Published in *Journal of World Trade Law* 2009

Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in *Brazil – Tyres*

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Non-discrimination obligations in the WTO agreements continue to be intensely debated in terms of how to characterize what is prohibited, and what legal tests and methodologies should be applied. This article engages with various aspects of this debate with reference to the different conceptions of the chapeau of GATT Article XX evident in the panel and Appellate Body reports in *Brazil-Tyres*.

I. INTRODUCTION

Governmental measures which restrict trade in goods, and which are disputed at the WTO, are frequently analysed in three stages by panels and the Appellate Body. Should a primary violation be confirmed, defendant states usually invoke an exceptions provision, the most prominent of which is GATT Article XX. The Article XX analysis may go no further than provisional justification, if challenged measures are found not to be 'necessary to protect public morals' or 'public health', or found not 'relate to the conservation of exhaustible natural resources'. However, challenged measures which pass muster at the first hurdle, will then be subject to further appraisal under the chapeau which provides as follows:

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

The Appellate Body's fullest general guidance on the role of the chapeau was provided in *United States – Shrimp*.[1] Among the key statements is that the chapeau reflects '… the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX … on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.'[2] The report also contains some interesting insights into the negotiating history of Article XX. Most of the chapeau as it appears above was absent from Article 32 of the United States Draft Charter for an International Trade Organization.[3] During the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946, several delegations expressed concern about the possibility of

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[1] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 November 1998).

[2] Ibid., para. 156. In a later passage, the task is described as that of 'locating and marking out a line of equilibrium between…' these 'competing rights' so that neither 'will cancel out the other'. Para. 159.

[3] This provision began merely with the phrase, 'Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: …'

abuse of the exceptions for protectionist reasons, and considered that an additional clause ought to be inserted.[4] The proposed text of the United Kingdom closely reflects the formulation which was later adopted.[5]

While the origins of the chapeau, and its overall purpose, are generally understood, less is known about the precise meaning which should be attributed to the chosen language. The task of providing specific guidance had been approached only from the most oblique of angles,[6] a matter of some concern given the impact the chapeau can have on state regulatory autonomy. In *Brazil – Tyres*[7], however, the Appellate Body was required to show its hand by reason of the panel's willingness to adopt interpretations of these phrases. The panel's approach was overruled by the Appellate Body, so that we now have two alternative conceptions of the applicable tests for determining compliance with the chapeau. This article evaluates these two conceptions with reference to the queries which are sketched below.

In general terms, the chapeau is an anti-discrimination provision. Therefore, the central challenge facing an interpreter, and the logical starting point, is to formulate a test which is capable of revealing the type of discrimination which should be caught. While it is not obvious upon first reading of the reports, the panel and the Appellate Body in *Brazil - Tyres* agreed with each other on what this test should be. The question is whether the less favourable treatment of imported products can be explained with reference to the policy objectives recognized in the heads of provisional justification. By so formulating the test, the tribunals seem to have endorsed the prevailing view that anti-discrimination provisions in the WTO Treaty texts are intended to catch discrimination based on nationality.[8] The test can be regarded as a proxy for directly

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[4] Note 154 of the Appellate report in *Shrimp* sets out the concerns of the Netherlands, Belgium and Luxembourg to the effect that:

> Indirect protection is an undesirable and dangerous phenomenon. … Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconsiliable [*sic*] with the aim of chapters IV, V and VI. E/PC/T/C.II/32, 30 October 1946.

Developing countries shared this concern. For example, South Africa commented that the exceptions 'were rational but were open to widespread abuse' and that a 'provision to prevent abuse' should be incorporated. E/PC/T/C.II/50 at 6.

[5] The United Kingdom's proposed text for the chapeau read:

> The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, at 36.

[6] In *United States – Gasoline*, it was noted that, '…the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade.' However, in respect of neither phrase was any guidance provided on what the pertinent considerations might be. *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996), page 25.

[7] *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 December 2007).

[8] Howse and Regan have thoroughly defended the view that, '…distinctions of nationality are irrelevant to economic efficiency. Products which differ only in their nationality should have the same

asking whether there is country-based discrimination. If there is a valid explanation for a challenged measure, it should be exonerated, even if the detrimental effect of the measure is felt mainly by imported products. In contrast, the absence of such an explanation strongly suggests that the measure distinguishes between domestic and imported products based on the illegitimate criterion of their origin.

A further issue for decision when interpreting the chapeau language is whether there is anything more to consider once discrimination of this nature has been detected. If there is no valid explanation for the less favourable treatment of imported products, does this mean that there is '…arbitrary or unjustifiable discrimination between countries where the same conditions prevail…', or merely that there is some discrimination of the prohibited kind '…between countries where the same conditions prevail…'? Is the term 'unjustifiable' a tautology, in the sense that discrimination of the prohibited kind is self-evidently unjustifiable, or, is there an issue over precisely what can exacerbate an initial finding of some discrimination, such as to render it unjustifiable? This further issue represents the main area of disagreement between the panel and the Appellate Body. The panel considered that there was a need to attribute a distinct meaning to the term 'unjustifiable' and, in so doing, adopted an effects based approach which depends upon a consideration of trade flows. Section II explains the panel's approach, noting that part of its reasoning which echoes the views expressed in the literature on the nature of objectionable discrimination. It is suggested that the panel's sequencing of the different issues is flawed, and a more logical order is proposed.

From the perspective of attributing a distinct meaning to the term 'unjustifiable', the panel seems to provide a very satisfying solution. However, in rejecting the panel's thinking, the Appellate Body considered that trade effects must be irrelevant under the chapeau, because they are irrelevant in considering whether there is discrimination under the primary violation analysis. Section III suggests that this position overlooks the sometimes decisive relevance of trade flows in the primary violation analysis, as evidenced most notably by the *Korea – Beef*[9] case. It is also argued that, *even if* trade effects are irrelevant in the primary violation analysis, this can be regarded as a good reason for why they should be relevant in the chapeau analysis. Nevertheless, attention is also drawn to a valid, and probably sufficient, reason for rejecting the effects based approach which featured prominently in the third party submissions, but not in the Appellate Body's reasoning. The approach is inherently uncertain.

Section IV proceeds to discuss the Appellate Body's alternative conception of discrimination under the chapeau. Attention is given to the rather peculiar provenance of this approach. It appears to be an endorsement of an argument made by the United States in *United States – Shrimp*. What is surprising, however, is that the approach which has now been explicitly endorsed, was just as explicitly rejected in *Shrimp*. Still

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competitive opportunities.' Robert Howse and Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy* 11 European Journal of International Law 2 (2000) 249-289 at 270. More recently, Pauwelyn has noted that, 'the core of any non-discrimination principle lies in the test of whether the regulation, either in law or in effect distinguishes based on national origin.' Joost Pauwelyn, *The Unbearable Lightness of Likeness*, http://www.law.duke.edu/fac/pauwelyn/pdf/unbearable_lightness.pdf visited on 10 July 2008.

[9] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R (adopted 10 January 2001)

more surprising is that the approach rejected in *Shrimp* was actually applied in this very case, and arguably also in *United States - Gasoline*.

Having revealed the presence of the 'new' approach in the earlier case law, section V explores the major points of contrast between the panel and Appellate Body approaches suggested above. Both tribunals questioned whether there was a rational connection between the reason for the discrimination and a recognized policy objective. However, the panel and the Appellate Body found this test in different parts of the chapeau language. Also, under the Appellate Body's approach, a failure to meet this test is decisive and brings the appraisal of the measure to an end. In contrast, under the panel's approach, even it this test is not satisfied, it remains possible for a measure to be exonerated based on a consideration of trade flows. The ways in which this additional test could be depicted as advantageous are identified, and weighed against the uncertainty inherent in the consideration of trade flows.

The second half of the article works through the implications of the Appellate Body's approach with a particular enquiry in mind. The discussion revolves around whether this approach blurs certain boundaries inherent in the structure of the GATT Treaty text. To the extent that indistinct boundaries might arise, it is questioned whether this should cause concern from perspectives such as creating too strict or permissive a regulatory environment, and depriving some of the Treaty language of meaning and function.

Section VI notes that the Appellate Body has not, until now, openly acknowledged its view of the chapeau, because it could be perceived to have blurred the Article XX internal boundary between provisional justification, and the chapeau. In the decade between *Shrimp* and *Tyres*, the Appellate Body seems to have formed the view that the now endorsed approach will rarely blur this boundary in any sense which need elicit concern. It will demonstrated how this would seem to be the correct (but by no means obvious) view. Section VII considers the implications of the Appellate Body's approach for what is an especially important boundary according to the Appellate Body warned in *Gasoline*[10] – that between the primary violation and chapeau analyses. The section examines the various techniques which have been used to maintain a clear distinction, and questions the extent to which the chapeau's focus on the way in which measures are 'applied' can be used to justify these techniques. Attention is then given to the view that a clear division was achieved in *Tyres* only by reason of a flawed primary violation analysis. It is argued that, even with a thoroughly revised primary violation analysis, the boundary would have remained intact.

Section VIII brings together the two themes of the nature of objectionable discrimination, and blurred boundaries. Proposals for the adoption of what is now the chapeau test have been advanced not only in this context, but also, and primarily, in the context of national treatment primary violations. This is simply because the nature of objectionable discrimination is the same, notwithstanding the location of the anti-discrimination provision in the Treaty text. However, the combination of the chapeau test, and what can be referred to as the early consideration of the aim of a measure, or regulatory purpose, within the primary violation analysis, would collapse the boundary whose importance was emphasized in *Gasoline*. This section goes against the tide

[10] *US-Gasoline*, page 23. The relevant passage is set out in section III.

somewhat in suggesting that there is no great imperative in the trade context for questions conventionally associated with Article XX to be considered in the national treatment analysis. Section IX concludes.

Before embarking upon the analysis, a brief statement of the facts and findings in *Tyres* is provided below in so far as relevant to the content outlined above.

