

The post-1945 legal order, whatever its deficiencies, has been associated with a certain stability in the relations among states. Under that legal order, constraints have limited territorial claims and the methods by which states pursue them. International law and its institutions do not provide support for the separation of Crimea from Ukraine or its annexation to Russia. Whether the international legal order will prove over time to operate as a constraint on the consolidation or durability of these acts remains to be tested.

## THE CHAPEAU OF THE GENERAL EXCEPTIONS IN THE WTO GATT AND GATS AGREEMENTS: A RECONSTRUCTION

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One of the most important issues in the law of the World Trade Organization is the right of WTO members to adopt measures for nontrade purposes. In the WTO's General Agreement on Tariffs and Trade (GATT 1994) and General Agreement on Trade in Services (GATS), this right is secured in general exceptions provisions,<sup>1</sup> which permit WTO members to adopt measures to achieve certain objectives, notwithstanding any other provisions of these agreements and also, in some cases, other WTO agreements.<sup>2</sup> These objectives include, most importantly, the protection of public morals, the maintenance of public order,<sup>3</sup> the protection of human, animal, or plant life or health, the enforcement of certain domestic laws, and the conservation of exhaustible natural resources.<sup>4</sup>

The right to adopt measures for these purposes is subject to various conditions, some of which are specific to the objective at issue. For example, a measure for conserving exhaustible natural resources needs to "relate to" that objective and be "made effective in conjunction with domestic restrictions on production or consumption of those resources,"<sup>5</sup> whereas a measure

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<sup>1</sup> General Agreement on Tariffs and Trade 1994, Art. XX, Apr. 15, 1994 [hereinafter GATT 1994], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, 1867 UNTS 187; General Agreement on Trade in Services, Art. XIV, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1B, 1869 UNTS 183 [hereinafter GATS]. WTO legal texts are available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) and reprinted in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1999).

<sup>2</sup> The general exceptions also apply to obligations in related WTO agreements, sometimes expressly, as in the Agreement on Trade-Related Investment Measures, Art. 3, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, 1868 UNTS 186, and the Agreement on Trade Facilitation, Art. 24(7), WTO Doc. WT/L/931 (July 15, 2014) (not yet in force), and sometimes by implication, as in relation to certain obligations in accession protocols. *See, e.g.*, Appellate Body Report, China—Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, para. 415, WT/DS363/AB/R (adopted Jan. 19, 2010). Documents for WTO disputes are available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#disputes](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes).

<sup>3</sup> This exception is not included in GATT 1994, *supra* note 1, Art. XX.

<sup>4</sup> This last exception is not included in GATS, *supra* note 1, Art. XIV.

<sup>5</sup> GATT 1994, *supra* note 1, Art. XX(g).

for protecting public morals must be “necessary” to that objective.<sup>6</sup> In addition—and this is the topic of this article—the right to adopt these measures is subject, in both GATT 1994 and GATS, to a set of conditions in an introductory paragraph to their general exceptions provisions, known as the “chapeau.” The chapeau provides that a measure that is adopted for one of the legitimate objectives listed in the subparagraphs of these provisions not be “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.”<sup>7</sup>

The conditions in the chapeau have proved decisive in a number of disputes in which the measures at issue, though adopted for legitimate reasons by the respondent WTO members, were found to discriminate arbitrarily or unjustifiably, or both, against the products or services of the complainant WTO members. For example, in *U.S.—Gasoline*, the United States was permitted to impose certain standards on gasoline in order to protect clean air, but it had done so in a manner that discriminated unjustifiably against Venezuelan gasoline.<sup>8</sup> In *U.S.—Shrimp*, the United States was entitled to prohibit imports of shrimp so as to protect sea turtles, but it had done so in a manner that discriminated arbitrarily and unjustifiably against shrimp from India, Malaysia, Pakistan, and Thailand.<sup>9</sup> In *U.S.—Gambling*, the United States was allowed to prohibit online gambling services from Antigua and Barbuda on public morals grounds, but its measure violated the chapeau because it permitted some domestic remote horserace-betting services.<sup>10</sup> In *Brazil—Retreaded Tyres*, Brazil was allowed to prohibit imports of retreaded tires in order to combat the spread of malaria and dengue fever, but it had arbitrarily and unjustifiably made an exception for imports of retreaded tires from MERCOSUR countries.<sup>11</sup> Most recently, in *EC—Seal Products*, the European Union was permitted to prohibit seal products on public morals grounds, but because of certain exceptions in its measure, including an exception for seal products resulting from traditional indigenous hunts, it had discriminated arbitrarily and unjustifiably against seal products from Canada and Norway, including seal products hunted by Canadian traditional indigenous hunters.<sup>12</sup>

These disputes have given the chapeau a high profile, and yet it is still not clear what it requires. In the first of these disputes, *U.S.—Gasoline*, the Appellate Body made two statements about the chapeau that have acquired doctrinal status. The first was that a measure’s “specific contents” are to be appraised under the subparagraphs of the general exceptions, whereas the chapeau is concerned with “the manner in which that measure is applied.”<sup>13</sup> The

<sup>6</sup> *Id.*, Art. XX(a).

<sup>7</sup> GATT 1994, *supra* note 1, Art. XX. The chapeau of GATS, *supra* note 1, Art. XIV, uses the term “like conditions” instead of “same conditions,” but this difference does not appear to be significant.

<sup>8</sup> Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (adopted May 20, 1996) [hereinafter Appellate Body Report, U.S.—Gasoline].

<sup>9</sup> Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter Appellate Body Report, U.S.—Shrimp].

<sup>10</sup> 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 Appellate Body Report, U.S.—Gambling].

<sup>11</sup> Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, Brazil—Retreaded Tyres].

<sup>12</sup> Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (adopted June 18, 2014) [hereinafter Appellate Body Report, EC—Seal Products] (reported by Gregory Shaffer and David Pabian at 109 AJIL 154 (2015)).

<sup>13</sup> Appellate Body Report, U.S.—Gasoline, *supra* note 8, at 22.

second statement, taken to be an implication of the first, was that “[it] is, accordingly, important to underscore that the purpose and object of the introductory paragraph of Article XX [that is, the chapeau] is generally the prevention of ‘abuse of the [general] exceptions.’”<sup>14</sup>

It is the contention of this article that neither of these statements accurately captures the various functions of the chapeau. Indeed, these statements do not even explain how the Appellate Body has applied the chapeau to the facts of any of the disputes before it, including, notably, *U.S.—Gasoline* itself.

Instead, it is suggested, the chapeau can be understood as comprising a set of standard economic and policy tests. These tests are in the form of two conditions. The first condition prohibits measures that discriminate arbitrarily or unjustifiably between countries where the same conditions prevail. This condition involves, in the first instance, a prohibition on any measure that has a disproportionately worse (or “disparate”) economic impact on products from certain countries when compared to its impact on competitive products from other countries.<sup>15</sup> This prohibition applies, however, only to disparate impacts on competitive products from countries in which the “same conditions prevail.” Assuming that these “conditions” are based on factors relevant to the objective of the measure,<sup>16</sup> the “same conditions” will *not* prevail in countries where these factors are relevantly different, and the chapeau’s discrimination test will not be applicable. In this sense, the “same conditions” requirement functions as a justification, based on the objective of the measure, for disparate impacts that are rationally related to that objective. But even where the “same conditions” *do* “prevail,” it is still possible to justify the disparate (now, almost certainly, “discriminatory”) effects of the measure. That is because the chapeau explicitly prohibits discrimination only if it is “unjustifiable or arbitrary discrimination.” This second justification for discrimination, it is argued, is necessarily independent of the objective of the measure, and may even—and should be able to—undermine that objective. The effect of these dual justifications is to enhance the regulatory autonomy of WTO members.

The second condition in the chapeau prohibits measures that are applied in a manner constituting a “disguised restriction on international trade.” This condition has so far mainly been ignored by WTO panels and the Appellate Body, perhaps because of a lack of certainty as to its meaning. It has, for example, been thought that a restriction on trade is “disguised” by not being published. Such interpretations, it is suggested, miss the point. It seems far more likely that this condition concerns illegitimate restrictions on international trade that are “disguised” by an ostensible legitimate objective. It remains to be seen what would render a restriction on international trade illegitimate for these purposes, but it might be suggested that, at a minimum, a measure that is adopted for explicit protectionist reasons would be illegitimate for these purposes.

This article proceeds as follows. Part I considers the Appellate Body’s approach to the chapeau. It argues that the Appellate Body has incorrectly distinguished between the “contents” and “application” of a measure, and it explains why the doctrine of abuse of rights does not generate any bright line between the subparagraphs and the chapeau. Part II highlights the functional similarities of the conditions in the subparagraphs and in the chapeau. It argues that

<sup>14</sup> *Id.*

<sup>15</sup> For simplicity, this article refers to discrimination between “products.” For the chapeau in Article XIV of GATS, the appropriate reference would be to “services” and also, most likely, “service suppliers.”

<sup>16</sup> See *infra* text accompanying note 89.

both sets of conditions function to limit the right to adopt measures for legitimate reasons and that the only reason that some of these conditions are located in the subparagraphs and others in the chapeau is that some conditions are specific to measures adopted for certain reasons, whereas others are horizontally applicable to all measures adopted under the general exceptions. More specifically, this second part argues that it is inappropriate to consider a measure's discriminatory aspects under the subparagraphs and that this question should be left for analysis under the chapeau. This conclusion sets the stage for an analysis, in part III, of the meaning of the discrimination test in the chapeau, and of the relationship of that test to the discrimination tests in the substantive obligations of GATT 1994 and GATS. Part IV presents in more detail the argument, summarized above, that the chapeau contains two independent, policy-based justifications for measures with discriminatory effects. This fourth part also expands on the meaning of "arbitrary" discrimination. It argues that this concept does not have any procedural dimension but simply refers to discrimination without *any* rationale, as opposed to discrimination that has *some* rationale, albeit insufficient to serve as a justification. Part V addresses the second chapeau condition concerning measures that constitute a "disguised restriction on international trade," and draws out its implications for measures with mixed proper and improper purposes. Part VI concludes with some observations on the implications of this analysis for WTO jurisprudence to date, and for the types of measures that are likely to be analyzed under the chapeau in the future.

#### I. A CRITIQUE OF THE APPELLATE BODY'S APPROACH TO THE CHAPEAU

The Appellate Body's approach to the chapeau essentially resolves into two propositions. The first is that the subparagraphs of the general exceptions are concerned with a measure's "contents" and the chapeau with its "application" in practice. The second is that the subparagraphs are concerned with the right to adopt measures for nontrade reasons and that the chapeau is concerned with the abuse of that right. It is contended that the first proposition is without foundation, while the second proposition does not generate the bright line that, according to the Appellate Body, exists between the chapeau and the subparagraphs of the general exceptions. This part also critiques two other propositions resulting from the Appellate Body's approach. The first is that the chapeau marks a "line of equilibrium" between the rights of WTO members. The second is that as a matter of structural logic, the general exceptions must be analyzed according to a "two-tiered" approach, beginning with the provisional justification of a measure under the subparagraphs, and only then moving to an appraisal of the measure under the chapeau.

