
DEFINING NONDISCRIMINATION UNDER THE LAW OF THE WORLD TRADE ORGANIZATION

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I. INTRODUCTION

Nondiscrimination is a fundamental principle of the world trading system. The Preamble of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) proclaims "the elimination of discriminatory treatment in international trade relations" as one of the chief objectives of the World Trade Organization (WTO).¹ The principle of nondiscrimination is embodied in numerous provisions of the WTO Agreement, which render the principle into concrete legal obligations of WTO Members. Among these provisions, the most prominent ones are the most-favored-nation treatment (MFN) and national treatment (NT) clauses. These clauses, in one form or another, appear in the General Agreement on Tariffs and Trade (GATT),² the General Agreement on Trade in Services (GATS),³ the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁴ and various other agreements of the WTO.⁵ In addition to the MFN and NT clauses, the WTO agreements

¹ See Marrakesh Agreement Establishing the World Trade Organization, pmbi., cl. 3, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (GATT 1947), which has been incorporated into General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex IA, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT]. Major MFN clauses, in various forms, appear in GATT Articles I:1, II:1, V:5, IX:1, and XIII:1. Major NT clauses appear in GATT Articles III:2 and III:4.

³ General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex IB, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]. The principal MFN and NT clauses are set out in GATS Articles II and XVII respectively.

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex IC, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS]. The principal MFN and NT clauses are set out in TRIPS Articles 3 and 4 respectively.

⁵ For example, MFN obligations are found in Article 2.2 of the Agreement on Safeguards [hereinafter the Safeguard Agreement]; Article 2.1 of the Agreement on Technical Barriers to Trade [hereinafter the TBT Agreement]; Article 2.1 of the Agreement on Preshipment Inspection; Article 9.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

also contain more generally worded anti-discrimination provisions, the most notable examples of which include the nondiscrimination clauses in GATT Article XX, GATS Article XIV, and the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement).⁶

The MFN and NT provisions define nondiscrimination in relatively precise terms. For example, GATT Article I:1, the most comprehensive expression of the GATT MFN obligation, requires a WTO Member to accord, immediately and unconditionally, “any advantage, favor, privilege or immunity” it grants to any product of any other country to the “like product” of all other WTO Members, with respect to (i) customs duties and charges levied on imports and exports or on the international transfer of payments for imports or exports, (ii) the method of levying such duties and charges, (iii) all rules and formalities in connection with importation and exportation, and (iv) internal taxation and regulations affecting the sale and use of imported products.⁷ GATT Article III, which states the GATT NT obligations, prohibits a Member from imposing internal taxes or charges on products imported from another Member “in excess of” those applied to “like domestic products” and obliges a Member to accord to such imported products “treatment no less favorable than that accorded to like products of national origin” with respect to internal regulations.⁸

In contrast to the MFN and NT clauses, the general nondiscrimination provisions of the WTO agreements employ the term “discrimination” per se, without providing specific parameters to define the obligation. For example, GATT Article XX, which permits a Member to adopt measures inconsistent with its GATT obligations for certain policy reasons, imposes

[hereinafter the Antidumping Agreement]; and Article 19.3 of the Agreement on Subsidies and Countervailing Measures [hereinafter the SCM Agreement]. NT obligations are found in Article 2.1 of the TBT Agreement, and Article 2 of the Agreement on Trade-related Measures (TRIMS). See WTO Agreement, *supra* note 1, Annex 1A. In addition, an MFN obligation also appears in Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Dispute, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 125 [hereinafter DSU]. Both MFN and NT obligations appear in Article III of the Agreement on Government Procurement (GPA), one of the Uruguay Round Plurilateral Agreements. See WTO Agreement, *supra* note 1, Annex 4.

⁶ See Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2.3, WTO Agreement, *supra* note 1, Annex 1A [hereinafter SPS Agreement]. For a detailed discussion of the nondiscrimination clauses in GATT Article XX, GATS Article XIV, and the SPS Agreement Article 2.3, see *infra* Section IV. Examples of other generally worded antidiscrimination clauses include GATT, *supra* note 2, art. XVII:1 and *Ad* art. XIV, paragraph 1; Agreement on Rules of Origin, arts. 2(d) and 3(c), WTO Agreement, *supra* note 1, Annex 1A; TRIPS, *supra* note 4, arts. 4(d) and 27.1.

⁷ See GATT, *supra* note 2, art. I.1.

⁸ See GATT, *supra* note 2, arts. III:2 and III:4.

on the Member an obligation not to apply such measures “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”⁹ A similarly worded provision appears in Article XIV of GATS and Article 2.3 of the SPS Agreement.¹⁰ In a recent dispute settlement case, the WTO Appellate Body (AB) has interpreted the term “nondiscriminatory” contained in the Enabling Clause, which exempts preferential treatment granted to developing countries from the MFN obligation under GATT Article I:1, as a binding legal obligation on the preference-giving Members.¹¹ When the term “discrimination” or “nondiscrimination” is used in such a general manner, questions arise as to the precise meaning of the term.

The notion of nondiscrimination is a complex one. Its content is highly elastic and context-dependent. Recognizing the “infinite complexity” entailed by the concept, a WTO panel once warned: “‘Discrimination’ is a term to be avoided whenever more precise standards are available, and when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.”¹²

Despite such perceived difficulties in defining the concept, the Appellate Body has recently interpreted the generic term “non-discriminatory” as a requirement of not treating similarly-situated countries differently.¹³ This interpretation is a significant development in WTO jurisprudence because it introduces a key for defining the general obligation of nondiscrimination under WTO law. Under this interpretation, discrimination occurs only when differential treatment is accorded to “similarly situated” countries; thus, the central issue is to determine the basis for comparing similarity between WTO Members.

Indeed, the concept of “similarly situated” underlies all nondiscrimination obligations of the WTO. The concept is obviously embodied in the above-noted general provisions that prohibit arbitrary or unjustifiable discrimination between countries where the “same,”¹⁴ “like”¹⁵ or “similar”¹⁶ conditions prevail. In essence, what these generally-worded antidiscrimination clauses require is equal treatment of Members that are “similarly situated” on the basis of their prevailing conditions. Moreover, the concept of “similarly situated” is also embodied in the MFN and NT

⁹ GATT, *supra* note 2, art. XX.

¹⁰ See GATS, *supra* note 3, art. IV; See SPS Agreement, *supra* note 6, art. 2.3.

¹¹ Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 143-147, WT/DS246/AB/R (Apr. 7, 2004) (adopted Apr. 20, 2004) [hereinafter *EC—Preferences*].

¹² Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.94, WT/DS114/R (March 17, 2000) (adopted Apr. 7, 2000) (referring to the term “discrimination” contained in Article 27.1 of the TRIPS).

¹³ Appellate Body Report, *EC—Preferences*, *supra* note 11, ¶ 153.

¹⁴ GATT, *supra* note 2, art. XX.

¹⁵ GATS, *supra* note 3, art. XIV.

¹⁶ SPS, *supra* note 6, art. 2.3.

obligations. In a general sense, the MFN and NT clauses designate all Members as “similarly situated” on the basis and within the parameters specified in the particular clauses. For example, under the MFN and NT clauses of GATT and GATS, the basis for classifying similarly-situated Members is defined by the concept of “like products,”¹⁷ “like services”¹⁸ or “like service suppliers.”¹⁹ Whether two products or services are “like” is conceptually the same question as whether they are similarly situated. The concept of “similarly situated,” therefore, controls the definition of MFN and NT obligations under GATT and GATS.

Identifying the concept of “similarly situated” in the nondiscrimination provisions of the WTO, however, is merely the first step towards defining nondiscrimination under WTO law. The critical issue remains as to the basis or criteria for determining similarity or likeness. In other words, how do we determine that X is a “like product” of Y, or conditions prevailing in Country A are the “same,” “like” or “similar” to the conditions prevailing in Country B? In fact, when the issue of discrimination arises, the question is almost never whether the similarly-situated should be treated alike, but whether the subjects concerned should be deemed as similarly situated. The real question, therefore, is how to determine the relevant criteria for comparing similarity or likeness between the subjects concerned.

As a conceptual matter, whenever a WTO tribunal makes a finding on discrimination, it has also made a determination, explicitly or implicitly, on the likeness or similarity between products, services, or nationals of the Members. Yet, the question of *how likeness or similarity should be determined* has never been answered coherently. Although the concept of “like products” has generated a substantial body of GATT/WTO jurisprudence,²⁰ it remains unclear when the tribunals should use a particular factor to define likeness. In fact, the AB has suggested that what constitute “like products” can only be determined on a case-by-case basis, subject to the individual, discretionary judgment of the treaty interpreter, and that no one approach to exercising that judgment will be appropriate for all cases.²¹ As for the concept of “like conditions” in the generally-worded antidiscrimination provisions of the WTO, only a handful of cases have interpreted it thus far. In these few cases, the tribunals have not focused on the issue of what conditions are relevant in determining similarity between the countries concerned.²²

¹⁷ See GATT, *supra* note 2, arts. I:1, III:2 and III:4.

¹⁸ See GATS, *supra* note 3, arts. II:1 and XVII:1.

¹⁹ *Id.*

²⁰ See *infra* Section III.

²¹ Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 19, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (*adopted* Nov. 1, 1996) [hereinafter *Japan—Alcohol*].

²² See *infra* Section IV.

Given the central importance of the concept of “similarly situated” in defining nondiscrimination under WTO law, it is highly unsatisfactory to leave the critical question of how to determine similarity largely unanswered. More importantly, the lack of a coherent approach to analyzing the issue contributes little to “providing security and predictability to the multilateral trading system.”²³ It is one thing to suggest that likeness decisions should be made on a case-by-case basis which will unavoidably involve an element of individual discretion of the treaty interpreter; it is quite another, however, to believe that there can be no coherent approach to analyzing the issue of likeness or similarity under WTO law.

This paper attempts to explore and develop such an analytical approach. Drawing from general moral philosophy on equality and from nondiscrimination jurisprudence developed under the United States constitutional law, Section II of the paper sets forth several basic propositions. These propositions address the questions of how to determine the relevance of a particular criterion to the comparison of similarity and what may influence the decision to use or reject a relevant criterion in making the comparison. Based on these propositions, a general approach is formulated to assist the determination of “likeness” or “similarity” within the WTO context. The approach identifies the general steps necessary to analyze the likeness or similarity issues and the kind of normative judgment that will have to be made in the process.

The next two sections employ this general approach to examine the “likeness” and “similarity” analyses made by WTO tribunals under various WTO provisions. Section III deals with the tribunals’ treatment of the likeness concept within the MFN and NT provisions. It focuses on the interpretation of “like products” under GATT Article III, where WTO likeness jurisprudence is most developed, and evaluates the interpretive approach of the tribunals in the context of a debate over what is known as the “aim and effects” test. Section IV deals with the “similarly situated” concept outside the realm of MFN and NT provisions. It examines the nondiscrimination requirements under the chapeau provisions of GATT Article XX and GATS Article XIV, SPS Articles 2.3 and 5.5, and the Enabling Clause. Since there have been only a handful of cases involving the interpretation of these requirements, and since WTO jurisprudence on the similarity of “conditions” and “situations” is still at an early stage of development, detailed analyses are made in this section to assess the tribunals’ interpretations of the “similarly situated” concept under each of these provisions.

Section V of the paper sets forth certain conclusions on the significance of the analytical approach developed in this study for defining nondiscrimination under WTO law. On the whole, applying this approach to the specific cases demonstrates that the “similarly-situated” paradigm provides a powerful analytical tool to address the issues of likeness or simi-

²³ DSU, *supra* note 5, art. 3.2.

larity in the WTO context. It helps to form a clear perspective on some of the most perplexing issues in WTO jurisprudence and expose gaps, ambiguities, and inconsistencies in the existing interpretations of the WTO nondiscrimination provisions. The approach is internally coherent and can be applied consistently to the likeness or similarity determination in various contexts of WTO law.

It should be noted that this paper is not intended to provide a comprehensive study of all the likeness concepts and all the generally-worded nondiscrimination clauses contained in the WTO agreements. Most notably, it does not discuss the nondiscrimination provisions of TRIPS, which operates in a significantly different manner from GATT and GATS.²⁴ Nonetheless, to the extent that a comparison of likeness or similarity between two objects is inherent in the analysis of any discrimination, the general approach developed in this paper should be applicable to all WTO nondiscrimination requirements at the conceptual level.

II. THE ANALYTICAL FRAMEWORK

This section provides the analytical framework for this study. Drawing on the general moral philosophy of equality, it explores the meaning of the concept of “similarly situated” and its relationship with the notion of nondiscrimination. It then analyzes how the “similarly situated” paradigm is reflected in the nondiscrimination cases decided under the equal protection and commerce clauses of the United States Constitution. Following a discussion on the question of standards of review, a generally formulated approach is proposed for the analysis and determination of the “likeness” or “similarity” issues under WTO law.

A. *Nondiscrimination and the Concept of “Similarly-Situated”*

The notion of treating the similarly-situated similarly is inherent in the notion of nondiscrimination. Underlying nondiscrimination is the idea of equality. Equality, however, has never meant the same treatment for all;

²⁴ TRIPS operates by incorporating the norms and rules of a number of major international agreements on intellectual properties, and the MFN and NT obligations of TRIPS are subject to certain limits imposed by these other agreements. Unlike MFN and NT under GATT and GATS which are accorded to “like products” and “like services” or “like service suppliers” of the Members, the TRIPS MFN and NT are granted to “nationals” of the Members. See TRIPS, *supra* note 4, arts. 3 and 4. For discussion on the relationship between the NT obligation of TRIPS Article 3.1 and that of GATT Article III:4, see Panel Report, *European Communities—Protection of Trademarks and Geographic Indications for Agricultural Products and Foodstuffs*, ¶¶ 7.181-7.187, 7.241-7.248, WT/DS290/R (March 15, 2005) (*adopted* Apr. 20, 2005) [hereafter *EC—Trademarks/GIs (Australia)*]; Panel Report, *European Communities—Protection of Trademarks and Geographic Indications for Agricultural Products and Foodstuffs*, ¶¶ 7.131-7.137, 7.205-7.212, WT/DS174/R (March 15, 2005) (*adopted* Apr. 20, 2005) [hereafter *EC—Trademarks/GIs (U.S.)*].

instead, equality consists in the like treatment of all similarly situated persons. It is a deeply-rooted moral principle in Western thought that it is just to treat the equals equally and to treat the unequals unequally.²⁵ Accordingly, the question almost never rests in whether the similarly situated should be treated equally, but how to classify the equals or the similarly-situated.

Rather than invoking the language of equal treatment for the similarly-situated, the notion of nondiscrimination is often expressed in the form of a comparative right, that is, a right that is determined by reference to the status of another.²⁶ For example, "X is entitled to whatever benefits Y receives." This formula prescribes equal or nondiscriminatory treatment between X and Y by defining X's right to be the same as Y's. The MFN and NT clauses in GATT Articles I:1 and III are such formulations of comparative rights. Under the MFN clause, the product of a WTO Member is entitled to receive any advantage, favor, privilege or immunity that one Member grants to the like product of any other country with respect to tariffs and other matters of importation and exportation. In effect, the MFN clause prescribes all WTO Members to be in the same class, or similarly situated, with respect to their like products for the purpose of tariffs and other treatment. In the same vein, the NT clauses prescribe imported products and like domestic products to be in the same class, or similarly situated, with respect to matters of internal taxation and regulation. Thus, when a rule of nondiscrimination is expressed in the form of a comparative right, it mandates that the right holders should be deemed as similarly situated with, and therefore be given the same treatment as, the person or object used as reference.²⁷

²⁵ According to Aristotle, for example, "[e]quality consists in the same treatment of similar persons." See ARISTOTLE, *THE POLITICS*, bk. VII. ch. 14 (Stephen Everson ed., Cambridge University Press 1988). "[B]uilding upon prior work by Plato," Aristotle also said "three things about equality that have influenced Western thought ever since: (1) It is just to treat people who are equal equally. (2) It is also just to treat people who are unequal unequally. (3) The foregoing propositions are self-evident, being 'universally accepted even without the support of argument.'" See PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF 'EQUALITY' IN MORAL AND LEGAL DISCOURSE* 185 (Princeton University Press 1990) (footnote omitted).

²⁶ In contrast, a non-comparative right, for example, the right of a person to the privacy of his or her home, is a right that can be determined without reference to the status of another. See *id.* at 131.

²⁷ The notion of nondiscrimination or treating the similarly-situated alike is also implicit in all substantive rules expressed in a non-comparative form. For example, consider a rule that states: "Every citizen who is 18 years or older and is otherwise eligible shall have the right to vote." Under this rule, all persons meeting the citizenship, age and other eligibility requirements are treated as a similarly situated group, and all other persons as differently situated from that group. In this sense, a generally applicable rule, as opposed to an *ad hoc* rule applicable only to a specific

Conceptually, the notion of nondiscrimination or treating the similarly-situated alike involves treatment accorded to two groups of recipients. In order to determine whether discrimination exists, it is necessary to make two comparisons: a comparison between the *treatment* accorded to the two groups so as to ascertain whether there is a disparity in treatment between them; and a comparison between the two groups of *recipients* so as to determine whether they are “similarly situated.” For example, in the context of GATT MFN obligations, a violation occurs only when (a) there is a disparity in *treatment* of the products of two Members, and (b) the products of the two Members are “like products,” i.e., they are similarly situated. In practice, identifying a disparity between the treatment accorded to the two groups does not seem to pose much of a problem, although *de facto* disparate treatment can be difficult to identify.²⁸ Determining whether the two groups are similarly situated, on the other hand, has proven to be much more complex. The focus of this study is on the comparison between the two groups of recipients. Nonetheless, to the extent that the purpose of comparing the treatment accorded to different recipients is to determine the likeness of such treatment, the analytical approach developed in this paper should be equally valid for that comparison.

B. *The Key to the Concept of Similarity: Relevant Criteria for Comparison*

The term “similarly-situated” derives from the concept of similarity. The concept of similarity implies that two or more objects are being compared by a common standard and judged as indistinguishable in relevant respects. Although the concept of similarity presupposes a standard of comparison, it does not itself prescribe particular standards. Instead, it operates by reference to whatever standard is appropriate or relevant to the purpose at hand.²⁹ A relevant standard for one purpose may be irrelevant for another. For instance, most people would describe nectarines and peaches as similar fruits when they use shape, size, color, texture, and taste of fruits as standards of comparison. For a student of language wishing to compare the names of fruits, these standards would be irrelevant;

person or object, requires, and (if faithfully applied) results in, nondiscrimination. It has been argued, however, that equality in its true sense can only be meaningfully understood as a claim about comparative rights. See Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1223 (1997).

²⁸ See Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favored-Nation Treatment – or Equal Treatment?* 36 J. WORLD TRADE 921 (2002). For an example of possible ways of comparing treatment accorded to different groups under NT obligations, see Panel Report, *EC–Trademarks/GIs (Australia)*, *supra* note 24, ¶¶ 7.206-7.240; Panel Report, *EC–Trademarks/GIs (U.S.)*, *supra* note 24, ¶¶ 7.152-7.153, 7.172-7.204.