The challenged measure in *Brazil – Tyres* was in the form of an import ban on retreaded and used tyres with the rationale for the prohibition being the established connection between the accumulation of waste tyres at the end of their useful life, and risks to human, animal and plant life and health. Waste tyres provide suitable breeding grounds for disease carrying mosquitoes and, if burnt, release toxic emissions which cause all manner of human health problems. The import ban, however, eventually came to be incomplete in two respects. An exemption for remoulded tyres (a sub-category of retreaded tyres) from other MERCOSUR countries was incorporated into the measure as a result of a ruling by a MERCOSUR arbitral tribunal. The second aspect of incompleteness was that significant volumes of used tyre casings were being imported by Brazilian retreaders who had obtained injunctions from their domestic courts preventing the enforcement of the ban against them. Brazilian retreading firms were therefore able to manufacture retreaded tyres made from casings of European origin, even though European firms were unable to export retreaded tyres to Brazil. Overall, the Panel found for the European Communities, confirming its view that the import ban was a quantitative restriction in violation of GATT Article XI:1 violation which could not be exonerated under Article XX.

Within the Article XX analysis, the Panel found that the import ban could be provisionally justified under paragraph (b) as being 'necessary to protect human, animal or plant life or health'. This finding was upheld on appeal. However, the panel went on to find that the chapeau was not satisfied. Here, the panel considered that the MERCOSUR exemption, and the court injunctions, should be regarded as aspects of the application of the import ban. For the Panel, the MERCOSUR exemption did not fall foul of the chapeau, a finding which was successfully appealed by the European Communities. Even the panel, however, considered that the injunctions obtained by Brazilian firms breached the chapeau, a finding which was upheld by the Appellate Body. In sum, the European Communities 'won' the case at both levels, but by a more convincing margin on appeal.

II. THE PANEL'S EFFECTS BASED APPROACH TO THE CHAPEAU

In attributing meaning to the terms used in the chapeau, the panel adopted an effects based approach. What mattered was the extent to which the discrimination was manifesting itself in trade flows, and, therefore, the extent to which the discrimination was undermining the policy objective. The panel began by noting that the MERCOSUR exemption had the potential to significantly undermine the policy objective of the import ban.[11] Firms from MERCOSUR countries benefiting from the exemption could of course obtain the required raw material (used tyre casing) from their own territory. However, they might also choose to obtain the casings from other

[11] *Brazil – Measures Affecting Imports of Used Tyres*, WT/DS332/R (adopted as modified by the Appellate Body Report, 17 December 2007), para. 7.286.

countries, process them in their own territory, and then export them to Brazil. Therefore, there was no real limit on the potential supply of suitable casings for the purposes of meeting demand for retreaded tyres in Brazil.

The Panel, however, was concerned with the actual trade flows reflected in the data at its disposal:

> If such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination. The more imports enter Brazilian territory through the exemption, the more Brazil's declared policy objective of reducing the unnecessary accumulation of waste tyres to the greatest extent possible will be undermined, thereby affecting the justification for the maintenance of the import ban *vis-à-vis* non-MERCOSUR WTO Members….[12]

The Panel then based its conclusion of the absence of 'arbitrary or unjustifiable' discrimination' on the finding that, as of the date of its examination, 'volumes of imports of retreaded tyres under the exemption appear not to have been significant'.[13]

The same approach was applied with respect to the injunctions granted to Brazilian importers of used tyres, albeit with a different result. The panel noted that, [T]he granting of injunctions allowing used tyres to be imported … effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading.'[14] The Panel went on to find both that, [T]his has the direct potential to undermine the objective of the prohibition on importation of retreaded tyres', and that the objective had actually been significantly undermined because of the import volumes.[15]

The panel then went on to consider whether the discrimination was occurring 'between countries where the same conditions prevail'. The panel began here by clarifying the nature of the discrimination created by the court injunctions. It seems clear from the passage below that this discrimination was in the nature of a national treatment violation:

> We first recall that the discrimination at issue, which arises from the importation through court injunctions of used tyres, favours tyres retreaded in Brazil using imported casings, to the detriment of imported retreaded tyres made from the same casings. The

[12] Ibid., para. 7.288.
[13] Ibid., para. 7.288. Even though there had been a 10 fold increase in the volume of imported retreaded tyres by weight between 2002 and 2004, the numbers involved remained modest having risen to only 2000 tons per year by 2004.
[14] Ibid., para. 7.295 (emphasis in original).
[15] Ibid., paras 7.296-7.297. The statistics here showed that imports of used tyres has increased by a factor of 7.5 between the year of enactment of the import ban (2000), and 2005. More tellingly, imports of used tyres had increased from less than 10,000 tons in 2000, to over 70,000 tons in 2005. Clearly, the increase here is of a different order than that associated with the MERCOSUR exemption.

> discrimination thus arises between Brazil and other WTO Members, including the European Communities.[16]

The Panel then stated a position expressed on a number of occasions in the report that there was no difference from a waste management point of view between imported retreaded tyres, and retreaded tyres made in Brazil from imported casings.[17] For a couple of reasons, this is an interesting interpretation of the phrase 'between countries where the same conditions prevail'. The approach clearly signals that prevailing conditions between countries can be compared with reference to the likeness of the products manufactured in these countries. If the products are 'like', this can be a sufficient basis for finding that prevailing conditions between countries are the same. More important is the method by which the Panel determines whether the products are 'like' / whether prevailing conditions as between countries are 'the same'. The approach resonates with the ideas of several scholars on how likeness should be determined.

Howse and Regan have written in the context of GATT Article III that products are 'like', 'if and only if they do not differ in any respect relevant to an actual non-protectionist policy'.[18] The idea of defining likeness with reference to regulatory purpose finds expression in the Panel's approach towards the chapeau. The tyres were 'like', and prevailing conditions between countries were 'the same', because the tyres did not differ in any respect relevant to the protection of public health.

Very comparable views to those expressed by Howse and Regan have been advanced specifically in the context of the chapeau phrase now under examination. Gaines recognises the need for 'a jurisprudence to decide which "conditions" are pertinent', when comparing prevailing conditions between countries under the chapeau. He notes that, '[T]he only principled basis on which to select the relevant conditions for comparison is that they should have something to do with the declared objectives of the measure.'[19] This idea seems to add context to the Panel's comment that, 'Brazil has not identified any difference between the conditions prevailing in Brazil and in other WTO Members, that would be pertinent in the context of considering whether the discrimination … occurs between countries where the same conditions prevail.[20] A more recent contribution by Qin presents the most sustained defence of the idea that, 'it is legally sound to examine the relationship between the measure and its declared policy objective under the chapeau standards.'[21] The Panel seemed to agree.

The panel's approach to the chapeau can be summarized in three stages. The first question was whether there was any discrimination. While the panel did not expressly say so, it effectively considered that the import ban was applied in a discriminatory manner in two respects. The MERCOSUR exemption resulted in discrimination in the nature of a most favoured nation treatment violation, since MERCOSUR firms could

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[16] Ibid., para. 7.308.
[17] Ibid., para. 7.309.
[18] Howse and Regan, *The Product/Process* Distinction, as note 8 above, at 260.
[19] Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 University of Pennsylvania Journal of International Economic Law (2001), 739-862, at 779.
[20] *Brazil*-Tyres, para. 7.309.
[21] Julia Ya Qin, *Defining Nondiscrimination Under the Law of the World Trade Organization*, 23 Boston University International Law Journal (2005), 215-297 at 265.

export retreaded tyres to Brazil, while European firms could not. As noted above, it also seems clear that the court injunctions resulted in discrimination in the form of a national treatment violation. The second question was whether this discrimination was 'unjustifiable' and it is here that the panel developed its effects based approach. There may well be an insurmountable problem with this approach (discussed below), but it at least provides a way of thinking about how discrimination can be exacerbated to such an extent as to become 'unjustifiable' under the chapeau. The third and final question is whether the unjustifiable discrimination occurs between countries where the same conditions prevail.

The sequencing of these three stages is, unfortunately, illogical. This is revealed when the three stages are applied in the sequence preferred by the panel, but the finding under the third stage is changed. If the first two findings are retained, the conclusion is that there is discrimination, which is unjustifiable because of the extent of the trade effects. Suppose, however, that this unjustifiable discrimination is *not* occurring between countries where the same conditions prevail, because of some difference between tyres from different origins which is relevant to the policy objective. This would surely require a reversal of the finding that the discrimination is unjustifiable. Regardless of how pronounced the trade effects of the discrimination under the second test, if there is a legitimate explanation for the different treatment of products from different countries under the third test, the chapeau will not be breached. This point can be brushed aside by regarding both the second and third tests as jointly determinative of whether the discrimination is unjustifiable. However, this was not the approach adopted by the panel, and it also seems preferable to adopt a different, and entirely coherent, sequence.

The logical sequence would be, first, to consider whether there is any treatment which could potentially be regarded as discriminatory. This is demonstrated by the disparate impact of the MERCOSUR exemption and court injunctions. The second issue is whether any such potentially discriminatory treatment occurs between countries where the same conditions prevail. An affirmative answer here would justify a finding of some discrimination, leaving the third issue of whether this discrimination rises to the level of being 'arbitrary or unjustifiable'. Under this preferable sequence, the cause or rationale of the discrimination would always be considered before trade effects, as part of the process of determining whether there is any discrimination.

However, the single most important point about the panel's approach applies regardless of how the issues are sequenced. Under the panel's approach, measures can be exonerated under the chapeau based on a finding of limited trade effects, even if there is no acceptable cause or rationale for the discrimination; in other words, even if there is country based discrimination. Once it has been decided that there is discrimination between countries where the same conditions prevail, a further trade effects test applies. This test is conceptually distinct from the other tests, and (at least potentially[22]) wholly independent. As will be discussed later in the article, the same observation does not apply to the Appellate Body's alternative approach towards the chapeau. Before coming to this approach, however, the response to the panel's effects based approach will be discussed.

[22] This caveat is added because trade effects can be relevant to the issue of whether there is any discrimination at all, a point which is discussed in Section III of the main text.