##### *The "Contents" or "Design" of a Measure, Versus Its "Application"*

In *U.S.—Gasoline*, the Appellate Body drew a distinction between a measure's "specific contents," which are to be appraised under the subparagraphs of the general exceptions, and "the manner in which that measure is applied," which is to be appraised under the chapeau.<sup>17</sup> It elaborated on this distinction in *U.S.—Shrimp*, where it said that the "general design of a measure, as distinguished from its application, is . . . to be examined in the course of determining

<sup>17</sup> Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 22.

whether that measure falls within one or another of the paragraphs of Article XX following the chapeau.”<sup>18</sup> The Appellate Body then went on to say that

the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.<sup>19</sup>

This statement appears to mean that for the purposes of appraising a “measure” under the general exceptions, that “measure” can be divided into an abstract element that is not “applied” and a concrete element that is “applied.” But any such distinction is spurious. As a matter of legal logic, it is only a single “measure,”<sup>20</sup> which is to say instance of conduct, that requires justification under the general exceptions.<sup>21</sup>

But how is a “measure” to be identified? It would seem that a “measure” is identified by reference to the terms of the original rule that the “measure” violates.<sup>22</sup> Some rules identify “measures” in terms of their formal characteristics<sup>23</sup> or purposes.<sup>24</sup> Other rules refer to “measures” in terms of their effects. A “measure” for the purposes of the most-favored-nation obligation in GATT 1994 is identified as that instance of conduct that does not accord an “advantage, favour, privilege or immunity” to products from one country that it accords to like products of another WTO member.<sup>25</sup> By contrast, a “measure” for the purposes of the most favored-nation-obligation in GATS will be identified as conduct by a WTO member that causes “less

<sup>18</sup> Appellate Body Report, U.S.—Shrimp, *supra* note 9, para. 116.

<sup>19</sup> *Id.*, para. 160.

<sup>20</sup> A measure can be any act or omission attributable to the WTO member at issue. See Appellate Body Report, *United States—Sunset Review of Anti-dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*, para. 81, WT/DS244/AB/R (adopted Jan. 9, 2004), referring to the Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.3, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 2, 1869 UNTS 401 [hereinafter *Dispute Settlement Understanding*]. It may also be an unpublished practice, as in Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS444/AB/R (adopted Jan. 26, 2015).

<sup>21</sup> See generally Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 26, UN Doc. A/56/10 (2001). The articles are annexed to General Assembly Resolution 56/83 (Dec. 12, 2001). Articles 2 and 12 describe “wrongful acts” as conduct consisting of acts or omissions, and Articles 20 to 25 describe circumstances precluding the wrongfulness of these same “acts.” In the WTO context, see Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, para. 177, WT/DS371/AB/R (adopted July 15, 2011) (referring to “treatment”), and William Davey & Keith Maskus, *Thailand—Cigarettes (Philippines): A More Serious Role for the “Less Favourable Treatment” Standard of Article III*, 12 WORLD TRADE REV. 163, 183 (2013). See also *infra* text accompanying note 68.

<sup>22</sup> The language of “violation” is used here as shorthand. It is suggested below, see *infra* text accompanying note 99, that the general exceptions apply to “nonviolation” measures. If so, then the “measure” would be defined by reference to the conduct causing the relevant “nullification or impairment” of “benefits” accruing to the affected WTO member under GATT 1994 or GATS.

<sup>23</sup> For example, the definition of “customs duties” in GATT 1994, *supra* note 1, Art. II, and of certain “quantitative restrictions” in GATT 1994, *supra* note 1, Art. XI:1. See also *infra* note 60.

<sup>24</sup> For example, the definition of “sanitary or phytosanitary measure” in the Agreement on the Application of Sanitary and Phytosanitary Substances, Annex A, para. 1, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, 1867 UNTS 493.

<sup>25</sup> GATT 1994, *supra* note 1, Art. I:1.

favourable treatment” to services and service suppliers of any other WTO member than it does to the like services and service suppliers of any other country.<sup>26</sup>

*U.S.—Gasoline* is illustrative. In that case the Appellate Body expressly defined the “measure” at issue to include different “baseline” standards applicable to U.S. and Venezuelan gasoline producers.<sup>27</sup> The Appellate Body then analyzed precisely that same measure under the relevant substantive nondiscrimination obligation, the relevant subparagraph of the general exceptions, and then the chapeau of the general exceptions.<sup>28</sup> Notably, the Appellate Body did not at any stage divide the “measure” into abstract and applied elements.<sup>29</sup> Its theoretical distinction between the “contents” and the “application” of a measure remained exactly that—*theoretical*.

The distinction between the “contents” (or “design”) and “application” of a measure was reiterated in *U.S.—Shrimp*. But here, too, this distinction had less meaning than is sometimes thought. The panel had found that “the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101–162 is not consistent with Article XI:1 of GATT 1994.”<sup>30</sup> On appeal, the Appellate Body distinguished between regulatory levels. In relation to whether the measure related to the conservation of exhaustible natural resources, the Appellate Body referred to the statute and implementing guidelines.<sup>31</sup> In relation to the chapeau it referred to the statute, the implementing guidelines and U.S. administrative practice.<sup>32</sup>

As Arwel Davies has noted, the Appellate Body’s analytical separation of these different regulatory levels can be explained by the evidence required to determine whether a given condition had been satisfied.<sup>33</sup> For the Appellate Body to determine whether the measure was adopted

<sup>26</sup> GATS, *supra* note 1, Art. II.1. When it is burdensome conduct that produces “less favourable treatment”, it is arguably that burdensome conduct alone that constitutes the “measure.” Any parallel, less burdensome conduct should arguably not be treated as part of the “measure” but should be considered, if at all, in the context of determining whether the “less favourable treatment” is caused by the more burdensome conduct in question.

<sup>27</sup> Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 13–14. The Appellate Body might have instead identified the “measure” as the most burdensome baseline that caused “less favourable treatment,” as noted *supra* note 26. That it did not is immaterial, however, to the result.

<sup>28</sup> *Id.* (measure under Articles III and XX of GATT 1994, *supra* note 1); *id.* at 16 (same measure under Article XX(g) of GATT 1994); *id.* at 22 (same measure under the chapeau and Article XX(g) of GATT 1994). The Appellate Body is sometimes criticized for having identified a discriminatory “measure” that violated a substantive nondiscrimination obligation, but then having justified a different, broader “measure” under Article XX of GATT 1994. Robert Hudec said that “the Appellate Body ruled that the ‘measure’ to be tested [under Article XX of GATT 1994] was the entire regulation in which the GATT-illegal provision appeared.” Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 INT’L LAW. 619, 637 (1998). To the same effect, see Davey & Maskus, *supra* note 21, at 182–83. This criticism is misdirected. On the relevance of the discriminatory and other features of the measure under different GATT 1994 provisions, see *infra* text accompanying notes 66–70.

<sup>29</sup> The Appellate Body did discuss, in the context of the chapeau, the failure of the U.S. authorities to cooperate with Venezuela and its producers, but the purpose of the discussion was to identify alternative less discriminatory measures. That is not the same as treating the U.S. failure to cooperate as the “application” of the measure at issue. See Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 27–28.

<sup>30</sup> Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para. 8.1, WT/DS58/R (adopted Nov. 6, 1998).

<sup>31</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 141.

<sup>32</sup> *Id.*, para 161.

<sup>33</sup> See Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the ‘New’ Approach in Brazil-Tyres*, 43 J. WORLD TRADE 507, 529–30 (2009). Davies also refers in this context to the Appellate Body’s reports in *U.S.—Gambling*, *supra* note 10, and *Brazil—Retreaded Tyres*, *supra* note 11.

for the purpose of “conserving exhaustible natural resources,” it was unnecessary, as a matter of evidence, to consider the practice of the administrative authorities. By contrast, to determine whether the measure discriminated against foreign shrimp producers and, if so, whether doing so was necessary for a particular purpose, the Appellate Body had to consider this practice and its effects.<sup>34</sup>

Subsequent cases confirm the fiction of the supposed distinction between the “contents” or “design” and the “application” of a measure. In *China—Rare Earths*, the Appellate Body said that a panel could look beyond the “design” of the measure and take into account factual evidence in determining whether a measure related to the “conservation of exhaustible natural resources.”<sup>35</sup> It is likely that if, in *U.S.—Shrimp*, it had been claimed that U.S. authorities were prohibiting shrimp imports for a purpose other than the “conservation of exhaustible natural resources,” the Appellate Body would also have permitted the consideration of evidence to that effect. By contrast, in *EC—Seal Products*, where empirical evidence was lacking as to whether the measure at issue met the chapeau’s discrimination conditions, the Appellate Body looked at the “actual or expected application” of the measure, based on its “design, architecture, and revealing structure.”<sup>36</sup> The use, in the context of the chapeau, of language previously reserved for Article XX(g) of GATT 1994 is itself revealing.

In short, the supposed distinction between the a measure’s “design” or “contents,” on the one hand, and its “application,” on the other, is merely descriptive of the evidence that is required and available to demonstrate whether a measure meets a given condition in the general exceptions; it does not support the notion that there is a functional distinction between the chapeau and the subparagraphs of the general exceptions.

### *The Chapeau and the Doctrine of Abuse of Rights*

In *U.S.—Gasoline*, the Appellate Body’s initial distinction between a measure’s “specific contents” and its “application” set the stage for its view that the chapeau is concerned with preventing the abuse of rights granted under the general exceptions.<sup>37</sup> It elaborated on this position in *U.S.—Shrimp*, where it said:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.”<sup>38</sup>

<sup>34</sup> Indeed, in *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, para. 79, WT/DS58/AB/RW (adopted Oct. 22, 2001) [hereinafter Appellate Body Report, U.S.—Shrimp (Article 21.5—Malaysia)], the Appellate Body stated that for the purposes of the chapeau, the “measure” comprised legislation, implementing regulation, and practice.

<sup>35</sup> Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, paras. 5.113, .138, WT/DS431/AB/R (adopted Aug. 29, 2014).

<sup>36</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.302. The Appellate Body’s willingness to consider the “expected application” of the measure contrasts with *U.S.—Shrimp (Article 21.5—Malaysia)*, *supra* note 34, para. 148, where it said that, “[a]s Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation.”

<sup>37</sup> Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 22.

<sup>38</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 158.

It is contended here that, while it is permissible for the Appellate Body to draw an analogy between the conditions in the chapeau and the doctrine of abuse of rights, the same analogy can be drawn in relation to all of the conditions in the general exceptions.<sup>39</sup> Contrary to the Appellate Body's view, the doctrine of abuse of rights does not serve as an analytical basis for delimiting the chapeau from the subparagraphs of the general exceptions.

To explain this point in more detail, it is necessary to refer to Bin Cheng's analysis of the doctrine of abuse of rights, which was cited by (and evidently served as an inspiration for) the Appellate Body in the quoted passage.<sup>40</sup> The relevant discussion appears in Cheng's book, under the heading "Rights and Treaty Obligations," where he states:

Whatever the limits of the right might have been before the assumption of the obligation, from then onwards, the right is subject to a restriction. Henceforth, whenever its exercise impinges on the field covered by the treaty obligation, it must be exercised bona fide, that is to say reasonably. A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right . . . . But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. In this way, the principle of good faith establishes an interdependence between the rights of a State and its obligations. By weighing the conflicting interests covered by the right and the obligation, it delimits them in such a way as to render the exercise of the right compatible with the spirit of the obligation.<sup>41</sup>

This passage underlies the Appellate Body's understanding of the doctrine of abuse of rights in the context of treaty obligations. But it is important to understand this passage in the context of the *North Atlantic Coast Fisheries* case,<sup>42</sup> which Cheng discusses at some length immediately before the quotation above. That case concerned a treaty obligation granting U.S. fishermen a right to fish in UK waters. The question was whether the United Kingdom was entitled to regulate fishing in its waters, the treaty being silent on this point. The arbitral tribunal stated that, notwithstanding its treaty obligations, the United Kingdom retained a right to regulate for certain purposes, subject to various conditions. The tribunal described the permitted regulations as follows:

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty.<sup>43</sup>

<sup>39</sup> In *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, 839 (2001), Sanford Gaines makes the same point, albeit without a detailed analysis of the doctrine of abuse of rights.

