommendation in the original proceeding. Malaysia complained that the revised U.S. measure continued to impose its import ban unilaterally, outside the framework of an international agreement.

Central to this dispute is the question of whether, in order to comply with the chapeau requirement of nondiscrimination, the United States must *conclude* international agreements regarding its import ban with all affected countries. Upholding the Panel’s negative answer to the question, the AB clarified its holding in the original proceedings on the duty to negotiate under the chapeau of Article XX. According to the AB,

240. AB Report, *EC–Asbestos*, *supra* note 125.

241. Panel Report, *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R (adopted Apr. 5, 2001, as modified by the Appellate Body report), ¶¶ 8.227–.229.

242. AB Report, *EC–Asbestos*, *supra* note 125, ¶¶ 126–32, 148.

243. *Id.* ¶¶ 174–75.

244. AB Report, *US–Shrimp (Article 21.5)*, *supra* note 132.

the United States would be expected to “make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.”²⁴⁵ But it cannot be held to have engaged in “arbitrary or unjustifiable discrimination” solely because one international negotiation resulted in an agreement while another did not; to hold otherwise would give another country party to the negotiation “a veto over whether the United States could fulfill its WTO obligations.”²⁴⁶ The significance of this decision lies in its clarifying the scope of “the duty to negotiate” under the chapeau. This duty, as already analyzed, is an extra-MFN obligation created by the AB.

3. US–Tuna II (Mexico) (Article 21.5 II) (2019)²⁴⁷

This is the most recent dispute involving application of Article XX chapeau. The action was brought by Mexico in *US–Tuna II* as the second compliance proceeding under DSU Article 21.5. As discussed above, in the first compliance proceeding brought by Mexico, the AB found that the United States failed to demonstrate that its amended measure met the chapeau requirements of nondiscrimination.²⁴⁸ After the United States further amended its labeling scheme in 2016, Mexico brought this second compliance proceeding to challenge the further amended U.S. scheme. This time, the AB upheld the Panel’s findings on all counts and concluded that the U.S. 2016 measure is consistent with the chapeau requirements.²⁴⁹

The dispute of *US–Tuna II* was resolved principally under the TBT Agreement.²⁵⁰ With respect to GATT provisions, the significance of the case lies in the AB’s clarification of the relationship between TBT Article 2.1, which contains a combination of MFN and NT obligations, and the chapeau requirement of nondiscrimination under GATT Article XX.²⁵¹

245. *Id.* ¶ 122 (stating that such negotiation must be “comparable” in the sense that “comparable efforts are made, comparable resources are invested, and comparable energies are developed to secure an international agreement”).

246. *Id.* ¶ 123.

247. Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States/Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW/USA, WT/DS381/AB/RW/2 (adopted Jan. 11, 2019) [hereinafter AB Report, *US–Tuna II (Mexico) (Article 21.5 II)*].

248. *Supra* text accompanying notes 217–20.

249. AB Report, *US–Tuna II (Mexico) (Article 21.5 II)*, *supra* note 247, ¶ 6.290.

250. For critical comments, see Cary Coglianese & Andre Sapir, *Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin-Safe Tuna Labeling Regime*, 16 WORLD TRADE REV. 327 (2017); Petros Mavroidis, *Last Mile for Tuna (to a Safe Harbor): What is the TBT Agreement All About?*, 30 EUR. J. INT’L L. 279 (2019).

251. See Gracia Marin Duran, *Measures with Multiple Competing Purposes After EC–Seal Products: Avoiding a Conflict Between GATT Article XX-Chapeau and Article 2.1 TBT Agreement*, 19 J. INT’L ECON. L. 467–95 (2016).

Although the AB in the original proceeding criticized the Panel for failing to conduct a separate analysis under GATT, the AB in the first compliance proceeding clarified that “so long as the similarities and differences” between TBT Article 2.1 and GATT Article XX “are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other.”²⁵² Thus, in the second compliance proceeding, the AB agreed with the Panel that since the US 2016 measure was found to be consistent with TBT Article 2.1, it did not constitute arbitrary or unjustifiable discrimination under the chapeau of GATT Article XX.²⁵³

IV. ALTERNATIVE FUNCTIONS OF THE CHAPEAU

The analysis thus far has made two major findings. First, as a matter of treaty design, the chapeau is unnecessary for preventing abuse of the general exceptions. That is so, in part because the GATT/GATS already prescribe various substantive obligations of nondiscrimination, and in part because the subparagraphs of GATT Article XX/GATS Article XIV already contain specific conditions, the compliance with which will prevent abuse or misuse of the exceptions. Second, in WTO practice, the chapeau has been interpreted for purposes other than the prevention of abuse. Today, the chapeau may be applied to strike down domestic regulations that are considered irrational or ineffective for achieving the policy objective of a challenged measure, irrespective of whether such irrationality or ineffectiveness is the manifestation of protectionism.