²⁹ Westen, *supra* note 25, at 31.

instead he might distinguish the fruits on the basis of their phonetics or orthography, and conclude that nectarine is similar to “mandarin” but not at all similar to “peach.”³⁰

The key to the concept of similarity, therefore, lies in the relevant criteria for comparison. To declare persons or things to be similar, one must first possess a suitable standard or criterion of comparison. A criterion is suitable when it is “conducive to or useful or instrumental in furthering some state of affairs one wishes to bring about.”³¹ Whether a particular consideration furthers a given goal, and hence is relevant, is mostly a matter of factual evaluation, whereas whether something ought to be a goal is a matter of normative decision.³² The nexus between a given goal and the criteria for comparison used in furthering it, i.e., the degree of relevance of such criteria to the goal, may range from that of necessity to that of a reasonable connection. If a factor is deemed indispensable in furthering the given goal, the consideration of that factor will be necessary in the similarity judgment since no meaningful comparison can be made without that consideration. On the other hand, if a factor is merely conducive to or useful in furthering the goal, then whether to allow such factor to be used as a criterion in the similarity judgment becomes a normative question.³³

Applying this conception to law, one can come to the following propositions. First, what nondiscrimination requires is that like treatment be extended to all that are similarly situated *with respect to the purpose of a given rule*. Whether persons or things are similarly situated cannot be determined meaningfully by neutral or “objective” standards. Instead, it must be determined by reference to the purpose of the particular rule under which a classification is made. Second, a criterion for classification is relevant only when it serves to further the goal of the particular rule. If the criterion does not further the goal, it is irrelevant and should not be used. The connection between the criterion and the asserted goal of the rule should at least be reasonable. Third, unless a criterion for classification is indispensable in furthering the goal of the rule, in which case it must be used, whether to allow a relevant criterion for classification is a normative decision of the court. The court may consider norms and values extrinsic to the immediate purpose of the particular rule in deciding whether to permit a useful but not indispensable factor to be the basis for classification. Fourth, the question of whether the purpose of a given rule

³⁰ *Id.*

³¹ *Id.* at 120-21.

³² *Id.* at 121.

³³ Westen does not seem to distinguish different levels of relevance when he stated that the “further question whether something *ought* to be a goal, and whether considerations *ought to be allowed* in furtherance of it, are normative questions.” *Id.* (emphasis original).

is appropriate or legitimate entails a normative decision that can only be made in light of a norm beyond the framework of classification itself.³⁴

– Examples from United States Law

The above propositions find support in United States law which, with its common law tradition, provides a rich source of jurisprudence on non-discrimination. Although the cases discussed below concern the nondiscrimination requirements of U.S. constitutional law, the approaches taken by U.S. courts in interpreting these requirements reflect a collective understanding of U.S. jurists on the conceptual truth of the notion of treating the similarly-situated similarly that should transcend any particular jurisdiction.

A major source of nondiscrimination jurisprudence is U.S. equal protection law. In cases involving alleged violations of the equal protection requirements of the U.S. Constitution, the courts are directed to examine whether a challenged classification serves to advance the legitimate purposes of the law containing such classification or is otherwise justified by a legitimate governmental interest. For example, in a case challenging a state statute banning the use of plastic non-refillable milk containers but permitting the use of paperboard non-refillable containers, the U.S. Supreme Court held that the different treatment of the two types of milk containers did not violate the equal protection clause of the U.S. Constitution because the ban was rationally related to the statute's legitimate objectives of encouraging conservation and reducing solid waste.³⁵ Although both kinds of containers were non-refillable and might pose the same overall environmental harm, the Court accepted the arguments that plastic containers create more volume of solid waste than paperboard ones, and that the ban on plastic containers would help conserve energy because the plastic was made from a nonrenewable resource whereas the paperboard was made from renewable forest products.³⁶ Based on these and other factors,³⁷ the Court was satisfied that the two types of containers were not similarly situated with respect to the asserted purposes of the statute.

By comparison, the Court has struck down classifications that it found to be irrelevant to the stated purposes of the law requiring such classifica-

³⁴ Indeed, without the ability to judge the appropriateness or legitimacy of the purpose of the rule itself, judicial review of the classification contained in the rule would become "an exercise in tautological reasoning." *Nordlinger v. Hahn*, 505 U.S. 1, 34 (1992) (Stevens, J., dissenting).

³⁵ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981).

³⁶ *Id.* at 468-69.

³⁷ The other arguments accepted by the Court were that elimination of the popular plastic jug would encourage the use of environmentally superior containers, and that the ban on plastic containers which had only recently been introduced would reduce the economic dislocation foreseen from the movement toward greater use of environmentally superior containers. *Id.* at 465-66.

tions or to any legitimate government interest. For example, in a case challenging a federal food stamp statute that excluded households containing unrelated persons from eligibility for federal food assistance, the Court held that this eligibility standard violated the equal protection requirement of the Constitution because it was irrelevant to the stated purposes of the statute and was not rationally related to furthering any legitimate government interest.³⁸ The stated purposes of the challenged statute were to raise national levels of nutrition among low-income households and to stimulate the agricultural economy.³⁹ The Court found that the classification contained in the statute was irrelevant to its stated purposes because the relationships among members of the households had nothing to do with their personal nutritional requirements or their abilities to stimulate agricultural economy.⁴⁰ To the extent that the legislation was intended to prevent "hippie communes" from participating in the food stamp program, the Court held that such a desire to harm a politically unpopular group could not constitute a legitimate governmental interest.⁴¹ In another case, the Court held that a Texas city zoning ordinance requiring a special permit for operating a group home for the mentally retarded violated the equal protection clause of the Constitution.⁴² The Court reasoned that while the mentally retarded as a group are different from others not sharing their misfortune, this difference is irrelevant since there was no showing that the proposed group home would threaten the city's legitimate interests in a way that other permitted uses would not.⁴³ Thus, under the Court's ruling, absent the showing of any legitimate governmental interest, the city zoning law must not treat the mentally-retarded as differently situated from others.

Another major source of nondiscrimination jurisprudence is developed under the commerce clause of the U.S. Constitution, which the Supreme Court has interpreted as prohibiting the several states from enacting legislation that discriminates against interstate commerce unless it can be justified by a legitimate local interest.⁴⁴ The purpose or rationale of the

³⁸ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

³⁹ *Id.* at 533-34.

⁴⁰ *Id.* at 534.

⁴¹ *Id.* at 534. In addition, the Court also rejected the government's argument that the challenged classification was useful in preventing fraud in the food stamp program. *See id.* at 536-38.

⁴² *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985).

⁴³ *Id.* at 448.

⁴⁴ The commerce clause, U.S. CONST. art. I, §8, grants the power to regulate interstate and foreign commerce to U.S. Congress. Although the commerce clause does not mention the nondiscrimination principle explicitly, the Supreme Court has consistently held that in the absence of Congressional legislation, the commerce clause imposes limits on the power of state to regulate interstate and foreign commerce and that such limits include nondiscrimination against out-of-state economic interests and interstate commerce. *See e.g., Welton v. Missouri*, 91 U.S. 275,

nondiscrimination requirement is to prevent state economic protectionism and ensure the free flow of commerce in the nation.⁴⁵ Although the Court has not been particularly clear in defining “discrimination” under the commerce clause,⁴⁶ its decisions can generally be understood in terms of the similarly-situated analysis proposed above. When state legislation is challenged under the commerce clause, it is typically accused of discriminating against interstate commerce or out-of-state economic interests in favor of local commerce or in-state economic interests. The question then is whether the disfavored (interstate or out-of-state) interest is similarly situated with the favored in-state interest with respect to the legitimate purpose of the state legislation.

Given the anti-protectionist objective of the commerce clause, a legitimate purpose of the state law must be something other than the protection of local economic interests. In practice, a challenged state law can almost always proffer purposes other than simple economic protectionism; examples of such purposes include public health, environmental or consumer protection, social (as opposed to economic) welfare of citizens, and other areas in which the state power to regulate is legitimate.⁴⁷ The

280-82 (1875); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523-27 (1935); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). The doctrine based on the Court’s interpretation of the commerce clause is commonly known as the “dormant commerce clause” or the “negative implications” of the commerce clause. For a history of the dormant commerce clause, see Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* §§ 6-2 – 6-5 (3d ed., West Publishing Company 2000). See generally, Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 *WAYNE L. REV.* 885 (1985).

⁴⁵ See *Baldwin*, 294 U.S. at 527 (stating that the ultimate principle of the commerce clause is “that one state in its dealings with another may not place itself in a position of economic isolation” and that the state power may not be used “with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.”); *Philadelphia*, 437 U.S. at 624 (stating “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected”).

⁴⁶ See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause*, 47 *VAND. L. REV.* 1401, 1412-15 (1994) (distinguishing three types cases under the dormant commerce clause: (a) those involving state measures that are explicitly origin-based, (b) those involving facially origin-neutral measures that have “discriminatory” effects on interstate commerce, and (c) those involving facially origin-neutral measures that impose merely “incidental” burdens on interstate commerce; and pointing out that the courts have not developed a clear test to distinguish the two types of facially neutral measures and that they often simply pronounce that a state statute is or is not “discriminatory.”)

⁴⁷ See e.g., *Baldwin*, 294 U.S. at 523 (the State of New York asserting sanitary security of milk supply as the purpose of its law that prohibited the sale of milk imported from another state unless the price paid in the other state met the minimum

real question, therefore, is whether the distinction effected by the state law between the in-state and out-of-state interests serves to further such asserted purposes. The Court will strike down the state law if it finds the distinction effected by that law between the in-state and out-of-state interests does not serve or is not necessary to achieve its asserted purposes. Conversely, it will uphold the state law if it finds the in-state and out-of-state distinction effected by that law serves or is necessary to further its legitimate purposes.

For example, the Court struck down as unconstitutional a New Jersey statute that prohibited the importation of waste generated outside its territory, despite the asserted legislative purposes of the statute being to protect the State's environment, public health, safety, and welfare.⁴⁸ The Court held that whatever the purpose of the statute, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."⁴⁹ Since New Jersey could not prove that the waste generated outside the State was more harmful to environment or public health and safety than that generated inside the State (i.e., that out-of-state waste is differently situated from the in-state waste with respect to the purposes of the statute), the distinction drawn by the statute between the two kinds of waste does not serve the asserted purposes of the law and is therefore invalid. In contrast, the Court upheld a Maine statute prohibiting the importation of live baitfish into the State of Maine, because it was satisfied that there was substantial scientific uncertainty surrounding the effects that non-native baitfish parasites could have on Maine's wild fish population and that there were no available nondiscriminatory alternatives to the ban.⁵⁰ Here, the Court recognized that Maine had a legitimate purpose to protect the State's unique fisheries, and the distinction drawn between native and nonnative live baitfish was necessary to further this legitimate purpose.⁵¹

The same analysis applies to cases in which the challenged state law does not explicitly discriminate against out-of-state interests but has an adverse impact on interstate commerce. For example, the Court struck down a local order prohibiting a company from shipping its Arizona-grown cantaloupes outside Arizona unless they were packed inside the state and marked as of Arizona origin.⁵² The order was issued under a

price for purchases from local producers) *See infra* notes 48 to 65 and accompanying text for further examples of local laws with asserted purposes of environmental protection, consumer protection, and protection of public health, safety, and social welfare.

⁴⁸ *Philadelphia*, 437 U.S. at 629.

⁴⁹ *Id.* at 626-27.

⁵⁰ *See Maine v. Taylor*, 477 U.S. 131, 148 (1986).

⁵¹ *Id.* at 151-52.

⁵² *Pike v. Bruce Church*, 397 U.S. 137 (1970).

state statute requiring all cantaloupes grown in Arizona to be packed in a manner approved by the state.⁵³ The primary purpose of the statute was to prohibit deceptive packaging so as to promote and preserve the reputation of Arizona growers.⁵⁴ The Court recognized the legitimacy of the purpose of the law, but found the local order did not serve that purpose since the company was not putting the good name of Arizona on an inferior or deceptive packaged product – the cantaloupes grown by the company were of a superior quality and were packed in California and bore the name of their California packer.⁵⁵ The drawing of a distinction between the company, an out-of-state packer, and in-state packers in this case was irrelevant to the asserted purpose of the State law but imposed an undue burden on interstate commerce.⁵⁶ Similarly, the Court struck down a North Carolina statute requiring all apples sold in closed containers in that state either to display the applicable grade approved by the federal system or to bear a no-grade label.⁵⁷ An effect of the statute was to deprive the competitive advantage of the apples produced in Washington State which had developed an inspection and grading system that was considered in the industry to be superior to the federal system.⁵⁸ The declared purpose of the statute was to protect consumers from deception and confusion caused by multiple grading in the marketplace.⁵⁹ However, the Court found that the challenged statute did “remarkably little to further that laudable goal at least with respect to Washington apples,” since the statute magnified the problem of consumer confusion by depriving consumers of all information concerning the quality of apples, and since the superior Washington grades could only “deceive” or “confuse” a consumer to his benefit.⁶⁰ In this case, a facially origin-neutral law had the effect of disadvantaging out-of-state producers in favor of the interest of local competitors, and the distinction effected by the law between the treatment of out-of-state producers and that of local producers was irrelevant to its asserted purpose.⁶¹ In comparison, the Court held a local ordi-

⁵³ *Id.* at 142.

⁵⁴ *Id.* at 143.

⁵⁵ *Id.* at 143-44.

⁵⁶ The Court further addressed the argument that Arizona had a legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality fruit was grown in Arizona, and found that such state interest was so “tenuous” that it could not constitutionally justify the burden the order imposed on interstate commerce by requiring the company to build a new packing plant in Arizona when the company could operate the business more efficiently elsewhere. *See id.* at 145.

⁵⁷ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

⁵⁸ *Id.* at 351.

⁵⁹ *Id.* at 352-53.

⁶⁰ *Id.* at 353-54.

⁶¹ This case is an example where the comparison of similarity is made between the *de facto* treatment accorded to two groups of recipients rather than between the two groups. *See supra* Section II.A, first paragraph. The case can also be viewed, however,

nance prohibiting door-to-door solicitation for national magazines as valid under the commerce clause even though the ban had the effect of favoring local retail merchants over out-of-state solicitors.⁶² The Court found that the purpose of the ordinance was to protect the privacy of local residents, which was a legitimate exercise of the state power,⁶³ and the distinction effected by the ordinance between the solicitors and other vendors served to advance that legitimate purpose. In other words, the out-of-state solicitors and the in-state vendors were deemed as dissimilarly situated with respect to the legitimate purpose of the local law. Likewise, the Court upheld a facially origin-neutral law of Minnesota banning the use of plastic non-refillable milk containers while permitting paperboard non-refillable milk containers, despite the fact that all the producers of plastic resin were from outside the state and that pulpwood is a major in-state industry.⁶⁴ The Court recognized the legitimacy of the asserted purposes of the state law as encouraging conservation and reducing solid waste, and found that the distinction drawn by the state law between the plastic and paperboard containers served rationally to further that legitimate purpose.⁶⁵ Thus, the two types of containers were deemed as dissimilarly situated with respect to the purpose of the state law and no discrimination was found under the commerce clause.

The above examples from U.S. law provide us with empirical evidence of how the notion of nondiscrimination, or treating the similarly situated similarly, is understood and applied under U.S. constitutional law. There are, of course, major differences between the U.S. and WTO legal systems that may affect their respective tribunals' approach to interpreting the notion of nondiscrimination. For one thing, the WTO system is strictly based on treaty provisions. WTO agreements contain specific forms of nondiscrimination requirements, such as MFN and NT obligations, and provide certain specific grounds that may be used to justify a departure from them, such as those set out in GATT Article XX and GATS Article XIV. WTO tribunals are charged with the mission to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" and their "clarification" of the treaty language "cannot add to or diminish" the rights and obligations provided in those agreements.⁶⁶ In contrast, the nondiscrimination requirements and possible justifications for departure

as one in which the same *de jure* treatment was accorded to Washington apples and local apples that are differently situated with respect to the asserted purpose of the state law, since Washington apples have superior grades that cannot create consumer confusion or deception targeted by the state law whereas the local apples might.

⁶² See *Breard v. Alexandria*, 341 U.S. 622, 640 (1951).

⁶³ *Id.* at 640.

⁶⁴ *Clover*, 449 U.S. at 474.

⁶⁵ See *supra* text at notes 35 and 36.

⁶⁶ DSU, *supra* note 5, art. 3.2.

from them under the equal protection and commerce clauses of the U.S. Constitution are largely open-ended. As a result, U.S. courts may have considerably more leeway than WTO tribunals in deciding what criteria for drawing a distinction between two groups are permissible in a given case.⁶⁷ Nonetheless, such systemic differences, while important to keep in mind, should not detract from the reference value of the general analytical approach developed under U.S. law for defining nondiscrimination. That is so because the reference value of the relevant U.S. case law lies in its illustration of how, as a conceptual matter, the purposes (asserted or actual) of a challenged law should relate to the basis for determining the “similarly situated.”

C. *The Question of Standards of Review*

A closely related but conceptually separate issue in defining nondiscrimination is that of the standard of judicial review. As noted above, except in cases where drawing a distinction between two groups does not serve the asserted purpose of the rule at all, the connection between a classification and the asserted purpose of the rule containing that classification is a matter of degree. Whether to recognize that purpose as legitimate, and whether to allow a particular classification that is useful (but not indispensable) in advancing a legitimate purpose, are matters of normative judgment. In making such judgment, the judiciary is expected to be guided by norms and values that are deemed important for the system. One normative issue that inevitably arises in the process is how much deference the judiciary should give to the legislature or government body that adopts a challenged classification. The higher the level of deference, the less likely the court is to invalidate the classification as violative of the norm of nondiscrimination.

It is again useful to refer to the U.S. experiences. The levels of judicial deference are translated into different standards of review under U.S. law. For example, under the equal protection clause of the U.S. Constitution, the Supreme Court has articulated different standards of review to the challenged classification depending on the constitutional importance of the particular individual rights involved. Under this approach, all race-based classification is “suspect” and is subject to “strict scrutiny” under the “compelling governmental interest” standard of review, which means that all race-based classification will be held unconstitutional unless it can

⁶⁷ On the other hand, it has been pointed out that, just as there are alternative judicial approaches to statutory interpretation in the United States, ranging from restrained textualism, to originalism, to an active, dynamic approach, WTO tribunals have at their disposal alternative approaches to interpreting WTO agreements. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 258 (2004). Also, there has been a growing concern that the AB has engaged in expansive lawmaking or judicial activism. *See generally, id.*

be shown to be precisely tailored to advancing a compelling government interest.⁶⁸ Gender-based classification receives a considerable degree of scrutiny under the “important and substantial relationship” standard of review, meaning that a gender-based classification will be invalidated unless it can be shown to be substantially related to the advancement of an “important governmental interest.”⁶⁹ In comparison, classification based on most other grounds, including most social and economic rights, is evaluated under the less restrictive “rational basis” standard of review, under which the challenged classification will be upheld so long as it is rationally related to the advancement of a “legitimate governmental interest.”⁷⁰ Thus, under the equal protection clause, the more constitutionally important the affected individual right is,⁷¹ the less deferential the Court will be to the governmental interests adopting the challenged classification.

The Court has also applied different levels of scrutiny to state laws challenged under the commerce clause. In general, a state law that is facially discriminatory, i.e., drawing a distinction explicitly on the basis of state origin, is subject to “strict scrutiny,” which means that the challenged law will be invalidated unless the state can prove that the origin-based distinction is necessary to advance a legitimate state interest.⁷² By comparison, a state law that is facially origin-neutral but adversely affects interstate commerce will receive a lesser degree of scrutiny, which means that the distinction drawn by the law will be upheld if it is rationally related to the legitimate purpose of the state law.⁷³ The Court has articulated the general rule applicable to reviewing facially-neutral state laws as a matter of balancing the burden imposed on interstate commerce against the legitimate local interests.⁷⁴ Given that the purpose of the commerce

⁶⁸ See Robert Sedler, *United States, Constitutional Law in INTERNATIONAL ENCYCLOPEDIA OF LAWS* (Supp. 40) ¶¶ 311-314 (R. Blanpain ed., Kluwer Law International 2005).

⁶⁹ *Id.* ¶¶ 321-322.

⁷⁰ *Id.* ¶ 375; see also *Clover*, 449 U.S. at 470; *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 446.

⁷¹ The level of importance assigned to an individual right is determined by the norms and values that are considered important for the U.S. legal system. Hence, given the history of racial discrimination in the American society, preventing racial discrimination is given the highest level of importance under the equal protection clause. See Sedler, *supra* note 68, ¶ 311.

⁷² See e.g., *Philadelphia*, 437 U.S. at 627-28; *Maine*, 477 U.S. at 151-52.