<sup>40</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, ch. 4 (1953), quoted in Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 158 n.156.

<sup>41</sup> CHENG, *supra* note 40, at 125.

<sup>42</sup> *North Atlantic Coast Fisheries (UK v. U.S.)*, 11 R.I.A.A. 167 (Perm. Ct. Arb. 1910).

<sup>43</sup> *Id.* at 189.

This passage bears an uncanny resemblance to the general exceptions of GATT and GATS. It establishes a right to regulate for a specific purpose, subject to the condition that the regulations must be necessary for achieving that purpose, and that they do not discriminate unjustifiably between foreign and domestic fishermen.

It is also notable that this passage does not establish any “weighing [of] the conflicting interests” of the parties to the treaty, as Cheng proposed, at least in the sense that one of these interests could potentially outweigh the other. The hierarchy of values is fixed: the United Kingdom’s right to regulate prevails over the right of U.S. fishermen to fish in those waters. This right is limited only by the requirements not to regulate unnecessarily and not to discriminate unnecessarily.

Why, then, did Cheng use the terminology of weighing conflicting interests? It may be that he was influenced by the use of the doctrine of abuse of rights in other contexts, where it has been customary to “weigh” the interests of parties, such as shared resources or transboundary harm.<sup>44</sup> But as Georg Schwarzenberger has pointed out, situations described in terms of abuse of rights may sometimes be better understood as involving an underlying equitable rule that permits such “weighing” of interests.<sup>45</sup>

There is also a broader question to be addressed: is it appropriate to use the language of abuse of rights in relation to conduct that is not an “abuse” of rights, in the sense of being consciously adopted for an improper purpose or, to put it another way, adopted in bad faith? The doctrine of abuse of rights and the related concept of “good faith” are frequently interpreted in this more limited way.<sup>46</sup> It is also true, however, that in some areas of the law, especially those involving individual rights, it is more customary to describe harmful conduct in terms of an abuse of rights, even if this conduct is not adopted for an improper purpose. For example, arbitrary discrimination against aliens is sometimes described as an abuse of rights.<sup>47</sup> Whether it is appropriate to describe arbitrary discrimination against states in similar terms, even when the relevant conduct is not in bad faith, is at best an open question.

For present purposes, the results of this analysis are as follows. On the narrowest, and least controversial, understanding of the doctrine of abuse of rights, it would be appropriate to consider as an abuse of rights any measure that is adopted for an improper purpose, which is to say,

<sup>44</sup> HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 162–65 (rev. ed. 1958); F. V. Garcia Amador, *State Responsibility: Some New Problems*, 94 *RECUEIL DES COURS* 365, 381 (1958 II); Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 *MCGILL L.J.* 389, 424–29 (2002).

<sup>45</sup> Georg Schwarzenberger, *Uses and Abuses of the “Abuse of Rights” in International Law*, 42 *TRANSACTIONS GROTIUS SOC’Y* 147, 153–54, 172, 177 (1956). The doctrine of abuse of rights also has more application when the rights at issue are otherwise considered to be absolute.

<sup>46</sup> See the individual opinions in *Whaling in the Antarctic* (Austl. v. Japan) (Int’l Ct. Justice Mar. 31, 2014) in relation to the question whether Japan had acted in good faith. See *id.*, Diss. Op. Owada, J., paras. 21–22; *id.*, Diss. Op. Abraham, J., paras. 28–29; *id.*, Diss. Op. Yusuf, J., para. 54; *id.*, Sep. Op. Greenwood, J., para. 29; *id.*, Sep. Op. Sebutinde, J., para. 29. See also Sonia Rolland, *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, 108 *AJIL* 496, 501 (2014). In EU law the principle of abuse of rights also implies that an act had had an improper purpose. See Stefan Vogenauer, *The Prohibition of Abuse of Law: An Emerging General Principle of EU Law*, in *PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF EU LAW?* (Rita de la Feria & Stefan Vogenauer eds., 2011). The same applies in investment arbitrations. See Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, *J INT’L DISP. SETTLEMENT* 763, 780 (2014).

<sup>47</sup> CHENG, *supra* note 40, at 133; Robert Kolb, *La bonne foi en droit international public*, *REVUE BELGE DE DROIT INTERNATIONAL* 661, 721–22 (1998); Byers, *supra* note 44, at 424–29 (2002). But see Schwarzenberger, *supra* note 45, at 172, 177 (stating that these rules on aliens, too, are merely rules of customary international law).

in bad faith. For reasons to be explained, this conception would cover the condition in the chapeau prohibiting “disguised restrictions on international trade.”<sup>48</sup> The doctrine of abuse of rights could also cover measures that are adopted without a good purpose and that therefore fail to meet the requirement that they be adopted for legitimate purposes under the subparagraphs of the general exceptions. On the most extended understanding of the doctrine of abuse of rights, it would be possible also to describe as an abuse of rights a measure that unnecessarily harms or discriminates against a WTO member. But whichever of these interpretations of the doctrine of abuse of rights is most appealing, the doctrine cannot serve to delimit the chapeau from the subparagraphs of the general exceptions. On any of these interpretations, the doctrine of abuse of rights describes conditions that are found in both locations. Moreover, on the broadest view, it applies to all of those conditions cumulatively.

*The “Line of Equilibrium” and the “Two-Tiered Analysis”*

The foregoing analysis has implications for two of the Appellate Body’s ancillary propositions concerning the relationship between the subparagraphs and the chapeau of the general exceptions. The first of these propositions is that the “task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions.”<sup>49</sup> This proposition seems to have been inspired by Cheng’s statement that the doctrine of abuse of rights demarcates a “line delimiting the rights of both parties . . . traced at a point where there is a reasonable balance between the conflicting interests involved.”<sup>50</sup> However, this statement must be treated with some care. If there is a “line of equilibrium” between the rights of WTO members, then, for reasons given above in the context of the *North Atlantic Coast Fisheries* case, it is a line that does not entail any balancing of these rights. Nor, for reasons mentioned, could any such line be drawn between the chapeau and the subparagraphs of the general exceptions. It would have to be drawn around all of the conditions of the general exceptions. It is suggested that this “line of equilibrium” is an unhelpful and potentially misleading metaphor that should be abandoned.

The second of the Appellate Body’s propositions, originating in *U.S.—Gasoline*, is that the general exceptions must be analyzed according to a “two-tiered” analysis. According to this analysis, a measure must first be “provisionally justified” under one of the subparagraphs of Article XX, and then it must be shown to be consistent with the conditions of the article’s chapeau.<sup>51</sup> In *U.S.—Shrimp*, the Appellate Body affirmed this approach and went on to explain why it was structurally necessary. It said that the “task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter . . . has not first identified and examined the specific exception threatened with abuse.”<sup>52</sup> This is not entirely true. For reasons to be explained, it is necessary to identify a measure’s purpose in order to determine

<sup>48</sup> See part V below.

<sup>49</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 159.

<sup>50</sup> CHENG, *supra* note 40, at 132.

<sup>51</sup> Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 20.

<sup>52</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 120.

whether the “same conditions” prevail in different countries and also whether the measure constitutes a “disguised restriction on international trade.” But it does not follow that the measure must pass all of the other conditions set out in the subparagraphs before being analyzed under the chapeau. This is not to say that a “two-tiered” analysis might not be sensible when an issue can be disposed of more efficiently under a subparagraph than under the chapeau. But that is merely a matter of judicial economy. Contrary to the Appellate Body’s view, a “two-tiered” analysis is not structurally necessary, and in some cases, it might even be an inefficient way to assess a situation.

## II. THE SUBPARAGRAPHS OF THE GENERAL EXCEPTIONS

Having identified certain problems with the Appellate Body’s approach to the chapeau, this article now offers an alternative interpretation. It suggests that the chapeau of the general exceptions can be understood in terms of a set of legal conditions that complement, without duplicating, the conditions set out in the subparagraphs of the general exceptions.

The central function of the subparagraphs is to establish a right to adopt measures for certain legitimate objectives. This right is always subject to a condition that the measure is (or will be) minimally effective in achieving the relevant object, even if the degree of likelihood can vary according to the objective at stake.<sup>53</sup> Some subparagraphs contain ancillary conditions. Article XX(g) of GATT 1994 permits measures “relating to the conservation of exhaustible natural resources,” but only “if such measures are made effective in conjunction with restrictions on domestic production or consumption,”<sup>54</sup> and Article XX(j) of GATT 1994 permits measures “essential to the acquisition or distribution of products in general or local short supply,” provided that these measures are “discontinued as soon as the conditions giving rise to them have ceased to exist.”

In addition, some of the subparagraphs require, as a distinct condition, that a measure must be “necessary” to achieve a legitimate objective.<sup>55</sup> The Appellate Body discussed the meaning of this term in *Korea—Various Measures on Beef*.<sup>56</sup> It said that a measure’s “necessity” for achieving one of the objectives in the subparagraphs depends on the “weighing and balancing”

<sup>53</sup> Appellate Body Report, U.S.—Gambling, *supra* note 10, para. 292. In *EC—Seal Products*, *supra* note 12, para. 5.215, the Appellate Body said that there was no “pre-determined threshold level of contribution” for determining whether a measure was “necessary” to protect public morals. This does not mean that a measure need not make *any* contribution to the protection of public morals. See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, para. 322 n.647, WT/DS381/AB/R (adopted June 13, 2012) [hereinafter Appellate Body Report, U.S.—Tuna II], where the Appellate Body said, in the context of the “necessity” test in the Agreement on Technical Barriers to Trade, Art. 2.2, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, 1868 UNTS 120 [hereinafter TBT Agreement], that a panel may not be required to undertake a review of alternative measures “if a measure is trade restrictive and makes no contribution to the achievement of the legitimate objective.” The legitimate objectives set out in the Article 2.2 of the TBT Agreement include public morals. Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, para. 7.418, WT/DS400/R (adopted, as modified, June 18, 2014).

<sup>54</sup> See Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *supra* note 35, paras. 5.136–141.

<sup>55</sup> See GATT 1994, *supra* note 1, Art. XX(a) (protection of public morals), (b) (protection of human, animal, or plant life or health), (d) (compliance with certain domestic laws or regulations); GATS, *supra* note 1, Art. XX(a) (protection of public morals and maintenance of public order), (b) (protection of human, animal, or plant life or health), (c) (compliance with certain domestic laws or regulations).

<sup>56</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (adopted Jan. 10, 2000) [hereinafter *Korea—Various Measures on Beef*].

of several factors, including “the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”<sup>57</sup> It added, importantly, that “the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available.’”<sup>58</sup>

It is significant that the Appellate Body refers here to a reasonably available, “less WTO-inconsistent” alternative measure. Because almost all of the obligations in the GATT 1994 are targeted at discriminatory measures, whether expressly<sup>59</sup> or by necessary implication,<sup>60</sup> this phrase implies not only that the measure at issue must be no more *trade restrictive* than any other reasonably available alternative measure, in the simple sense of limiting international transactions,<sup>61</sup> but that it must also be no more *discriminatory* than any other reasonably available alternative measure, in the sense of affecting conditions of competition for products of different origins.<sup>62</sup> Applying this test to the facts of the case, the Appellate Body affirmed this interpretation of “WTO-inconsistency” insofar as it expressly considered “the extent to which the compliance measure produces restrictive effects on international commerce, that is, in

<sup>57</sup> *Id.*, para. 164. The Appellate Body endorsed this formulation of the “necessity” test in *EC—Seal Products*, *supra* note 12, paras. 5.169, .214. On “weighing and balancing” beyond the consideration of alternative measures, see Donald Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV.* 347 (2007).