III. THE APPELLATE BODY'S RESPONSE TO THE EFFECTS BASED APPROACH

One of the Appellate Body's observations about the effects based approach was that, '…the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination.'[23] This is technically correct because the statement only relates to the panel's approach to the second of its tests – whether the discrimination is unjustifiable. However, a more complete assessment of the panel's approach would acknowledge the relevance of the cause or rationale of the discrimination in the third test. In assessing whether the discrimination was between countries where the same conditions prevail, the panel considered whether there was any difference from a waste management point of view between imported retreaded tyres, and retreaded tyres made in Brazil from imported casings. The conclusion that there was no difference, is effectively a conclusion that there was no acceptable cause or rationale for the discrimination. This point becomes clear once it is observed that there *would* have been an acceptable cause or rationale for the discrimination if the tyres receiving the less favourable treatment were somehow more difficult to dispose of safely. The explanation for the discrimination would then have been to protect public health.

However, the Appellate Body's intention was probably to signal its disapproval of the centrally important characteristic of the panel's approach – the possibility of exonerating measures based on their limited trade effects.

Another of the Appellate Body's reasons for rejecting the Panel's approach was provided in note 437, as follows:

> We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure 'equality of competitive conditions for imported products in relation to domestic products'. The Appellate Body added that 'it is irrelevant that "the trade effects" of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent'. For the Appellate Body, 'Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.'[24]

Issue can be taken with the view that trade effects are irrelevant when determining whether there has been a violation of GATT Article III:4. It seems more accurate to state that trade effects are only formally irrelevant, but can also be a decisive evidential consideration. National measures can 'modify the conditions of competition'[25] between domestic and imported products to the detriment of the latter, without trade

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[23] *Brazil-Tyres*, para. 229.
[24] Ibid., note 437 (references omitted).
[25] This phrase seems first to have been used by the GATT panel in *Italian Discrimination Against Imported Agricultural Machinery*, L/833 – 7S60 (adopted 23 October 1958), para. 12. The phrase is also elevated to the status of Treaty text by the GATS National Treatment provision Article XVII:3.

effects in the sense of a reduced volume of imports. However, if there *are* such trade effects, this will provide evidence that the conditions of competition have been modified. These points are illustrated by the Appellate Body's approach to the Article III:4 violation in *Korea – Beef*, where the existence of the violation was based on the pronounced trade effects of the measure. The following passage sets the scene:

> …the Korean measure formally separates the selling of imported beef and domestic beef. However, [contrary to what the Panel decided] that formal separation, *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef. To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, we must, as earlier indicated, inquire into whether or not the Korean dual retail system for beef modifies the *conditions of competition* in the Korean beef market to the disadvantage of the imported product.[26] (emphasis in original)

The Appellate Body then proceeded to determine that the conditions of competition had been modified by considering the actual (rather than potential) trade effects of Korea's dual retail system. In the whole of paragraph 145, the Appellate Body emphasises its conviction that, in this case, it was necessary to go beyond the face of the measure, and consider the trade effects generated by it, in order to determine whether there was less favourable treatment. It was noted, for example, that, [T]he result [of the response of beef retailers to the dual retail system] was the virtual exclusion of imported beef from the retail distribution channels through which domestic beef (and until then, imported beef, too) was distributed to Korean households and other consumers throughout the country.'

There is therefore an argument that trade effects can be relevant to the existence of a primary violation, and may even be decisive. It is possible to depict the Panel's approach as consistent with the methodology for the primary violation analysis. Let us proceed, however, by accepting that trade effects are irrelevant in the context of the primary violation analysis. Does this mean that trade effects must also be irrelevant under the chapeau?

Arguably, the position is quite the contrary to the extent that trade effects ought to be relevant in the chapeau analysis, for the very reason that they are not relevant in the primary violation analysis. The reason for this relates to the structure of the GATT / WTO legal texts, under which discrimination can be relevant in both the primary violation and chapeau analyses. The need for a clear distinction between the two analyses was recognized by the Appellate Body in the *United States - Gasoline* case, where the primary violation was of Article III:4. A key insight in the Appellate Body's reasoning was the explanation of why a finding of discrimination under Article III, cannot lead to a finding of discrimination under the chapeau:

> 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

[26] *Korea – Beef*, para. 144.

> 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.[27]

It will be questioned later on (in Section VIII) whether this passage over-emphasises the importance of the boundary between the primary violation and chapeau analyses. For the moment, however, it can readily be seen how the conditioning of compliance with the chapeau on the absence of a significant undermining of the policy objective, could provide a means of distinguishing the primary violation, and chapeau analyses. The trade effects of measures would only be considered within the chapeau analysis.

Might there be other reasons for regarding the consideration of trade effects as an unsound basis for determining the 'unjustifiable' nature of discrimination under the chapeau? Surprisingly, the most obvious reason for avoiding trade effects was not referred to by the Appellate Body within its own reasoning, even though the European Communities, and all but one of the third parties in the dispute, presented arguments based on this reason.[28] These arguments were brought together in the extract from a third party submission provided below, the final sentence of which raises an interesting point, which was not explicitly raised in the other submissions:

> The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu further suggests that the Panel's findings in this dispute might cause confusion for WTO Members when assessing whether a specific measure is WTO-consistent, create a tendency for WTO Members to initiate a multiplicity of WTO disputes, and undermine the security and predictability needed to conduct future trade. These problems stem from the Panel's failure to provide clear criteria for determining what volume of imports or increase in import volumes would be considered 'significant'. Moreover, since import volumes are generally determined by supply and demand, the Panel's significance test, if adopted, would make it difficult for WTO Members, who do not have the power to control trade flows into their domestic markets, to adopt WTO-consistent measures or to eliminate WTO-inconsistent measures.[29]

This passage requires little explanation, although it is worth adding that, even if it were possible to provide clear criteria, the WTO consistency of the measure could vary from year to year (or any shorter or longer a time period considered to be appropriate) as trade flows fluctuate. The uncertainty inherent in the Panel's approach is illustrated by Australia's views. While perhaps not wholly opposed to the quantitative approach, Australia (unlike the panel) considered that the import levels by reason of the MERCOSUR exemption 'did not appear to be insignificant or without practical impact.'[30]

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[27] *United States – Gasoline*, page 23.
[28] *Brazil – Tyres*, European Communities, paras 36 and 221; Australia, para. 93; Japan, para. 97; Korea para. 104; United States para. 115.
[29] Ibid., para. 111.
[30] Ibid., para. 93.

It is possible to argue that, in other areas of world trade law, the permissibility of measures which restrict trade, depend upon a consideration of trade flows. A loose analogy can be made with the safeguards context in which the right to impose a safeguard measures is conditioned upon national investigating authorities demonstrating the existence of increased imports.[31] While it is known that some methodologies do not provide a sufficient basis for the imposition of safeguards, there is uncertainty about precisely when authorities can confidently conclude that the requisite increase is present.[32] Perhaps the key point here, however, is that this uncertainty is unavoidable by reason of the need to apply a test embedded in the Treaty text, rather than the need to apply a judicially created test. It seems difficult to discount the concerns over the uncertainty of the Panel's approach. However, it is probably wise to defer judgement on whether this is a sufficient basis to reject the effects based approach, until the relative merits of the Appellate Body's approach have been fully evaluated.

IV. THE APPELLATE BODY'S ALTERNATIVE APPROACH AND ITS PROVENANCE

The crucial passage in the Appellate report was as follows:

> …there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when 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.[33]

In terms of provenance, this approach can be traced back to a view presented by the United States in *Shrimp* on how it should be determined whether discrimination under the chapeau is 'unjustifiable'. This view was set out by the Appellate Body as follows:

> [A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception*, rather than for

[31] Agreement on Safegaurds, Articles 2:1 and 4.2.

[32] It is certain that a challenged investigation will be found to be inadequate if it does not proceed beyond comparing import levels at two points in time. The requirement in Article 4.2(a) to assess the 'rate and amount' of the increase requires that consideration be given to fluctuations in import levels between these two points. However, there is uncertainty over what pattern of fluctuations might lead the Appellate Body to strike down a finding of increased imports, in particular, where imports are declining towards the end of the investigation. See *United States – Definitive Safeguard Measures on Certain Imports of Steel Products*, WT/DS248,249,251,252,253,254,258,259/AB/R (adopted 10 December 2003), paras 352-355.

[33] *Brazil - Tyres*, para. 227.

> protectionist reasons, *the measure does not amount to an abuse of the applicable Article XX exception*.[34] (emphasis in original)

As with the key passage in *Tyres*, the intention here is clearly to link the concept of 'unjustifiable' discrimination under the chapeau, with the policy goals under which a measure can be provisionally justified. A useful shorthand version of the test is that there will be 'unjustifiable' discrimination in the absence of a 'rational connection' between the reasons for the discrimination, and the objectives reflected in the heads of provisional justification.

In *United States – Shrimp*, the Appellate Body displayed an ambivalent attitude towards this suggested approach. As noted in the introduction, it was both explicitly rejected, and implicitly applied. The explicit rejection was informed by a desire to avoid blurring the boundary within Article XX between the initial stage of provisional justification, and the second stage of applying the chapeau. It was noted that:

> the policy goal of a measure 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 [the heads of provisional justification].[35]

A few pages into the report, however, the rejected test is applied:

> *...shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles.[36] (emphasis in original)

The concern in this passage is that the measure, as applied, amounted to country based discrimination. In other words, imports were discriminated against purely because of their origin, rather than on the basis of any legitimate criteria. The rejected test is applied in the closing sentence of the passage. The Appellate Body effectively identifies the absence of a rational connection between the reason for the discrimination, (being the fact that some exporting countries had not been certified) and

[34] *United States – Shrimp*, para. 148.
[35] Ibid., para. 149.
[36] Ibid., para 165.

the conservation objective reflected in Article XX(g).[37] Indeed, the *Brazil – Tyres* report confirms that the now endorsed test was applied in *United States – Shrimp*.[38]

In the first case to be heard by the Appellate Body, *United States – Gasoline*, it would be an overstatement to claim that the 'new' test was clearly applied. However, the chapeau findings in *Gasoline* can easily be reconciled with the test, so providing further evidence that the test is only new in the sense that it was first explicitly endorsed in *Tyres*.