Given these two findings, one wonders what the proper functions of the chapeau should be. Assuming the chapeau provision will continue to play a significant role in the application of the general exceptions, it is submitted that the chapeau may serve purposes other than the prevention of abuse.

A. Purposes Other Than Prevention of Abuse

A preliminary question for the generally recognized purpose of the chapeau is what constitutes “abuse” of the general exceptions. In a narrow sense, the abuse refers to the use of the general exceptions to justify a measure that is not genuinely designed for the policy purposes of the subparagraphs, i.e., the measure is “a disguised restriction on international trade.” In a broad sense, the abuse may refer to any “unreasonable” exercise of the right to invoke the general exceptions.

252. AB Report, *US–Tuna II (Mexico) (Article 21.5)*, *supra* note 214, ¶ 7.347.

253. AB Report, *US–Tuna II (Mexico) (Article 21.5 II)*, *supra* note 247, ¶¶ 6.279–.287.

Such unreasonableness includes not only improper purposes, but also procedural unfairness.²⁵⁴

A different but critical question is whether the chapeau provision may be interpreted to serve purposes other than the prevention of abuse. The purpose of abuse prevention is drawn from the drafting history of GATT Article XX.²⁵⁵ But as a matter of treaty interpretation, must the purpose of the chapeau be limited to the one originally intended?

1. The Expansionist Version

Pursuant to VCLT Article 31, the chapeau language shall be interpreted in good faith in accordance with the ordinary meaning given to its terms in the treaty context and in the light of the object and purpose of the treaty. Under VCLT Article 32, the drafting history of the chapeau, as a supplementary means of treaty interpretation, "may be had" in order to "confirm" the meaning resulting from the application of Article 31, or to "determine" the meaning when the result of such application is ambiguous or obscure, or manifestly absurd or unreasonable.²⁵⁶ In WTO practice, the drafting history of the chapeau has always been used to confirm the originally intended purpose of the chapeau.

Textually or contextually, however, there appears to be no barrier to interpreting the chapeau beyond its originally intended purpose. Textually, the condition-based concept of nondiscrimination is so broad that it does not constrain the function of the chapeau to its originally intended purpose. Contextually, the drafting history does not indicate that the drafters intended the chapeau to serve one purpose exclusively. In this regard, it is helpful to recall the AB's interpretation of the term "exhaustible natural resources" in Article XX(g) to include both living and nonliving natural resources, despite that the drafting history of Article XX(g) contains references only to minerals as examples of exhaustible resources.²⁵⁷ The AB famously stated that the words of Article XX(g) "were actually crafted more than 50 years ago" and "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."²⁵⁸ Consistent with such an evolutionary interpretive approach, the chapeau provision could be construed in the light of contemporary concerns of nations about application of the general exceptions.

254. See AB Report, *US-Shrimp*, *supra* note 66, ¶ 160 (stating that the standards of the chapeau "project both substantive and procedural requirements").

255. See *supra* Part II.A.3.

256. VCLT, *supra* note 163, arts. 31 and 32.

257. AB Report, *US-Shrimp*, *supra* note 66, ¶¶ 127–31.

258. *Id.* ¶ 129.

When freed from the (single) purpose of abuse prevention, the chapeau requirement of nondiscrimination may be understood as an *independent* obligation, separate from the MFN and NT obligations that are subject to the general exceptions. Viewed in this light, the AB's interpretation of the chapeau as containing super-NT and extra-MFN obligations would not give rise to a problem in legal logic.²⁵⁹ Likewise, when freed from the purpose of abuse prevention, what constitutes "justifiable" discrimination under the chapeau could be interpreted to impose modern regulatory standards beyond the requirements under the subparagraphs of GATT Article XX/GATS Article XIV.

This expansionist version of the chapeau narrows the regulatory space of the Members. It has been accepted by the Members through their adoption of the relevant panel and AB reports, which adoption is practically automatic.²⁶⁰ Absent objection from the Members, this expansionist version may constitute "subsequent agreement" or "subsequent practice" of the Members regarding the interpretation or application of GATT/GATS.²⁶¹

2. The Exculpatory Function

By the same token, but conversely, when freed from the single purpose of abuse prevention, the chapeau provision could also be construed to *excuse* measures that serve a policy objective not specified in GATT/GATS provisions. This interpretive approach would have an opposite effect from that of the expansionist approach. Instead of reducing the policy space of the regulating Member, this approach would work to preserve such policy space. As explained below, this "exculpatory" function of the chapeau is not only desirable as a matter of policy, but also doctrinally coherent as a matter of law.

a. The Policy Needs

The need for the exculpatory function of the chapeau arises from the AB's interpretive approach to the MFN and NT obligations under GATT and GATS. By the time *EC–Seal Products* was decided, the AB had firmly established that violation of GATT MFN or NT obligations is to be defined solely by the detrimental impact of the challenged measure on the competitive opportunities for like products, without regard to the regulatory purpose of the measure.²⁶² Since the impact of a domestic

259. See *supra* Part II.B.2.c.

260. See DSU arts. 16.4 and 17.14.

261. VCLT, *supra* note 163, art. 31(3)(a) and (b). On "subsequent agreement" and "subsequent practice" of international organizations, see Int'l Law Comm'n, *Third Report on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/683 (Apr. 7, 2015).