<sup>58</sup> Appellate Body Report, *Korea—Various Measures on Beef*, *supra* note 56, para. 166. This formulation of the “necessity” test originates in GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, para. 5.26, L/6439 (adopted Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989). The Appellate Body has left open the possibility that the consideration of reasonably available alternatives might not be required in all cases. See Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.215 n.1299; Appellate Body Report, *U.S.—Tuna II*, *supra* note 53, para. 322 n.647 (in relation to the TBT Agreement, *supra* note 53, Art. 2.2).

<sup>59</sup> *E.g.*, GATT 1994, *supra* note 1, Arts. I, III; GATS, *supra* note 1, Arts. II, XVII.

<sup>60</sup> Discrimination is implicit in the customs duties and other charges prohibited by Article II of GATT 1994, *supra* note 1, and the quantitative restrictions prohibited by Article XI:1 of GATT 1994, as by definition, such measures apply only to foreign goods. In *India—Additional and Extra-additional Duties on Imports from the United States*, para. 158, WT/DS360/AB/R (adopted Nov. 17, 2008), the Appellate Body said that Article II:1(b) of GATT 1994 prohibited certain “other duties and charges” even if these were not discriminatory. It reasoned that such duties and charges may be applied for nonprotectionist purposes and in “situations where there is no domestic production (or even expectations of future domestic production).” It might have been better to say that, because such duties and charges are ipso facto discriminatory, a violation of Article II of GATT 1994 does not depend upon identifying any actual or expected protectionist effects.

<sup>61</sup> For this definition of a trade restriction, see Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, para. 319, WT/DS394/AB/R (adopted Feb. 22, 2012), para. 319, and Appellate Body Report, *U.S.—Tuna II*, *supra* note 53, para. 319.

<sup>62</sup> The trade-restrictive and discriminatory effects of a measure are independent and can be, but need not be, cumulative. A tax on alcoholic beverages that disproportionately affects products from one country compared to another is trade restrictive, in that it affects sales of the taxed beverages, and is also discriminatory, in that it does not equally affect all competitive products. By contrast, a domestic regulation that prohibits sales of all like products and that has an equal impact on products regardless of their origin is trade restrictive but not discriminatory. A subsidy granted only to domestic goods or services is discriminatory but not trade restrictive. By way of analogy with this last example, discriminatory trade preferences that have negative effects on the exports of third countries are not considered to “raise barriers” to the trade of those third countries within the meaning of Article XXIV:4 of GATT 1994, *supra* note 1, or paragraph 3(a) of the Enabling Clause, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT B.I.S.D. (26th Supp.) at 203 (1979). I am grateful to James Flett for provoking me to consider these distinctions in more detail.

respect of a measure inconsistent with [GATT 1994] Article III:4 [a nondiscrimination obligation], restrictive effects on imported goods.”<sup>63</sup>

Since *Korea—Various Measures on Beef*, the Appellate Body has gone in two directions. In *Thailand—Cigarettes (Philippines)* the Appellate Body considered the “necessity” test in Article XX(d) of GATT 1994 exclusively in terms of the discriminatory effects of the measure at issue.<sup>64</sup> By contrast, in other cases the Appellate Body interpreted the “necessity” test in Article XX(b) of GATT 1994 exclusively in terms of the trade-restrictive effects of the measure. In *Brazil—Retreaded Tyres* the Appellate Body did not even cite *Korea—Various Measures on Beef*.<sup>65</sup> Usually, the Appellate Body has cited the “less WTO-inconsistent” test of *Korea—Various Measures on Beef* but has then gone on to consider solely the trade-restrictive effects of the measure at issue.<sup>66</sup>

This divergence in the Appellate Body’s approach to the “necessity” test under the subparagraphs of the general exceptions raises the question whether this test should be concerned with the trade-restrictive or the discriminatory effects of a measure, or both. In considering this question it is necessary to bear in mind an important conceptual distinction between the identity of the “measure” and the features of that “measure” that are relevant under any given rule. This conceptual distinction is sometimes overlooked. In particular, at the stage of determining whether a given instance of conduct violates an obligation, the distinction is necessarily conflated, and that is because, as explained above, a “measure” is identified by reference to the terms of the rule that it violates. As noted above, for the purposes of an obligation prohibiting “less favorable treatment,” any given instance of conduct that accords “less favorable treatment” will be the identified “measure.” But it does not follow that for other rules applicable to that measure, including the general exceptions, it is only this feature of the “measure” that will be relevant. These other rules may be concerned with the measure’s other features, such as its purposes or its economic or non-economic effects. What is important under Article XX(g) of GATT 1994 is not whether the measure at issue is discriminatory but whether it was adopted for the purpose of conserving exhaustible natural resources.

The conceptual distinction between the identification of a “measure,” on the one hand, and the legal relevance of the different features of that “measure,” on the other, is an important one. In *United States—Section 337 of the Tariff Act of 1930*, the GATT panel stated that “what has to be justified as ‘necessary’ under Article XX(d) is each of the inconsistencies with another GATT Article found to exist” rather than “Section 337 as a system.”<sup>67</sup> Likewise, in *Thailand—Cigarettes (Philippines)*, the Appellate Body said that Thailand should have “justif[ie]d the differential treatment afforded to imported versus domestic cigarettes under its measure.”<sup>68</sup> In

<sup>63</sup> Appellate Body Report, *Korea—Various Measures on Beef*, *supra* note 56, para. 163 (footnote omitted).

<sup>64</sup> Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, *supra* note 21, para. 179.

<sup>65</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 11, para. 178.

<sup>66</sup> See Appellate Body Report, *U.S.—Gambling*, *supra* note 10 (compare paragraphs 305 and 309). In Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.169, the Appellate Body cited its decision in *Korea—Various Measures on Beef*, *supra* note 56, para. 164, for the proposition that the “the trade-restrictiveness of the measure” is a relevant factor, but it omitted to mention that, as noted, *supra* text accompanying notes 59–63, it was the discriminatory aspects of the measures that were considered important in that case.

<sup>67</sup> GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, *supra* note 58, para. 5.27.

<sup>68</sup> Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, *supra* note 21, para. 179.

other words the same “treatment” that violates a substantive obligation must be shown to be “necessary” to a legitimate objective.<sup>69</sup> For the reasons mentioned above, both statements are correct insofar as they indicate that it is the same “measure” (or, to use the Appellate Body’s term, “treatment”) that violates an obligation that requires justification.<sup>70</sup> But both statements are incorrect insofar as they go on to reason that the same discriminatory features of a “measure” that are relevant for the primary rule must also therefore be relevant for purposes of any given rule in the general exceptions. Just as the discriminatory effects of a measure, if any, are irrelevant under Article XX(g) of GATT 1994, there is no *a priori* reason that a measure’s discriminatory effects must be relevant to the “necessity” test in Article XX(d) or in other subparagraphs.

As a matter of legal logic, there is consequently no need to consider the discriminatory features of a measure under the subparagraphs. Moreover, there are reasons to resist taking such an approach. First, the chapeau already contains a discrimination condition, which, as will be explained in more detail, is subject to two independent justifications. To apply a discrimination condition under the subparagraphs without reference to these justifications, which are not available under the subparagraphs, would be equivalent to finding a violation of a substantive obligation of an agreement without considering any available exceptions to that obligation.

Second, for some measures it is logically impossible to apply a “no less discriminatory” and a “no less trade restrictive” test at the same time. An example is the measure in *Brazil—Retreaded Tyres*, which concerned an import prohibition on retreaded tires from all sources except MERCOSUR countries. Appraising this measure under Article XX(b) of GATT 1994, the Appellate Body found that the import prohibition was the least trade-restrictive measure reasonably available that achieved Brazil’s objective of protecting public health. The Appellate Body did not consider at that stage, however, whether a less discriminatory measure might have been available. If one considers the less discriminatory alternatives that might have been available, that makes perfect sense. On the one hand, Brazil might have reduced the trade-restrictive aspects of its measure, but such an alternative measure would no longer have met Brazil’s public health objectives. Alternatively, Brazil might have extended its import prohibition to MERCOSUR countries, but such an alternative measure would have been *more* trade restrictive than the measure at issue—and therefore, by definition, unnecessary to achieve its objectives. One can generalize: if a measure is the least trade-restrictive measure reasonably available that achieves a legitimate objective *and* if discrimination results from the non-application of that measure to all competitive products, then there will be a trade-off between its trade-restrictive and its discriminatory effects. In such cases a less discriminatory measure either will fail to achieve the legitimate objective or will be more trade restrictive than the measure at issue.

Nevertheless, it might be objected that it would be wrong for a measure whose discriminatory effects are justified, under the chapeau, to fail to be justified under a subparagraph solely because it is trade restrictive. This objection rests on the assumption that GATT 1994 prohibits only discriminatory measures.<sup>71</sup> It is not clear, however, that the assumption is correct. In addition to prohibiting measures that are discriminatory, GATT 1994 prohibits measures that are

<sup>69</sup> *Id.*, para. 177.

<sup>70</sup> See *supra* note 21.

<sup>71</sup> I am grateful to Frieder Roessler for insightful discussions on this issue.

both discriminatory and trade restrictive.<sup>72</sup> There is no inconsistency in requiring the trade-restrictive aspects of such measures to be independently justified under the subparagraphs of the general exceptions.

For these reasons, it is proposed that it is appropriate to limit the “necessity” test under the subparagraphs of the general exceptions to a consideration of a measure’s trade restrictiveness, and to analyze its discriminatory effects, if any, under the chapeau. This approach respects both the text of the chapeau and, importantly, the qualifications relating to the application of the chapeau’s discrimination test. It is the only logical way of dealing with those measures that present a trade-off between their trade-restrictive and discriminatory effects. It accords with the Appellate Body’s general practice, albeit with two exceptions, which are based on erroneous reasoning. Finally, it corresponds to the structure of the Agreement on Technical Barriers to Trade, in which a measure’s discriminatory effects are considered under one provision and its trade-restrictive effects under another, with the possibility of justifying the measure, on independent policy grounds, under either provision.<sup>73</sup>

### III. DISCRIMINATION UNDER THE CHAPEAU

If discrimination is to be analyzed solely under the chapeau, that test for discrimination needs to be clearly elaborated and, insofar as necessary, distinguished from other, related, discrimination tests, particularly those in the substantive most-favored-nation and national-treatment obligations in GATT 1994 and GATS. Appellate Body jurisprudence has been surprisingly inconsistent, however, on such a fundamental issue.

The first dispute in which this matter was considered was *U.S.—Gasoline*. The Appellate Body said that the nondiscrimination conditions in the chapeau are different from those in the substantive nondiscrimination obligations in GATT 1994:

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4 [a national treatment obligation]. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. 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 paragraphs (a) to (j) of meaning. Such recourse would also confuse the 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.<sup>74</sup>

<sup>72</sup> See *supra* text accompanying notes 59–60.

<sup>73</sup> Article 2.1 of the TBT Agreement, *supra* note 53, is concerned with the questions whether a measure causes a disparate impact on (or between) foreign products and, if so, whether that disparate impact stems exclusively from a legitimate regulatory distinction, and Article 2.2 states that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” On the final clause, “taking account of the risks non-fulfilment would create,” see Chris Downes, *Worth Shopping Around? Defending Regulatory Autonomy Under the SPS and TBT Agreements*, WORLD TRADE REV. (forthcoming; FIRSTVIEW at 18–20 (2015)), and Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)*, paras. 5.253–.255, WT/DS384/AB/RW (adopted May 29, 2015).

<sup>74</sup> Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 23.