In *Gasoline*, the United States had provided explanations for why it was not possible to align the treatment of domestic and imported gasoline such as to avoid the initial violation of GATT Article III:4. Imported gasoline could not be granted the same treatment as domestic gasoline, because of administrative problems connected with verification of origin and enforcement actions. Although this explanation was not linked to any particular part of the chapeau's language, the United States effectively seemed to be arguing that the difference in treatment was not discriminatory under the chapeau, because it was not as 'between countries where the same conditions prevail'. In other words, prevailing domestic conditions presented less difficulty, with respect to verification of origin and enforcement, than prevailing foreign conditions. Such an argument would have corresponded with the perspectives noted above on what conditions should be selected when comparing prevailing conditions between countries. Conditions relating to the availability and reliability of information about gasoline from exporting countries would be pertinent to the policy objective of enhancing air quality.

The Appellate Body responded by pointing towards the limited efforts by the United States to surmount these difficulties by entering into arrangements with foreign governments. Therefore, the view was that alleged differences in prevailing conditions do not suffice to exonerate measures under the chapeau, and that the United States had failed to establish that these alleged differences actually existed.

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[37] An interesting query is why the United States devoted so much attention to persuading the Appellate Body of the merits of its suggested approach, when, upon its application, it only served the confirm the presence of unjustifiable discrimination. The answer probably relates to the distinction between the measure itself, and the manner of its application. Had the Appellate Body concentrated more on the measure itself, rather than (as required by the chapeau) the measure's application, it is entirely possible that the measure would have been exonerated. It was noted (at para. 161) that,

> [A]s enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries. However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

The suggested approach / new test can now be applied. If we concentrate on the measure itself, the discretion to accept the importation of shrimp caught with methods comparable to those mandated in the United States can be emphasized. Under the measure itself, the only reason for discriminating against shrimp from some countries would then be that these shrimp were actually caught in a manner detrimental to sea turtles. This reason clearly has a direct and strong connection to the policy objective.

[38] *Brazil – Tyres*, para. 228.

It can quickly be appreciated how the *Tyres* approach could be applied here to reach the same result of a failure to meet the terms of the chapeau. The primary explanation for the discrimination was the unsubstantiated claim about difficulties with verification and enforcement. There is no 'rational connection' between this explanation and the environmental policy objective, since the unsubstantiated claims do not support the policy objective to any extent at all. In contrast, had the claims been substantiated, there would have been a connection between the explanation, and the policy objective. Subjecting foreign gasoline to the less favourable regime would have been a difficult situation to avoid, and would have been done in the name of conserving an exhaustible natural resource – clean air.

V. CONTRASTING THE PANEL AND APPELLATE BODY APPROACHES

As noted above, under the panel's approach, measures can be exonerated under the chapeau based on a finding of limited trade effects, even if the explanation for the discrimination undermines the policy objective. The Appellate Body's alternative approach does not permit this possibility. A finding that the discrimination undermines the policy objective will bring the chapeau analysis to an end without considering the possibly exonerating quality of limited trade effects. As will now be explained, the absence of this independent test means that the Appellate Body has not attributed distinct meaning to the different phrases within the chapeau.

By its formulation, the Appellate Body's test (as set out above) is clearly intended to reveal only the 'arbitrary or unjustifiable' nature of measures already found to have been applied in a discriminatory manner 'between countries where the same conditions prevail'. However, the Appellate Body's test for the 'arbitrary or unjustifiable' element, is the same as the panel's test to determine whether the discrimination is 'between countries where the same conditions prevail'. This point has already been illustrated twice in the discussion above. In *Gasoline*, the United States argued that the chapeau was not breached because it was not possible to align the treatment of domestic and imported gasoline. In explaining why this was not possible, the (unsuccessful) argument was effectively that prevailing conditions differed, so that there was a valid explanation for the discrimination connected with a recognized Article XX objective. It has also been explained that the panel in *Tyres* explicitly considered whether the discrimination resulting from the court injunctions occurred 'between countries where the same conditions prevail'. The panel's positive finding here was effectively a finding of the absence of a valid explanation for the discrimination.

It follows that, under the Appellate Body's approach, once it is known that the discrimination is 'unjustifiable', it is also known whether there is discrimination 'between countries where the same conditions prevail', and *vice versa*. In contrast, the panel's approach in *Tyres* has the relative advantage that distinct tests apply in the two areas. Trade flows are considered only in connection with the 'unjustifiable' standard. Therefore, the panel's approach could be depicted as more responsive to the need to 'give meaning and effect to all the terms of a treaty' first recognized by the Appellate Body in *Gasoline*.[39] However, this surely cannot be something which must be achieved even at the expense of introducing an unworkable test. The panel's approach could also be depicted as preserving more regulatory autonomy for WTO members, since the

[39] *United States – Gasoline*, page 23.

additional test provides an extra opportunity for measures to be exonerated under the chapeau. However, the inherent uncertainty of considering trade flows only preserves additional regulatory autonomy in a very limited and unpredictable sense which is outside the control of governments.

In any event, there seems to be little wrong in principle with thinking about the chapeau as posing the single question of when there is 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', and deciding this question with a single test. Something which might cast doubt on this provisional conclusion, however, is if the Appellate Body's approach were to blur certain boundaries in the Treaty text with objectionable consequences.

VI. Blurring the Article XX Internal Boundary Between Provisional Justification and the Chapeau

The concern which prevented the Appellate Body from openly acknowledging its approach towards the chapeau was the risk of blurring the boundary within Article XX between provisional justification and the chapeau.[40] An indistinct boundary here could be presented as a reason for preferring the panel's approach under which the level of trade effects would be decisive only under the chapeau. The precise sense in which the Appellate Body's approach blurs the Article XX internal boundary therefore needs to be explored. It will be shown that the applicable tests in the two areas may well be the same. However, the same tests will not very often actually be applied to the same measure, both under provisional justification and the chapeau. In the occasional instances when this occurs, the chapeau analysis would be unlikely to add anything to the provisional justification analysis, thereby blurring the internal boundary in a real sense. However, it is argued that the effect is to preserve regulatory autonomy, without creating an overly permissive environment.

A. THE SAME TESTS UNDER PROVISIONAL JUSTIFICATION AND THE CHAPEAU

How then could the applicable tests in the two areas be the same? It can first be explained why this possibility does not emerge clearly from *Tyres* itself. Neither of the reasons for the discrimination (the MERCOSUR exemption and the court injunctions) was found to bear any relationship to the legitimate objective pursued by the import ban. On the contrary, the public health objective was actually undermined by these reasons. The Article XX internal boundary was therefore blurred, only to the limited extent that the content of the heads of provisional justification needed to be borne in mind when dismissing the reasons for the discrimination as invalid.

However, in different cases, where the reason for the discrimination supports the policy goal to at least some extent,[41] the question becomes that of how compelling the connection needs to be. By analogy with the case law on the 'necessary' requirement

[40] This is clear from para. 149 of *United States - Shrimp* set out in Section IV above.

[41] An example of such a situation can be provided by referring to the analysis of the *Gasoline* case provided in the main text above. Had the claims about difficulties with verification and enforcement been substantiated, there would have been at least *a* connection between the explanation for the discrimination, and the policy objective. It would then have been necessary to assess whether the required 'rational connection' was present.

in some of the heads of provisional justification, the required extent of the connection could vary depending on the importance of the public policy goal at issue.[42] It would be easier to establish the required connection when, for example, the policy goal is to protect human life, as opposed to plant health. In sum, where the reason for the discrimination supports the policy goal to at least some extent, the evaluation of whether the required 'rational connection' is present, is likely to bear a resemblance to the provisional justification analysis. This blurs the Article XX internal boundary, more than the situation in which there is absolutely no connection between the explanation for the discrimination and the policy goal.

It is possible to interpret a rather cryptic passage in the *Brazil – Tyres* report as hinting towards these ideas. Having dismissed the Panel's effects based approach, the Appellate Body proceeded as follows:

> Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable.[43]

How does this passage relate to the test for detecting unjustifiable discrimination? We know, from the new test, that the 'cause or rationale of the discrimination' *will* be 'acceptable or defensible' when it has a rational connection with a recognized policy objective. Therefore, what needs to be identified is a situation when the consideration of trade effects, can assist in identifying this rational connection. Might the Appellate Body be alluding to a 'weighing and balancing' exercize of the kind associated with provisional justification under the 'necessary' requirement?[44] If the reasons for the discrimination support the policy goal to at least some extent, this might need to be weighed against the restrictive trade effects of the discrimination. Whether the required 'rational connection' exists, might then depend on the outcome of such a weighing and balancing exercize, during which, trade effects are placed in the negative side of the balance. If this is what the Appellate Body intended to say, why did it not do so in clearer terms? Perhaps the answer is that it did not wish to be seen to be blurring the Article XX internal boundary, in a case in which it was not necessary to do so to any significant extent.

1. *Cost-Benefit Balancing Under the Chapeau?*

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[42] This idea was first expressed by the Appellate Body in *Korea – Beef* , para. 162 in the context of Article XX(d). In *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001) which involved Article XX(b), the original statement was generalized so that '[t]he more vital or important [the] common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.' (para. 172).

[43] *Brazil – Tyres*, para. 230.

[44] In its review of the panel's provisional justification analysis, the Appellate Body in *Tyres* described this exercize by quoting from its findings in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 April 2005) para. 143:

> …the weighing and balancing process inherent in the necessity analysis 'begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure', and also involves an assessment of other factors, which will usually include 'the contribution of the measure to the realization of the ends pursued by it' and 'the restrictive impact of the measure on international commerce'.

It is interesting to add a few observations here about how the views expressed above correspond with the debate about the meaning of the term 'necessary' in some of the heads of provisional justification. In a recent contribution, Regan argues that the Appellate Body has not engaged in cost-benefit balancing (frequently also referred to as proportionality *strictu sensu*) despite the 'weighing and balancing' language used to describe the process of applying the necessity test.[45] His view is that the test has been equated with the less invasive question of whether there is a less-restrictive alternative which would achieve the desired level of protection to the same extent as the chosen measure, but with a lesser cost in terms of reduced trade.[46] If this question is answered in the negative, the measures should be provisionally justified, without being subjected to the further test of whether the benefits of the measure are outweighed by its costs in terms of reduced trade. Under this test, the state may be required to adopt a measure that is less restrictive of trade, even if this measure does not fully achieve the desired level of protection of the legitimate interests.