262. See *supra* text accompanying notes 97–98.

regulation on trade is almost always disparate on different countries, the AB's approach renders all types of domestic regulations vulnerable to the charge of MFN or NT violations. In this sense, the AB has turned GATT Articles I:1 and III:4 into provisions similar to GATT Article XI, which prohibits all quantitative restrictions on imports and exports regardless of the reason for the restrictions.

Turning MFN and NT provisions into Article XI-like provisions, however, has undesirable consequences because of the exhaustive list of policy exceptions under Article XX. As Roessler observed, Article XX was drafted with policy objectives in mind that can be achieved only through import or export restrictions, very much like the 1927 Convention.²⁶³ In other words, the ten policy exceptions of Article XX were designed to excuse GATT-inconsistent measures that discriminate between products based on their origin or destination, i.e., *de jure* discriminatory measures. A typical example is an import ban on products carrying diseases, which violates Article XI but can be justified by the public health exception of Article XX(b). In contrast, modern-day domestic regulations may be adopted for a variety of legitimate purposes that are not listed in Article XX, and such regulations are typically origin-neutral but have a disparate impact on foreign like-products. The IC and MRM exceptions in *EC-Seal Products* provide an example. The regulatory purposes of IC exception (protecting the welfare of indigenous peoples) and MRM exception (balancing welfare of different marine animals) are clearly legitimate, but are not specified in the ten subparagraphs of Article XX.

A most sensible way to overcome the constraints of the closed list of policy exceptions under Article XX is to take the regulatory purpose of a challenged measure into consideration, together with the market impact of the measure, under the MFN and NT provisions. This "aim and effect" interpretive approach was adopted during the GATT era,²⁶⁴ but was rejected by the AB.²⁶⁵ Instead, the AB decided to split the analysis of the aim and the effect of a regulation between the MFN/NT provisions and

263. Frieder Roessler, *The Scope of Regulatory Autonomy of WTO Members under Article III:4 of the GATT: A Critical Analysis of the Jurisprudence of the Appellate Body*, in RSCAS Policy Paper 2015/4, at 2, at <https://papers.ssrn.com/sol3/results.cfm> [<https://perma.cc/FA74-WH8C>].

264. See Panel Report, *United States–Measures Affecting Alcoholic and Malt Beverages* (adopted June 19, 1992), BISD 39S/208.

265. See WTO, *Analytical Index: Guide to WTO Law and Practice*, GATT 1994 – Art. III (Jurisprudence) 1.3.3, *Relevance of Policy Purpose of Internal Measures/“Aims and Effects” Test*. For a systemic critique of the Appellate Body's approach, see Hudec, *supra* note 55. See also Roessler, *supra* note 263.

Article XX. The AB's approach has been criticized for giving Article XX "a function that it cannot fulfill."²⁶⁶

Given the AB's interpretive approach towards the MFN/NT provisions, it becomes desirable to expand the types of policy exceptions under GATT Article XX and GATS Article XIV. Short of a realistic prospect for amending the treaties, the only viable way to do so is through treaty interpretation. And the chapeau provision is where a sensible interpretive approach could make the difference.

b. The Doctrinal Basis

Textually, the chapeau provision lends itself to the incorporation of any number of legitimate regulatory purposes into the treaty. That is so, because the discrimination prohibited by the chapeau is defined by the broad concept of the same/like "conditions" prevailing in different countries, and what conditions to choose for comparison between countries will depend on the purpose for which the comparison is made.²⁶⁷ Bartels held a similar view when he stated that the "same conditions" requirement may function "as a justification, based on the objective of the measure, for disparate impacts that are rationally related to that objective."²⁶⁸ Furthermore, prohibited discrimination under the chapeau must be "arbitrary or unjustifiable" in character. And what constitutes "justifiable" disparate impacts is a value judgment open to interpretation.

Recall that the AB did not focus on the concept of condition-based discrimination until *EC-Seal Products*. There, the AB stated that only "relevant" conditions should be considered, and that such relevance is to be determined by (i) the subparagraphs of Article XX, especially the subparagraph under which the challenged measure has been provisionally justified, and (ii) the GATT provisions with which the measure was found to be inconsistent.²⁶⁹ Limited by these two factors, the AB's chapeau analysis essentially repeats the process of its analysis under the MFN provision and Article XX(a).