The Appellate Body affirmed this reasoning in *U.S.—Shrimp*, noting that “the nature and quality of this discrimination [in the chapeau] is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994.”<sup>75</sup>

This reasoning is hard to follow. It seems obvious that to apply the same discrimination test under a substantive nondiscrimination obligation and under the chapeau would not “empty the chapeau of its contents.” The reason is simple: the chapeau does not prohibit all discriminatory measures but only measures that discriminate arbitrarily and unjustifiably between products from countries where the same conditions prevail.

The Appellate Body itself now also takes a different view. In *EC—Seal Products*, the Appellate Body referred to both of the above passages and then continued: “This does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.”<sup>76</sup> Moreover, it went on to determine that “in the present case, the causes of the ‘discrimination’ found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau.”<sup>77</sup> The clear implication is that an identical discrimination test can be used in both contexts.

It is therefore now clear that discrimination under the chapeau is a fundamentally economic concept—and one that is to be determined by comparing products from different countries that are competitive in the domestic marketplace.<sup>78</sup> Moreover, this position is well in accord with the Appellate Body’s practice. In *U.S.—Gasoline*, the Appellate Body considered whether the United States regulations discriminated between gasoline from Venezuela and that from the United States. Notwithstanding what the Appellate Body said about the different discrimination tests that should be applicable,<sup>79</sup> it was evident from the panel’s earlier finding of discrimination that one of the reasons for finding discrimination was that the relevant products were competitive in the U.S. marketplace.<sup>80</sup> In *U.S.—Shrimp* the Appellate Body also seems to have assumed that shrimp from the various disputing parties was competitive, while in *Brazil—Retreaded Tyres*, the panel had established that the retreaded tires from the disputing parties were “like.”<sup>81</sup> *U.S.—Gambling* presents an anomaly: it was not established, and it was not obvious, that domestic telephone-betting services and Antigua online gambling services were in competition in the U.S. market. However, the Appellate Body’s failure to analyze this issue

<sup>75</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 150.

<sup>76</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.298.

<sup>77</sup> *Id.*, para. 5.318.

<sup>78</sup> In *EC—Seal Products*, *supra* note 12, para. 5.130, the Appellate Body found that the European Union had discriminated against seal products of Canadian and Norwegian origin, respectively, in violation of Article I:1 of GATT 1994, *supra* note 1, and adopted this reasoning in determining whether there was any discrimination under the chapeau, *id.*, para. 5.318. The question of the relevant comparators was discussed in the context of the TBT Agreement, *supra* note 53, Art. 2.1, in Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, *supra* note 53, paras. 7.149–.154, and found to be “like,” *id.*, para. 7.594.

<sup>79</sup> See *supra* text accompanying note 74.

<sup>80</sup> Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, para. 6.16, WT/DS2/R (adopted, as modified, May 20, 1996).

<sup>81</sup> Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, para. 7.235 (adopted, as modified, Dec. 17, 2007).

arguably says more about the Appellate Body's analysis than it does about the principle at issue.<sup>82</sup>

History also supports the proposition that the chapeau's nondiscrimination test is to be considered in terms of competitive products in a domestic marketplace, as the "chapeau" in the 1938 U.S.-Canada Reciprocal Trade Agreement, for example, made plain:

Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either country *against articles* the growth, produce or manufacture of the other country in favor of the *like articles* the growth, produce or manufacture of any other foreign country, the provisions of this Agreement shall not extend to prohibitions or restrictions . . . .<sup>83</sup>

This 1938 agreement replaced an earlier, 1935 agreement between the same parties, which prohibited "arbitrary discrimination by either country against the other country in favor of any third country where similar conditions prevail."<sup>84</sup> The express reference to "like articles" disappeared a decade later in another agreement binding on these parties—namely, GATT 1947. Sometimes in these situations, a change in wording can be significant,<sup>85</sup> but it is submitted that, given the back-and-forth of the wording in these provisions, the language in the 1938 agreement was meant as a clarification of the wording in the 1935 agreement, rather than as a change, and that "like articles" indicates how the corresponding phrase in the chapeau of the general exceptions in GATT 1994 and GATS should be understood.

There is, of course, more to a discrimination analysis than the basic idea that it involves competitive products in a marketplace. And while *EC—Seal Products* recognized a similarity between the discrimination analyses under the substantive nondiscrimination provisions in GATT 1994 and under the chapeau, significant room for variation remains. For example, it would be possible to emphasize different elements in determining whether products are competitive or to come to a different conclusion on whether the disparate impact must be understood in terms of a single product or a group of products.<sup>86</sup> On the facts of any given case, it is also possible to apply the chapeau's discrimination test to a set of competitive products that has not yet been analyzed under any substantive rules.<sup>87</sup> No *a priori* reason requires, however,

<sup>82</sup> In *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, para. 7.657 (adopted Aug. 14, 2014) [hereinafter Panel Report, *China—Rare Earths*], the panel determined that Chinese export duties discriminated between exported and non-exported Chinese "like" products. This determination must be incorrect. On its own terms the chapeau does not prohibit discrimination between products from the same country. More plausibly, the panel might have analyzed the measure in terms of discrimination between Chinese and foreign downstream products using the raw materials as inputs. It did actually take this approach in the (different) context of China's export quotas, *id.*, paras. 7.833, .959, albeit with metonymic references to "consumers" and "users."

<sup>83</sup> Reciprocal Trade Agreement, U.S.-Can., Art. XII(2), Nov. 17, 1938, 53 Stat. 2348 (emphasis added). In *U.S.—Gasoline*, *supra* note 8, at 25 n.46, the Appellate Body referred to a 1927 multilateral treaty and a 1935 bilateral treaty between the same parties and noted that "[t]hese earlier treaties are here noted, not as pertaining to the *travaux préparatoires* of the *General Agreement*, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer's ink in the *General Agreement*."

<sup>84</sup> Reciprocal Trade Agreement, U.S.-Can., Art. XII, Nov. 15, 1935, 49 Stat. 3960.

<sup>85</sup> In *U.S.—Gasoline*, *supra* note 8, at 24 n.46, the Appellate Body contrasted the language of the same 1935 agreement (discrimination in favor of "any third country") with the wording of GATT 1947 ("countries") to conclude that, as opposed to the earlier wording, the latter wording was not limited to third countries.

<sup>86</sup> On the latter issue, see Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most Favoured Nation Treatment—or Equal Treatment*, 36 J. WORLD TRADE 921 (2002).

<sup>87</sup> See also *infra* text accompanying note 126.

the adoption of tests different from those applied under the substantive obligations. In particular, there is no reason to take into account a measure's regulatory purpose in determining whether the measure is discriminatory under the chapeau. The reason, it is submitted, is that the chapeau already contains two policy-based justifications for any such discrimination.

#### IV. JUSTIFICATIONS

##### *"Countries Where the Same Conditions Prevail"*

It is sometimes underemphasized that the chapeau does not prohibit discrimination between all competitive products but only discrimination between those products that originate in "countries where the same conditions prevail."<sup>88</sup> This phrase can be seen as excluding the application of the chapeau's discrimination test to measures with a disparate impact on products of certain origins (that is, otherwise discriminatory measures) if the disparate impact has a rational relationship to the measure's objective. Put another way, this phrase permits the objective of a measure to justify any rationally related disparate effects. The next section will consider the way in which measures that cannot be justified on that basis can nonetheless be justified on other grounds.

This interpretation depends on using the objective of the measure at issue as a means of determining the "conditions" prevailing in the respective countries. *EC—Seal Products* provides support for this approach; the Appellate Body said that "'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau."<sup>89</sup> To date, however, it has never been found that "conditions" were *not* the same in different countries, which leaves this scenario somewhat underexplored.

A convenient way of understanding the "conditions" prevailing in different countries is in terms of the risks that the measure at issue is designed to address. Accordingly, for a measure prohibiting imports of products produced by prison labor, "conditions" would be the same in countries where products are, to the same degree, produced by prison labor, but they would be different in countries where products are not produced by prison labor to the same degree. It is only in the first of these two scenarios that the chapeau permits a discrimination analysis. For countries where conditions are not relevantly the same, the objective of the measure operates to justify any disparate impact between products from those countries. It might also be suggested that these "conditions" should be defined in terms of not only the measure's objective but also the degree to which that measure achieves its objective. This broader definition would allow for a calibration between the "conditions" prevailing in the relevant countries and the extent to which the measure addresses those conditions.

It is appropriate, if perhaps challenging, to consider the facts of *U.S.—Shrimp* in light of this approach.<sup>90</sup> The starting point would be to identify, based on the measure's objective, the relevant "conditions." As the objective of the measure in *U.S.—Shrimp* was to protect endangered

<sup>88</sup> One may contrast this phrase with, for example, "any other country" under the most-favored-nation obligations in Article I:1 of GATT 1994, *supra* note 1, and Article II.1 of GATS, *supra* note 1.

<sup>89</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, paras. 5.300, .317; *see also* Gaines, *supra* note 39, at 779; Julia Qin, *Defining Nondiscrimination Under the Law of the World Trade Organization* 23 B.U. INT'L L.J. 215, 264 (2005).

<sup>90</sup> For a similar analysis, *see* Gaines, *supra* note 39, at 779.

sea turtles, the relevant “conditions” prevailing in the countries at issue would depend on the endangered status of sea turtles in those countries. On such an analysis, the United States would be able to prohibit imports of shrimp from countries where sea turtles are endangered but not from countries where sea turtles are not endangered.

A series of questions follows. The first is whether it matters how “conditions” in the respective countries have come to be as they are. Should it matter, for example, that one country has taken steps, of whatever kind, to protect and even breed sea turtles, or that another country has no sea turtles in the first place? Arguably, the answer to this question is no: what matters are the “conditions prevailing” on the date on which the measure at issue was adopted.<sup>91</sup> In particular, it should be irrelevant whether a given country adopted one type of measure as opposed to another type of measure. But what if, on that “critical date,” the country in which sea turtles are not endangered—and that therefore benefits from favorable treatment—was in that situation only as a result of conduct attributable to the respondent country? Should that make a difference? That situation arose in *U.S.—Shrimp*, in which the United States had assisted some exporters, but not others, to meet its requirements, and as a result of that assistance, sea turtles were less endangered in those countries.

There are several ways of addressing such a situation. One is to consider the respondent’s facilitative acts the “measure” at issue. It is not certain that such a measure would violate the substantive GATT 1994 or GATS nondiscrimination obligations,<sup>92</sup> at least when the facilitative acts take place beyond the ordinary territorial jurisdiction of the respondent country. But even in the absence of such a violation, trade-facilitative acts of this nature might undermine benefits accruing directly or indirectly to a WTO member under those agreements.<sup>93</sup> Prior to the entry into force of the Agreement on Subsidies and Countervailing Measures in 1995,<sup>94</sup> such “nonviolation” claims were mainly used under GATT 1947 as a remedy for domestic subsidies that undermined tariff concessions. But “nonviolation” claims have also been successful in certain other situations. In *EC—Citrus Products*, a GATT panel determined that the European Community had impaired the benefit accruing to the United States directly or indirectly under the GATT most-favored-nation obligation, insofar as it granted discriminatory tariff preferences to products from third countries on which concessions had been granted.<sup>95</sup> Moreover, in *U.S.—COOL (Article 21.5)*, a WTO panel determined that a discriminatory labeling regulation impaired the benefits accruing to a WTO member in respect of products on which

<sup>91</sup> See Appellate Body Report, *U.S.—Tuna II*, *supra* note 53, para. 297. Another implication is that it is irrelevant that a WTO member might be able to take steps reduce the incidence of harm *after* the measure is adopted. See Panel 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)*, paras. 7.448–.450, WT/DS381/RW (Apr. 14, 2015; under appeal).

<sup>92</sup> See Qin, *supra* note 89, at 257 n.173.