If the reader's preferred view is that WTO tribunals should not engage in such balancing, there is a way to interpret the cryptic passage above in a way which avoids any implication of balancing under the chapeau. The passage should be read as indicating that trade effects are relevant under the chapeau, for whatever reason/s they are relevant under the necessity test in provisional justification. Trade effects are of course relevant to the less-restrictive alternative test since, in order to apply the test, one needs to know how trade restrictive the chosen measure is. This approach can be carried over to the chapeau in cases where (unlike *Tyres*) the reason for the discrimination supports the policy objective to at least some extent. Whether the required 'rational connection' is present might depend on whether there is a less-restrictive alternative. We would need to know the relative trade restrictiveness of the chosen measure, and the possible alternatives, to apply this test. On the other hand, those in favour of cost-benefit balancing could emphasize the need to distinguish the chapeau analysis from the provisional justification analysis. Measures found to be necessary during provisional justification based on the non-availability of a less-restrictive alternative, could still fail a cost-benefit test under the chapeau.[47] However, the value in maintaining a clear distinction between the two analyses is a rather small point when weighted with the formidable arguments against judicial cost-benefit balancing.[48]

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[45] See Donald Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 World Trade Review 3 (2007) 347-369.

[46] This view seems to be confirmed by the Appellate Body's statements in *Tyres*. It was noted that possible alternatives must not only be less trade restrictive than the chosen measure, 'but should preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'. See paras 156 and 170.

[47] It is informative here to mention the view that the chapeau can be interpreted as embodying proportionality *stricto sensu* on the basis that Article 30 second sentence of the EC Treaty uses the same language as the chapeau, and has occasionally been interpreted by the European Court of Justice as a full proportionality principle. The prevailing view is that this approach should not be carried over to the WTO context. See Jam Neumann and Elisabeth TÜrk, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos and EC Sardines*, 37 *Journal of World Trade* 1 (2003) 199-233 at 205-206.

[48] There are perhaps four types of argument against balancing. First, there is little in the WTO texts which provides a mandate for balancing, and it is inconsistent with the ordinary meaning of the relevant Treaty terms. Secondly, it has been argued with reference to economic theory that balancing is not required in order to give virtual representation to the voice of foreign producers which are lost in

B. ACTUAL APPLICATION OF THE SAME TESTS

It has now been demonstrated how the applicable tests in the two areas may well be the same so that the second introductory point can now be recalled. The same tests will not very often actually be applied to the same measure, both under provisional justification and the chapeau. The most obvious reason for this is that the analysis may not proceed beyond provisional justification. Another reason is illustrated by *Tyres*, in which entirely different aspects of the challenged measure (or, arguably, different measures) were addressed in the two different parts of the Article XX analysis. At issue during provisional justification was the necessity of the import ban. In contrast, during the chapeau analysis, the MERCOSUR exemption and the injunctions were presented as aspects of the application of the import ban.[49] Therefore, even if there had been some connection between the reasons for the discrimination and the policy objective, and, even if something resembling a necessity type test had been applied to check for the required 'rational connection', this analysis would not have been a repeat of the provisional justification analysis.

Nevertheless, there is a scenario in which the same tests could actually be applied in both parts of the Article XX analysis, thereby blurring the internal boundary in a real sense. This would occur in the situation where a measure is considered to be necessary during provisional justification, and also exonerated under the chapeau using the same reasoning. Here, the provisional justification and chapeau analyses would merge into one. The measure is not subject to additional legal standards under the chapeau, over and above those applied during provisional justification. In a round about way, *Gasoline* provides an illustration of this possibility.[50]

Based on the way the case was actually decided, a clear boundary was maintained within the two parts of the Article XX analysis. The United States failed to provisionally justify the measure under Article XX(b) as being 'necessary to protect human, animal or plant life or health', and did not invite the Appellate Body to examine the panel's findings here. Also, the Appellate Body's findings that the measure could be provisionally justified under Article XX(g), but ultimately fell foul of the chapeau, did not blur the Article XX boundary. There was still something fresh to say under the chapeau, having found (under Article XX(g)) that the measure was related 'to the

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the domestic political process. Global efficiency can be achieved merely through enquiry into the domestic rationality of the trade measure; a process which does not implicate balancing. In respect of both these perspectives, see Regan, as note 45 above. The third argument is that balancing can only acceptably occur against a background of strong democratic legitimacy which the WTO presently lacks. See J Neumann and E TÜrk, as note 47 above at 231-233. Finally, it is difficult for international courts to have at their disposal sufficient factual information to perform the quantitative analysis associated with cost-benefit balancing. It has been noted that, '…in many cases the ECJ, although it has sufficient legitimacy, exercises judicial self-restraint and leaves the final decision on whether the measure satisfies the proportionality standard to the national court.' Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services The Best is Yet to Come*, 19 European Journal of International Law 2 (2008) 365-408 at 390.

[49] This situation is not unique. There is an analogy here with *United States – Gambling* where the prohibition on the remote supply of gambling services was considered during provisional justification, and the possible permissibility of such gambling under the Inter State Horseracing Act (IHA) was considered under the chapeau.

[50] A further illustration relating to an alternative conception of the primary violation analysis in *Brazil – Tyres* is provided below. See the discussion which culminates with note 76.

conservation of exhaustible natural resources, and 'made effective in conjunction with restrictions on domestic consumption.'

However, in connection with the Article XX(b) analysis, what if the panel, having decided that the measure was not 'necessary', had chosen also to analyse it under the chapeau?[51] Alternatively, what if the panel had decided that the measure *was* 'necessary' under Article XX(b)? It would then, of course, have proceeded to the chapeau. In respect of both questions, would there have been anything more to say under the chapeau, that had not already been covered under Article XX(b)?

The short answer here is that the chapeau analysis would have strongly resembled the provisional justification analysis under Article XX(b). As noted, the Appellate Body's analysis moved from provisional justification under Article XX(g), to the chapeau. However, its chapeau analysis draws on the panel's reasoning while discussing provisional justification under Article XX(b). In its analysis of the 'necessary' requirement in Article XX(b), the panel examined '…whether there were measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health.'[52] One of the key findings here was that:

> …the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes.[53]

This was part of several passages from the panel report set out by the Appellate Body. The point which needs to be emphasized, however, is that the panel's findings within its provisional justification analysis, were cited by the Appellate Body within its chapeau analysis.[54] In other words, the main reason for the 'unjustifiable' nature of the discrimination under the chapeau, (being the failure to substantiate the claim of administrative problems connected with verification of origin) was also the main reason that the measure was not 'necessary' under Article XX(b). While the panel and Appellate reports are internally coherent, they do not map very well with each other, at least if there is value in having something different to say in each part of the overall analysis. Had the United States demonstrated the existence of insurmountable difficulties with verification, it seems likely that the measure would have been both 'necessary' under Article XX(b), and would have satisfied the chapeau.

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[51] The Appellate Body noted in *United States – Gambling* that there is no '*requirement* on panels to stop evaluating a responding party's defence once they have determined that a challenged measure is not provisionally justified under one of the paragraphs of the general exception provision.' (para. 343)
[52] *United States – Gasoline*, panel report, para. 6.25. Admittedly, the panel analyzed the 'necessary' requirement with reference to the 'less restrictive alternative' test, rather than by conducting a 'weighing and balancing' exercise. However, the former articulation of the approach towards the term 'necessary' can overlap just as much with the approach to the chapeau in *Brazil – Tyres*, as the latter articulation. Whether the required 'rational connection' between the explanation for the discrimination and the policy objective is present, could be determined by asking whether a less trade restrictive alternative to the selected measure is reasonably available.
[53] Ibid., para. 6.28.
[54] *United States – Gasoline*, Appellate Body report, pages 26-27.

This possibility of an indistinct boundary is advantageous in the sense that it preserves regulatory autonomy. The view that too much autonomy would be preserved, to the extent of depriving the chapeau of its role in guarding against abuse of the exceptions, can be met with the following response. Even with this concern in mind, it is possible to remain sanguine about the strong parallels within the Article XX analysis when the case comes to the chapeau via paragraph (b), and its 'necessary' requirement. The 'necessary' requirement is more difficult to satisfy than the 'relating to' requirement in Article XX(g). It, therefore, plays a strong role in guarding against the abuse of the paragraph (b) exception. To put this point in a slightly different way, the protection against abuse of the exception is internal to the exception, so that the chapeau does not need to have as strong a role.[55] A final point which flows logically from the analysis above is that, in order for measures to be exonerated under Article XX(g), they must not only relate 'to the conservation of exhaustible natural resources', but must also be necessary under the chapeau.[56] Article XX(g) might just as well state that measures must be necessary for the conservation objective.[57]

In sum, therefore, it seems that the Appellate Body's new found sanguinity towards the possible problem of blurring the Article XX internal boundary is justified. The worse case scenario is that the chapeau analysis could strongly resemble the provisional justification analysis. However, this situation does not arise at all in cases where different aspects of the measure are examined in the different parts of Article XX. Where the problem does arise, it seems neither to curtail regulatory autonomy, nor to create too permissive an environment.

VII. THE CLARITY OF THE BOUNDARY BETWEEN THE PRIMARY VIOLATION AND CHAPEAU ANALYSES

The implications of the Appellate Body's approach for what may be a more important boundary – that between the primary violation and chapeau analyses – can now be more fully considered. The need for a clear distinction between the two analyses was recognized by the Appellate Body in *United States – Gasoline*. To conflate the primary violation and chapeau analyses, '…would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning.' This '…would also confuse the question of whether inconsistency with a substantive rule existed, with the further

[55] *Brazil – Tyres* seems to contradict this suggestion. While the measure was necessary, the chapeau still had a strong role to play. Of course, the explanation for this has already been referred to in the main text. This was a case in which completely different aspects of the measure (or, arguably, different measures) were examined in the different parts of Article XX. In such cases, there is both little risk of blurring the internal boundary, and the chapeau is likely to retain a strong role.