266. Roessler, *supra* note 263, at 3. See also Hudec, *supra* note 55, at 381 (stating that the list of policies enumerated in Article XX "is too narrow to cover all of the many kinds of policies that should be considered valid bases for regulatory actions" and that "no panel ruling will ever be able to change the limiting structure of Article XX itself").

267. Interestingly, the concept of condition-based discrimination appears to be at odds with the premise of the world trading system. See Lydgate, *supra* note 25, at 972 (observing that "WTO law, and economic globalization more broadly, is based on the premise that products and services from all countries should be treated the same, despite many differences between these countries"; except where the WTO agreements specify special and differential treatment for developing country Members, "there can be no premise of equality of *situations* between countries trading in goods and services.").

268. Bartels, *supra* note 25, at 97.

269. See *supra* text accompanying notes 99–100.

The AB's approach to identifying "relevant" conditions under the chapeau is misguided. Conceptually, to define two things as "the same" or "like," one must first choose a suitable criterion or standard for comparison. As Western explained, a criterion is suitable when it is "conducive to or useful or instrumental in furthering some state of affairs one wishes to bring about."²⁷⁰ To illustrate, Western used the comparison between two fruits as example. For most people, nectarines and peaches are similar fruits when they use shape, color, texture and taste as standards for comparison. For a student of language, these standards would be irrelevant, as he might distinguish the fruits on the basis of their phonetics or orthography and conclude that "nectarine" is similar to "mandarin" but not at all similar to "peach."²⁷¹ Whether a criterion is relevant for comparison, therefore, depends on the purpose for which the comparison is made. Whether a particular criterion furthers a given goal, and hence is relevant, is mostly a matter of factual evaluation, whereas whether something ought to be the goal is a matter of normative decision.²⁷²

Applying this understanding to *EC-Seal Products*: if the purpose of comparing conditions in different countries is to advance seal welfare, then the only conditions relevant will be those that matter to the protection of seal welfare. If the purpose is to protect the welfare of Inuit—the declared purpose of the IC exception—then the relevant conditions for comparison would be very different. The fact that most of the Greenlandic population is Inuit whereas the Canadian Inuit population is very small, and the fact that the Greenlandic Inuit were better organized and supported in their seal hunting and production activities than the Canadian Inuit,²⁷³ would all be relevant conditions for comparison. Since the prevailing conditions relevant to the purpose of protecting Inuit interests are *not* the same between Greenland and Canada, there should be no discrimination within the meaning of the chapeau. As for the question of which purpose *should* be used for comparison, the choice is a matter of normative decision. By choosing seal welfare as the *sole* criterion for comparison, the AB effectively positioned seal welfare above the welfare of Inuit and other indigenous communities.²⁷⁴

270. PETER WESTERN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE 120–21 (1990).

271. *Id.* at 31.

272. *Id.* at 121. See also Julia Qin, *Defining Nondiscrimination under the Law of the World Trade Organization*, 23 B.U. INT'L. L. J. 215, 262–65 (2005).

273. Panel Report, *EC-Seal Products*, *supra* note 93, ¶¶ 7.309–313.

274. Unlike the Panel, the AB report did not refer to the international instruments on the rights of indigenous peoples.

c. The Principle

As a normative matter, all legitimate policy goals should be acceptable under the chapeau. The legitimacy of the policy goal can be determined by reference to the WTO Agreements and broader principles of international law. Once the legitimacy of a declared policy objective is established, the adjudicators should use that objective to identify *relevant* conditions for comparison between countries. If the conditions so identified are not the “same” (GATT Article XX) or “like” (GATS Article XIV) between the countries under comparison, no discrimination shall be found under the chapeau.

Applying this principle in *EC–Seal Products*, the adjudicators should first determine the legitimacy of the declared purpose of the IC exception. Given that the protection of the welfare of indigenous peoples is a perfectly legitimate purpose under international law, the adjudicators should use that purpose to identify relevant conditions for comparison. Since the prevailing conditions relevant to the purpose of protecting IC welfare are not the same between Greenland and Canada, and since the differences in such conditions can largely explain the disparate impact of the IC exception on the exports of seal products from Greenland versus Canada, there would be no finding of discrimination within the meaning of the chapeau.