<sup>93</sup> See Article XXIII:1(b) of GATT 1994, *supra* note 1, read together with Article 26.1 of the Dispute Settlement Understanding, *supra* note 19. See also GATS, *supra* note 1, Art. XXIII.3. “Nonviolation” claims are subject to certain other conditions, recently discussed in Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)*, paras. 7.673–.716, WT/DS384/RW (adopted, as modified, May 29, 2015).

<sup>94</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, 1869 UNTS 14.

<sup>95</sup> GATT Panel Report, *European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, paras. 4.36, 5.1, L/5776 (Feb. 7, 1985).

that member was entitled to trade concessions.<sup>96</sup> Neither finding has legal weight, the first because the panel report was not adopted, and the second because it was made *arguendo* for the purpose of assisting the Appellate Body in the event that the Appellate Body overturned the panel's other findings (which did not occur).<sup>97</sup> Nonetheless, these findings show that the range of "measures" supporting a "nonviolation" claim might include trade-facilitative measures that negatively affect the conditions of competition for products on which concessions have been made.

But can the general exceptions to GATT 1994 or GATS apply to such a "nonviolation" measure? It is submitted that the answer to this question should be in the affirmative. Both of these provisions contain the phrase "nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of [certain] measures." WTO members adopting a "nonviolation" measure are obligated to make a "mutually satisfactory adjustment" in relation to any affected WTO member.<sup>98</sup> Although the question has not been much discussed, it is arguable that the existence of such an obligation "prevent[s]" WTO members from adopting such measures.<sup>99</sup>

Assuming, then, that an extraterritorial facilitative measure could be justified under the general exceptions, the next questions would be whether that measure was adopted for a legitimate objective under one of the subparagraphs and, if so, whether it meets any other relevant conditions. If the measure survives all of these conditions, the question would then arise whether, based on the objective of the measure, the same "conditions" prevail between the countries at issue. On these assumptions, the same "conditions" would indeed prevail, as these "conditions" are those that existed on the date of the measure's adoption. Inevitably, there would be a finding of discrimination, at which stage the respondent would be required to justify its discriminatory measures on separate grounds. That might be difficult.<sup>100</sup>

A simpler alternative might be to discount any conduct attributable to the respondent that contributed to the currently prevailing "conditions," and to treat those "conditions," instead, as they would have been in the absence of that conduct. On the facts of *U.S.—Shrimp*, the result of such an approach would be that, for countries where sea turtles are not endangered, the "conditions" prevailing would be determined prior to receiving U.S. assistance. The "conditions" prevailing in the complaining countries, where sea turtles are endangered, would then be the "same" as in those other countries, and a discrimination analysis could proceed.

<sup>96</sup> Panel Report, United States—Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico), *supra* note 93, para. 7.716.

<sup>97</sup> *Id.*, para 7.672.

<sup>98</sup> Dispute Settlement Understanding, *supra* note 19, Art. 26.1; GATS, *supra* note 1, Art. XXIII.3.

<sup>99</sup> In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, para. 191, WT/DS135/AB/R (adopted Apr. 5, 2001), the Appellate Body held, conversely, that a measure that was justified by Article XX of GATT could be the subject of a "nonviolation" claim. The relevance of the phrase "nothing shall prevent" in Article XX of GATT 1994, *supra* note 1, was not considered. It is submitted that this phrase should have been considered and that, if it had been considered, the result would have been the opposite.

<sup>100</sup> In *U.S.—Shrimp* itself, the United States offered only a single justification for one of the many discriminatory aspects of its trade-facilitative acts—namely, that the difference in time periods granted to different countries to phase in the use of special technology was justified "by the then undeveloped character of [turtle excluder device] technology, while the shorter period was later made possible by the improvements in that technology." Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 174. This argument was rejected on the facts. *Id.*

These options are speculative, and they concern what is admittedly an unusual fact situation. The first of these options may even lead to the conclusion that a discriminatory trade-facilitative measure does not violate a relevant substantive nondiscrimination obligation in GATT 1994 or GATS, and perhaps also that it does not support a nonviolation complaint. But if that is the case, it is also difficult to see why such a measure should fail to meet the discrimination test in the chapeau of the general exceptions. In any case, it is submitted that these options are an improvement on the Appellate Body's actual approach, when it said, famously, that there could be discrimination "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 for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."<sup>101</sup>

This statement presents several problems. By the language used, it appears to mean that the chapeau prohibits discrimination even when the "conditions" prevailing in different countries are *not* the same. It is obvious, however, that this interpretation cannot be valid, for it would violate the text of the chapeau.<sup>102</sup> This statement is also strange in another way. Whether or not "conditions prevailing" are the "same" is an objective question of fact, which is relevant in determining whether a discrimination test under the chapeau is applicable. It is irrelevant whether the United States made any effort to determine that fact, and equally, it cannot be said that the United States was under an obligation to determine that fact.

Julia Qin has suggested a different interpretation of the Appellate Body's statement, which is to treat it as suggesting the availability of an alternative, less discriminatory measure, one that would have enabled the United States to achieve its objectives.<sup>103</sup> But to read this statement in the context of a "necessity" test, it would need to be assumed that the Appellate Body had already accepted not only that the U.S. measure discriminated against products from countries in which the relevant "conditions" were the same but also that these discriminatory effects were, at least potentially, in pursuit of a legitimate objective. That is unlikely to have been the case. As noted, the language used by the Appellate Body indicates that it did not think that the "conditions prevailing" were the same, and it also rejected the only justification that the United States offered for its discriminatory trade-facilitative measure.<sup>104</sup>

Given these difficulties with the Appellate Body's attempt to grapple with what is, admittedly, a difficult problem, it is suggested that a fidelity to the text of the chapeau is at least a good place to start in finding a more plausible solution.

### *Arbitrary or Unjustifiable Discrimination*

Even if a measure produces disparate effects that are not rationally related to its objective and that are then found to be discriminatory under the chapeau, the party adopting such a measure

<sup>101</sup> *Id.*, para. 165; see also Appellate Body Report, U.S.—Shrimp (Article 21.5—Malaysia), *supra* note 34, para. 149.

<sup>102</sup> Gaines, *supra* note 39, at 784–85. Even supporters of the Appellate Body's ruling have accepted that this interpretation contradicts the text of the chapeau. See, e.g., Donald McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 230* (Marco Bronckers & Reinhard Quick eds., 2000).

<sup>103</sup> See Qin, *supra* note 89, at 269.

<sup>104</sup> See *supra* note 100.

has another chance to justify such effects, because the chapeau prohibits discrimination only when it is “arbitrary or unjustifiable.” What that means, however, is still uncertain.

In *U.S.—Shrimp*, the Appellate Body said the following:

The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX(g), and the treaty interpreter may then and there declare the measure inconsistent with Article XX(g). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX.<sup>105</sup>

This statement has been much criticized. Sanford Gaines said that it “is absurdly redundant for the Appellate Body to point out that measures that do not ‘provisionally qualify under one of the paragraphs’ cannot ‘ultimately’ meet the Article XX qualifications by reference to the chapeau.”<sup>106</sup> It is difficult to fault this assessment, and in *Brazil—Retreaded Tyres* the Appellate Body revised its approach. It now said that the “Appellate Body Reports in *US—Gasoline*, *US—Shrimp*, and *US—Shrimp (Article 21.5—Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to existence.”<sup>107</sup> This statement makes intuitive sense. In determining whether a discriminatory measure can be justified, it seems proper to take into account any rationale offered by the party responsible for the discrimination. The Appellate Body then limited the range of acceptable rationales, however, saying that the discrimination would be arbitrary or unjustifiable if the “reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.”<sup>108</sup>

Both parts of this statement are problematic. The first problem is that, as mentioned, a measure’s objective is already taken into account in determining whether “conditions prevailing” are the “same” in affected countries. In relation to products originating in countries where conditions are not the “same,” a measure may have a disparate impact. It follows that a finding of discrimination under the chapeau can be found only when the measure’s objective does not justify such disparate impact. Consequently, for the term “arbitrary or unjustifiable” to have any meaning, it must refer to something that is logically distinct from the measure’s objective. There may be a connection between the rationale for the discrimination and the objective of the measure, but any such connection is no more than coincidental.

The second problem concerns the Appellate Body’s assertion that the rationale used to justify discrimination cannot “go against” a measure’s objective. The problem here is that, when a measure’s discriminatory effect results from an exception to that measure, the rationale for that exception, and hence for the discrimination, not only will differ from but will often necessarily contradict the measure’s objective. In *Brazil—Retreaded Tyres* it was not disputed that

<sup>105</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 149.

<sup>106</sup> Gaines, *supra* note 39, at 777.

<sup>107</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 11, para. 226.

<sup>108</sup> *Id.*, para. 227.

the measure discriminated against retreaded tires from the European Union, which were prohibited, because the measure did not prohibit retreaded tires from MERCOSUR countries.<sup>109</sup> It is difficult to understand why the Appellate Body refused even to *consider* whether the rationale for this discrimination—namely, Brazil’s ongoing membership in MERCOSUR, which Brazil had joined pursuant to its right, set out in Article XXIV of GATT 1994, to form a customs union—might have been justified (even if, on the facts, the Appellate Body may have rejected this reason for discriminating against the European Union).

The Appellate Body displayed more caution when a similar measure came before it in *EC—Seal Products*. That dispute concerned an EU prohibition on the sale of seal products, for public morals reasons. The measure contained several exceptions, among which was an exception for seal products derived from indigenous hunts—an exception that was designed to protect the interests of indigenous hunters.<sup>110</sup> The panel had found that allowing the importation of seal products derived from indigenous hunts clearly “went against” the measure’s objective,<sup>111</sup> that objective and the exception’s rationale were in direct conflict.

In dealing with this issue, the Appellate Body began by refining its statement in *Brazil—Retreaded Tyres*. It said that

the relationship of the discrimination to the objective of a measure is one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary or unjustifiable discrimination. In other words, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment.<sup>112</sup>

In what followed, however, the Appellate Body displayed a certain ambivalence in its approach. On the one hand, the Appellate Body considered the extent to which the measure actually supported subsistence hunting by Inuit communities.<sup>113</sup> This inquiry would have precluded by the approach followed in *Brazil—Retreaded Tyres*. On the other hand, however, the Appellate Body faulted the European Union for “fail[ing] to demonstrate . . . how the discrimination resulting from the manner in which the EU Seal Regime treats [indigenous communities] hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.”<sup>114</sup> This statement harks back to the original test in *Brazil—Retreaded Tyres*.

This ambivalence is regrettable. For the reasons mentioned, it is suggested both that the Appellate Body was right to consider that the protection of indigenous interests could justify discrimination under the chapeau, even if, as had been established, this justification “went

<sup>109</sup> *Id.*, para. 3.

<sup>110</sup> See Panel Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, *supra* note 53, para. 7.261 n.419, citing the UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Sept. 13, 2007), as well as the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, at <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm>, and the Charter of the Inuit Circumpolar Council (1980), at <http://www.inuitcircumpolar.com/charter-bylaws.html>.

<sup>111</sup> Panel Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, *supra* note 53, para 7.275. The Appellate Body accepted this finding in *EC—Seal Products*, *supra* note 12, para. 5.320 n.1559.

<sup>112</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.321; *see also id.*, para. 5.306.

<sup>113</sup> *Id.*, paras. 5.321–.326.

<sup>114</sup> *Id.*, para. 5.320; *see id.*, para. 5.338.

against” the measure’s objective, and that the Appellate Body was wrong when, inconsistently, it required this justification to be “related to” that objective.