⁷³ See e.g., *Clover*, 449 U.S. at 471-72; *Breard*, 341 U.S. at 640. *Cf.*, In *Pike and Hunt*, the distinction drawn by the challenged law was not rationally related to its asserted purpose of the state law. See *Pike*, 397 U.S. at 144-45; *Hunt*, 432 U.S. at 353-54 (noting that the challenged statute did “remarkably little” to further its asserted goal).

⁷⁴ *Pike*, 397 U.S. at 142 (stating “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are

clause is to prevent state economic protectionism, the Court is the least deferential to (or most suspicious of) the asserted interest of the local government when the challenged distinction is explicitly based on the state origin, and is most deferential when the measure is facially origin-neutral, serves to advance a legitimate local interest and does not impose an undue burden on interstate commerce.

In the context of the WTO, a similar issue of deference arises whenever a WTO tribunal is called upon to decide whether a particular classification drawn by an individual Member is permissible under the WTO Agreement. Strictly speaking, the issue of deference, or standards of judicial review, is present in every WTO dispute settlement case, since WTO tribunals must decide in each case how intensively the challenged measure should be scrutinized. As in the U.S. legal setting, the level of deference paid by a WTO tribunal to the decision of a Member government directly affects the outcome of a WTO dispute. Despite the critical importance of this issue, WTO dispute settlement procedures do not contain explicit standards of review except for those arising under the Antidumping Agreement.⁷⁵ Although the issue has been discussed from time to time in various disputes, few clearly articulated standards of review have emerged from WTO case law.⁷⁶ The lack of clearly articulated standards of review, however, does not mean that WTO tribunals do not employ standards of review in deciding cases. Instead, it merely means that the

only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”)

⁷⁵ The Antidumping Agreement, *supra* note 5, art. 17.6.

⁷⁶ The AB has held that for all WTO agreements other than the Antidumping Agreement, the appropriate standard of review for panels is set out in Article 11 of DSU, which requires a panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement.” Appellate Body Report, *Argentina–Safeguard Measures on Imports of Footwear*, ¶ 118, WT/DS121/AB/R (Dec. 14, 1999) (adopted Jan. 12, 2000) [hereinafter *Argentina–Footwear*]. The “objective assessment” standard is neither one of *de novo* review, nor of “total deference.” Appellate Body Report, *EC–Measures Affecting Meat and Meat Products (Hormones)*, ¶ 117, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *EC–Hormones*]. This articulation of the standard of review for panels based on DSU Article 11, however, is too general to serve as a useful guide in specific cases. See Claus-Dieter Ehlermann and Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491 (2004) (recognizing the need for developing appropriate standards of review for different subject matters under WTO law); Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT’L ECON. L. 635 (2003) (concluding that panels and the AB had generally paid little deference to Members’ interpretation of the WTO agreements).

tribunals apply, deliberately or not, certain implicit standards that may not be readily discernible.

A fundamental normative question facing WTO tribunals is how to balance “the values of international coordination” on the one hand, and “the values of preserving national sovereign authority” on the other.⁷⁷ As the Appellate Body indicated, the appropriate standard of review should reflect the balance established in the relevant agreement “between the jurisdictional competence conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”⁷⁸ The normative question is answered, and the balance between the authority of the WTO and the authority of the Members is drawn, in every WTO dispute settlement decision with or without an explicitly stated standard of review.

Although it is beyond the scope of this paper to study the subject, the author believes that the question of standards of review is practically intertwined with the issue of defining discrimination under WTO law. And the question looms large when the tribunal must make its normative judgment whether an asserted purpose of a challenged classification is legitimate and whether the classification that is merely conducive to serving a legitimate purpose is permissible. Therefore, an effort will be made in this paper to ascertain the standards of review applied by the tribunals in the relevant cases and to analyze the effect of such application on the outcomes of the cases where appropriate.

D. *Defining Nondiscrimination under WTO Law: Developing an Analytical Approach*

Drawing on the conceptual analysis and U.S. experiences introduced above, and keeping in mind the strictly treaty-based nature of WTO obligations, we may develop an analytical approach to assist in the interpretation of the nondiscrimination requirements under WTO law. Such an approach is needed in interpreting the inherently ambiguous term “nondiscrimination” where no specific criterion of classification of different groups is provided in the treaty language. And it is also needed when a WTO rule calls for a decision on likeness, such as “like products” or “like services” under the MFN and NT clauses, or like (or the “same” or “similar”) conditions under GATT Article XX and GATS Article XIV, where likeness is not defined.

Conceptually, the proposed approach consists of the following steps: first, identifying the purpose or goal of the WTO provision under which a

⁷⁷ See generally Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (April 1996) (also pointing out that the various arguments justifying a high level of judicial deference to government agencies under the U.S. administrative law do not fare well in the WTO setting).

⁷⁸ Appellate Body Report, *EC-Hormones*, *supra* note 76, ¶ 115.

classification effected by a Member's measure is challenged as discriminatory; second, identifying the criteria of classification that are relevant to furthering that goal; and third, determining whether the challenged classification is consistent with the relevant criteria. Because the degree of relevance of a particular criterion to the goal of the WTO provision may range from that of necessity to that of a tenuous connection, it is necessary to set a certain standard for the required level of relevance under the particular WTO provision. Evidently, if a criterion does not help to further the goal, it is irrelevant and should not be used. Conversely, if a criterion is indispensable for achieving that goal, it must be used. For a criterion that falls somewhere in between the two ends of the spectrum, whether to use it becomes a normative decision. In making such a normative decision, the WTO tribunal may consider and balance among various values, including the values of international coordination versus preservation of national autonomy, liberal trade versus non-trade norms recognized by the WTO Agreement, and the need to strengthen a rule-based WTO system versus the need for efficiency and efficacy in resolving particular trade disputes which may call for flexibility and pragmatism. This decision-making process inevitably involves the application of a certain standard of review, whether or not articulated explicitly.

In practice, it may not always be feasible to identify all the permissible criteria of classification under a particular WTO provision in advance. For example, when a challenged classification is effected by a Member's measure falling within one of the policy exceptions, such as an environmental measure under GATT Article XX(g), it may be impossible, as well as undesirable, for the WTO tribunals to predetermine a set of permissible criteria of classification since the measures covered by a broad policy exception can be too diverse to warrant a uniform set of criteria.⁷⁹ In such cases, the question becomes whether the purpose of the challenged measure effecting the classification is permissible under the relevant WTO provision. If it is not, the classification should be invalidated. If it is, then the tribunal needs to evaluate whether the classification serves to advance that permissible purpose. Again, if the classification does not further that purpose, it is irrelevant and should not be allowed; if the classification is useful, but not indispensable, in advancing that purpose, whether to allow it is a matter of normative decision.

The above proposed approach is clearly purpose-oriented. It is so for the simple reason that whether two groups (e.g., products or countries) are similarly situated and therefore should be treated alike cannot be determined meaningfully without reference to the purpose for which they are compared. There are, however, a number of questions regarding "purpose" that require further explanation.

First, is it feasible for a WTO tribunal to identify the purpose of a particular WTO provision? In interpreting WTO provisions, the panels and

⁷⁹ See *infra* Section IV.A.3.

the AB are guided by the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties,⁸⁰ which states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.”⁸¹ Although the “object and purpose” referred to in Article 31 apparently means that of a treaty as a whole, the AB has from time to time examined the object and purpose of a particular WTO provision.⁸² Seeking the object and purpose of a particular provision is often necessary to ascertain the meaning of the provision since the object and purpose of a relevant treaty is typically expressed in broad terms in its preamble and is difficult to apply meaningfully to a particular provision.⁸³ Furthermore, a relevant WTO agreement may contain multiple objectives, some of which may not be directly applicable to a particular provision. Of course, the object and purpose of a particular provision identified by the WTO tribunal must reflect, and be consistent with, one or more of the wider objects and purposes of the relevant WTO agreement.⁸⁴

Second, when a WTO tribunal inquires into the purpose or policy goal of a Member’s measure effecting a classification, should the tribunal accept the purpose asserted by the Member (either declared in advance or explained post hoc) or determine independently what the true purpose of the measure is? The first approach was apparently adopted by the U.S. courts in the cases illustrated above. Upon taking the asserted purposes

⁸⁰ The Vienna Convention on the Law of Treaties, art. 31(1), May 22, 1969, 1155 U.N.T.S. 331 [hereinafter the Vienna Convention]. It has been established that Article 31 of the Vienna Convention forms part of the “customary rules of interpretation of public international law” that WTO tribunals are directed by Article 3.2 of DSU to apply in clarifying the provisions of WTO agreements. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996) (adopted May 20, 1996) [hereinafter *U.S.—Gasoline*].

⁸¹ The Vienna Convention, *supra* note 80, art. 31(1).

⁸² For example, Appellate Body Report, *U.S.—Gasoline*, *supra* note 80, at 17-18, 22 (“the purpose and object of Article III:4,” and “the purpose and object of the introductory clause of Article XX”); Appellate Body Report, *Japan—Alcohol*, *supra* note 21, at 19 (“the purpose and object of Article III:2”); Appellate Body Report, *EC—Hormones*, *supra* note 76, ¶ 177 (“the purpose and object of Article 3” of the SPS Agreement); Appellate Body Report, *Argentina—Footwear*, *supra* note 76, ¶ 91 (“the object and purpose of Article XIX”). For a detailed analysis, see Michael Lennard, *Navigating By the Stars: Interpreting the WTO Agreements*, 5 J. INT’L ECON. L. 17, 28 (2002).

⁸³ Lennard, *supra* note 82. It has been pointed out, however, that in the interpretation of a particular provision the AB has favored “ordinary meaning” of the term over consideration of its “context and “object and purpose.” See Steinberg, *supra* note 67, at 261.

⁸⁴ Lennard, *supra* note 82.

of a challenged classification at their face value, the courts applied the appropriate standard of review to scrutinize whether such purposes were permissible, and whether the classification served to advance a permissible purpose. This approach has the obvious advantage of being simple to use, as it does not require the court to determine whether the asserted purpose is the true purpose or intent of a challenged law, which can be a complicated and difficult task. The potential disadvantage of the approach is that it may let the government get away with a problematic classification when the applicable standard of scrutiny is at the level of a mere “rational” connection. In the WTO setting, it appears that depending on the specific WTO provision involved, the tribunals may take either the first (asserted purpose) or second (actual purpose) approach in identifying the purpose of a challenged measure. For example, the AB has unequivocally adopted the actual purpose approach when examining a challenged classification of products under GATT Article III,⁸⁵ but has generally accepted the asserted policy objectives of the Members when assessing their consistency with the policy grounds explicitly permitted under GATT Article XX.⁸⁶ Whether the purpose identified by the tribunal is the actual or asserted one, however, such purpose has to be judged as permissible and the challenged classification has to serve that permissible purpose (meeting a required degree of relevance) to be valid.

Third, what if the relevant WTO provision or the Member’s measure under review has multiple purposes? The multi-purpose situation may occur with a Member measure because such a measure is often part of broader social and economic legislation charged with multiple policy objectives that may or may not point in the same direction. In comparison, WTO agreements are concerned with relatively few objectives,⁸⁷ of which trade liberalization is a primary one, and our focus on the purpose of particular WTO provisions within a particular WTO agreement may further narrow the possibility of encountering a multi-purposed situation. Nonetheless, it is certainly possible for a WTO provision to have more than one objective, as will be shown below.⁸⁸ In such circumstances, it is up to the tribunal to sort out the principal objective from the lesser ones and decide which is the most pertinent for the purpose of WTO scrutiny. The process of such decision is necessarily a normative one, involving again the application of a chosen standard of review.

⁸⁵ See *infra* notes 137 and 139 and accompanying text.

⁸⁶ See *infra* Section IV.A.

⁸⁷ The Preamble of the WTO Agreement sets out the following general objectives: raising standards of living, ensuring full employment and steady growth of real income and effective demand, expanding the production of and trade in goods and services, seeking sustainable development, promoting economic development of developing countries, reducing trade barriers, and eliminating discrimination in international trade relations. See WTO Agreement, *supra* note 1, pmbl.

⁸⁸ See *infra* Section IV.D.2.

Lastly, it should be clarified that, although the above-proposed approach suggests concrete steps to be taken in applying a WTO nondiscrimination requirement, it is not meant to serve as a practice guide. Instead, the central aim of the proposal is to explore the meaning of “nondiscrimination” within the WTO context in terms of a “similarly situated” paradigm. That being the goal, the proposed approach provides an analytical framework for the assessment of the similarity or likeness issues arising from the WTO context.

III. THE “SIMILARLY-SITUATED” CONCEPT WITHIN MFN AND NT PROVISIONS: LIKE PRODUCTS

Given that the notion of treating the similarly-situated similarly is inherent in the notion of nondiscrimination, it is no surprise that we should find that the concept of “similarly situated” lies at the heart of MFN and NT obligations, the two primary forms of nondiscrimination under WTO law. For purposes of GATT MFN and NT clauses, whether two or more WTO Members are similarly situated, and therefore should receive the same or similar treatment, is defined by the concept of “like products.” In other words, under GATT MFN and NT provisions, nondiscrimination between WTO Members means treating like products alike, irrespective of their national origins. The corresponding concept for GATS MFN and NT obligations is “like services” and “like service suppliers.”⁸⁹ Given that most of the jurisprudence on likeness concerns products,⁹⁰ this section will focus on the discussion of “like products.”

The concept of “like products” is central to the GATT system. It defines not only the scope of GATT MFN and NT obligations, but also the right to trade remedies (antidumping,⁹¹ anti-subsidy measures,⁹² and

⁸⁹ It has been suggested that the determination of likeness in the context of services needs to follow a somewhat different path from that in the context of products. See Aaditya Mattoo, *MFN and the GATS*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 73 (Petros C. Mavroidis & Thomas Cottier eds., Patrick Blatter assoc. ed., University of Michigan Press 2000). For purposes of this study, however, the likeness issue is the same at the conceptual level in the contexts of products and services.

⁹⁰ In contrast with the many WTO/GATT cases involving the issue of “like products,” see *infra* note 95, there have been so far only two WTO cases that discussed the issue of like services. See Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.322, WT/DS27/R (May 22, 1997) (adopted Sept. 25, 1997, as modified by Appellate Body Report, WT/DS27/AB/R); Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 10.289, WT/DS139/R, WT/DS142/R (Feb. 11, 2000) (adopted June 19, 2000, as modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R).

⁹¹ The concept of “like products” is employed in the definition of dumping under GATT, *supra* note 2, art. VI:1, and in the definition of “domestic industry” under the Antidumping Agreement, *supra* note 5, art. 4.1. The determination of “like products” effectively controls the scope of antidumping investigation and duty application. See

safeguards⁹³).⁹⁴ The concept has been examined in a number of GATT and WTO dispute settlement decisions.⁹⁵ Since the term “like products” appears in the text of various WTO agreements, it is incumbent upon WTO tribunals to interpret the term when the issue arises over a particular classification of products by a Member’s measure. To that end, the tribunals have endeavored to identify specific criteria to be used in determining “like products.” The tribunals’ jurisprudence has generated much debate and a considerable body of literature.⁹⁶

generally Marco Bronckers & Natalie McNelis, *Rethinking the “Like Product” Definition in GATT 1994: Anti-Dumping and Environmental Protection*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 89, at 345.

⁹² Similarly as in the antidumping field, the determination of “like products” controls the scope of countervailing investigations and application of countervailing duties. See the SCM Agreement, *supra* note 5, arts. 11, 15, and 16. The concept of “like products” also defines “serious prejudice” under Article 6 of the SCM Agreement, which applies to anti-subsidy actions taken at the WTO dispute settlement forum.

⁹³ Safeguard measures may be applied only if there is an import surge of the product that causes serious injury to the domestic industry that produces “like or directly competitive products.” See Safeguard Agreement, *supra* note 5, arts. 2 and 4.

⁹⁴ For a list of GATT provisions containing the term “like product,” see Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 88, WT/DS135/AB/R (Mar. 12, 2001) (*adopted* Apr. 5, 2001) [hereinafter *EC—Asbestos*]

⁹⁵ For a list of GATT and WTO decisions addressing the term “like products,” see *id.* n. 58.

⁹⁶ Recent studies on likeness include: Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, in ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 359 (Cameron May 1999) [hereinafter Hudec, *Aim and Effects*]; Robert E. Hudec, “Like Product”: *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 89, at 101 [hereinafter Hudec, *Like Product*] (n. 1 cites a number of other studies on “like products”); Bronckers & McNelis, *supra* note 91; William Davey and Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product,”* in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 89, at 13; Mattoo, *supra* note 89, at 73-75; Petros C. Mavroidis, “Like Products”: *Some Thoughts at the Positive and Normative Level*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 89, at 125; Donald H. Regan, *Regulatory Purpose and “Like Product” in Article III:4 of the GATT (With Additional Remarks on Article III:2)*, 36(3) J. WORLD TRADE 443 (2002); Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783 (2003); Won-Mog Choi, *‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE* (Oxford University Press 2003).

As a conceptual matter, to ask whether two products are “like” is to ask whether they are similarly situated with respect to the purpose of their comparison. As expected, the key issue to the concept of likeness lies in identifying the relevant criteria for comparison. Hence, in order to determine whether Japanese shochu and vodka, or a luxury car and an economy car, or beer of 6% alcohol content and beer of 3% alcohol content, are “like products,” one must first know for what purpose they are compared and then apply criteria that are suitable to further that purpose. The entire issue of what constitute “like products,” therefore, can be approached by applying the “similarly situated” analysis explained above.

Given the existing jurisprudence on “like products,” this section will focus on two things. First, it will examine a general interpretive position taken by the AB that the definition of like products should vary depending on the particular WTO provision involved. Second, it will apply the similarly-situated analysis to assess the “like product” criteria developed by WTO tribunals under GATT Article III. Although the concept of likeness in Article III has been much studied, it remains a controversial and perplexing subject in WTO law.

A. *Why should the definition of “like products” vary within the WTO context?*

The Appellate Body has taken a general position on the interpretation of like products: the definition of likeness varies according to the context of the WTO provision in which the concept appears.⁹⁷ It has expressed that position in a colorful metaphor:

The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.⁹⁸

While the AB did not explain why the definition of likeness should vary within the WTO context, its position can be easily understood in light of the similarly-situated analysis. According to this analysis, whether two products are like, or similarly situated, cannot be determined meaningfully without reference to the purpose of the provision requiring their comparison. Consequently, if two provisions containing the concept of likeness differ in their purposes or policy objectives, their respective criteria for determining likeness, which must advance such purposes, may well differ, and so will the resulting definitions of likeness under them.

⁹⁷ Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 21.

⁹⁸ *Id.*

It should be noted that to the extent that the various WTO provisions containing the likeness concept may share the same general goal, such as promoting liberal trade through protecting competitive conditions of the market, their likeness criteria may consist of the same factors; but since each of such provisions is likely to have its distinct and more concrete purpose within the WTO framework, the furtherance of its specific purpose may require the consideration of separate factors. For example, the concepts of “like products” and “directly competitive products” appear in both GATT Article III and Article XIX (safeguard),⁹⁹ as well as in the Agreement on Safeguards that clarifies and reinforces the disciplines of Article XIX.¹⁰⁰ While Article III aims at *preventing* the protection of domestic producers against imports through internal measures, Article XIX and the Agreement on Safeguards are designed to *allow* the protection of domestic producers from imports under certain conditions. To the extent that these provisions all concern products that are in a competitive relationship, their respective criteria for determining like products may comprise common factors, such as physical characteristics and end uses. However, since the two sets of provisions serve distinct policy objectives, there is no reason why all of their respective criteria should be the same.¹⁰¹ A further example can be found in comparing the MFN clause of GATT Article I:1 with the NT clauses of GATT Article III. While these clauses share similar purposes of nondiscrimination and serve similar functions of ensuring equal competitive conditions in the market, there are clear distinctions between their policy goals. Unlike Article III, which aims at eliminating protection of domestic production through internal measures, Article I permits protection of domestic production through tariffs and its goal, therefore, is merely an orderly management of protection.¹⁰² Such differences in policy objectives between the MFN and NT provisions may warrant a narrower definition of “like products” under Article I:1 than that under Article III.¹⁰³

⁹⁹ See GATT, *supra* note 2, arts. III:2 (“like domestic products”) and III:4 (“like products”); *Ad art. III*, paragraph 2 (“directly competitive or substitutable product”); and art. XIX:1 (“like or directly competitive products”).