The application of this principle can be further illustrated in the case of *Brazil–Tyres*. Under the proposed interpretive approach, the adjudicators would first examine whether the stated objective of the Mercosur exemption is justifiable under WTO law and general international law. There, they would find that Mercosur is a regional trade bloc sanctioned by GATT Article XXIV. Moreover, they would find that free trade within Mercosur in waste tires is consistent with the principles set out in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,²⁷⁵ including “the proximity principle”, which encourages local disposal of waste products to the extent possible, and “the consent principle”, which requires prior written consent of the importing country for the transfer of waste products.²⁷⁶ The Basel Convention also recognizes the special interests of developing countries in preventing waste transfer from developed countries, as well as their right to enter into regional agreements on waste

275. 28 ILM 649 (1989). The Basel Convention has more than 170 parties including all Mercosur countries, the EC and most other WTO Members.

276. See also *Basel Technical Guidelines on the Identification and Management of Used Tyres* (1999), <http://www.basel.int/Implementation/TechnicalMatters/DevelopmentofTechnicalGuidelines/TechnicalGuidelines/tabid/8025/Default.aspx> [<https://perma.cc/7KV2-PPFL>]. While the Panel made numerous references to the Basel Guidelines in the context of Art. XX(b) analysis, neither the Panel nor the AB referred to the Basel norms in their analysis of the chapeau.

management.²⁷⁷ Once the legitimacy of the objective of the Mercosur Exception was established, the adjudicators would compare conditions that are relevant to that objective. Since the EU is not a member of the Mercosur trading bloc, nor a developing country geographically proximate to Brazil, the conditions relevant to the objective of the Mercosur exception are not the same between the EU and Mercosur countries. Consequently, there would be no finding of discrimination within the meaning of the chapeau.

d. The Level of Scrutiny

It must be noted that not all analyses of condition-based discrimination should necessarily perform the exculpatory function. Doctrinally, even if a measure is found to serve a legitimate purpose, it does not follow that any condition “relevant” to that purpose must be used for comparison under the chapeau. Rather, whether a relevant condition is chosen for comparison will depend on the level of scrutiny applied by the adjudicators. For a measure that is nondiscriminatory on its face, the adjudicators might apply a “rationally related” standard to select relevant conditions. In contrast, for a measure that is *de jure* discriminatory, the adjudicators might apply a standard of strict scrutiny, such as to require that the difference in relevant conditions be “necessary” for achieving the declared legitimate purpose.

Take *US–Gasoline* for example. In that case, the U.S. measure at issue was *de jure* discriminatory in violation of Article III:4, but its purpose—the implementation of the Clean Air Act—was justified under Article XX(g). The measure was then invalidated by the AB under the chapeau on the grounds that the United States failed to demonstrate why it could not have done more to eliminate the discriminatory impact of the measure. In so doing, the AB effectively turned the chapeau into a “necessity” test for the U.S. measure.²⁷⁸ This process could also be understood in terms of relevant conditions for comparison, even though the AB did not engage in a condition-based analysis. Recall that the United States had argued that the enforcement conditions in foreign countries were not the same as those in the United States. The U.S. argument was disregarded by the AB, even though differences in enforcement conditions are apparently “relevant” to the implementation

277. Basel Convention, arts. 4(2)(e), 11(1), Mar. 22, 1989, 1673 U.N.T.S. 28911. Given that Mercosur members are all developing countries and geographically proximate to each other, their consent to liberalizing trade in retreaded tires among themselves could be considered a type of regional agreement on waste management.

278. See *supra* Part III.C.3.a.

of the U.S. statute.²⁷⁹ By ignoring this relevant condition in its chapeau analysis, the AB effectively applied a high level of scrutiny in determining the relevance of the conditions for comparison.

B. *The Purpose of Abuse Prevention*

Alternative functions of the chapeau notwithstanding, preventing abuse of the general exceptions remains the generally recognized purpose of the chapeau. To serve this original purpose, the chapeau provision could be utilized in two meaningful ways.

1. Applying a Heightened Level of Scrutiny

First, the chapeau may be used to apply heightened scrutiny to measures that can pass the relatively lenient standards under the subparagraphs of GATT Article XX. In *US–Gasoline*, for instance, the chapeau provision was applied by the AB to impose a *de facto* necessity standard for Article XX(g), which contains a mere “relating to” standard for the nexus between the challenged measure and the objective of environmental conservation. By requiring the origin-based U.S. measure to be not only “relating to”, but also necessary for (judged by availability of a less trade restrictive alternative) achieving the objective of environment protection, the chapeau functioned to prevent abuse of this policy exception by the *de jure* discriminatory measure. Notably, this function was expressly recognized by the Panel in *China–Rare Earth* in the context of Article XX(g), which also involved a *de jure* discriminatory measure.²⁸⁰

Similarly, the chapeau could be utilized to elevate the less demanding standards under other subparagraphs of Article XX, including that of “relating to” under subparagraphs (c) and (e), “undertaken in pursuance of” under subparagraph (h), and “involving” under subparagraph (i).²⁸¹ Textually, the necessity requirement is set out in Article XX(a), (b) and (d) only, which contain some of the most important nontrade values. From a policy standpoint, it is curious why the more lenient standards should apply to some of the arguably lesser values under Article XX. Using the chapeau to impose a necessity standard would have the effect of equalizing the level of scrutiny for all policy exceptions.