### *Identifying Legitimate Justifications Under the Chapeau*

A logically separate question is how to identify the set of rationales that can justify discrimination under the chapeau. The chapeau’s text leaves this issue entirely open, with the following interpretive options, among others. First, discrimination could be justified only for one of the reasons set out in the subparagraphs, even if the reason for such discrimination differs from the reason for the measure itself. Second, discrimination could be justified on grounds recognized elsewhere in the agreement at issue or other WTO agreements. Discrimination might accordingly be justified in terms of the right to form a regional trade agreement or the right to discriminate, in certain respects, in favor of developing countries. Third, discrimination could be justified for reasons recognized in international standards. The Appellate Body took something like this position in *EC—Tariff Preferences* when it said that a developing country’s “needs” in relation to the WTO Enabling Clause<sup>115</sup> are to be assessed according to objective standards for which “[b]road-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve.”<sup>116</sup> Fourth, but less likely, the Appellate Body might recognize legitimate objectives without reference to other normative considerations.<sup>117</sup>

It is difficult to predict which of the above approaches, if any, might be adopted. It is perhaps relevant, however, that in *EC—Seal Products* (as noted above), the Appellate Body seems to have accepted that the protection of indigenous interests might constitute a legitimate reason for discrimination, even if it also, and inconsistently, required this objective to “relate” to the public morals objective of the measure itself.

### *Discrimination “Necessary” to Achieve a Legitimate Objective*

Even if uncertainty remains as to the particular legitimate objectives that can justify discrimination under the chapeau, existing jurisprudence on the chapeau indicates that discrimination can be justified only if it is “necessary” to achieve such an objective.<sup>118</sup> This means that there must be no other measure, reasonably available to the regulating party, that achieves its objectives in a less discriminatory manner. In *U.S.—Gasoline*, for example, the Appellate Body

<sup>115</sup> See *supra* note 62.

<sup>116</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, para. 163, WT/DS246/AB/R (adopted Apr. 20, 2004).

<sup>117</sup> See Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 225, WT/DS406/AB/R (adopted Apr. 24, 2012), concerning “legitimate regulatory distinctions” in the TBT Agreement, *supra* note 53, Art. 2.1. The United States had argued that prohibiting clove cigarettes, but not menthol cigarettes, was justified in order to minimize the health care costs of responding to withdrawal symptoms of “millions” of menthol cigarette smokers and to minimize the risk of a black market in menthol cigarettes. The Appellate Body, not persuaded that these risks would materialize, noted, in effect, that addicted smokers could still smoke regular cigarettes. What is important is that the Appellate Body accepted, at least *arguendo*, that the United States might have had justifiable reasons for discriminating that had nothing to do with the objective of the measure, even if it then rejected any causal link between the measure and those reasons.

<sup>118</sup> See Qin, *supra* note 89, at 267–69.

thought that the United States could have achieved its objectives by cooperating with Venezuela and Venezuelan producers—which, it believed, would have led to a less discriminatory outcome.<sup>119</sup> In *U.S.—Shrimp*, the Appellate Body considered a range of alternative U.S. measures that, it believed, would have led to a less discriminatory outcome while achieving the country’s environmental objectives. For reasons mentioned, it is suggested that these objectives should not have been considered at this stage. Nonetheless, setting aside that problem, what is important is that the Appellate Body considered a range of alternative, less discriminatory measures that might have been adopted by the United States. These alternative measures included taking into account the policies and measures adopted by the countries in which the affected products originated, taking into account of the actual conditions prevailing in those countries, and negotiating with them.<sup>120</sup>

Certain other anomalous findings in *EC—Seal Products* can also be explained in these terms. The Appellate Body focused on two issues that were, in its reasoning, independent of its prior determination that the European Union had discriminated against Canadian and Norwegian seal products. One was that the European Union had facilitated market access for seal products derived from Greenland indigenous hunts but had not made “comparable efforts” to facilitate market access for seal products derived from Canadian indigenous hunts.<sup>121</sup> Another was that, due to ambiguities in the measure at issue, “seal products derived from what should in fact be properly characterized as ‘commercial’ hunts could . . . enter the EU market under the [indigenous communities] exception in some instances.”<sup>122</sup>

It is suggested that the proper way to deal with both of these issues would have been to accept the finding of discrimination against Canadian and Norwegian seal products, and then to determine whether this discrimination could be justified either on the ground that, seen in terms of public morals, different “conditions” prevailed or on the alternative ground that the discrimination was “necessary” to protect indigenous interests. In the event, the Appellate Body established that according to the measure’s rationale, “conditions” between all relevant countries were the same.<sup>123</sup> It thereby disposed of the first of the two possibilities for justifying the discriminatory aspects of the measure.

But what about the second justification—namely, whether discrimination against Canadian and Norwegian seal products was justified on the ground of protecting indigenous interests? As noted, it seems that the Appellate Body implicitly accepted the European Union’s objective of protecting indigenous interests as legitimate (or else it would have disposed of the case at this early stage, as it did in *Brazil—Retreaded Tyres*). On the approach suggested here, the question would have been whether any alternative measures reasonably available to the European Union would have achieved its objectives of protecting indigenous interests in a less discriminatory manner. Accordingly, it might have been established that the European Union could have made “comparable efforts” to facilitate market access for seal products deriving

<sup>119</sup> *E.g.*, Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 26–27. Here, as elsewhere, the Appellate Body assumed that negotiations would likely have led to a less discriminatory result. See the Appellate Body’s discussions in *U.S.—Shrimp*, *supra* note 9, *U.S.—Shrimp (Article 21.5—Malaysia)*, *supra* note 34, and *EC—Seal Products*, *supra* note 12, para. 5.337. The Appellate Body came to the opposite conclusion, however, in *U.S.—Gambling*, *supra* note 10, para. 317, in the context of a “necessity” test under GATT 1994, *supra* note 1, Art. XX(a).

<sup>120</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, paras. 163, 165, 166, 171.

<sup>121</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.337.

<sup>122</sup> *Id.*, para. 5.326; *see also id.*, para. 5.328.

<sup>123</sup> *Id.*, para. 5.317.

from Canadian Inuit hunts and could have ensured that all seal products deriving from hunts properly characterized as “commercial” were prohibited. Both amendments would have been less discriminatory than the measure actually adopted.

It is notable that the first of these amendments would have been less trade restrictive than the measure at issue, and that the second of these amendments would have been *more* trade restrictive than the measure at issue. But that does not matter. In *U.S.—Gasoline*, the Appellate Body suggested that the United States could have imposed “[higher] statutory baselines without differentiation as between domestic and imported gasoline.”<sup>124</sup> Under the chapeau, what is important is the justification of the measure’s discriminatory aspects. That justification, if made out, overrides the trade interests of affected WTO members.

The analysis above can be understood as a reconstruction—that is, as an effort to use the Appellate Body’s findings in *EC—Seal Products* to answer the question whether discrimination against Canadian and Norwegian seal products was “necessary.” In reality, the Appellate Body approached the matter quite differently. As to the first issue—namely, that the European Union had not made “comparable efforts” to facilitate imports of Canadian Inuit seal products—the Appellate Body presented a discrimination analysis involving new comparators, the seal products resulting from Inuit hunts in Greenland and Canada, respectively. Thus, it made a finding that

to the extent that the [indigenous communities] exception is designed and applied so as to be *de facto* only available to Greenland, the EU Seal Regime would treat seal products derived from [indigenous communities’] hunts in Greenland and Canada differently and, in this respect, result in discrimination between countries where the same conditions prevail.<sup>125</sup>

The chapeau does not expressly state that the comparators that are relevant for its discrimination test must be the same as those that produced the violation that is in need of justification. But ignoring those comparators at this later stage breaks the connection with the fundamental issue at stake, which is whether a measure’s discriminatory effects, insofar as they affect products from countries in which the “same conditions prevail,” can be justified on policy grounds.<sup>126</sup>

The Appellate Body’s analysis of the second issue—namely, that the European Union might yet admit seal products from hunts properly characterized as “commercial”—is also unsatisfactory. It said:

Given the ambiguities in the criteria of the [indigenous communities] exception and the broad discretion that the recognized bodies consequently enjoy in applying these criteria, we consider that seal products derived from what should in fact be properly characterized

<sup>124</sup> See Appellate Body Report, *U.S.—Gasoline*, *supra* note 8, at 25.

<sup>125</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.333. Earlier, *id.*, para 5.316, the Appellate Body had said that “we will analyze whether the measure has any discriminatory effects on different indigenous communities.” This language should be treated as metonymic. On no reading of the chapeau is GATT 1994 concerned with discrimination between indigenous communities *per se*.

<sup>126</sup> Likewise, the Appellate Body’s references to “even-handedness” in applying a “legitimate regulatory distinction” under the TBT Agreement, *supra* note 53, Art. 2.1, might be understood in terms of the “necessity” of the measure’s discriminatory effects for achieving a legitimate objective. See Appellate Body Report, *U.S.—Tuna II*, *supra* note 53, para. 216.

as “commercial” hunts could potentially enter the EU market under the [indigenous communities] exception. Thus, pursuant to its design, the EU Seal Regime could be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.<sup>127</sup>

In this context the Appellate Body cited *U.S.—Shrimp*, where it had determined that the “casual” application of the U.S. measure in that case constituted “arbitrary discrimination.”<sup>128</sup> The Appellate Body made no attempt in that paragraph, however, to explain why the admission of “commercially hunted” seal products was discriminatory, nor whether any such discrimination might be justified. This lack of reasoning, it is submitted, strengthens the case for asking, instead, whether this aspect of the European Union’s measure was “necessary” to its objective of protecting indigenous interests.

In another respect, however, *EC—Seal Products* made a valuable contribution to the tests relevant to the justification of discriminatory measures under the chapeau. It said that

the European Union has not established . . . why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of [indigenous communities’] hunts, given that “[indigenous communities’] hunts can cause the very pain and suffering for seals that the EU public is concerned about.”<sup>129</sup>

The Appellate Body seems here to have been requiring the European Union to demonstrate that no alternative measure would achieve the European Union’s objectives of protecting indigenous interests while being less harmful to the objective of the measure itself. With one caveat, this test seems reasonable. A reasonably available alternative measure may be both less discriminatory than the measure at issue and less inconsistent with that measure’s objective.

It is not clear, however, why the burden of identifying such a measure should be on the European Union. In the context of the “necessity” test in the subparagraphs of the general exceptions, it is well established that the initial burden of identifying such measures lies with the complainant.<sup>130</sup> It is suggested, likewise, that the burden of identifying an alternative, less discriminatory measure under the chapeau should also rest with the complainant. On the facts of *EC—Seal Products*, it was unlikely that any alternative measure could have protected both public morals and indigenous interests. This situation illustrates why it is important that the complainant bear the burden of identifying an alternative measure.

### *Arbitrary Discrimination*

To date, the Appellate Body has generally refrained from drawing any significant distinctions between arbitrary and unjustifiable discrimination.<sup>131</sup> In *U.S.—Shrimp* the Appellate Body said that the “standards of the chapeau . . . project both substantive and procedural

<sup>127</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 12, para. 5.328.

<sup>128</sup> *Id.* (citing Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 181).

<sup>129</sup> *Id.*, para. 5.520.

<sup>130</sup> Appellate Body Report, *U.S.—Gambling*, *supra* note 10, para. 309.

<sup>131</sup> In Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 11, para. 232, the Appellate Body considered that Brazil’s rationale for discrimination was arbitrary because it did not relate to the measure’s purpose, and it found the rationale unjustified for the same reason.

requirements.”<sup>132</sup> Applying this test, it held that the U.S. measure involved arbitrary discrimination because of the rigidity of the U.S. certification process and certain due process defects.<sup>133</sup> In *EC—Seal Products*, as mentioned above,<sup>134</sup> the Appellate Body determined that the European Union’s measure constituted “arbitrary or unjustifiable discrimination”—without differentiating between “arbitrary” and “unjustifiable”—because it was likely to be applied in an uncertain manner.