¹⁰⁰ See Safeguard Agreement, *supra* note 5, art. 2.1 (“like or directly competitive products”).

¹⁰¹ For possible relevant factors in deciding like product under Article 2.1 of the Safeguard Agreement, see Panel Report, *Argentina–Safeguard Measures on Imports of Footwear*, ¶ 8.251, WT/DS121/R (June 25, 1999) (*adopted* Jan. 12, 2000, as modified by Appellate Body Report, WT/DS121/AB/R). For factors used in deciding like product under GATT Article III, see *infra* Section III.B.

¹⁰² See Hudec, *Like Product*, *supra* note 96, at 108. Additionally, WTO Members may utilize classification of products under Article I to deal with the problem of “free riders” who do not make reciprocal concessions in WTO tariff negotiations. *Id.* at 109.

¹⁰³ *Id.* at 112.

B. *Criteria for Defining “Like Products” under GATT Article III: “Aim and Effects”*

1. Background

GATT Article III prohibits the importing Member from using internal tax or other regulations to disadvantage imported products in favor of like domestic products. In disputes arising under Article III, the general issue is whether the importing Member has treated the imported products less favorably than competing domestic products. The complaining Member would contend that the imported and domestic products *are* “like products” and that the imports have been treated less favorably than their domestic like products, whereas the importing Member would typically argue that the imported and domestic products receiving different treatment are *not* “like products” (or, if the products are like, the treatment is not less favorable to the imports).

In resolving these disputes, GATT/WTO tribunals have endeavored to develop a set of criteria to be used in determining “like products” under Article III. Traditionally, four factors have been used: physical characteristics, tariff classification, end-uses in a given market, and consumers’ tastes and habits.¹⁰⁴ More recently, the tribunals have moved to focus on the factor of commercial interchangeability or substitutability of the products, recognizing that a determination of likeness is fundamentally a determination about “the nature and extent of a competitive relationship” between imported and domestic products.¹⁰⁵

A major controversy regarding the definition of “like product” is over the so-called aim-and-effects approach. First developed in the GATT Panel Report in *U.S.–Malt Beverages*,¹⁰⁶ the aim-and-effects approach advocates that in determining “like product” under Article III, one should consider, in addition to the various other factors, the basic policy objective of the Article as set out in Article III:1.¹⁰⁷ Article III:1 states that internal taxes and other regulatory measures “should not be applied

¹⁰⁴ The traditional list of four factors was originally compiled in the Report of the Working Party adopted on 2 December 1970 on Border Tax Adjustments, GATT Doc. L/3464. See GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter B.I.S.D.] (18th Supp.) 97, 101-102 (1972). The Appellate Body quoted the list with approval. See Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 20.

¹⁰⁵ Appellate Body Report, *EC–Asbestos*, *supra* note 94, ¶ 99 (interpreting “like products” under Article III:4). This factor was originally used only in interpreting the term “a directly competitive or substitutable product” in GATT *Ad Article III*, paragraph 2, which supplements the second sentence of Article III:2.

¹⁰⁶ Panel Report, *United States–Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R (March 16, 1992) (adopted June 19, 1992), B.I.S.D. (39th Supp.) 206 (1993) [hereinafter Panel Report, *U.S.–Malt Beverages*]. The approach was also used in the Panel Report in *United States–Taxes on Automobiles*, GATT Doc. DS31/R (Oct. 11, 1994) (unadopted).

¹⁰⁷ *U.S.–Malt Beverages*, *supra* note 106, ¶¶ 5.24-5.25.

to imported or domestic products so as to afford protection to domestic production.”¹⁰⁸ In light of this policy objective, the aim-and-effects approach suggests that “the legitimacy of internal taxes and regulations should be determined primarily on the basis of their purpose and market effects, i.e., whether they have a bona fide regulatory purpose and whether their effect on conditions of competition is to create a protective advantage in favor of domestic products.”¹⁰⁹ Under this approach, a domestic tax or regulation that treats an imported product less favorably than a domestic product would not likely be held in violation of Article III if the measure is shown to have a bona fide (i.e., non-protectionist) regulatory purpose.¹¹⁰ The development of this approach is particularly significant for cases in which the challenged internal measure is origin-neutral on its face.¹¹¹

In the view of most commentators, the aim-and-effects approach has been largely discredited by the Appellate Body.¹¹² The major cases in which the AB rejected this approach are *Japan–Alcohol*,¹¹³ which involves Japanese liquor taxes differentially levied on *shochu* and vodka

¹⁰⁸ GATT, *supra* note 2, art. III:1.

¹⁰⁹ Hudec, *Aim and Effects*, *supra* note 96, at 368.

¹¹⁰ Applying this approach, the Panel in the *U.S.–Malt Beverages* made two findings on the issue of like product. The first finding involved a Mississippi wine tax that differentiated wine according to the type of grape from which the wine was made and imposed a lower tax on wine made from the type of grape suitable to grow in Mississippi vineries. Since the United States was unable to demonstrate any bona fide regulatory purpose for the classification and the tax had the effect to protect domestic product, the Panel concluded that the two types of wine were “like products” and should be treated the same. Panel Report, *U.S.–Malt Beverages*, *supra* note 106, ¶¶ 5.24-5.26. The second finding concerns several U.S. state regulations imposing more onerous point-of-sale restrictions on beer with alcohol levels exceeding 3.2 percent. Since the Panel was able to identify certain social welfare policy and revenue collection purposes for the state regulations, it concluded that the two kinds of beer were not like products, and therefore the distinction was valid. *Id.* ¶¶ 5.70-5.77.

¹¹¹ An internal tax or regulation that treats foreign product less favorably than domestic product explicitly on the basis of their national origin will be *de jure* discriminatory in violation of Article III. There will be a strong presumption in such a case that the regulatory purpose of the measure is protectionist. See Regan, *supra* note 96, at 455-56.

¹¹² See Hudec, *Aim and Effects*, *supra* note 96; Davey & Pauwelyn, *supra* note 96, at 37-38. One exception is Donald Regan who, while firmly believing in the central importance of regulatory purpose in like product determination, suggests that a correcting reading of the AB’s opinions in these cases would lead to the conclusion that the AB has not discredited the aim-and-effects approach. See Donald Regan, *Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec*, 37 J. WORLD TRADE 737 (2003).

¹¹³ See Appellate Body Report, *Japan–Alcohol*, *supra* note 21.

and certain other imported products, and *EC–Bananas*,¹¹⁴ a case involving the EC’s preferential treatment of domestic producers in the issuance of certain import licenses for bananas. In these decisions, the AB indicated that, while the anti-protection principle articulated by Article III:1 “informs the rest of Article III,”¹¹⁵ a distinction must be made between Article III:2 (internal taxes), second sentence, which applies to “directly competitive or substitutable products” and specifically refers to Article III:1, and Article III:2, first sentence, and Article III:4 (internal regulation), which apply to “like products” and do not specifically refer to Article III:1.¹¹⁶ In interpreting Article III:2, second sentence, the AB has adopted an approach that is not substantively different from the aim-and-effects approach – it examined the market effects and the “protective application” of the challenged measure to determine whether the measure was protectionist in nature.¹¹⁷ By contrast, the AB explicitly rejected the need to separately consider the overall policy objective set out in

¹¹⁴ Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (adopted Sept. 25, 1997) [hereinafter *EC–Bananas*].

¹¹⁵ See Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 18; Appellate Body Report, *EC–Bananas*, *supra* note 114, ¶ 216 (quoting *Japan–Alcohol*).

¹¹⁶ *Id.* GATT Article III:2 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. (emphasis added)

The Interpretive Note of *Ad Article III*, paragraph 2, states:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not similarly taxed. (emphasis added).

Article III:4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

See GATT *supra* note 2, art. III and *Ad art. III*.

¹¹⁷ See *Japan–Alcohol*, *supra* note 21, at 25, 29 (stating: “Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.”) As Hudec pointed out, the concept of “protective application” employed by the AB “for all the world looked like an objective analysis of regulatory purpose”; and it would “make a great deal more sense if one substitutes the word ‘purpose’ for ‘application.’” Hudec, *Aim and Effects*, *supra* note 96, at 373.

Article III when interpreting the concept of “like products” under Article III:2, first sentence, and Article III:4.¹¹⁸ As a result, the criteria for defining “like products” under Article III were essentially limited to the traditional list of “objective” factors, such as physical characteristics of the products, and would not include the regulatory aim and market effects of the measure.¹¹⁹ When using these criteria, the AB said, “panels can only apply their best judgment in determining whether in fact products are ‘like’.”¹²⁰ This process “will always involve an unavoidable element of individual, discretionary judgment” and “[n]o one approach to exercising judgment will be appropriate for all cases.”¹²¹

The AB’s rejection of the aim-and-effects approach in defining like products has met with criticism. Critics faulted the AB’s approach in *Japan–Alcohol* and *EC–Bananas* as being overly formalistic and providing no policy coherence on issues that go to the very core of the WTO’s policing function over domestic regulatory policy.¹²² In subsequent cases, the Appellate Body appears to have modified its position.¹²³ Most notably, in *EC–Asbestos*, a case involving Canada’s challenge of a French ban of asbestos products as violating Article III:4, the AB explicitly stated that the term “like product” in Article III:4 must be interpreted to give proper scope and meaning to the principle set out in Article III:1.¹²⁴ From this basic stand, the AB concluded that a determination of “likeness” under Article III:4 is, fundamentally, a determination about “the nature and extent of a competitive relationship between and among products.”¹²⁵

¹¹⁸ Regarding the first sentence of Article III:2, the AB stated: “There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures ‘so as to afford protection.’ This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence.” *Japan–Alcohol*, *supra* note 21, at 18. The AB applied the same reasoning to Article III:4 in *EC–Bananas*: “Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure ‘afford[s] protection to domestic production.’” *Supra* note 114, ¶ 216.

¹¹⁹ See Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 20.

¹²⁰ *Id.* at 20-21.

¹²¹ *Id.*

¹²² See Hudec, *Aim and Effects*, *supra* note 96, at 375.

¹²³ See Porges & Trachtman, *supra* note 96 (reviewing six WTO cases decided under GATT Article III subsequent to *Japan–Alcohol* and suggesting that the AB’s more recent decisions have opened the door for the “resurrection” of the aim-and-effects test).

¹²⁴ Appellate Body Report, *EC–Asbestos*, *supra* note 94, ¶ 98.

¹²⁵ *Id.* ¶ 99.

As it now stands, with respect to “like products” in Article III:4, the AB has embraced market “effects” as the central element in defining likeness, but has not recognized the relevance of regulatory “aim” to the likeness determination.¹²⁶ With respect to “like products” in Article III:2, first sentence, the AB has recognized neither the market effects nor the regulatory aim of a challenged measure as relevant to its definition. It should be noted, however, that because “like products” in the first sentence of Article III:2 are considered a subset of the broader category of “directly competitive or substitutable products,”¹²⁷ if the challenged measure is also scrutinized under the second sentence of Article III:2, which is often the case,¹²⁸ the overall policy objective of Article III will be taken into consideration.

2. Applying the Similarly-Situated Analysis

The merit of the aim-and-effects approach can be readily assessed by applying the similarly-situated analysis. Under this analysis, whether imported and domestic products are “like” cannot be determined meaningfully without reference to the purposes of the Article III provisions that require their comparison. Once the purposes of those provisions are identified, we can evaluate whether and to what extent the consideration of the “aim” and “effects” of a measure helps to advance such purposes.

The policy objective of Article III is set out in Article III:1, which establishes a general principle that internal taxes and regulations “should

¹²⁶ In *EC–Asbestos*, instead of recognizing the regulatory aim of the French ban on asbestos as a relevant factor in defining “like products” under Article III:4, the AB interpreted the health risks associated with the asbestos products – the apparent “aim” of the French measure – as physical characteristics of the products. *See id.*

¹²⁷ *See* Appellate Body Report, *Korea–Taxes on Alcoholic Beverages*, ¶ 118, WT/DS75, 84/AB/R (adopted Feb. 17, 1999) [hereinafter *Korea–Alcohol*]; Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 25.

¹²⁸ The tribunals may find a violation of the second sentence of Article III:2 without making a finding under the first sentence of Article III:2. *See* Appellate Body Report, *Canada–Certain Measures Concerning Periodicals*, 22-23, 30-32, WT/DS31/AB/R (June 30, 1997) (adopted July 31, 1997) [hereinafter *Canada–Periodicals*]; Appellate Body Report, *Korea–Alcoholic*, *supra* note 127; Appellate Body Report, *Chile–Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) (adopted Jan. 12, 2000) [hereinafter *Chile–Alcohol*]. On the other hand, if imported and domestic products are found to be “like products” and the imported product is taxed in excess of the domestic product, there is a violation of the first sentence of Article III:2, and it is not necessary to examine the same measure under the second sentence of Article III:2. *See e.g.*, Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 20 (with respect to taxes on shochu and vodka); Panel Report, *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 7.327-7.364, WT/DS302/R (Nov., 26, 2004) (adopted May 19, 2005, as upheld by Appellate Body Report, WT/DS302/AB/R).

not be applied to imported or domestic products so as to afford protection to domestic production.”¹²⁹ As the Appellate Body explained:

The broad and fundamental purpose of Article III is to *avoid protectionism* in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production.’”¹³⁰ (emphasis added)

The AB further stated that this general principle set out in Article III:1 “‘informs’ the rest of Article III and acts ‘as a guide to understanding and interpreting the specific obligations contained’ in the other paragraphs of Article III.”¹³¹

Given this clearly defined purpose – avoiding protectionism – of Article III, factors that are relevant to the likeness determination under the Article III provisions must be those that are helpful in ascertaining whether a measure is protectionist in nature. The aim-and-effects approach identifies the regulatory aim and market effects of the challenged measure as the two key factors in detecting protectionism. The role of market effects (i.e., the effects of a measure on the conditions of competition between imported and domestic products¹³²) is easy to understand. Evidently, if a measure does not have the effect of modifying the conditions of competition in favor of domestic products, it will not give rise to the issue of protectionism. In this sense, “market effects” is a factor necessary or indispensable in determining whether two products are “like” under Article III.¹³³ The focus on the market effects, or the competitive relationship between imported and domestic products, also brings policy coherence to the list of traditionally used factors. These factors – physical characteristics, end uses, consumers’ taste and habit, and tariff classification – are relevant to the likeness decision only because,

¹²⁹ GATT, *supra* note 2, art. III:1.

¹³⁰ Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 16 (footnote omitted).

¹³¹ Appellate Body Report, *EC–Asbestos*, *supra* note 94, ¶ 94 (quoting Appellate Body Report in *Japan–Alcohol*).

¹³² The AB has confirmed the understanding that Article III requires Members “to provide equality of competitive conditions for imported products in relation to domestic products” and that it “protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.” Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 16.

¹³³ There are, of course, further issues regarding how to measure the market effects or determine the competitive relationship between imports and domestic products. As the AB pointed out, “there is a spectrum of degrees of ‘competitiveness’ or ‘substitutability’ of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word ‘like’ in Article III:4 of the GATT 1994 falls.” Appellate Body Report, *EC–Asbestos*, *supra* note 94, ¶ 99.

and only to the extent that, they inform the market effects of a measure at issue. As noted above, the AB has now fully embraced the use of market effects in defining not only “directly competitive or substitutable products” under Article III:2,¹³⁴ but also “like products” under Article III:4.¹³⁵

What about the role of regulatory aim in detecting protectionism? Given that “protectionism” suggests intent to protect, few would doubt that it is useful to examine the purposes of a measure in order to ascertain whether it is protectionist in nature.¹³⁶ The only question, and an entirely separate one, is how the regulatory purposes should be determined – should they be identified by the assertion of the Member imposing the measure (asserted purposes) or by the WTO tribunal objectively (actual purposes)?

It is important to recall that the Appellate Body has never rejected the examination of regulatory purposes, as objectively determined, under the second sentence of Article III:2.¹³⁷ The AB’s view on the role of regulatory purposes in detecting protectionism was most clearly expressed in *Chile–Alcohol*,¹³⁸ a case involving the issue of whether Chilean taxes differentially levied on the low-alcohol Chilean *pisco* and certain high-alcohol imported spirits violated the second sentence of Article III:2:

¹³⁴ See Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 25 (indicating that it is appropriate to look at “competition in the relevant markets” as one of the means of identifying “directly competitive or substitutable” products); Appellate Body Report, *Korea–Alcohol*, *supra* note 127, ¶ 127 (stating that in interpreting the term “directly competitive or substitutable product,” it is “not only legitimate, but even necessary” to take into account the purpose of maintaining equality of competitive conditions for imported and domestic products).

¹³⁵ See *supra* text at note 125.

¹³⁶ Hudec believed that GATT/WTO tribunals had relied on a “smell test” in most of their likeness decisions under Article III and would continue to do so in the future. “Common sense tells us that whenever a panel member is asked to decide whether a particular regulatory measure is or is not playing by the rules, that panel member will instinctively want to know whether the measure has a bona fide regulatory purpose and to what extent its market effects are protective.” Hudec, *Aim and Effects*, *supra* note 96, at 377. Regan has argued that the central question in reviewing a measure under Article III is whether the measure is the result of a protectionist legislative purpose. Regan, *supra* note 112, at 738.

¹³⁷ See *supra* text at note 117. Applying its “objective” standard of ascertaining regulatory aim, the AB has struck down a number of facially origin-neutral tax measures upon examining their designs and structures, rejecting their asserted regulatory purposes. See *e.g.*, Appellate Body Report, *Japan–Alcohol*, *supra* note 21; Appellate Body Report, *Korea–Alcohol*, *supra* note 127; and Appellate Body Report, *Chile–Alcoholic*, *supra* note 128. Nonetheless, where a measure’s declared purpose was to protect domestic production, the AB did not hesitate to use such asserted purpose as evidence of the measure’s protective nature. See Appellate Body Report, *Canada–Periodicals*, *supra* note 128, at 30-32.

¹³⁸ Appellate Body Report, *Chile–Alcoholic*, *supra* note 128.

[W]e consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, *are* intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.¹³⁹

Here, the AB has explicitly recognized the regulatory aim of a measure as a highly relevant (“intensely pertinent”) factor in determining whether it is protectionist in nature.

However, the AB will use this “intensely pertinent” factor only in determining whether a tax measure is protectionist under the second sentence of Article III:2, when the imported and domestic products are defined as “directly competitive or substitutable.”¹⁴⁰ When the imported and domestic products are defined as “like products” under the first sentence of Article III:2, a measure will be found in violation of Article III, i.e., protectionist, if it taxes the imported product “in excess of” the domestic product, irrespective of its regulatory purposes.¹⁴¹ Similarly, when a measure is challenged under Article III:4, which contains only a single category of “like products,” whether the measure is protectionist will be determined solely by an analysis of its market effects without con-

¹³⁹ *Id.* ¶ 71. The AB also said: “The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member’s legislature and government as a whole – to the extent that they are given *objective* expression in the statute itself, are not pertinent.” *Id.* ¶ 62 (emphasis original). See Regan, *supra* note 112, for detailed comments on the AB’s position in *Chile–Alcohol*.