279. *Cf.* Deere argued that only conditions *inherent* in foreign countries can constitute “conditions” under the chapeau. Thus, if Venezuela or Brazil had no verifiable information about the refineries, the US argument on different enforcement conditions would be valid. But the United States merely argued that it was more difficult to verify such information, which cannot be considered “condition” under the chapeau. Deere, *supra* note 25, at 27–29.

280. Unlike in *US–Gasoline*, China’s discriminatory measure was found not to have met the standard of Article XX(g). *Supra* text accompanying notes 183–86.

281. See Appendix A. None of these clauses has been interpreted thus far.

It should be noted, however, whether this potential function of the chapeau ought to be utilized in a given case would be a matter of judgment. In theory, if the adjudicators believe that a challenged measure is genuinely designed to serve a nontrade policy, especially when the measure is non-origin based, they may choose to apply a “rationally related” standard to excuse the measure under the chapeau.²⁸²

2. “Disguised Restriction on International Trade” as the Ultimate Test

The second meaningful way to prevent abuse of the general exceptions through the chapeau is to resort to the test of “disguised restriction on international trade.” Of the 14 cases in which chapeau inconsistencies were identified, “disguised restriction” on trade was found only in three instances: *US–Gasoline* (AB),²⁸³ *China–Rare Earths* (Panel),²⁸⁴ and *Colombia–Textiles* (Panel).²⁸⁵

According to the AB, “disguised restriction” on international trade, “arbitrary discrimination” and “unjustifiable discrimination” are concepts that “impart meaning to one another.”²⁸⁶ Disguised restriction includes “disguised *discrimination* in international trade”, but “*concealed* or *unannounced* restriction or discrimination does not exhaust the meaning of ‘disguised restriction.’”²⁸⁷ Thus, while these concepts may overlap, they are not identical in scope. Arbitrary or unjustified discrimination does not necessarily constitute disguised restriction on trade, and “disguised restriction on trade may exist even if there is no discrimination.”²⁸⁸

However, there is no clear guidance on how to determine whether arbitrary or unjustifiable discrimination constitutes a disguised restriction on trade. Notably, each of the three cases in which disguised restriction was found involved an origin-based measure. Yet, even though *Brazil–Tyres* also involved an origin-based measure, the AB refrained from making a finding on disguised restriction after reversing the Panel’s two findings (one positive and one negative) on the issue.²⁸⁹

Conceptually, if a measure is a disguised restriction on trade, its invocation of the general exceptions will certainly constitute abuse. Thus, so long as the prevention of abuse remains a “fundamental theme” of the

282. In practice, however, the “rationally related” standard has been applied to expand the function of the chapeau beyond the necessity equivalent. See *supra* Part III.C.3.d.

283. AB Report, *US–Gasoline*, *supra* note 38, at 29.

284. Panel Report, *China–Rare Earths*, *supra* note 184, ¶¶ 7.679; 7.844; 7.969.

285. Panel Report, *Colombia–Textiles*, *supra* note 197, ¶¶ 7.579–580.

286. AB Report, *US–Gasoline*, *supra* note 38, at 25.

287. *Id.*

288. Panel Report, *China–Rare Earths*, *supra* note 184, ¶¶ 7.826, 7.952.

289. AB Report, *Brazil–Tyres*, *supra* note 66, ¶¶ 239, 251.

chapeau,²⁹⁰ WTO adjudicators may consider “disguised restriction” as the most significant element in the chapeau.²⁹¹ Especially in cases involving an origin-neutral measure, “disguised restriction” can be used as the ultimate test in judging whether the origin neutrality is genuine, i.e., whether the measure was taken in disguise of a protectionist purpose, thus constituting abuse of the general exceptions. In practice, WTO adjudicators might be reluctant to make a finding on this element, as “disguised” restriction seems to suggest a bad motive or bad faith. However, consideration of motives is “inevitable” in judicial practice, especially in difficult cases.²⁹² Hence, a more frequent resort to this element by the tribunals would be desirable.

CONCLUSIONS

WTO’s chapeau jurisprudence is critical to the policy space of the trading nations. As it now stands, it will be very difficult for many important regulations of the Members, such as those designed to deal with climate change, to pass scrutiny of the chapeau. That is because the WTO Appellate Body has interpreted the chapeau—a condition for invoking the policy exceptions under GATT and GATS—as imposing a nondiscrimination requirement above and beyond the nondiscrimination obligations of their underlying MFN and NT rules. Meanwhile, an increasing number of FTAs have copied the chapeau language in their policy exceptions, thus creating a similar structure of double-layered nondiscrimination requirements under the treaties. Since these new FTAs cover a broader range of economic activities than GATT and GATS, WTO chapeau jurisprudence could potentially exert an even greater impact on the regulatory freedom of the trading nations.