[56] For further discussion of whether the Appellate Body's reasoning in *Gasoline* introduces a necessity requirement into the chapeau, see Neumann and TÜrk, as note 47 above at 227-228 and references cited therein.

[57] It is possible that this point may have been appreciated by the drafters of the Canada – Peru Bilateral Investment Treaty. The language used in Article 10 – the General Exceptions provision – is clearly inspired by GATT Article XX. However, all three heads of provisional justification are preceded by the term 'necessary'. The agreement can be viewed through this gateway: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx

and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified.'[58]

The analysis here will proceed in several stages. First, it will be considered whether the emphasis in the chapeau on the manner in which measures are 'applied', provides a means of distinguishing the primary violation and chapeau analyses. It will be argued that this is an illusory basis for maintaining the distinction, and it will be questioned whether more convincing techniques are evident in the case law. Particular attention will be given to the technique used in *Tyres*, which involved evaluating completely different measures in the primary violation and chapeau analyses. The view that the measures evaluated under the chapeau ought to have been evaluated as independent primary violations will be addressed, and it will be questioned what implications this alternative analysis would have had for the clarity of the primary violation / chapeau boundary. It is argued that, even under this alternative analysis, the 'new' chapeau test does not lead to an indistinct boundary.

A. THE EMPHASIS ON THE MANNER IN WHICH MEASURES ARE 'APPLIED'

By its express terms, the chapeau is concerned with the way in which measures are 'applied', and the Appellate Body has often drawn attention to this language. In *Shrimp*, for example, it was noted that the chapeau can be breached 'where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner.'[59]

Whether this emphasis provides a means of distinguishing the primary violation and chapeau analyses depends, in the first instance, on what analytical techniques are adopted under the pretext of focusing on application under the chapeau. Thus in *Tyres*, the MERCOSUR exemption and court injunctions were regarded as aspects of the application of the import ban, and evaluated only under the chapeau, thereby maintaining a distinct boundary. While this approach is discussed further in the next section, the comments below relate to the situation where what can realistically be regarded as the same measure is evaluated both in the primary violation and under the chapeau.

In this situation, the relevant enquiry is whether matters relating to application can be excluded from the primary violation analysis. However, such exclusion can only be made where the violation is plain from the face of the measure. To put this point differently, the statement from *Shrimp* is almost *a non-sequitur*. If the measure is 'fair and just' on its face, and the manner of its application is not considered in the primary violation analysis, then there would surely not be a primary violation.[60] The possibility that the chapeau's focus on application provides a means to establish a distinct boundary, can be further dispelled in two ways, the first of which is generally understood, while the second has emerged from *Gambling*.

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[58] *United States – Gasoline*, Appellate Body report, page.23.

[59] *United States - Shrimp*, para. 161.

[60] The only means to avoid the interpretation of a *non-sequitur* is to concede that the manner of application is considered in both the primary violation and chapeau analyses, but that the chapeau is concerned with a search for more egregious aspects of the application than the primary violation. However, this leads to the artificial situation of keeping something in reserve to consider under the chapeau, which could just as well be considered in the primary violation.

The general point relates to a well-established position in WTO jurisprudence. Legislation which is discretionary in character, in the sense that it is capable of being applied in either a WTO consistent manner, or a WTO inconsistent manner, cannot ordinarily itself be challenged with a view to eradicating the discretion for inconsistent application. Only individual instances of the inconsistent application of the legislation can be challenged.[61] Therefore, the analysis under the primary violation might need to focus on the manner in which a measure is applied.

In *Gambling*, the Appellate Body reiterated that, '[T]he focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV.'[62] Elements of the application of the enactments were then considered in terms of whether they had been enforced in a discriminatory manner. Clearly, therefore, the starting point was indeed the way in which the enactments had been applied. However, the evidence relating to enforcement was found to be inconclusive, and the Appellate Body fell back on the face of the enactments which were non-discriminatory.[63] The lack of persuasiveness of the evidence presented, meant that the enactments themselves were decisive, rather than the manner of their application.

In sum, the manner in which a discretionary measure is applied may be decisive in the primary violation analysis, just as the measure itself may be decisive in the chapeau analysis, as in *Gambling*. The question of whether more convincing techniques have been used to separate the two analyses can now be addressed.

B. MAINTAINING THE BOUNDARY IN *GASOLINE*, *GAMBLING* AND *TYRES*

In *United States – Gasoline*, the risk of blurring the boundary between the primary violation and chapeau analyses was especially pronounced, by reason of discrimination in the form of national treatment violations in both areas. However, an indistinct boundary was avoided by considering distinct issues in the two areas. The panel was easily able to find an Article III:4 national treatment violation by observing that the scheme could prevent the sale of imported gasoline which was chemically identical to domestic gasoline which could permissibly be sold.[64] This finding can be thought of as the departure point for the Appellate Body's chapeau analysis which proceeded to question whether there were valid and convincing reasons for the discrimination.[65] The two analyses were distinctive in the sense that only under the chapeau was there any enquiry into the possibly exonerating quality of explanations for the discrimination.

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[61] See Yoshiko Naiki, *The Mandatory / Discretionary Doctrine in WTO Law*, 7 Journal of International Economic Law 1 (2004), 23-72; Kwan Kiat Sim, *Rethinking the Mandatory / Discretionary Legislation Distinction in WTO Jurisprudence*, 2 World Trade Review 1 (2003). 33-64.

[62] *United States – Gambling*, para. 339.

[63] The same pattern was repeated in respect of the IHA. This enactment authorized domestic, but not foreign, service suppliers to offer remote betting services on certain horse races. The United States argued that this civil statute could not impliedly repeal earlier criminal statutes, but both the panel and Appellate Body found the evidence presented to be inconclusive. Therefore, the Appellate Body again fell back on the face of the IHA, which, on this occasion, was plainly discriminatory.

[64] *United States – Gasoline*, panel report, para. 6.10.

[65] This point is discussed above – presently p. 15.

The risk of an indistinct boundary is lessened still further in cases where completely different measures are considered in the two analyses, and in cases where the same measures are evaluated in the two areas, but for different purposes. The *Gambling* case is illustrative of both points. In respect of the latter point, the challenged enactments were found to be primary violations of GATS Article XVI, the *Market Access* provision. Under the chapeau, however, the same enactments were evaluated for the different purpose of checking for discrimination in the form of national treatment violations.[66] In respect of the former point, the chapeau analysis also involved considering an enactment which was not considered in the primary violation – the Interstate Horseracing Act (IHA).

Brazil – Tyres can be depicted both as a case where completely different measures were considered in the two areas, or as a case in which the same measure was evaluated, but for different purposes. The case falls within the second category based on the way it was actually decided. As noted above, the import ban was analysed under Article XI. In contrast, the MERCOSUR exception, and the court injunctions, were regarded as aspects of the application of the import ban, and were considered primarily in the chapeau analysis. The different purpose here was to check for most favoured nation and national treatment violations. In the present author's view, the case fits more naturally under the first category (completely different measures) since it is a rather strained interpretation to think of the selective non-application of an import ban as aspects of the application of the ban. The chapeau's focus on application ought not to be pushed this far as a means of distinguishing the primary violation and chapeau analyses.

C. MAINTAINING THE BOUNDARY IN *TYRES* UNDER A DIFFERENT CONCEPTION OF THE PRIMARY VIOLATION

What if the MERCOSUR exception and court injunctions had been analyzed, not under the chapeau as aspects of the application of the import ban, but as independent primary violations, respectively of Article I, and Article III:4? What impact would this have had on the clarity of the primary violation, and chapeau boundary? In the days following the publication of the Appellate Body's report, the initial view that this alternative

[66] The analysis here could be taken further by asking whether the primary violation analysis in *Gambling* was flawed, and, if so, what implications this might have had for the clarity of the primary violation / chapeau boundary. Regan has argued that the Appellate Body mistakenly found an Article XVI *Market Access* violation in its primary violation analysis (Donald Regan, *A Gambling Paradox: Why an origin-Neutral 'Zero-Quota' is Not a Quota Under GATS Article XVI*, 41 *Journal of World Trade* 6 (2007), 1297-1317). The view that there was no market access violation, raises the possibility that the primary violation analysis ought to have centred on GATS Article XVII, the national treatment provision, especially as the United States had not inscribed any limitation on national treatment in the gambling sector. Had this occurred, the chapeau analysis would surely have appeared in the Article XVII primary violation analysis. In most respects, this would have been unproblematic since most of the enactments did not amount to national treatment violations, thereby removing the need for recourse to the Article XIV *General Exceptions*. In other words, most of the enactments would have been exonerated under the national treatment primary violation analysis, for the same reasons they were exonerated under the chapeau. In contrast, however, the IHA would likely have amounted to a primary violation for the same reasons it was found to fall foul of the chapeau. From this position, it would be easy to commit the error of pointing towards the absence of any boundary between the primary violation and chapeau analyses. However, the error here would be to forget the intermediate stage of provisional justification. The analysis would not have reached the chapeau because by no stretch of the imagination could the explicit discrimination in the IHA be, 'necessary to protect public morals'.

primary violation analysis would have collapsed the boundary was expressed,[67] thereby providing a reason for favouring the panel's approach. A contrary view is proposed here.

1. *The MERCOSUR Exemption as an Independent Violation*

It is notable that both Brazil and the European Communities considered the import ban, and the MERCOSUR exemption, to be 'distinct legal instruments' requiring separate analysis.[68] Also notable is that the Appellate Body criticized the panel for not examining the separate claim of an Article I violation.[69] Had there been a separate analysis, there is little doubt that the MERCOSUR exemption would have been found to violate Article I, since this was conceded by Brazil. On the other hand, it is highly unlikely that the analysis would have proceeded as far as the chapeau of Article XX. Even if it had, the chapeau analysis would have differed from the Article I analysis.