¹⁴⁰ In interpreting the second sentence of Article III:2, the AB adopts an approach of examining the following three issues separately: (i) whether the imported and domestic products are “directly competitive or substitutable”; (ii) whether the directly competitive or substitutable products are “not similarly taxed”; and (iii) whether the dissimilar taxation of such products is applied “so as to afford protection to domestic production.” See Appellate Body Report, *Japan–Alcohol*, *supra* note 21, at 24. In determining whether the products are directly competitive or substitutable, it focuses solely on the competitive relationship between the products. In determining whether such products are not similarly taxed, it holds that the differential taxes must be more than *de minimis* and that what amounts to *de minimis* must be determined on a case-by-case basis. It is in the inquiry of whether the dissimilar taxation is applied “so as to afford protection to domestic production” that it examines the aim of the measure, as objectively determined. See *id.* at 25–29. The AB also indicates, however, that if there is a finding that the “directly competitive or substitutable products” are not dissimilarly taxed, then there is “neither need nor justification” for inquiring further as to whether the taxes have been applied so as to afford protection. *Id.* at 27. Thus, the AB segregates the inquiry of regulatory purpose from the two similarity determinations (similarity between products and similarity between taxes). As a result, its interpretive approach to the second sentence of Article III:2 suffers from the same problem as its interpretive approach to Article III:4.

¹⁴¹ See *supra* note 118 and accompanying text.

sideration of its regulatory purposes.¹⁴² The inconsistency in the AB's interpretive approach to these provisions is apparent.

From a policy standpoint, it makes little sense that whether regulatory aim is considered in detecting protectionism should depend on whether the paragraph invoked explicitly refers to Article III:1,¹⁴³ given that the same policy objective in Article III:1 informs and guides the interpretation of the rest of Article III. Drawing such a distinction in the interpretive approach is particularly problematic between Articles III:2 and III:4, since a tax measure, covered by Article III:2, and a non-tax measure, covered by Article III:4, can often be used to achieve the same ends.¹⁴⁴ As the AB acknowledged,

[i]t would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate *a consistent application* of the “general principle” in Article III:1.¹⁴⁵ (emphasis added)

Based on this rationale, the AB has concluded that the product scope in Article III:4 is broader than that of “like products” in the first sentence of Article III:2, but not broader than that of “directly competitive or substitutable products” under the second sentence of Article III:2.¹⁴⁶ In light of the AB's ruling on the relationship between the two provisions, one cannot help but question whether the divergence in the AB's interpretive approach would not “frustrate a consistent application” of the general principle in Article III:1, a result that the AB itself has specifically warned against.¹⁴⁷

¹⁴² The analysis of “market effects,” or the competitive relationship between products, under Article III:4 integrates the examination of the traditionally used factors for like products. *See supra* text at note 125; *see also*, Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137, WT/DS161/AB/R (Dec. 11, 2000) (*adopted* Jan. 10, 2001) [hereinafter *Korea–Beef*] (stating that whether or not imported products are treated “less favorably” than like domestic products under Article III:4 should be assessed “by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.”).

¹⁴³ *See supra* text at note 116.

¹⁴⁴ Appellate Body Report, *EC–Asbestos*, *supra* note 94, ¶ 99.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The AB has however declined to decide if the scope of “like products” in Article III:4 “is co-extensive” with the combined scope of “like” and “directly competitive or substitutable” products in Article III:2. *Id.*

¹⁴⁷ It has been suggested that although the AB has refused to consider regulatory purposes in defining “like products” under Article III:4, it may move towards recognizing the relevance of regulatory purposes in the determination of “less favorable treatment.” *See* Porges & Trachtman, *supra* note 96, at 795. It should be

Perhaps more importantly, by excluding regulatory purposes from the likeness decision under Article III, the AB has made a normative decision that may affect the balance between the WTO interest in preventing disguised protectionism on the one hand, and the need to respect legitimate regulatory interests of the Members on the other. To the extent that regulatory aim is taken merely as a highly relevant, but not an indispensable, factor in detecting the protectionist nature of a measure, the tribunal has the discretion whether to consider it in making likeness decisions. Presently, a Member's measure can be found in violation of the first sentence of Article III:2 or Article III:4 even if the measure is origin-neutral and has bona fide (non-protectionist) regulatory purposes. The only avenue through which the importing Member can defend its measure in such cases is to invoke the general exceptions under Article XX, which contains only a limited number of policy grounds for justifying a departure from GATT obligations.¹⁴⁸ Thus, by excluding from the likeness decision the consideration of regulatory purpose—an “intensely pertinent” factor in discerning protectionism—the AB has effectively adopted a strict standard of review under the first sentence of Article III:2 and under Article III:4.

In sum, applying the similarly-situated analysis to the interpretation of like products has revealed an inconsistency in the AB's interpretation of GATT Article III provisions. It has also confirmed the merit of the aim-and-effects doctrine. The aim-and-effects approach provides policy guidance and certainty to the application of Article III because it recognizes that the most relevant factors in the likeness decision are those that are helpful in detecting protectionism, the prevention of which is the fundamental purpose of Article III.

IV. THE “SIMILARLY-SITUATED” CONCEPT OUTSIDE MFN AND NT PROVISIONS: LIKE CONDITIONS

This section seeks to apply similarly-situated analysis to WTO nondiscrimination obligations outside the realm of MFN and NT provisions. Such obligations are explicitly provided in GATT Article XX, GATS Article XIV, the SPS Agreement, and the Enabling Clause. While the MFN and NT obligations equalize treatment of Members on the basis of “like products,” “like services” or “like service suppliers,” the non-discriminatory obligations beyond MFN and NT provisions are measured by equal treatment of Members with the “same,” “like” or “similar” conditions. In contrast with the considerable amount of literature on “like

noted that the determination of “less favorable treatment” involves a comparison between treatment accorded to two groups of products. Insofar as the comparison is made to determine the sameness or likeness or similarity between such treatment, the similarly-situated paradigm should also apply to the determination of “less favorable treatment.” See *supra* Section II.A, last paragraph.

¹⁴⁸ See *infra* Section IV.A.

products,”¹⁴⁹ the concept of “like conditions” has not generated much discussion. There have been only a handful of WTO cases interpreting the concept, and the relevant WTO jurisprudence is still at an early stage of development. This section will provide an analysis of the major cases interpreting “like conditions” and examine such interpretation in light of the similarly situated paradigm.

A. *Nondiscrimination under GATT Article XX*

As noted above, GATT Article XX permits a Member to adopt measures that depart from its GATT obligations, including the MFN and NT obligations, on certain public policy grounds. Set out in paragraphs (a) to (j) of Article XX, these policies include: protection of public morals; protection of human, animal or plant life or health; enforcement of domestic law not inconsistent with GATT; protection of intellectual property rights; prison labor policy; protection of national treasures; conservation of exhaustible natural resources; implementation of intergovernmental commodity agreements; gold and silver trade; and ensuring supply to domestic production.

Invocation of Article XX(a) to (j) is subject to the specific conditions contained in these paragraphs. In addition, it is subject to the general requirement set out in the introductory clause (the chapeau) of Article XX that “such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or a disguised restriction on international trade.” (emphasis added)

The chapeau provision imposes an obligation of nondiscrimination that applies a different standard from that of MFN or NT provisions. As the Appellate Body indicated, “the nature and quality of this discrimination [under Article XX] is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.”¹⁵⁰ This discrimination “must be arbitrary or unjustifiable in character” and “must occur between countries where the same conditions prevail.”¹⁵¹ The purpose of the chapeau, according to the AB, is to prevent abuse of the exceptions of Article XX.¹⁵²

¹⁴⁹ See *supra* note 96.

¹⁵⁰ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WT/DS58/AB/R (Oct. 20, 1998) (*adopted* Nov. 6, 1998) [hereinafter *U.S.–Shrimp*]. The AB also quoted its own statement in *U.S.–Gasoline*: “The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of substantive rule has been determined to have occurred.” *Id.* n.138.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 157 (reviewing the drafting history of the chapeau).

In contrast with GATT MFN or NT provisions, which requires like treatment of *like products*, Article XX requires like treatment of all Members with *like conditions*. This condition-based criterion for comparison between Members is arguably broader in scope than the product-based criterion under the MFN or NT clauses. Given the difference in criteria, a government measure that falls under Article XX(a) to (j) will have to be examined separately against the nondiscrimination standard of Article XX, whether or not such measure violates MFN or NT obligations.

It is unclear, however, what “conditions” are relevant and therefore should be used for comparison between Members under Article XX. Prior to the establishment of the WTO, GATT panels had largely kept their distance from the chapeau provision, avoiding making decisions under its rather general language.¹⁵³ The Appellate Body, on the other hand, has grappled with the provision from the beginning, and its interpretation has breathed fresh life into the chapeau, generating a new body of Article XX jurisprudence.¹⁵⁴

1. Leading Cases Involving Interpretation of the Chapeau

Because Article XX exceptions apply to all substantive GATT obligations, measures brought to the scrutiny of the chapeau requirement can be divided into two categories: those that have been found to violate MFN or NT obligations, and those that have been found to violate another GATT provision, such as Article XI which prohibits quantitative restrictions on imports. The first category typically involves measures that are discriminatory on their face (that is, measures imposing differential treatment of products on the basis of their national origins), whereas the second category measures that are formally origin-neutral. In either situation, the challenged measure will be separately examined under the chapeau standards of nondiscrimination.

(a) Measures that have been found to violate MFN or NT obligations

The leading case in this category is *U.S.—Gasoline*,¹⁵⁵ the first WTO case to interpret the chapeau of Article XX. At issue was a U.S. measure that formally discriminated between domestic and foreign products. In order to control air pollution, the United States adopted certain standards for gasoline quality, and measured compliance by comparing existing gasoline emissions against the level of emissions in 1990. In implementing these standards, the U.S. permitted one method (individual

¹⁵³ Hudec, *Aim and Effects*, *supra* note 96, at 381.

¹⁵⁴ Donald M. McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, ESSAYS IN HONOR OF JOHN H. JACKSON* 219, 227 (Marco Bronckers & Reinhard Quick eds., Kluwer Law International 2000) (containing a critical assessment of the new jurisprudence).

¹⁵⁵ Appellate Body Report, *U.S.—Gasoline*, *supra* note 810.

baseline) to measure the cleanness of domestically-produced gasoline, but required another (statutory baseline) to measure imported gasoline. This distinction resulted in less favorable treatment of imported gasoline. Brazil and Venezuela brought the case to the WTO. The Panel found that the U.S. measure violated the national treatment provision of Article III:4, and could not be justified by Article XX(b), (d) or (g).¹⁵⁶ The U.S. appealed the Panel decision regarding Article XX(g), contending that its rules were “relating to the conservation of exhaustible natural resources” (clean air) within the meaning of Article XX(g). To justify its discriminatory rules, the U.S. cited the difficulties involved in verification and enforcement of individual baselines in foreign countries, claiming that the same enforcement conditions did not prevail in the United States and other countries.¹⁵⁷ In addition, the U.S. claimed that requiring domestic refiners to use statutory baseline would be physically and financially impossible because of the magnitude of the changes that would be required in almost all U.S. refineries.¹⁵⁸

In its decision, the Appellate Body agreed with the United States that its rules were within the meaning of Article XX(g), but held that the application of these rules constituted “unjustifiable discrimination” and a “disguised restriction on international trade” under the chapeau.¹⁵⁹ The AB reached this conclusion based on the finding of two omissions on the part of the United States. First, the AB found that the U.S. did not make any reasonable effort to mitigate the administrative problems that it relied on for rejecting individual baselines for foreign refiners. Second, while the U.S. had considered the high costs of imposing statutory baselines for its domestic refiners, it had failed to do the same for foreign refiners.¹⁶⁰ According to the AB, “these two omissions go well beyond what was necessary for the Panel to determine a violation of Article III:4 had occurred in the first place.”¹⁶¹ In reaching this conclusion, the AB did not explicitly examine and make a finding on whether the same conditions prevailed between the U.S. and the complainant countries. Instead, it held in effect that the differences in enforcement conditions between the United States and other countries could not justify the differential treatment of foreign refiners absent a showing that the United States had made a reasonable effort to mitigate them.

¹⁵⁶ Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) (adopted May 20, 1996, as modified by Appellate Body Report, WT/DS2/AB/R).

¹⁵⁷ Appellate Body Report, *U.S.—Gasoline*, *supra* note 80, at 25.

¹⁵⁸ *Id.* at 29.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ The AB continued to state that the “resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.” *Id.*

Another case involving the application of the chapeau of Article XX to a facially discriminatory measure is *Argentina–Bovine Hides*.¹⁶² In this case, Argentina was found to have taxed imports “in excess of” like domestic products in violation of Article III:2. Argentina defended its discriminatory taxes under Article XX(d) which exempts from GATT obligations measures “necessary to secure compliance with” domestic law consistent with GATT. The Panel held that the tax measure met the requirement of Article XX(d), but its application constituted “unjustifiable discrimination” in violation of the chapeau. According to the Panel, the discrimination was unjustifiable because it was not “unavoidable” (i.e., necessary) for the operation of the tax measure.¹⁶³ In reaching this conclusion, the Panel skipped the step of examining whether the same conditions prevailed between Argentina and exporting Members. It explained in a footnote:¹⁶⁴

Argentina has not been able to convince us that, in the present case and for purposes of applying the chapeau, “same conditions [do not] prevail” between Argentina and the European Communities. In particular, the fact that Argentina is a developing country Member which has to contend with low levels of compliance with its tax laws, does not, in our view, provide a justification for discriminating against imported products under the facts of the present case. It should be recalled, moreover, that the Appellate Body in *United States–Gasoline* – a case which also involved discrimination between imported and like domestic products – did not specifically examine and make a finding on whether the “same conditions prevail[ed]” between Brazil and Venezuela, on the one hand, and the United States, on the other hand. We therefore do not see a need to further examine this element. (citation omitted)

As a result of skipping the likeness analysis under the chapeau, the Panel effectively examined the same discrimination, i.e., higher taxes on imports, under Article XX and Article III:2, which is contrary to the AB’s instruction that the nature and quality of the discrimination found under Article XX must be different from the discrimination found under Article I or III.¹⁶⁵ The Panel’s decision in this case was not appealed.

¹⁶² Panel Report, *Argentina–Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Dec. 19, 2000) (adopted Feb. 16, 2001) [hereinafter Panel Report, *Argentina–Bovine Hides*].

¹⁶³ *Id.* ¶ 11.324.

¹⁶⁴ *Id.* n.570.

¹⁶⁵ See *supra* text at note 150. It should be noted that the Panel’s conclusion was based on drawing a rather artificial and ultimately inconsequential distinction between the tax measure on the one hand, and the application of the tax measure resulting in discrimination against imports on the other. The Panel’s decision would have been sounder if it had simply ruled that the tax measure in violation of Article III:2 did not meet the necessity test under Article XX(d). See Appellate Body Report, *Korea–Beef*, *supra* note 142 (holding that the challenged measure in violation of Article III:4 did not meet the “necessity” test under Article XX(d)).

(b) Measures that have not been found in violation of MFN or NT provisions

A measure may be found to be inconsistent with the nondiscrimination requirement of Article XX even when no violation of MFN or NT obligations has been established. This was the case in *U.S.–Shrimp*.¹⁶⁶ The measure in dispute was the implementation of United States law that prohibited shrimp imports unless the shrimp exporting country obtained U.S. certification for compliance with the U.S. requirements for protection of sea turtles in shrimp harvesting. Because the ban was clearly a violation of GATT Article XI:1, which prohibits quantitative restrictions on importation, the United States relied on Article XX(g) for defense, which exempts measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” The Appellate Body held that the U.S. measure, while qualifying for provisional justification under Article XX(g), failed to meet the nondiscrimination standards under the chapeau of Article XX.¹⁶⁷

Specifically, the Appellate Body held that the U.S. ban was applied in a manner constituting arbitrary and unjustifiable discrimination between countries where the same conditions prevail.¹⁶⁸ The AB reached this conclusion upon making two comparisons: first, between the United States and the shrimp exporting countries, and second, between the various shrimp exporting countries. In the first comparison, the AB found that the United States used an economic embargo to require all shrimp exporting countries to adopt “essentially the same” policy and enforcement program as applied in the United States “without taking into consideration different conditions which may occur in the territories of those other Members.”¹⁶⁹ In the second comparison, the AB found that the United States had treated selected shrimp exporting Members better than

¹⁶⁶ *Supra* note 150. The complainants in this case originally claimed that the U.S. measure violated GATT Articles I:1 and XIII:1. Having found the ban violated Article XI, however, the Panel ruled that it was no longer necessary to review these claims. See Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.18-7.23, WT/DS58/R (15 May 1998) (adopted Nov. 6, 1998, as modified by Appellate Body Report, WT/DS58/AB/R) [hereinafter Panel Report, *U.S.–Shrimp*].

¹⁶⁷ The AB has interpreted the chapeau as containing three standards, i.e., “the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard.” Appellate Body Report, *U.S.–Gasoline*, *supra* note 80, at 23.

¹⁶⁸ Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 184.

¹⁶⁹ *Id.* ¶ 164. In addition, the AB found that the United States had banned shrimp caught using methods identical to those employed by U.S. vessels solely because they were caught in waters of countries that had not been certified by the United States. The resulting situation, according to the AB, was “difficult to reconcile with the desired policy objective of protecting and conserving sea turtles.” *Id.* ¶ 165.

others in that it had negotiated with certain shrimp exporting countries on conservation of sea turtles but not with others; that it had made greater efforts to transfer technology for sea-turtle protection to some shrimp exporting countries than to others; and that it had granted some shrimp exporting countries longer “phase-in” periods for complying with U.S. requirements than that granted to others.¹⁷⁰ In short, the AB faulted the United States both for its failure to treat differently-situated countries differently (as between the U.S. and shrimp exporting countries) and for its failure to treat similarly-situated countries similarly (as between shrimp exporting countries).¹⁷¹ These failures, according to the AB, constitute “arbitrary” and “unjustifiable” discrimination between countries where the same conditions prevail.

The AB’s decision in *U.S.—Shrimp* demonstrates the broad scope of the nondiscrimination obligation under Article XX. Although no violation of MFN or NT obligations had been established in this case, the AB made both MFN-like and NT-like comparisons under the chapeau of Article XX. In the MFN-like comparison, the AB examined not only the factors that might be covered by MFN provisions (e.g., the differing phase-in periods¹⁷²), but also factors that are arguably beyond the reach of these provisions, such as efforts to engage in negotiations and to transfer technology.¹⁷³ In the NT-like comparison,¹⁷⁴ the AB found that the very fact that the U.S. imposed the same requirements on both domestic and for-

¹⁷⁰ *Id.* ¶¶ 172-176. The United States essentially provided better treatment to the shrimp exporting countries that entered into the Inter-American Convention for the Protection and Conservation of Sea Turtles. It should be noted that with respect to the second ground, the AB apparently assumed that the same conditions prevailed in all shrimp exporting countries.

¹⁷¹ The AB stated: “We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.” *Id.* ¶ 165.

¹⁷² The complainants in this case had claimed that the differences in the phase-in period violated GATT Articles I:1 and XIII:1, the latter provision in particular requires that no quantitative restriction on imports may be imposed on any member unless like product from all third countries is “similarly prohibited or restricted.” See Panel Report, *U.S.—Shrimp*, *supra* note 166, ¶ 7.19.

¹⁷³ Note the scope of MFN under GATT Article I:1 covers customs duties and charges, the method of levying such duties and charges, all rules and formalities in connection with importation and exportation, internal taxation and regulations. It seems a stretch to interpret U.S. negotiation and technology transfer efforts as “formalities in connection with importation.”