Given its systemic importance, the chapeau provision and its interpretations deserve to be better understood. Towards that goal, this Article has made three major contributions. First, it revealed that the chapeau language was included in GATT Article XX by a drafting oversight, and that oversight has led to the creation of an incoherent order of values under the treaty. The drafters of the Havana Charter took the chapeau language from the 1927 Convention without considering a critical difference between the two treaties. The 1927 Convention prescribed no substantive rules of nondiscrimination, which made it necessary to include a nondiscrimination requirement in the context of the policy exceptions so as to prevent the contracting parties from abusing the policy exceptions by discriminatory means. In contrast, the part of the

290. AB Report, *US–Gasoline*, *supra* note 38, at 25.

291. *See* Bartels, *supra* note 25, at 123 (suggesting that disguised restriction “may prove to be one of the more important aspects of the chapeau.”). *See also* Leonelli, *supra* note 14 (suggesting that chapeau interpretation should be limited to a good-faith centered approach).

292. Farber & Hudec, *supra* note 157, at 1440.

Havana Charter that became GATT 1947 prescribed two sets of substantive obligations of nondiscrimination in the form of MFN and NT rules. Yet, the drafters neglected to consider the relation between the two sets of nondiscrimination requirements. Conceptually, when all GATT obligations are subject to the policy exceptions of Article XX, the values represented by those policies are placed above the value of GATT substantive obligations, including MFN and NT obligations. But this otherwise clear order of values is muddled by the chapeau, as the condition imposed by the chapeau on the invocation of the policy exceptions potentially encompasses the value of MFN and NT rules. This incoherent order of values is the root cause of the various problems manifested in WTO's chapeau jurisprudence.

Second, this Article has found that the chapeau provision is mostly unnecessary for the prevention of abuse of the general exceptions, which is its originally intended purpose. As a matter of treaty design, GATT and GATS already prescribe numerous substantive rules of nondiscrimination, and the subparagraphs of the general exceptions already contain specific conditions to prevent their abuse. This understanding is confirmed by WTO practice. The article's survey of all relevant WTO cases has shown that the chapeau has been applied for the following types of functions: (i) elevating the "relating to" standard under GATT Article XX(g) to a "necessity" equivalent; (ii) replicating the substantive rules of MFN, NT and QRs, but with a reversed burden of proof; (iii) imposing nondiscrimination requirements beyond those of the underlying MFN and NT rules, including the creation of super-NT and extra-MFN obligations; and (iv) imposing regulatory standards beyond a "necessity" equivalent in relation to the policy objectives of the general exceptions. With a possible exception of type (i), none of these functions serves the purpose of abuse prevention. Instead, the chapeau has been applied to expand GATT and GATS requirements beyond the scope of their underlying obligations.

Third, this Article has inquired whether, as a matter of treaty interpretation, the chapeau provision may be applied for purposes other than its originally intended one. It has found no barrier, either textually or contextually, in this regard. Thus, it should be permissible for the WTO adjudicators to expand the scope of GATT and GATS obligations through their interpretation of the chapeau provision. Conversely, however, when freed from the single purpose of abuse prevention, the chapeau provision could also be interpreted to expand the scope of the policy exceptions available under GATT and GATS. Such an "exculpatory function" would help overcome the constraints placed by the closed list of the general exceptions on the regulatory space of the Members. Doctrinally, the article has shown that the key to developing the exculpatory function lies

in proper interpretations of “condition-based” discrimination under the chapeau.

In the final analysis, this Article cautions against the utilization of the chapeau language in the application of the general exceptions. Given the interpretive issues involved, nations would be well advised to avoid the structure of double-layered rules of nondiscrimination in their future agreements.

APPENDIX A

GATT Article XX

General Exceptions

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

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to

them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph no later than 30 June 1960.

GATS Article XIV

General Exceptions

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

- (a) necessary to protect public morals or to maintain public order;²⁹³
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective²⁹⁴ imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

293. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

294. Footnote omitted.

APPENDIX B-1

WTO Panel and AB Decisions on Defenses Invoking GATT/GATS
General Exceptions

Case Name	DS Number	GATT Art. XX	GATS Art. XIV	Defense rejected	Defense succeeded	Chapeau Analyzed
US-Gasoline (1996)	2	(b), (d), (g)		x		*
Canada-Periodicals (1997)	31	(d)		x		
US-Shrimp (1998)	58	(b), (g)		x		*
Korea-Beef (2001)	161/169	(d)		x		
Argentina-Bovine Hides (2001)	155	(d)		x		*
EC-Asbestos (2001)	135	(b)			√	*
US-Shrimp (21.5) (2001)	58	(g)			√	*
EC-Tariff Preferences (2004)	246	(b)		x		*
Canada-Wheat (2004)	276	(d)		x		
US-Gambling (2005)	285		(a), (c)	x		*
Dominican Republic-Cigarettes (2005)	302	(d)		x		
Mexico-Soft Drinks (2006)	308	(d)		x		
US-Gambling (21.5) (2007)	285		(a)	x		*
Brazil-Tyres (2007)	332	(b)		x		*
US-Shrimp (Thailand) (2008)	343	(d)		x		
US-Customs Bond Directive (2008)	345	(d)		x		
China-Auto Parts (2008)	339/340/342	(d)		x		
Columbia-Ports of Entry (2009)	366	(d)		x		
China-Publications and Audiovisuals (2009)	363	(a)		x		
US-Poultry (2010)	392	(b)		x		
Thai-Cigarettes (2011)	371	(d)		x		
China-Raw Materials (2012)	394/395/398	(b), (g)		x		
EC-Seal Products (2014)	400/401	(a)		x		*
China-Rare Earths (2014)	431/432/433	(g)		x		*
US-Tuna II (Mexico) (21.5) (2015)	381	(g)		x		*
Argentina-Financial Services (2016)	453		(c)	x		*
Columbia-Textiles (2016)	461	(a), (d)		x		*
India-Solar Cells (2016)	456	(i), (d)		x		
Indonesia-Import Licensing Regimes (2017)	477/478	(a), (b), (d)		x		*
Indonesia-Chicken (2017)	484	(b), (d)		x		
EU-Energy Package (2018)	476	(i)	(a)	x#		*
US-Tuna II (Mexico) (21.5 II) (2019)	381	(g)			√	*
Brazil-Taxation (2019)	472/497	(a), (b), (g)		x		
US-Tariffs on Chinese Goods (2020)	543	(a)		x#		
Turkey-Pharmaceuticals (2022)	583	(b), (d)		x##		
Indonesia-Raw Materials (2022)	592	(d)		x#		
Total: 36				33	3	17

Appeal of the panel report pending, due to incapacity of the Appellate Body.

Panel report appealed to DSU Article 25 arbitration; its findings under Article XX upheld by arbitrators.

APPENDIX B-2

WTO Cases Involving Interpretation of the Chapeau

Case Name	Substantive Rules Violated (Rules for which judicial economy exercised)	Defense under GATT XX	Defense under GATS XIV	Type of discrimination found under Chapeau	Defense under Chapeau failed	Defense under Chapeau succeeded
QRs						
US-Shrimp (1998)	GATT XI (GATT I; XIII)	(b), (g)		MFN; extra-MFN; super-NT	x (AB)	
US-Shrimp (21.5) (2001)	GATT XI	(g)				√ (AB)
US-Gambling (2005)	GATS XVI (GATS XVII)		(a), (c)	NT	x (AB)	
US-Gambling (21.5) (2007)	GATS XVI		(a)	NT	x (panel)	
Brazil-Tyres (2007)	GATT XI (GATT I; XIII)	(b)		MFN; NT	x (AB)	
China-Rare Earths (2014)	GATT XI	(g)		NT#	x (panel)	
Indonesia-Import Licensing Regimes (2017)	GATT XI	(a), (b), (d)		NT	x (panel)	
Tariffs						
Columbia-Textiles (2016)	GATT II:1	(a), (d)		MFN#	x (panel)	
MFN/NT						
US-Gasoline (1996)	GATT III:4	(b), (d), (g)		NT#	x (AB)	
Argentina-Bovine Hides (2001)	GATT III:2	(d)		NT	x (panel)	
EC-Asbestos (2001)	GATT III:4*	(b)				√ (panel)
EC-Tariff Preferences (2004)	GATT I:1	(b)		extra-WTO	x (panel)	
EC-Seal Products (2014)	GATT I:1; III:4	(a)		MFN; NT extra-MFN	x (AB)	
US-Tuna II (Mexico) (21.5) (2015)	TBT 2.1 GATT I:1; III:4	(g)		MFN; NT	x (AB)	
Argentina-Financial Services (2016)	GATS II; XVII		(c)	MFN	x (panel)	
EU-Energy Package (2018)	GATT III:4 GATS XVII	(j)	(a)	NT	x** (panel)	
US-Tuna II (Mexico) (21.5 II) (2019)	TBT 2.1 GATT I:1; III:4	(g)				√ (AB)
Total: 17					14	3

Disguised restriction on trade also found.

* Panel's finding reversed by the Appellate Body.

** Appeal of the panel report pending, due to incapacity of the Appellate Body.