In other cases, however, the Appellate Body has refrained from treating “arbitrary discrimination” in procedural terms. And even when it has done so, its focus has remained on the discriminatory effects of procedural irregularities. For example, in discussing the United States’ failure to negotiate in *U.S.—Shrimp*, the Appellate Body was careful to phrase its actual findings in terms of the discriminatory effects of that omission.<sup>135</sup> The Appellate Body did much the same in *U.S.—Shrimp (Article 21.5—Malaysia)*, when it concluded that “[s]o long as such comparable efforts are made, it is more likely that ‘arbitrary or unjustifiable discrimination’ will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.”<sup>136</sup>

The Appellate Body’s ambivalent approach to the interpretation of “arbitrary discrimination” in terms of due process is understandable. First, as Gaines has pointed out, even arbitrary decision making does not necessarily imply an economically discriminatory result,<sup>137</sup> and according to the text of the chapeau, it is just such a result that is relevant. Second, treating arbitrary discrimination in terms of due process is at odds with the historical background to the chapeau. In many trade agreements, both prior and subsequent to GATT 1947, the standard wording for chapeau conditions has been “arbitrary discrimination between countries where the same conditions prevail.”<sup>138</sup> Indeed, an early draft of the chapeau of Article XX of GATT 1947 was the same, referring to measures “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.”<sup>139</sup> The word “unjustifiable” was added at some later point in the drafting process.

That history has important implications for the interpretation of “arbitrary” discrimination. In its original context, it is clear that this concept refers to conduct having no proper purpose.

<sup>132</sup> Appellate Body Report, *U.S.—Shrimp*, *supra* note 9, para. 160.

<sup>133</sup> *Id.*, paras. 177–181. The Appellate Body added that the practice of U.S. administrative authorities was “contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994,” which provides for the transparent administration of domestic laws and regulations. *Id.*, para. 183. If one reads “if not” in this phrase as inclusive rather than exclusive (see “*If Not*,” *ECONOMIST* (Oct. 23, 2012), at <http://www.economist.com/blogs/johnson/2012/10/ambiguity>), this ruling was arguably *non ultra petita*, as none of the parties had raised this obligation at any stage in the proceedings.

<sup>134</sup> See *supra* text accompanying note 127.

<sup>135</sup> *Id.*, para. 172. The same point is made in Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 *COLUM. J. ENVTL. L.* 491, 507–09 (2002).

<sup>136</sup> Appellate Body Report, *U.S.—Shrimp (Article 21.5—Malaysia)*, *supra* note 34, para. 122.

<sup>137</sup> Gaines, *supra* note 39, at 825.

<sup>138</sup> See *supra* text accompanying notes 83–85; Consolidated Version of the Treaty on the Functioning of the European Union, Art. 36, May 9, 2008, 2008 OJ (C 115) 47; *infra* note 139 and accompanying text.

<sup>139</sup> Preparatory Committee of the International Conference on Trade and Employment, Committee II, Technical Sub-committee, at 7, UN Doc. E/PC/T/C.II/50 (Nov. 13, 1946); Preparatory Committee of the International Conference on Trade and Employment, Committee II, Report of the Technical Sub-committee, at 36, UN Doc. E/PC/T/C.II/54/Rev.1 (Nov. 28, 1946).

Indeed, as noted above,<sup>140</sup> that is how “arbitrary” is understood in the context of the doctrine of abuse of rights. But such an interpretation generates an obvious, and potentially problematic, overlap with the word “unjustifiable.” There is a solution, however, that makes sense of both words: “arbitrary” discrimination could refer to discrimination for which no rationale is offered, whereas “unjustifiable” discrimination could refer to discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.

## V. DISGUISED RESTRICTION ON INTERNATIONAL TRADE

The second of the conditions in the chapeau requires that a measure not be applied in a manner that constitutes a “disguised restriction on international trade.” It is suggested that this condition applies to measures for which an ostensibly legitimate purpose is merely a “disguise” for an improper purpose;<sup>141</sup> in other words, measures that are adopted for a mixture of proper and improper purposes<sup>142</sup>—which, as discussed above, would be a classic example of the abuse of the right to adopt measures for legitimate reasons.<sup>143</sup>

There is a special need for a rule governing such measures, because, unlike measures that are adopted for no legitimate purpose,<sup>144</sup> the legitimate purposes of measures adopted for mixed legitimate and illegitimate purposes may enable the measures to be justified under one of the subparagraphs. It is also appropriate that such a condition be located in the chapeau, because it is horizontally applicable to all measures presented for justification under the general exceptions.

If this interpretation is accepted, then a further question arises: should a rule prohibiting “disguised restrictions on international trade” include only measures with a *sole* or *primary* illegitimate purpose or should it also include, more broadly, measures with *any* illegitimate purpose, even if the illegitimate purpose is minor compared to the legitimate purpose? The second of these options would be significantly more restrictive of regulatory autonomy. Given the prevalence of measures that seek to achieve public policy goals, such as environmental protection, but that also have the purpose of protecting domestic industry, this condition may yet prove to be one of the more important aspects of the chapeau.

<sup>140</sup> See *supra* text accompanying note 47.

<sup>141</sup> Panel Report, China—Rare Earths, *supra* note 82, para. 7.343 (argument made by China). In the context of the WTO, an improper reason would arguably be a measure to protect domestic industry, but there could be other reasons, such as corruption. See *Lalanne & Ledour (Fr. v. Venez.)*, 10 R.I.A.A. 17 (Fr.-Venez. Mixed Cl. Comm’n 1903–05).

<sup>142</sup> An alternative, but less compelling, interpretation is that this condition relates to measures that are not published. In *U.S.—Gasoline*, *supra* note 8, at 24, the Appellate Body said that “disguised” restrictions were not limited to those that were “concealed or unannounced.” In Panel Report, *EC—Measures Affecting Asbestos and Products Containing Asbestos*, para. 8.234, WT/DS135/R (adopted Apr. 5, 2001), the panel interpreted this statement as meaning that “a measure that was not published would not satisfy the requirements of the second proposition of the introductory clause of Article XX.” The same panel also said, however, *id.*, para. 8.236, that “a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.” This view aligns with the interpretation proposed here. By contrast, in *Brazil—Retreaded Tyres*, *supra* note 81, para. 7.349, the panel found a “disguised” restriction on trade even though the respondent had not adopted the measure for an improper purpose, and in *China—Rare Earths*, *supra* note 82, para. 7.625, the panel found that “a situation of discrimination that is not justified constitutes a disguised restriction on trade.”

<sup>143</sup> See *supra* text accompanying note 46.

<sup>144</sup> *E.g.*, Panel Report, China—Rare Earths, *supra* note 82, paras. 7.168–169, 7.191–193.

## VI. CONCLUSIONS

This article argues that the Appellate Body has misunderstood the chapeau and that, in particular, there is no analytic, structural, or even thematic difference between the conditions in the chapeau and those in the subparagraphs of the general exceptions. The primary reason is that all of the conditions in the general exceptions function to limit the right of a WTO member to adopt certain measures. In this broad sense, all of these conditions are directed against “abuses” of the right to adopt measures for legitimate reasons under the general exceptions. As to why some conditions are located in the subparagraphs and others in the chapeau, the explanation is mundane: some of these conditions are specific to certain types of measures, whereas others apply horizontally to all of the measures that can be adopted under the general exceptions. It also follows that, in principle, the order in which the application of these several conditions is to be analyzed should be dictated solely by the requirements of judicial economy.

With regard to the conditions in the chapeau, this article makes several points. It first argues that a measure’s discriminatory effects, if any, are to be assessed exclusively under the chapeau, and not the subparagraphs. It agrees with the Appellate Body in *EC—Seal Products* that the discrimination test in the chapeau is concerned with competitive products and that this test can be considered similar—even identical—to the discrimination tests in the substantive obligations in the agreements. Moreover, but now contrary to *EC—Seal Products*, it argues that the comparators for any discrimination analysis under the chapeau should, where possible, be the same as those that are relevant under the substantive obligations. It would have been appropriate for the Appellate Body to consider whether, under the chapeau, the European Union had discriminated between seal products from Canada and Greenland, respectively, rather than whether it had discriminated between indigenously hunted seal products from those same countries.

Next, this article proposes that structurally, there are two independent justifications for measures with disparate effects. In relation to the first justification, the chapeau’s discrimination test applies only to discrimination between products originating in countries where the “same conditions” prevail. As it is a measure’s objective that determines when the “same conditions” do not prevail, the measure’s objective is capable of permitting the measure’s disparate effects—in effect, justifying those effects. The second justification is relevant only when the preceding analysis does not apply—that is, when the “same conditions” do prevail, as determined by the objective. In these circumstances it is necessary to consider whether the measure’s disparate effects constitute “arbitrary or unjustifiable discrimination.” Since the precondition for this question is that the measure’s objective does not justify its disparate effects (or else, the “same conditions” would not prevail), it follows that this second justification must be based on a rationale that is independent of the measure’s objective. The conclusion is that, as a matter of legal logic, it cannot be a requirement that the rationale for the discrimination and the objective of the measure be rationally connected. Moreover, when the rationale for the discrimination is due to an exception to a rule, as in *EC—Seal Products*, it will in many cases even contradict the objective of the measure.

In relation to the much overlooked chapeau condition prohibiting measure constituting a “disguised restriction on international trade,” this article has argued that this condition has nothing to do with restrictions “disguised” by nonpublication, as some have thought, but

rather that it refers to measures for which an improper purpose is “disguised” by an ostensibly legitimate purpose. Given the prevalence of mixed purposes in the adoption of trade-restrictive measures, an important question will be whether this condition is interpreted as prohibiting measures that are adopted even in part for an improper purpose or only measures that are adopted substantially for an improper purpose. A measure that is adopted entirely for an improper purpose would not survive scrutiny under the subparagraphs in the first place.

More work remains to be done, but it is hoped that this article provides at least a first step toward recognizing the chapeau of the general exceptions as an important and sensible part of the WTO legal framework.

## THE EXPULSION OF ALIENS (REVISITED) AND OTHER TOPICS: THE SIXTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION

*By Sean D. Murphy\**

The International Law Commission held its sixty-sixth session in Geneva from May 5 to June 6, and from July 7 to August 8, 2014, under the chairmanship of Kirill Gevorgian (Russian Federation).<sup>1</sup> Notably, the Commission revisited on second reading its work concerning the expulsion of aliens so as to finalize thirty-one draft articles, along with commentaries. The general thrust of this project has been to acknowledge the sovereign right of a state to expel an alien from its territory and to identify or propose rules—protective of the rights of the alien—that the state must follow when doing so.

Additionally, the Commission adopted on first reading twenty-one draft articles, along with commentaries, relating to the protection of persons in the event of disasters. These draft articles address the rights and obligations of states affected by natural or man-made disasters, as well as the rights and obligations of states and international organizations that provide assistance to an affected state. Moreover, the Commission finalized its work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*).

Work continued on other topics on the Commission’s agenda: subsequent agreements and subsequent practice in relation to the interpretation of treaties; protection of the atmosphere; immunity of state officials from foreign criminal jurisdiction; identification of customary international law; protection of the environment in relation to armed conflicts; provisional application of treaties; and the most-favored-nation clause. A new topic of crimes against humanity was added to the agenda, while another new topic on *jus cogens* was placed on the long-term work program.

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<sup>1</sup> See Report of the International Law Commission on the Work of Its Sixty-Sixth Session, UN GAOR, 69th Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/69/10 (2014) [hereinafter 2014 Report]. Most UN documents are available online at <http://documents.un.org/simple.asp>.