¹⁷⁴ On its face, an import ban is not an internal measure subject to Article III, but a quantitative restriction on imports subject to Article XI. However, according to the headnote of *Ad Article III*, if a border measure is merely enforcing a domestic law that applies equally to both domestic and imported products, it is to be regarded as an internal measure subject to Article III. For example, a French ban on importation of

eign producers constituted discrimination under Article XX, which is in sharp contrast to the NT requirement under Article III where formally identical treatment of like products would not be the basis for violation.¹⁷⁵

Thus, it appears that with respect to measures that are provisionally justified under paragraphs (a) to (j) of Article XX, the Appellate Body has interpreted the chapeau of Article XX to impose a higher and more general standard of nondiscrimination than that for the MFN or NT provisions. The chapeau standard appears to be higher because a measure, as applied,¹⁷⁶ may be held as inconsistent with the nondiscriminatory requirement of the chapeau when it has not been found to violate MFN or NT obligations (as in *U.S.–Shrimp*), or when a violation of MFN or NT provisions by the measure is otherwise exemptible (as in *U.S.–Gasoline*). The chapeau standard is also more general than the MFN or NT standard since the basis for determining whether discrimination exists under Article XX is like “conditions” prevailing in the countries involved, a term that can cover not only products, but potentially any other factor that can affect the production of products. Furthermore, for cases in which Article XX is invoked to defend a violation of Article XI (or another GATT provision other than MFN or NT clauses) and a claim under Article I or III is not reviewed by the panel on the grounds of judicial economy, the chapeau of Article XX provides another chance to examine the discriminatory effect of the challenged measure.

2. Like Conditions – An Underdeveloped Concept

Despite the fact that discrimination under Article XX is defined as “between countries where the same conditions prevail,” the Appellate Body has not focused on the meaning of “the same conditions” in its decisions. In *U.S.–Gasoline*, the AB did not address the validity of the U.S. argument that different conditions existed between the U.S. and for-

asbestos products was scrutinized under GATT Article III. See Appellate Body Report, *EC–Asbestos*, *supra* note 94.

¹⁷⁵ Cf. The national treatment provision under GATS Article XVII:3: “Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.” GATS, *supra* note 3, art. XVII:3.

¹⁷⁶ The AB has distinguished a “measure” to be scrutinized under (a) to (j) of Article XX from the “application” of the measure to be scrutinized under the chapeau. See *U.S.–Gasoline*, *supra* note 80, at 22; *U.S.–Shrimp*, *supra* note 166, ¶¶ 147 and 160. In these cases, the AB interpreted the “measure” not as the GATT-violating part of a regulation, but the entire regulation in which the GATT-illegal provision appeared. Since the entire regulation in these cases easily met the standard of Article (g), it became necessary to examine the GATT-illegal portion as the “application” of the measure under the chapeau. See Hudec, *Aim and Effects*, *supra* note 96, at 380, for an analysis of the AB’s interpretative approach to Article XX.

eign countries with respect to enforcement of U.S. law; instead, it rejected the argument on the grounds that the United States had not made a reasonable effort to mitigate such differences. In *U.S.–Shrimp*, when finding that the United States failed to accord the same treatment to various exporting members, the AB apparently assumed that the same conditions prevailed in all the exporting countries; when finding that the United States discriminated against the exporting members, the AB conversely assumed that different conditions prevailed between the United States and other countries.¹⁷⁷ It is therefore not surprising that the Panel in *Argentina–Bovine Hide* concluded that there was no need in the Article XX analysis to specifically examine and make a finding on whether the same conditions prevailed between the countries concerned.¹⁷⁸

Why, then, has not the Appellate Body focused on the likeness analysis in the context of Article XX? There appear to be both procedural and substantive reasons. Procedurally, it is up to the Member invoking an Article XX defense to demonstrate that it did not discriminate between countries with like conditions.¹⁷⁹ If the defending Member does not make an explicit or a convincing argument on the issue of like conditions, the tribunal can simply find that the Member has failed to bear its burden of proof.¹⁸⁰

Substantively, the particular structure of the GATT nondiscrimination provisions has made Article XX analysis rather complex and confusing. In the broad scheme of things, nondiscrimination in international trade should cover all forms of discrimination against the trade interests of Members, whether such interests are based on product or otherwise; and the discrimination may be excused if it is necessary for or rationally related to, depending on the applicable standard of scrutiny, a non-trade interest recognized by the Members as legitimate. This is essentially the

¹⁷⁷ The AB seemed to suggest that different conditions relevant in this case might include the actual incidence of sea turtles, the species of sea turtles, or other differences or disparities that may exist in different waters, when it commented that while the United States may ignore these factors in imposing the same standards on all domestic producers, it is inappropriate to do so to foreign countries. See Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 164. However, there was no specific examination or finding on the issue.

¹⁷⁸ See *supra* text at note 164.

¹⁷⁹ The general exceptions in Article XX are “in the nature of affirmative defenses” and the burden of establishing such a defense rests on the party asserting it. Appellate Body Report, *United States–Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 16, WT/DS33/AB/R (Apr. 25, 1997) (adopted May 23, 1979). See generally, Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?* 1 J. INT’L ECON. L. 227 (1998).

¹⁸⁰ In both *U.S.–Gasoline* and *Argentina–Bovine Hides*, the defending Member was unable to convince the tribunal that different conditions prevailed between it and other Members.

approach adopted by U.S. courts under the commerce clause.¹⁸¹ In contrast to this simple structure, the GATT nondiscrimination provisions are split into two tiers. The first tier consists of the product-based MFN and NT obligations; and the second tier a generally worded nondiscrimination obligation under the chapeau of Article XX. The policy exceptions of paragraphs (a) to (j) of Article XX are set in between the two tiers. Paragraphs (a) to (j) use various terms describing the requisite connection between a particular policy ground and the measure to be excused. They range from “necessary” and “essential,” to “relating to,” “for the protection of,” “in pursuance of” and “involving,” indicating different levels of scrutiny required.¹⁸² For a measure falling under a policy exception that is subject to a less strict standard of scrutiny, such as the “relating to” or “involving” standard, it is relatively easy to meet the requirement of policy justification. After such a measure has been determined to have a justifiable purpose, however, its application must still be judged against the requirement of the chapeau.¹⁸³ In order to determine whether the discriminatory aspect of the measure is otherwise permissible under the chapeau, the tribunal is compelled to apply a separate (and so far not well-defined) standard of scrutiny to interpret the “arbitrary” or “unjustifiable” language of the chapeau as the final test for the permissibility of the discrimination.¹⁸⁴ This convoluted structure of GATT anti-discrimination provisions can obscure the need to focus on the concept of like conditions.

In addition, the AB’s analysis of the concept of discrimination under the chapeau may also have contributed to the lack of focus on the concept of like conditions. The AB has enunciated a three-element approach to the interpretation of the nondiscrimination requirement under the chapeau: first, the application of the measure in question must result in discrimination; second, the discrimination must be arbitrary or unjustifiable in character; and third, the discrimination must occur between countries

¹⁸¹ See *supra* text at notes 44 to 65. See also Farber & Hudec, *supra* note 46, for a comparative study between GATT and the commerce clause of the U.S. Constitution. For a critique of that study, see Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 139, *supra* note 89, at 139.

¹⁸² See GATT, *supra* note 2, art. XX, paragraphs (a) through (j).

¹⁸³ See *supra* note 176.

¹⁸⁴ For example, in *U.S.—Gasoline*, the AB essentially held that it was unnecessary for the United States to resort to the discriminatory means because with some reasonable effort the United States should have been able to mitigate the differences in enforcement of U.S. law between home and abroad. The rationale was followed by the Panel in *Argentina—Bovine Hide*, which concluded that the discriminatory taxes in that case were unjustifiable because it was not unavoidable. See Panel Report, *Argentina—Bovine Hide*, *supra* note 162.

where the same conditions prevail.¹⁸⁵ The problem with this three-element analysis is that it separates the concept of “discrimination” from its defining term “between countries where the same conditions prevail.” By treating “discrimination” as an independent element, it is possible to reach a conclusion on the “arbitrary” or “unjustifiable” character of discrimination without having first to make a finding on the likeness between the countries concerned. This is apparently what the Panel managed to do in *Argentina–Bovine Hides*.¹⁸⁶

The approach taken by the AB has resulted in less than satisfactory legal reasoning concerning the chapeau. Without a sufficient analysis of like conditions, the AB is unable to define the nondiscrimination requirement of Article XX clearly. Instead, it has provided “a rather broad and impressionistic definition of the words of the chapeau, saying that the text involved several overlapping concepts that were not easy to separate.”¹⁸⁷

More importantly, the insufficient analysis of the concept of like conditions has led the AB to generate potentially problematic jurisprudence on the chapeau. In *U.S.–Shrimp*, the AB found that the United States discriminated against the shrimp exporting Members because it required them to adopt essentially the same regulatory program as the United States without taking into consideration that different conditions may occur in the territories of those Members.¹⁸⁸ The AB did not explain, however, what types of conditions occurring in the exporting Members ought to be taken into account by the United States. Without providing any guidance on how to select the conditions for comparison, the AB’s finding can have sweeping implications for future cases involving origin-neutral measures. Since *some* differences relevant to the purposes of paragraphs (a) to (j) are bound to exist between the importing and exporting countries concerned, virtually all formally origin-neutral measures, which by definition impose the same requirement on domestic and foreign producers, could be found discriminatory under the chapeau of Article XX. Consequently, the only meaningful issue in such cases would

¹⁸⁵ Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 150.

¹⁸⁶ *See supra* text at notes 162-65.

¹⁸⁷ Hudec, *Aim and Effects*, *supra* note 96, at 381. The following passage demonstrates the lack of clarity in the AB’s interpretation of the chapeau concepts: “‘Arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade . . . impart meaning to one another. It is clear to us that ‘disguised restriction’ includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of ‘disguised restriction.’ We consider that ‘disguised restriction,’ whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination . . .” *See* Appellate Body Report, *U.S.–Gasoline*, *supra* note 80, at 24-25 (emphasis original).

¹⁸⁸ According to McRae, this finding is “not derived from any textual analysis of the term discrimination as used in the chapeau or in the broader context of GATT 1994 and the other WTO agreements.” McRae, *supra* note 154, at 230.

be to determine whether the inevitably discriminatory measure is arbitrary or unjustifiable – the two standards yet to be defined by the AB.¹⁸⁹ To avoid such sweeping implications, the AB needs to further develop the concept of like conditions.

The potentially overreaching effect of the AB's approach can also be seen in its finding in *U.S.–Shrimp* that the United States discriminated among exporting Members. In this finding, the AB used technology transfer and participation in international negotiation as the bases for comparing U.S. treatment of various other Members. While international cooperation is essential for effective conservation of highly migratory species such as sea turtles, positive efforts to engage in such cooperation are not required by Article XX(g) or any other GATT provisions.¹⁹⁰ The AB's approach, therefore, raises the issue whether and to what extent non-WTO requirements may be translated into WTO obligations via the non-discriminatory provision of Article XX.¹⁹¹

3. Applying the Similarly-Situated Analysis

As previously discussed, the key for defining the nondiscrimination obligation of the chapeau lies in the relevant criteria for comparing likeness or similarity between countries. In order to determine what conditions prevailing in the countries involved are relevant to the comparison, one must first identify the purpose for which such comparison is to be made. A condition should be used only if it helps to further that purpose. Unless the condition is indispensable in achieving that purpose, however, it is a matter of normative decision whether to use the condition in the likeness analysis. In making such normative decisions, the tribunal will apply certain standards of review.

¹⁸⁹ Instead of defining each standard, the AB has insisted that the two standards impart meaning to one another. See *supra* note 187.

¹⁹⁰ The purpose of Article XX(g) is to exempt the conservation measures taken by individual Members from GATT obligations, and not to require them to participate in conservation activities. Thus, if the United States had made no effort to transfer technology or negotiate with any exporting country, it could not have been found to violate the nondiscrimination requirement of Article XX on these grounds. As previously noted, these positive efforts appear to be beyond the scope of GATT Article I:1. See *supra* note 173.

¹⁹¹ The AB gave the impression that international negotiation would be required for a measure falling under Article XX(g) to pass muster under the chapeau. See Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 172. The AB also emphasized the importance of engaging in international negotiation in *U.S.–Gasoline*. See Appellate Body Report, *U.S.–Gasoline*, *supra* note 80, at 28, n.52. In both cases, the AB examined this factor in the context of determining whether the challenged measure constituted “unjustifiable” discrimination. To the extent that the AB used “unjustifiability” as a necessity test, it apparently viewed the effort to engage in international negotiation as a “reasonably available alternative” to the discriminatory measure in question.

(a) Identifying the Purpose of Comparison

The purpose for comparing whether the “same” or “like” conditions prevailed in the countries involved is to be found in both the chapeau and the substantive provisions of (a) to (j). According to the Appellate Body, the purpose and object of the chapeau is generally “the prevention of abuse” of the Article XX exceptions.¹⁹² Given that Article XX sets out ten different exceptions, what amounts to abuse of Article XX exceptions can only be determined in the context of a particular paragraph of (a) to (j). As the Appellate Body has pointed out:

When applied in a particular case, the actual contours and contents of [the chapeau] standards will vary as the kind of measure under examination varies. What is appropriately characterizable as “arbitrary discrimination” or “unjustifiable discrimination”, or as a “disguised restriction on international trade” in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of “arbitrary discrimination”, for example, under the chapeau may be different for a measure that purports to protect public morals than for one relating to the products of prison labor.¹⁹³

By the same token, because a finding of discrimination under the chapeau is inherently related to the substantive provisions of (a) to (j), whether a condition is relevant to the likeness comparison under the chapeau will also depend on the particular exception invoked. Essentially, what the chapeau requires is equal treatment of countries that are similarly situated with respect to the policy exceptions of paragraphs (a) to (j).

– Should the regulatory purpose of the measure be considered under the chapeau?

Having identified that the substantive provisions of (a) to (j) control the relevance of the conditions for comparison under the chapeau, it is necessary to clarify further whether it is the policy objectives of (a) to (j) in abstract, or the regulatory purpose of a measure that is found to fall within the provisions of (a) to (j), that should determine the relevance of the conditions for comparison.

Although the AB has confirmed that the chapeau standards should vary depending on the particular policy exception invoked, it appears to have dismissed the need to consider the regulatory purpose of a measure under the chapeau. In *U.S.–Shrimp*, the United States argued that if a measure differentiating between countries is “based on a rationale legiti-

¹⁹² Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 151 (quoting Appellate Body Report, *U.S.–Gasoline*, at 22.)

¹⁹³ *Id.* ¶ 120. This passage is reminiscent of the accordion metaphor used by the Appellate Body in its interpretation of “like product” under Article III. The AB made this statement to explain why in analyzing Article XX it is necessary to examine the substantive provisions of (a) to (j) before the chapeau.

mately connected with the policy of an Article XX exception, rather than for protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception.”¹⁹⁴ In rejecting the U.S. argument, the AB stated:

The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of *the declared policy objective* of the measure, and *the relationship of that objective with the measure* itself and its general design and structure, are examined under Article XX(g) . . . it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau. To accept the argument of the United States would be to disregard the standards established by the chapeau.¹⁹⁵ (emphasis added)

This statement, while aiming to differentiate the chapeau standards from that of paragraph (g), seems to indicate that the policy objective of a measure should be examined only under paragraphs (a) to (j), and not under the chapeau.

There are, however, good reasons why the regulatory purpose or policy objective of a measure should be considered under the chapeau. First of all, because paragraphs (a) to (j) set out the permissible policy objectives in general terms, it would be practically impossible to identify conditions that are relevant to such generally worded objectives in abstract. Take as an example paragraph (g), which excuses measures “relating to the conservation of exhaustible natural resources.” Since there are many different types of exhaustible natural resources, the conditions relevant to the conservation of one type (e.g., clean air) may not be relevant to the conservation of another (e.g., sea turtles). Hence, as a practical matter, in order to determine what conditions are relevant for comparison under the chapeau in a given case, the tribunal needs to refer to the concrete policy objective of the measure under review.

Furthermore, the regulatory purposes of a measure should be considered under the chapeau as a matter of sound WTO legal policy. Unlike Article III or other GATT provisions that impose positive obligations on Members, Article XX is designed to allow Members to escape those obligations when their measures serve certain “legitimate state policies or interests outside the realm of trade liberalization,”¹⁹⁶ provided that they do not abuse this right. Therefore, in contrast with the context of Article III – in which whether the regulatory purposes of a measure should be taken into account remains controversial – it is undisputed that the regulatory purposes of a measure are to be considered under Article XX. In

¹⁹⁴ Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 148.

¹⁹⁵ *Id.* ¶ 149.

¹⁹⁶ Appellate Body Report, *U.S.–Gasoline*, *supra* note 80, at 17.

practice, the WTO tribunal will begin its task under Article XX by examining whether the *declared* policy objective of a measure falls within the terms of paragraphs (a) to (j), and whether the connection between the measure and its *declared* policy objective meets the standards set out in (a) to (j).¹⁹⁷ It is only after the tribunal has determined that a measure satisfies the requirements of (a) to (j) that it will proceed to examine the measure under the chapeau.¹⁹⁸ In other words, when a measure comes to be scrutinized under the chapeau, the legitimacy of its policy objective has already been established for Article XX purposes. Consequently, in deciding whether the measure is permissible under the chapeau, it is legally sound to examine the relationship between the measure and its declared policy objective under the chapeau standards.

Finally, it should be emphasized that, as a conceptual matter, accepting the legitimacy of the regulatory purpose of a measure is not the same as accepting the legitimacy of the measure itself. Whether a measure that has been found to serve a legitimate policy objective under paragraphs (a) to (j) is also permissible under the chapeau is to be determined separately by the review standards of the chapeau. Such standards are necessarily different from, and higher than, those of paragraphs (a) to (j), as will be further explained below.

(b) Relevant Conditions for Comparison and Standards of Review

The above analysis establishes that whether a measure constitutes a means of “arbitrary or unjustifiable discrimination” within the meaning of the chapeau is to be determined by comparing prevailing conditions that are relevant to the policy objective of the measure. A condition is only relevant as the basis for comparing likeness between countries if it serves to further that policy objective. If a condition does not serve to advance that policy objective, it is irrelevant; and the measure differentiating between countries based on such an irrelevant condition would necessarily constitute a means of “arbitrary or unjustifiable” discrimination within the meaning of the chapeau. Conversely, if a condition is indispensable in achieving the policy objective of the measure, the distinction drawn by the measure between countries based on such a condition would not be “arbitrary or unjustifiable.” If a condition is useful, but not indispensable, in advancing the policy objective of the measure, whether to allow it to enter into the likeness determination under the chapeau, i.e., whether to hold a distinction drawn on the basis of such a condition as “arbitrary or unjustifiable,” becomes a matter of normative decision.

In making such a normative decision, the tribunal would inevitably engage in a balancing act between different interests and values. Indeed, the AB has interpreted the application of the chapeau as a matter of maintaining “a balance of rights and obligations” between the Member

¹⁹⁷ See Appellate Body Report, *U.S.—Shrimp*, *supra* note 150, ¶¶ 117-122 (establishing the proper sequence of steps in interpreting Article XX).

¹⁹⁸ *Id.*

invoking the Article XX exceptions and other Members.¹⁹⁹ As it further explained:

The task of interpreting and applying the chapeau is . . . essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.²⁰⁰

Where to mark the line of equilibrium in a given case is a question of standard of review. Ultimately, whether a measure constitutes a means of “arbitrary or unjustifiable” discrimination within the meaning of the chapeau depends on the required level of connection between the measure and its legitimate policy goal. The required level of connection in turn depends on how strictly the tribunal scrutinizes the measure at issue. The stricter the standard of scrutiny is applied, the higher the required level of connection will be, and the more likely the measure will be struck down under the chapeau.

At this juncture, it should be noted that the level of connection required by the chapeau between a measure and its policy objective will always be higher than that required by paragraphs (a) to (j). As previously noted, paragraphs (a) to (j) use various terms (e.g., “necessary,” “relating to,” and “involving”) to describe the levels of connection between particular policy exceptions and the measures adopted to implement them.²⁰¹ Given that a measure will come under the chapeau only after it passes the scrutiny of (a) to (j), to be meaningful the chapeau standards must be stricter than those applied under (a) to (j). In practice, a measure scrutinized under the chapeau is likely to have been reviewed under a paragraph that contains less than a “necessity” standard, such as paragraph (g), which requires merely that the measure is “relating to” the policy objective of conservation.²⁰² Nonetheless, a measure meeting a “necessity” standard under paragraphs (a) to (j) can also be scrutinized by a higher standard under the chapeau, since the AB has distinguished the examination of a “measure” under paragraphs (a) to (j) from that of

¹⁹⁹ Appellate Body Report, *U.S.—Shrimp*, *supra* note 150, ¶ 156.