It is first arguable that Article XX ought to be regarded as completely irrelevant as a possible means of justifying this particular Article I violation. The exemption was connected with regional integration, to the extent that it was introduced in order to implement the findings of an ad hoc MERCOSUR arbitral tribunal. As such, the exemption ought to have been evaluated under Article XXIV only, this being the most relevant provision.[70] The Panel would have needed to grapple with the relationship between paragraphs 5 and 8 of Article XXIV. One of the most pressing issues might have been whether, and how, to apply the Appellate Body's test from *Turkey – Textiles* to the effect that the permissibility of the measure (the MERCOSUR exemption) depends on whether the formation of the customs union would have been prevented if Brazil were not allowed to introduce the measure.[71] Had this test been applied,[72] it is

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[67] This view was expressed in a thought provoking contribution to the International Economic Law and Policy Blog posted by Julia Qin on 4 December 2007. This contribution, and others by leading commentators can be viewed at http://worldtradelaw.typepad.com/ielpblog/2007/12/ab-in-tyres-and.html as of 10 June 2008.

[68] This is clear from their responses to the Panel's Question 131. However, for reasons which are not obvious, by the time of the appeal, the European Communities had come to regard the import ban and the exemption as 'two aspects of a single measure'. *Brazil – Tyres*, Appellate Body report, para. 125.

[69] Ibid. paras 253-257.

[70] This view was favoured by the European Communities. See *Brazil – Tyres*, panel report, para. 4.382.

[71] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (adopted 19 November 1999), para. 58. This is the second of the two tests in *Turkey – Textiles*; the first being that the measure is introduced upon the formation of a customs union that fully meets various provisions in Article XXIV. In its Question 78, in *Brazil – Tyres*, the panel asked the European Communities whether it was of the view that, '…no measure adopted by parties to a customs union after its formation could ever be justified under Article XXIV.' The European Communities responded that the formation process was typically 'gradual' in nature so that, 'a measure may also be regarded as adopted on the formation of the customs union if it is adopted at a later point than the initial formation of a customs union, provided it is necessary for the formation of the customs union, and is adopted within a reasonable period of time'. The European Communities went on to argue that these conditions were not satisfied here.

[72] This caveat is added as it is arguable that this test ought not to be applied in this case. The panel in *United States – Definitive Safeguard Measures Against Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, distinguished *Turkey – Textiles* in these terms:

> *Turkey – Textiles* concerned the imposition by a member of a customs union of restrictive measures against imports from a third country, upon the formation of that customs union. Clearly, if members of a customs union seek to introduce restrictive measures against imports

possible that it would not have been satisfied since Article XXIV:8 does not require the elimination of 'restrictive regulations of commerce' within a customs union in so far as they are 'necessary' under Article XX. In other words, so far as the WTO rules are concerned, MERCOSUR can still be recognized as a customs union even if trade restrictions are maintained within the region on health grounds.[73]

Had the panel dealt with the MERCOSUR exemption as a separate violation, *Brazil – Tyres* might have generated some authoritative guidance on Article XXIV. The issues which were avoided are of tremendous importance to the balance between regional and multilateral liberalization. At the same time, however, they are not of direct relevance to maintaining the boundary between the primary violation and chapeau analyses. The view which needs to be reiterated is that the exemption should have stood or fallen based on Article XXIV, thereby removing the possibility of blurring the boundary now under examination. However, the parties also presented arguments based on Article XX(d) as a possible means of justifying the Article I violation.[74] Had the analysis moved from the primary violation of Article I, to provisional justification under Article XX(d), would the chapeau of Article XX have come into play?

In order for measures to be provisionally justified under Article XX(d), they must be, 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to … the prevention of deceptive practices.' What is most striking about Brazil's reliance on this exception, is the distance between the situation in *Tyres*, and a paradigm case. The provision is most immediately associated with the *Korea – Beef* case, where Korea argued (unsuccessfully) that the separation of domestic and imported beef at the point of sale was necessary to prevent the deception of consumers via the practice of passing off imported beef, as the more expensive domestic beef. To generalize, this was a case about the government enforcing its GATT consistent domestic laws, dealing with the prevention of deceptive practices, *against* economic operators. In contrast, *Tyres* involved the government *itself* complying with its MERCOSUR based obligation to implement the ruling of the ad hoc tribunal. While Brazil can be thought to be

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> from third countries, contrary to GATT 1994, it is entirely appropriate that they should be required to demonstrate the necessity of such measures. That being said, we are not at all convinced that an identical approach should be taken in cases where the alleged violation of GATT 1994 arises from the elimination of 'duties and other restrictive regulations of commerce' between parties to a free-trade area, which is the very raison d'être of any free-trade area. If the alleged violation of GATT 1994 forms part of the elimination of 'duties and other restrictive regulations of commerce', there can be no question of whether it is necessary for the elimination of 'duties and other restrictive regulations of commerce'. Para. 7.148 (emphasis in original).

It is also arguable, however, that the panel's views in *United States – Line Pipe* are not as apposite to the situation in *Brazil – Tyres*, as they are in the safeguards context. A regional grouping cannot be recognized as a customs union under Article XXIV:8 if safeguard measures can be imposed on the internal trade. In contrast, a customs union is not prevented from being recognized as such under this provision, merely because restrictions necessary under Article XX are maintained. The European Communities made comparable submissions which the *Brazil - Tyres* panel set out in paras. 4.413-4.420.

[73] The *Brazil - Tyres* panel set out the exchange of arguments between the parties on this point at paras 4.421-4.422.

[74] *Brazil – Tyres* panel report paras 4.425-4.448.

complying with its obligations, the notion of securing compliance, implies action by the government *against* operators.[75]

The panel would have had to engage with this issue, and others, in order to decide on the availability, in principle, of the paragraph (d) exception so that the case would have tested the limits of this provision. This reinforces the view that the MERCOSUR exemption should have been considered only under Article XXIV which, in contrast, is obviously and directly relevant. Let us imagine, however, both the 'in principle' availability of Article XX(d), and the satisfaction of its necessity test. The chapeau would then have come into play. Had the Appellate Body's conception of the chapeau been applied, would this have meant that the chapeau analysis would merely have repeated the primary violation analysis? Would the MERCOSUR exemption have fallen foul of the chapeau, for the same reasons as established the Article I primary violation?

The position would have been quite the contrary, to the extent that the MERCOSUR exemption would have been exonerated under the chapeau. The 'new' chapeau test is whether the reasons given for the discrimination bear a rational connection to the objective falling within the purview of a paragraph of Article XX. The objective is now to secure compliance with GATT consistent laws or regulations under paragraph (d); *in casu* implementing the ruling of the MERCOSUR tribunal. We can be certain that the 'rational connection' standard in the chapeau would have been met, as the necessity of the measure would first have been established in the provisional justification analysis.[76]

To sum up, had the MERCOSUR exemption been analysed as a separate violation of Article I, there does not seem to be any risk at all of blurring the boundary between the primary violation and chapeau analyses. The presence of such a risk would provide a small argument for preferring the panel's effects based approach towards the chapeau. The risk does not however seem to be present, at least with respect to the MERCOSUR exemption.

2. *The Court Injunctions as an Independent Violation*

As noted above, the panel seemed to be of the view, during its chapeau analysis, that the court injunctions resulted in discrimination in the form of a national treatment violation. Domestically produced retreaded tyres made from casings of European origin could be sold, while imported retreaded tyres made from the same casings could not be sold. The panel therefore noted that, 'the discrimination … arises between Brazil

[75] This was the European Communities' view of the scope of paragraph (d). See panel report para. 4.440. The same sentiment has been expressed by a panel which noted that, 'to secure compliance' means 'to enforce compliance' and that the 'the notion of enforcement contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects'. *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R adopted 25 March 2006, paras 8.175 and 8.178.

[76] Of course, this means that the chapeau analysis would have added nothing to the provisional justification analysis. However, this is a different boundary from that now under examination. It has also been argued the blurring of the boundary within the chapeau is not problematic. When a case comes to the chapeau via the necessity standard in provisional justification, the chapeau does not need to have a strong role in protecting against abuse of the exception. The protection is internal to the exception itself.

and other WTO Members, including the European Communities.'[77] This situation could have been analysed as an independent violation of Article III:4.[78] The domestic and imported tyres are like in every respect other than their origin, and there is clearly less favourable treatment of the imported tyres. Again, however, there does not seem to be any possibility here of the court injunctions failing to meet the terms of the chapeau, for the same reasons as established the primary violation. This is simply because the analysis would not have proceeded beyond provisional justification under Article XX. The importation of significant quantities of used tyres through the injunctions could not possibly be necessary to protect public health.

It has therefore been demonstrated that the Appellate Body's approach towards the chapeau does not create the danger of blurring the primary violation and chapeau analyses. This point holds true regardless of which view about the number of independent primary violations is preferred, so that the Appellate Body's original views about the sanctity of this boundary expressed in *Gasoline* remain unaffected. However, it is necessary to highlight a possible development which, in combination with the 'new' approach to the chapeau, could collapse the boundary.

VIII. THE CHAPEAU TEST IN COMBINATION WITH THE EARLY CONSIDERATION OF REGULATORY PURPOSE

As indicated in the introduction, the challenge facing an interpreter of the chapeau is to identify the nature of the discrimination which ought to be caught. The answer which features as part of the panel's reasoning, and which is the only test in the Appellate report, reflects formulations which have for some time been advocated in order to detect the discrimination with which the world trading order should be concerned. However, the crucial point for the present discussion is that calls for the adoption of what is now the chapeau test, have been made primarily in relation to national treatment primary violations. The usual recommendation here is that the possibly exonerating quality of explanations for the alleged discrimination should be considered within the primary violation analysis itself.[79] Endorsing this approach would undoubtedly '…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.'[80] To what extent is this concern offset

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[77] *Brazil – Tyres*, panel report para. 7.308, provided in Section II.

[78] It is notable, however, that, unlike the MERCOSUR exemption, there was no discussion of the possibility of treating the court injunctions as an independent violation in either the panel or Appellate Body reports.