²⁰⁰ *Id.* ¶ 159.

²⁰¹ *See supra* text at note 182.

²⁰² The two major cases involving the application of the chapeau, *U.S.—Gasoline* and *U.S.—Shrimp*, are both Article XX(g) cases.

the “application” of a measure under the chapeau.²⁰³ Furthermore, the AB has interpreted the “necessary” standard as covering “a range of degrees of necessity,” with “indispensable” at the one end and “making a contribution to” at the other.²⁰⁴

What levels of connection, then, between a measure and its declared policy objective have been required by the “arbitrary or unjustifiable” standards? Although the AB has not clearly defined them, it is possible to ascertain the standards as applied in the three cases discussed above.

In *U.S.—Gasoline*, it appears the AB essentially applied a “necessity” standard to scrutinize the U.S. measure under the chapeau. As previously noted, in defending its differential treatment between domestic and foreign refiners, the United States argued that the same conditions did not prevail in the United States and other countries because of the substantial difficulties involved in verification and enforcement of individual baselines in foreign territories. In other words, the United States considered its domestic refiners and foreign refiners not to be similarly situated with respect to the purpose of its antipollution law, using the enforcement conditions as the basis for drawing such a distinction. Insofar as such differences in enforcement conditions did exist between domestic and foreign territories, drawing the distinction was evidently relevant to the purpose of the antipollution law. However, the nexus between drawing such a distinction and the purpose of the law apparently did not reach the level of necessity, i.e., drawing the distinction was not indispensable for achieving the purpose of the law. As the AB indicated, there might well be reasonably available alternatives that the United States could use to mitigate the differences in enforcement conditions between domestic and foreign territories.²⁰⁵ Stating that the resulting discrimination “must have been foreseen, and was not merely inadvertent or unavoidable,” the AB concluded that the measure constituted “unjustifiable discrimination” and a “dis-

²⁰³ See *supra* note 176. The Panel in *Argentina—Bovine Hides*, a case involving an interpretation of the “necessary” standard of Article XX(d), followed this interpretive approach. See *supra* text at note 163.

²⁰⁴ See Appellate Body Report, *Korea—Beef*, *supra* note 142, ¶ 161 (interpreting “necessary” under Article XX(d)). In addition, the AB stated that what constitutes “necessary” involves in every case a process of weighing and balancing a series of factors, including the relative importance of the interests or values involved. *Id.* ¶ 164.

²⁰⁵ See Appellate Body Report, *U.S.—Gasoline*, *supra* note 80, at 27-28 (indicating that there were established techniques for checking, verification, assessment and enforcement of data relating to imported goods that could be used to monitor compliance by foreign producers). It is interesting to compare this decision with the GATT Panel Decision, *United States—Section 337 of the Tariff Act of 1930*, (adopted Nov. 7, 1989), GATT Doc. L/6439, B.I.S.D. (36th Supp.) 345 (1990), which found that the U.S. measure in violation of Article III:4 was partially justifiable due to the difficulties in enforcing injunctions in foreign jurisdictions. Unlike *U.S.—Gasoline*, this finding was made under the necessity test of Article XX(d), rather than under the chapeau of Article XX.

guised restriction on international trade.”²⁰⁶ Essentially, the AB held that the U.S. measure was unnecessary for achieving its claimed policy objective. In rejecting an evidently relevant condition for comparison, therefore, the AB exercised its normative judgment and applied a standard of strict scrutiny. Given that the U.S. measure was facially discriminatory – drawing a distinction on the basis of national origins – it is understandable that a high standard of review should apply.

A similar standard was applied in *Argentina–Bovine Hides*, which also involved a facially discriminatory measure. In that case, the Panel framed its inquiry under the chapeau as “whether the extra tax burden imposed on importers by the Argentina measure is nevertheless justifiable because it is *unavoidable* for the operation of Argentina tax laws.”²⁰⁷ After pointing out some alternative courses of action available to Argentina, the Panel concluded that the discriminatory aspect of the measure was not “unavoidable” (i.e., not necessary) and therefore constituted “unjustifiable discrimination” within the meaning of the chapeau.²⁰⁸

The case of *U.S.–Shrimp* presented a very different situation. The challenged U.S. measure in this case was origin-neutral and had not been found to violate MFN or NT obligations. Consequently, the AB was not asked to review a distinction drawn by the United States under its conservation law. Rather, it was asked to decide whether a violation by the U.S. measure of Article XI:1 (prohibition of quantitative restrictions) could be excused by Article XX. In holding that the U.S. measure fell within the scope of Article XX(g), the AB recognized the legitimate regulatory purpose of the U.S. measure. However, it went on to find that the application of the U.S. measure constituted arbitrary and unjustifiable discrimination within the meaning of the chapeau upon making an MFN-like comparison and an NT-like comparison.²⁰⁹ It is in the NT-like comparison that the AB explicitly referred to the comparison of different conditions between the United States and other countries. The AB found that the U.S. measure was discriminatory because it imposed an identical requirement on domestic and foreign producers without taking into consideration the possibility that conditions prevailing in other countries might be different from those in the United States.²¹⁰ The AB, however, did not specify what such different conditions might be.

Whatever such different conditions might be, the AB essentially held that the U.S. measure imposing the same requirements for all shrimp producers is *unnecessary* for achieving its policy objective of sea turtle conservation. In other words, under *U.S.–Shrimp*, a Member may not impose the same requirements for all without taking into account their different

²⁰⁶ See Appellate Body Report, *U.S.–Gasoline*, *supra* note 80, at 29.

²⁰⁷ See Panel Report, *Argentina–Bovine Hides*, *supra* note 162, ¶ 11.324.

²⁰⁸ *Id.* ¶¶ 11.325-11.330.

²⁰⁹ See *supra* notes 172-175 and accompanying text.

²¹⁰ See *supra* text at note 169.

conditions unless doing so is *necessary* for achieving its policy goal. This “necessity” standard, however, would effectively require a Member to anticipate different conditions prevailing in other countries that might be relevant to its policy objective before adopting an origin-neutral measure, and to accommodate such different conditions to the extent feasible. This kind of “necessity” standard would seem more difficult to satisfy than that applied in *U.S.–Gasoline*. There, the AB implied that an origin-based measure would be permissible under the chapeau if its discriminatory effects were “unforeseen,” “merely inadvertent” or “unavoidable.”²¹¹ In comparison, under *U.S.–Shrimp*, an origin-neutral measure having discriminatory effects would be permissible only if the Member had made positive efforts to avoid such effects that might otherwise have been unforeseen or inadvertent.

Furthermore, the AB in *U.S.–Shrimp* has interpreted the terms “arbitrary” and “unjustifiable” to mean something more than the standards for the requisite level of connection between a discriminatory measure and its declared policy objective. The AB has construed “unjustifiability” as coerciveness, unilateralism, rigidity and inflexibility in the application of the U.S. measure, and “arbitrariness” additionally as the lack of transparency and due process in such application.²¹² These characteristics of a measure, while offensive to other Members, are not inherently related to discrimination. In reality, a Member typically adopts its regulatory measures unilaterally without consulting with other Members in advance; and its measures may well have coercive effects on other Members and may even be procedurally improper. But those qualities do not make the Member’s measure “discriminatory.” What makes a measure discriminatory is its drawing of a distinction between similarly-situated countries. It appears, therefore, that the AB in *U.S.–Shrimp* has interpreted “arbitrariness” and “unjustifiability” as independent standards for conducting international trade relations, which are separate from the standards for gauging the necessity of a discriminatory measure in carrying out its declared policy objective.

In sum, it appears that the AB has applied a strict standard of review to scrutinize an origin-based measure, as evident in *U.S.–Gasoline*, and an

²¹¹ See *supra* note 161.

²¹² See Appellate Body Report, *U.S.–Shrimp*, *supra* note 150, ¶ 161 (“the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect” on other Members), ¶ 172 (the “unilateral character of the application of [the U.S. measure] heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability”), and ¶¶ 177-182 (e.g., “this rigidity and inflexibility” in the application of the measure “also constitute ‘arbitrary discrimination’ within the meaning of the chapeau”; “exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.”).

equally strict, if not stricter, standard to scrutinize an origin-neutral measure that has produced a discriminatory impact, as manifested in *U.S.–Shrimp*. If this analysis is correct, the pattern emerging from these cases is in sharp contrast to that of U.S. cases decided under the commerce clause, where the standards of scrutiny for origin-neutral measures with a bona fide regulatory purpose are generally less strict than that for facially discriminatory ones.²¹³ It remains to be seen, however, whether the same pattern will be followed in future WTO cases.

B. *Nondiscrimination under GATS Article XIV*

Article XIV of GATS contains a provision similar to GATT Article XX. It permits a WTO member to adopt measures inconsistent with its GATS obligations if they are “necessary” for the following reasons: the protection public morals or maintenance of public order; protection of human, animal or plant life or health; securing compliance with laws or regulations not inconsistent with GATS including those relating to the prevention of deceptive practices; and the protection of privacy of individuals and safety.²¹⁴ Similar to GATT Article XX, the chapeau of GATS Article XIV requires that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where *like* conditions prevail, or a disguised restriction on trade in services.” (emphasis added) A notable difference is that Article XIV refers to “like conditions,” as opposed to “the same conditions” contained in GATT Article XX. Technically, “like conditions” suggests a slightly different standard from “the same conditions.” For the purpose of this article, however, the difference between the two terms is negligible, since both terms imply a comparison between relevant conditions prevailing in the countries concerned.

In *U.S.–Gambling Services*, the only case interpreting GATS Article XIV thus far, the Panel and the AB essentially followed the jurisprudence of GATT Article XX.²¹⁵ The case involved Antigua’s challenge

²¹³ See *supra* text at notes 72-74.

²¹⁴ GATS, *supra* note 3, art. XIV(a)-(c). In addition, Article XIV(d) and (e) specifically exempt tax measures inconsistent with the NT obligation under Article XVII, if the difference in treatment “is aimed at ensuring equitable or effective imposition or collection direct taxes” with respect to foreign services or service suppliers, and the MFN obligation under Article II, if the difference in treatment is the result of tax treaties.

²¹⁵ Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report, *U.S.–Gambling*]; Appellate Body Report, WT/DS285/AB/R (Apr. 7, 2005) (*adopted* Apr. 20, 2005) [hereinafter Appellate Body Report, *U.S.–Gambling*]. The AB noted that GATS Article XIV sets out the general exceptions from obligations under GATS “in the same manner” as does GATT Article XX, and that it accordingly finds previous decisions under Article XX “relevant for our analysis under Article XIV of the GATS.” *Id.* ¶ 291.

against the ban imposed by the United States on the supply of cross-border gambling services. Antigua claimed that the ban violated the U.S. market access commitments under Article XVI and the national treatment obligation under Article XVII. With respect to national treatment, Antigua argued that the United States permitted domestic service suppliers to offer remote horse-betting services while prohibiting Antiguan service suppliers from providing cross-border gambling services to the United States, resulting in violation of the NT obligation under GATS. The United States denied both charges. In addition, the U.S. claimed that in any event the ban would fall within the scope of Article XIV(a) and (c), which respectively excuse measures inconsistent with GATS obligations that are “necessary” to protect public morals and to secure compliance with domestic law. The Panel found that the United States did make market access commitments on gambling and betting services and that the U.S. ban breached such commitments in violation of Article XVI.²¹⁶ Having made this finding, the Panel did not examine whether the U.S. measure also violated the national treatment obligation under Article XVII on the ground of judicial economy.²¹⁷

The Panel then proceeded to the general exceptions under Article XIV. It found that the U.S. ban did not meet the “necessary” standard under either paragraph (a) or (c) because the United States did not resort to consultations with Antigua as a less trade-restrictive alternative.²¹⁸ Although after making this finding it was not necessary for the Panel to examine the chapeau requirement, it nonetheless did so. The Panel found that the U.S. measure was inconsistent with the chapeau of Article XIV because the United States had failed to demonstrate that its laws prohibiting remote supply of gambling services were applied “in a consistent manner as between those supplied domestically and those supplied from other Members.”²¹⁹ In making this finding, the Panel accepted the arguments made by Antigua in the context of the NT provision and did not separately analyze the elements of the chapeau.²²⁰ Thus, there was no discussion on whether “like conditions” prevailed in the United States and Antigua, or whether the alleged discrimination was also “arbitrary or unjustifiable” in character. Rather, the Panel reached its conclusion under the chapeau solely on the basis that the United States had failed to disprove that its measure discriminated against foreign suppliers of like services.

On appeal, the AB upheld the Panel’s finding that U.S. ban violated the market access obligations under Article XVI, but reversed its finding that the U.S. measure did not meet the “necessary” standard under Arti-

²¹⁶ See Panel Report, *U.S.–Gambling*, *supra* note 215, ¶¶ 6.258-6.421.

²¹⁷ *Id.* ¶ 6.426.

²¹⁸ *Id.* ¶¶ 6.528-6.531; 6.562.

²¹⁹ *Id.* ¶ 6.607.

²²⁰ *Id.* ¶¶ 6.584-6.589.

cle XIV. The AB found instead that consultations with Antigua would not have been a reasonable alternative to the ban and that the U.S. measure was necessary to protect public morals or maintain public order within the meaning of Article XIV(a).²²¹ Regarding the chapeau analysis, the AB agreed with the Panel that the United States had not demonstrated that its laws were applied consistently with the requirements of the chapeau.²²² In addition, the AB disagreed with the United States that the Panel had erred in not making an assessment of whether the alleged discrimination was also arbitrary or unjustifiable in character. The AB indicated that such an analysis was unnecessary in this case because the United States had asserted that there was no discrimination of any kind in the application of its laws.²²³

In sum, by upholding the Panel's approach, the AB did not require the discrimination found within the meaning of the chapeau to be different from the violation of the NT obligation alleged by Antigua. As a result, this case has contributed little to the interpretation of the nondiscrimination requirement of the chapeau.

Meanwhile, the AB's decision has raised an issue of consistency in WTO jurisprudence. As previously noted, the AB has clearly stated that the discrimination under Article XX of GATT must be different in "nature and quality" from the discrimination that has been found to violate MFN or NT obligations.²²⁴ Although in this case no violation of NT obligations was established due to the Panel's exercise of judicial economy, it is nonetheless questionable whether the nature and quality of discrimination under Article XIV of GATS (or Article XX of GATT) should become indistinguishable from that under MFN or NT provisions solely because the tribunal chose to exercise judicial economy rather than to examine potential violations of MFN or NT obligations. Furthermore, when the tribunal chose to address potential violations of MFN or NT under the chapeau of GATS Article XIV (or GATT Article XX) rather than under the MFN and NT provisions, the burden of proof would shift from the complainant, who has the initial burden to prove discrimination under the MFN and NT provisions, to the respondent invoking the exceptions of GATS Article XIV (or GATT Article XX), who would then have the burden of demonstrating that no such discrimination has ever existed.²²⁵ When the nature and quality of the discrimination examined

²²¹ The Appellate Body Report, *U.S.—Gambling*, *supra* note 215, ¶ 326. Having reached this conclusion, the AB found it unnecessary to examine whether the measure is justifiable under Article XIV(c). *Id.* ¶ 337.

²²² *Id.* ¶ 369.

²²³ *Id.* ¶ 350 (stating further that the United States "could have, but did not, put forward an additional argument that even if such discrimination exists, it does not rise to the level of 'arbitrary' or 'unjustifiable' discrimination.").

²²⁴ *See supra* text at note 150.

²²⁵ *See supra* note 179.

under the chapeau is the same as that under the MFN or NT provisions, the appropriateness of the burden shifting becomes questionable.

C. *Nondiscrimination under the SPS Agreement*

The SPS Agreement sets out health and sanitary standards for food and agricultural products, which, along with the Agreement on Technical Barriers to Trade (TBT), supplements GATT rules on product standards. It has long been recognized that facially-neutral product standards can be used to discriminate against imports implicitly.²²⁶ Accordingly, the SPS and the TBT agreements both provide independent obligations for nondiscrimination. The structures of their nondiscrimination provisions, however, are quite different. The TBT Agreement contains a single nondiscrimination provision that combines the elements of GATT MFN and NT clauses.²²⁷ As a result, the TBT provision simply affirms that the MFN and NT obligations apply to technical regulations.²²⁸ In comparison, the SPS Agreement contains two provisions of nondiscrimination that are worded more like the chapeau of Article XX.²²⁹ The complex structure of these provisions has generated separate jurisprudence on nondiscrimination under the SPS Agreement.

²²⁶ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 221-224 (2d ed., The MIT Press 1997) for a brief discussion of the rationales of the TBT and the SPS agreements.

²²⁷ See TBT Agreement, *supra* note 5, art. 2.1 (stating that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.”) It should be noted that the preamble of the TBT Agreement incorporates, almost verbatim, the chapeau language of GATT Article XX.

²²⁸ To date, there has been only one WTO case involving interpretation of Article 2.1 of the TBT Agreement. See Panel Report, *EC–Trademarks/GIs (Australia)*, *supra* note 24. In this case, Australia challenged an EC labeling requirement for geographic indications as inconsistent with the national treatment obligation under TBT Article 2.1. *Id.* ¶ 7.426. The Panel found that Australia did not make a prima facie case that the EC measure accorded any difference in treatment to imported products and like products of EC origin. *Id.* ¶¶ 7.464-7.475. Given this finding, the Panel considered it unnecessary to examine whether the products involved were “like.” *Id.* ¶ 7.463. The same EC labeling requirement was also challenged under the national treatment provisions of TRIPS Article 3.1 and GATT Article III:4 by the United States. See Panel Report, *EC–Trademarks/GIs (U.S.)*, *supra* note 24, ¶¶ 7.482, 7.500. Similarly, the Panel found that the United States did not make a prima facie case that the EC measure accorded any difference in treatment to different nationals under TRIPS Article 3.1 or to like products under GATT Article III:4. *Id.* ¶¶ 7.497-7.499, 7.508-7.509.

²²⁹ In addition, similar language of nondiscrimination also appears in the preamble of the SPS Agreement. See SPS Agreement, *supra* note 6, pmbll., cl. 1.

The first of the two SPS provisions is Article 2.3, which sets out a general obligation of nondiscrimination:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where *identical or similar conditions* prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.²³⁰ (emphasis added)

The second provision is found in Article 5.5, which contains a more specific obligation of nondiscrimination:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid *arbitrary or unjustifiable distinctions* in the levels it considers to be appropriate in different situations, if such distinctions result in *discrimination* or a disguised restriction on international trade. (emphasis added)

The Appellate Body has construed Article 5.5 as a subsidiary rule of Article 2.3,²³¹ and that a violation of Article 5.5 necessarily implies a violation of Article 2.3.²³²

Clearly, a finding of discrimination under either of the two provisions will be predicated on a similarity comparison. For Article 2.3, a comparison must be made between treatment of Members with “identical or similar conditions”; for Article 5.5, a comparison between different levels of sanitary protection applied by a Member in different situations. Thus far, there has been more elaboration of Article 5.5 than Article 2.3 in WTO jurisprudence, as will be discussed below.

Before delving into the SPS cases, it is important to note that, despite the pattern of their wording, the SPS provisions of nondiscrimination have a very different field of application from that of the chapeau of GATT Article XX. According to the Appellate Body, Article 2.3 of the SPS Agreement “takes up obligations similar to those arising under [GATT] Article I:1 and Article III:4,” as well as “incorporates part of the ‘chapeau’ of Article XX.”²³³ This interpretation suggests that the SPS obligation of nondiscrimination, while encompassing elements of all three GATT provisions, is *independent* of GATT MFN or NT provisions and

²³⁰ SPS Agreement, *supra* note 6, art. 2.3.