[79] This idea is most closely associated with the work of Robert Hudec. See, *GATT / WTO Constraints on National Regulation: Requiem for an 'Aims and Effects Test*' 32 The International Lawyer 3 (1998), 619-649. The idea has perhaps been most fully explored in Regan's work. See, for example, *Regulatory Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article III:2)* 36 Journal of World Trade 3 (2002), 443-478; *Further Thoughts on the Role of Regulatory Purpose Under Article III of General Agreement on Tariffs and Trade* 37 Journal of World Trade 4 (2003), 737-760. A further landmark contribution was provided by Henrik Horn and Petros C. Mavroidis, *Still Hazy After all These Years: The Interpretation of National Treatment in the GATT / WTO Case-law on Tax Discriminaiton* 15 European Journal of International Law (2004), 39-69. Continued support for this idea was recently expressed in, Nicholas DiMascio and Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102 American Journal of International Law 1 (2008), 48-89 at 83-84.

[80] *United States – Gasoline*, Appellate Body report, page.23.

by the arguments in favour of the early consideration of the aim of the measure, or the underlying regulatory purpose, within the primary violation analysis?

As noted in the introduction, it is commonly understood that anti-discrimination provisions in the WTO Treaty texts are intended to catch country-based discrimination. It can also be readily seen how enquiring into regulatory purpose assists in detecting origin based discrimination. If there is a valid explanation for a challenged measure, it should be exonerated, even if the detrimental effect of the measure is felt mainly by imported products. In contrast, the absence of such an explanation strongly suggests that the measure distinguishes between domestic and imported products based on the illegitimate criterion of their origin. In themselves, these points establish only the imperative for regulatory purpose to be considered somewhere within the overall appraisal of a measure. However, they also provide the foundation for further arguments in favour of the early consideration of regulatory purpose within the national treatment analysis.

The main argument here appeals to what is presented as the ordinary meaning of the term 'like products' within GATT Article III. Regan argues that a ban on the internal sale of plastic containers in a state which produces mainly cardboard containers may, or may not, amount to an Article III:4 violation. Complaining states would argue that the ban results in the less favourable treatment of 'like products' on the basis of the previously close competitive relationship between the products and the clear disparate impact. However, establishing this relationship does not demonstrate that the ban falls foul of the Article III:1 prohibition against applying measures 'so as to afford protection to domestic production'. This phrase implicates regulatory purpose, or the aim of the measure, which could have strong environmental credentials. Should this explanation for the disparate impact of the measure be accepted, the products being compared should not to be regarded as 'like', thereby avoiding the primary violation.

There is recent evidence in the case law of a comparable method which also does not define the national treatment standard solely with reference to disparate impact. The difference with this method is that the focus is on the less favourable treatment standard rather than the like products issue. An alleged Article III:4 national treatment violation in *Dominican Republic – Cigarettes*,[81] centred on a requirement for both importers and domestic producers to post a bond of five million pesos to guarantee compliance with tax liabilities. On a per cigarette basis, the fixed amount of the bond was less for domestic producers by reason of their higher market share relative to importers. Honduras argued that this disparate impact amounted to less favourable treatment. The Appellate Body dismissed this argument, noting that,

> …the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.[82]

[81] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted 19 May 2005).
[82] Ibid., para. 96.

In this passage, the allegation of less favourable treatment is denied on the basis of a non-protectionist explanation for the disparate impact. A slightly different way to think about this finding is that the challenged measure does not so much modify the conditions of competition between domestic and imported products, as reflect these conditions.

The case for favouring these analytical methods is strengthened when supplemented with a perspective explained by Ortino on why a prohibition of *de jure* discrimination must be viewed differently from a prohibition on *de facto* discrimination:

> When the NT principle is defined simply on the basis of discriminatory 'language' (i.e., nationality as the prohibited regulatory criterion) or of a limited notion of 'inherent' discrimination (i.e., 'residence', 'religion', 'language' as the prohibited regulatory criteria), the prohibition of internal measures based on such formal regulatory criteria will be deemed to be in general an acceptable and reasonable *rule*…
>
> On the other hand, when the NT principle is defined on the basis of a larger concept—such as discriminatory 'effect'—the normative balance between 'rule' and 'exception' changes dramatically. For example, a prohibition of origin-neutral measures with discriminatory effects vis-à-vis imported products or investors may not on its own represent a legitimate norm. Without an inquiry into the public policy justification (and in particular into the relationship between the measure and its policy objective), the national treatment principle would simply be lacking the necessary normativity.[83]

The extent to which the approach called for blurs the boundary between the primary violation and Article XX as a whole becomes apparent when the methodology for identifying regulatory purpose is considered. Regan notes that a 'failure to use less trade-restrictive measures that would achieve the asserted non-protectionist goal is strong evidence that the actual goal is protectionism.[84] Of course, the availability of alternatives is among the tests developed by the Appellate Body to determine whether a measure is 'necessary' during provisional justification under Article XX. It is also likely that, under the approach to the chapeau in *Tyres*, the availability of alternatives will be relevant to establishing the 'rational connection' between the reason for the discrimination and a recognized policy objective. The potential for significant conflation of the primary violation and chapeau analyses can readily be seen. If the measure amounts to a national treatment violation by reason of the failure to use reasonably available alternatives, the scope for finding the required 'rational connection' under the chapeau is, at the very least, significantly curtailed. The measure would fail to satisfy the chapeau, for the same reasons as established the primary violation.[85]

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[83] Federico Ortino, *From Non-Discrimination to Reasonableness: A Paradigm Shift in International Economic Law?* Jean Monnet Working Paper 01/2005 at 49-50.
[84] Above note 79, at 451 and note 28.
[85] This is assuming that the analysis would reach the chapeau, since the early consideration of regulatory purpose also blurs a third boundary - that between the primary violation and provisional justification.

While accepting the persuasiveness of the arguments in favour of the early consideration of regulatory purpose, it is submitted that WTO tribunals would be well advised in most cases to retain a two-stage analysis dealing with the primary violation, and the justification. This is the methodology suggested by the structure of the GATT and the GATS, something which is not always the position in other areas of international economic law. Several contributions have drawn attention to the one-stage analysis in the context of investment treaties by reason of the general non-inclusion of general exceptions provisions.[86] There is a more compelling case here for evaluating whether there is an acceptable reason for differentiating between investments within the determination of whether investors or investments are in 'like circumstances'. In the trade context, it is difficult to see what is lost by deferring the consideration of regulatory purpose until Article XX.

There are perhaps two caveats here. First is that Article XX provides only a closed list of exceptions. It is in the recognition of other non-listed legitimate policies that the use of the methodology described above is most likely to be used. Even here, however, it is submitted that it is preferable to discuss non-listed objectives under Article XX(d) where possible. The danger might otherwise lie in the development of an Article XX 'light' jurisprudence within the primary violation analysis, in which it might easier for a measure to be exonerated with reference to a non-listed objective than a listed objective. The second caveat is that, in some cases, it might be appropriate to nip in the bud any allegation of a national treatment violation by using one or other of the techniques described above. *Dominican Republic – Cigarettes* is an example of such a case. A national treatment violation could have been confirmed based on the disparate impact, which might then have been examined under Article XX(d).[87] However, the disparate impact of the measure was extremely small.[88] This is something which might have contributed to the Appellate Body's decision to deny the primary violation, just as the pronounced effects in *Korea – Beef* resulted in the opposite outcome.

In sum, the recommendation is that the boundary between the primary violation and chapeau analyses should remain intact, while, at the same time, should not be regarded as impermeable. This will occasionally lead to measures being exonerated within the primary violation analysis without recourse to Article XX, and other measures falling foul of the chapeau for the same reasons as established the primary violation. This seems inevitable once it is accepted that anti-discrimination provisions in the WTO texts are intended to catch country based discrimination. The panel's alternative analysis in *Tyres*, in which trade effects would be decisive only under the chapeau, provides a means of differentiating the two analyses, but this does little to offset the disadvantages of this approach.

IX. CONCLUSION

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[86] Ortino, as note 83 above note; DiMascio and Pauwelyn, as note 79 above; Andrew Newcombe *General Exceptions in International Investment Agreements*, Paper presented at the BIICL Eighth Annual WTO Conference 13th and 14th May 2008, London.

[87] The question would then have been whether the fixed bond requirement would have been necessary to secure compliance with the tax liabilities.

[88] The panel noted that the bond had to be issued by financial institutions registered in the Dominican Republic. The effective cost of the bond was therefore the fee charged by the issuing institution with the fee for the importer from Honduras being US$1873 or around 2 cents per thousand cigarettes. *Dominican Republic – Cigarettes*, panel report para. 7.299.

For several reasons, the tasks of attributing a distinct function to the chapeau, and distinct meaning to its terms, are difficult undertakings. The chapeau was inserted in order to prevent abuse of the exceptions. Arguably, this additional clause was not required since the nexus requirements in the heads of provisional justification provide ample protection against their abuse. For a measure already found to be necessary to be subject to further review under the chapeau is perhaps indicative of an ordering of values in favour of trade which is obviously now anachronistic. The view that the chapeau functions to ensure that facially unobjectionable measures do not escape review if they are applied in an objectionable manner is also unconvincing. There is little to prevent the manner in which measures are applied being considered before the chapeau is reached, and this may indeed be unavoidable. As for attributing a distinct meaning to the chapeau terms, the difficulty stems from the centrality of the discrimination issue both here, and within some primary violations.

Undeterred by these difficulties, the panel in *Brazil – Tyres* considered that the chapeau is intended to catch country based discrimination, but only if it 'unjustifiable' is the sense that it generates significant trade effects. The panel's desire for distinctive tests to apply in each stage of the appraisal of measures perhaps led it to lose sight of the need to ensure the workability of the decisive relevance of trade effects under the chapeau. In contrast, the Appellate Body considered that the chapeau is designed to uncover country based discrimination which, by definition, is 'unjustifiable'. The single chapeau test which the Appellate Body has now explicitly endorsed would appear to be workable bearing in mind that it has been used in a number of cases. In these cases, the test was not used altogether openly because, at first sight, it seems to blur the boundaries between the different stages associated with the overall appraisal of a measure. It has been argued that this situation will rarely materialize in practice and, when it does, the effect is to preserve regulatory autonomy without creating too permissive an environment. It has also been argued that WTO tribunals should respond with caution to calls for justificatory elements to be considered within the primary violation analysis. The arguments in favour of the early consideration of regulatory purpose are entirely sound, but not overwhelming in the trade context.