²³¹ Article 5.5 is to be read in the context of Article 2.3 and “may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3.” Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶ 212.

²³² Appellate Body Report, *Australia–Measures Affecting Importation of Salmon*, ¶ 252, WT/DS18/AB/R (Oct. 20, 1998) (*adopted* Nov. 6 1998) [hereinafter *Australia–Salmon*].

²³³ *Id.*

Article XX. The independent character of the SPS obligation stems from the relationship of the SPS Agreement with GATT. Although designed to elaborate rules for the application of GATT to SPS measures and in particular the provisions of Article XX(b),²³⁴ the SPS Agreement is legally a separate agreement from GATT. The substantive obligations of the SPS Agreement “go significantly beyond and are additional to” the requirements for invocation of Article XX(b).²³⁵ And such obligations are not imposed, as is the case of Article XX(b), to justify a violation of another GATT obligation.²³⁶

1. Leading Cases Involving Interpretation of Article 5.5

Article 5.5 has been interpreted in *EC–Hormones*²³⁷ and *Australia–Salmon*.²³⁸ In *EC–Hormones*, the challenged measures were EC regulations prohibiting the sale and importation of meat and meat products that had been treated with growth hormones.²³⁹ Canada and the United States argued that the EC measures were inconsistent with various provisions of the SPS Agreement, including Article 5.5. While the Appellate Body ultimately held that the EC measures were inconsistent with the requirements of the SPS Agreement, it reversed the Panel’s finding that such measures violated Article 5.5.²⁴⁰ According to the AB, a violation of Article 5.5 requires the presence of three distinct elements: (i) the Member imposing the SPS measure at issue has adopted different levels of sanitary protection in different but “comparable situations”; (ii) those levels of protection exhibit arbitrary or unjustifiable differences in their treatment of these situations; and (iii) the arbitrary or unjustifiable differences result in discrimination between Members or a disguised restriction on international trade.²⁴¹ The AB did not explain how the first element

²³⁴ See SPS Agreement, *supra* note 6, pmb., cl. 8.

²³⁵ Panel Report, *EC–Measures Affecting Meat and Meat Products, (Hormones)*, ¶ 8.38, WT/DS26/R/USA (Aug. 18, 1997) (*adopted* Feb. 13, 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R) [hereinafter Panel Report, *EC–Hormones (USA)*]; Panel Report, *EC–Measures Affecting Meat and Meat Products (Hormones)*, ¶ 8.41, WT/DS48/R/CAN (Aug. 18, 1997) (*adopted* Feb. 13, 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R) [hereinafter Panel Report, *EC–Hormones (CAN)*].

²³⁶ *Id.* While an SPS measure conforming to the SPS Agreement is presumed to comply with Article XX(b) of GATT, the converse is not true. See SPS Agreement, *supra* note 6, art. 2.4. For comment on the relationship between the SPS Agreement and the GATT, see R. Quick & A. Blüthner, *Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case*, 2 J. INT’L ECON. L. 4, 603 (1999).

²³⁷ Appellate Body Report, *EC–Hormones*, *supra* note 76.

²³⁸ See Appellate Body Report, *Australia–Salmon*, *supra* note 232.

²³⁹ See Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶¶ 2-5.

²⁴⁰ *Id.* ¶ 253.

²⁴¹ *Id.* ¶ 214.

should be determined; instead, it implicitly accepted the Panel's conclusions as to the comparability of the situations involved.²⁴² With respect to the second element, the AB found that the different levels of sanitary protection set by the EC for meat (beef) treated with growth hormones as compared with meat (pork) treated with antimicrobial agents were unjustifiable.²⁴³ Although they all involve the same health risk (carcinogenicity), growth hormones were banned while antimicrobial agents were allowed. Despite these two findings, however, the AB concluded under the third element that the unjustifiable distinction in the EC levels of protection did not result in discrimination between Members or a disguised restriction on international trade.²⁴⁴ In reaching this conclusion, the AB relied on its assessment that the EC regulations had legitimate purposes and were genuinely designed to protect its population from the risk of cancer.²⁴⁵

In *Australia–Salmon*, the SPS measures at issue were import restrictions imposed by Australia on salmon from Canada.²⁴⁶ Australia had identified 24 “disease agents” associated with North American salmon and considered them a threat to the health of the Australian salmon population. Accordingly, Australia prohibited importation of salmon from North America unless they had been heat-treated, which would eliminate the risk of disease. Canada challenged the import prohibition as inconsistent with various provisions of the SPS Agreement, including Article 5.5. Following the AB's statement in *EC–Hormones* regarding the three elements under Article 5.5, the Panel made detailed analysis with respect to each of them.²⁴⁷ It first found that Australia, while banning imports of Canadian salmon due to certain disease agents, permitted imports of herring and finfish, which are known to host the same diseases. Such differences in the treatment of salmon and other fish, according to the Panel, were arbitrary or unjustifiable given the evidence that there was a higher risk, or at least as high a risk, of disease introduction associated with herring and finfish as compared with Canadian salmon. The Panel further found that such differences resulted in “a disguised restriction on international trade.”²⁴⁸ This last finding was based on the cumulative consideration of several factors, one of which was that Australia had made a substantial but unexplained change in its conclusion between the draft report of import risk analysis issued in 1995, which recommended

²⁴² *Id.* ¶¶ 216-218; see *infra* Section IV.C.2.

²⁴³ *Id.* ¶¶ 226-235.

²⁴⁴ *Id.* ¶ 246.

²⁴⁵ *Id.* ¶¶ 244-246.

²⁴⁶ See Panel Report, *Australia–Measures Affecting Importation of Salmon*, ¶¶ 2.1-2.30, WT/DS18/R (June 12, 1998) (*adopted* Nov. 6, 1998, as upheld by Appellate Body Report, WT/DS18/AB/R) [hereinafter Panel Report, *Australia–Salmon*].

²⁴⁷ See *id.* ¶¶ 8.108-8.159.

²⁴⁸ *Id.* ¶ 8.159.

allowing the importation of Canadian salmon under certain conditions, and the final report in 1996, which recommended continuing the import prohibition. The Panel stated that the unexplained change in its conclusion “might well have been inspired by domestic pressures to protect the Australian salmon industry against import competition.”²⁴⁹ The Panel’s finding under Article 5.5 was upheld by the AB with only a minor modification in analysis.²⁵⁰ By implication, Australia was also found to have violated Article 2.3 of the SPS Agreement.²⁵¹

2. The “Comparable Situations” Analysis

The examination of the first element under Article 5.5 requires a determination whether different levels of protection are provided in different but comparable situations. The issue is essentially whether different treatment is accorded to similar situations, an inquiry that conceptually involves the same type of likeness analysis as that involved in the context of like products or like conditions.

In *EC–Hormones*, the Panel first interpreted situations as comparable if they involved the “same substance” or the “same adverse health effect.”²⁵² The EC appealed this interpretation, arguing that such common element was not necessarily sufficient to ensure a rational comparison.²⁵³ Rather than addressing whether the Panel had properly defined the “comparable situations,” the AB decided that there was no need to examine the matter in any length.²⁵⁴ Instead, it stated summarily: “The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable.”²⁵⁵ The AB’s statement, however, provides little interpretive guidance since it failed to discuss the criteria for choosing the relevant elements for comparison.

The question of what renders situations comparable under Article 5.5 can be readily addressed by applying the similarly-situated analysis. Once again, the relevant elements for comparison must be factors that are useful in furthering the goal of the provision. As evident from its text, Article 5.5 is designed to detect inconsistencies in trade protection provided by SPS measures, since adopting different levels of protection against the same or similar levels of sanitary risks may indicate that the SPS measures in question are unnecessary and constitute a disguised restriction on

²⁴⁹ *Id.* ¶ 8.154.

²⁵⁰ Appellate Body Report, *Australia–Salmon*, *supra* note 232, ¶¶ 143-177.

²⁵¹ *Id.* ¶ 178.

²⁵² Panel Report, *EC–Hormones (USA)*, *supra* note 235, ¶ 8.176; Panel Report, *EC–Hormones (CAN)*, *supra* note 235, ¶ 8.179.

²⁵³ Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶ 216.

²⁵⁴ *Id.* ¶ 217.

²⁵⁵ *Id.*

international trade.²⁵⁶ Given this purpose, the basis for comparison should be the *risks* against which the SPS measures at issue were adopted. In other words, whether situations are similar or comparable with respect to the purpose of Article 5.5 depends on whether they involve the same or similar levels of risks to human, animal or plant life or health. If different levels of protection are provided to products presenting the same or similar levels of risks, there is an inconsistency in the use of SPS measures. That is so, irrespective of whether the products involved are “like” or are of any national origins. Although the risks targeted by SPS measures vary from case to case and the perception of what constitutes a health risk evolves over time, a certain health risk ought to be the *indispensable* common element that renders situations comparable for the purpose of Article 5.5.

In light of the above analysis, the use of the “same substance” as the basis for comparison between different situations is conceptually problematic, because the same substance may or may not present the same health risk depending on the circumstances. For example, the Panel in *EC–Hormones* found that the EC’s ban on natural hormones injected as growth promoters was arbitrary and unjustifiable because they were the same substance as the hormones occurring naturally in meat, which was not regulated. This comparison was apparently erroneous since there was no reason to believe that injected natural hormones should have the same health effect as naturally-occurring hormones.²⁵⁷ The AB reversed the Panel’s finding, recognizing that there was a fundamental distinction between added hormones and naturally-occurring hormones in meat.²⁵⁸ The AB’s reversal, however, was not based on the ground that the two situations were incomparable due to the differences in health risks involved. Rather, the AB reasoned that the EC would have to incur an incredible regulatory burden if it were to regulate the effect of naturally-occurring hormones in foods.²⁵⁹

²⁵⁶ See Quick & Blüthner, *supra* note 236, at 620.

²⁵⁷ Whether they present the same or similar levels of risk is an issue relating to risk assessment. In this case, the AB upheld the Panel’s finding that the EC measure was not based on a risk assessment as required by Article 5.1 of the SPS Agreement, since the EC had not actually performed such risk assessment. See Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶ 208. Given that cognition of health risks is a progressive process, the comparison can only be made on the basis of perceived risks at the time. The issue of what constitutes risk against which SPS measures can be taken is at the heart of the entire regime of the SPS Agreement and is beyond the scope of this paper.

²⁵⁸ Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶ 221.

²⁵⁹ The AB reasoned that to require the EC to regulate naturally-occurring hormones in food would “entail such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity.” *Id.* Here, the AB appears to have confused the issue of

In essence, using the “same substance” as the basis for defining “comparable situations” under Article 5.5 is similar to using the physical characteristics of products as the basis for defining “like products” under the MFN and NT provisions. In both contexts, the comparison is rendered impotent without referring to the goal of the underlying rule. Fortunately, the analysis of comparable situations under Article 5.5 improved significantly in *Australia–Salmon*. There, the Panel focused on the sanitary risks targeted by the Australian ban on the imports of Canadian salmon, and found that the imports of herring and finfish and the imports of Canadian salmon were comparable situations because they represented the same kinds of risks to the Australian salmon population.²⁶⁰ The Appellate Body upheld the Panel’s finding.²⁶¹

3. Regulatory Purposes and Standards of Review under Article 5.5

The application of Article 5.5 in the two cases has produced opposite outcomes: the EC ban on hormone-treated beef was held not in violation of the article, whereas the Australia ban on Canadian salmon was held to constitute a disguised restriction on international trade in violation of the article. The divergent results came despite the fact that, under the analysis of the first and second elements of Article 5.5, both bans were found to draw “arbitrary or unjustifiable distinctions” in the levels of protection provided in comparable situations.²⁶² It was the findings under the third element of Article 5.5 that made the difference in the outcomes. Apparently, the decisive factor was the perceived regulatory intent or purposes of the SPS measures at issue. While the EC was able to demonstrate to the satisfaction of the tribunal that it had sufficient non-protectionist reasons to impose the ban on the import of hormone-treated beef, Australia was unable to do so with respect to its ban on the import of Canadian salmon.

Hence, it seems that the AB not only is willing to consider legislative intent,²⁶³ but has solely relied on the perceived regulatory purpose, in its finding of discrimination or a disguised restriction on trade under Article

situation comparability under the first element of Article 5.5 with the issue of whether the distinction in treatment is “arbitrary or unjustifiable” under the second element.

²⁶⁰ Panel Report, *Australia–Salmon*, *supra* note 246, ¶ 8.121.

²⁶¹ *See supra* note 250.

²⁶² According to the AB, the arbitrary or unjustifiable distinction in the levels of production “is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade”; whether the unjustifiable distinctions result in discrimination between Members or a disguised trade restriction “must be sought in the circumstances of each individual case.” Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶ 240.

²⁶³ Appellate Body Report, *EC–Hormones*, *supra* note 76, ¶¶ 243-245 (discussing the legislative intent of the EC in enacting the ban).

5.5 (and by implication a finding of discrimination or a disguised restriction on trade under Article 2.3). The AB's attention to legislative intent in SPS cases marks a sharp contrast with its unwillingness to consider regulatory purposes in the likeness decision under GATT Article III²⁶⁴ and its ambivalent position on whether the policy objective of a measure should be taken into account under the chapeau of Article XX.²⁶⁵

It also seems that the AB has applied a less strict standard of scrutiny under Article 5.5 with respect to an origin-neutral measure having a *bona fide* regulatory purpose. Under the SPS Agreement, a Member is required to apply SPS measures "only to the extent necessary to protect human, animal or plant life or health."²⁶⁶ Nonetheless, in determining whether the EC ban resulted in discrimination between Members in *EC-Hormones*, the AB apparently deferred to the non-protectionist purpose of the ban, rather than focusing on whether the ban was necessary to protect human health.²⁶⁷ Although the EC measure was ultimately held to be inconsistent with the SPS Agreement on different grounds,²⁶⁸ it is interesting to note that, with respect to the issue of defining discrimination, the standard of scrutiny applied in *EC-Hormones* appears to be more lenient than that applied under the chapeau of Article XX in *U.S.-Shrimp*, which also involved an origin-neutral measure with a non-protectionist purpose.²⁶⁹

4. Interpretation of Article 2.3

*Australia-Salmon (Article 21.5)*²⁷⁰ is the only case so far that interprets the elements of the nondiscrimination requirement of Article 2.3. The case concerns a subsequent dispute over Australia's implementation of the rulings in *Australia-Salmon*. Canada claimed that Australia had failed to impose a stricter control over the internal movement of Australian fish as compared to its control over the import of Canadian salmon, and that such practice constituted discrimination between Australia and Canada under Article 2.3.²⁷¹ In addressing this claim, the Panel considered Aus-

²⁶⁴ See *supra* Section III.B.1.

²⁶⁵ See *supra* text at notes 194-195.

²⁶⁶ SPS Agreement, *supra* note 6, art. 2.2.

²⁶⁷ The AB held that it was not necessary in this case to make a finding on whether Article 2.2 was violated since a finding had been made under Article 5.1 which was informed by, and provides more specific rights and obligations than, Article 2.2. See Appellate Body Report, *EC-Hormones*, *supra* note 76, ¶ 250.

²⁶⁸ See *supra* note 257.

²⁶⁹ See *supra* text at notes 209-13.

²⁷⁰ Panel Report, *Australia-Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada*, WT/DS18/RW (Feb. 18, 2000) (*adopted* March 20, 2000) [hereinafter, *Australia-Salmon (Article 21.5)*]

²⁷¹ *Id.* ¶ 7.109. Canada made a similar claim in the original dispute that Australia failed to impose control over the internal movement of Australian fish from infected states to disease-free states while prohibiting importation of Canadian salmon, and

tralia's explanation that the risk of disease associated with the internal movement of Australian fish was different from that associated with imported salmon.²⁷² It expressed doubts as to whether "identical or similar conditions" prevailed in the territories of both Australia and Canada within the meaning of Article 2.3, noting "the substantial difference in disease status" between the two countries.²⁷³ Accordingly, the Panel held that Canada did not meet its burden of demonstrating that Australia discriminated against Canada arbitrarily or unjustifiably under Article 2.3.²⁷⁴

The Panel in this case used the risk of diseases associated with imported salmon as the basis for comparing conditions under Article 2.3, an approach that is sound in light of the similarly situated analysis. If the goal of Article 2.3 is to ensure that Members will take SPS measures solely for the purpose of protecting human, animal or plant life or health, and not for protectionist reasons, the criteria for determining whether "identical or similar conditions" prevailed between the countries concerned must center on the sanitary risk targeted by the SPS measure at issue.

D. *Nondiscrimination under the Enabling Clause*

Preferential treatment of developing countries is one of the major exceptions to the GATT MFN principle. The legal basis for this exception is set out comprehensively in the 1979 GATT Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries,²⁷⁵ known as the Enabling Clause, which became an integral part of GATT 1994 under the WTO Agreement.²⁷⁶ The Enabling Clause provides that "notwithstanding" the MFN obligation under GATT Article I, Members "may accord differential and more favorable treatment to developing countries, without according such treatment to other [Members]."²⁷⁷

that the difference in treatment constituted discrimination within the meaning of Article 2.3. The Panel saw no need to examine the discrimination claim after it found that the Australian measure constituted a disguised restriction on international trade. Panel Report, *Australia-Salmon*, *supra* note 246, ¶ 8.184.

²⁷² Panel Report, *Australia-Salmon (Article 21.5)*, *supra* note 270, ¶ 7.93.

²⁷³ *Id.* ¶ 7.113.

²⁷⁴ *Id.*

²⁷⁵ Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28 1979), B.I.S.D (26th Supp.) 203 (1980) [hereinafter the Enabling Clause].

²⁷⁶ The Enabling Clause constitutes one of "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement.

²⁷⁷ Enabling Clause, *supra* note 275, paragraph 1.

A primary form of such treatment is the grant of preferential tariffs by developed Members to products of developing countries in accordance with the Generalized System of Preferences (GSP). Drawn up by the United Nations Conference on Trade and Development (UNCTAD) in the late 1960's, the GSP was envisioned as "a mutually acceptable system of generalized, non-reciprocal, non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries."²⁷⁸ The GSP programs are voluntarily adopted and individually designed by developed countries under their domestic laws. In practice, preference-giving countries have imposed various limitations on the product coverage and eligibility of beneficiaries under their GSP programs.²⁷⁹ While some of the eligibility criteria are based on economic factors, such as requiring more advanced developing countries to "graduate" from the GSP program and granting greater benefits to the least developed countries, others are motivated by political and national interest considerations. For example, the United States excludes eight categories of countries from GSP benefits, which include countries that are "communist" (with exceptions), that aid or abet terrorism, that fail to enforce arbitral awards in favor of U.S. citizens, that expropriate the property of U.S. citizens, including intellectual property, without just compensation, and that fail to comply with international labor standards.²⁸⁰ The beneficiary eligibility requirements inevitably result in differentiation among developing countries, calling into question whether such programs are truly "nonreciprocal" and "nondiscriminatory." However, given the voluntary nature of the GSP programs, it was not clear, before the WTO decision in *EC-Preferences*,²⁸¹ whether the "generalized, non-reciprocal and non-discriminatory" characteristics of the GSP were legally binding.

1. Interpretation of "Non-Discriminatory" in *EC-Preferences*

The issue of non-discriminatory treatment of GSP beneficiaries is at the heart of the dispute in *EC-Preferences*. In this case, India challenged a special program of EU's GSP that accorded special tariff preferences to twelve specific developing countries affected by drug production and traf-

²⁷⁸ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 144. For a discussion of the origin of the GSP, see Panel Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.64, WT/DS246/R (Dec. 1, 2003) (adopted Apr. 20, 2004, as modified by Appellate Body Report, WT/DS246/AB/R) [hereinafter Panel Report, *EC-Preferences*].

²⁷⁹ See Gene M. Grossman & Alan O. Sykes, *A Preference for Development: the Law and Economics of GSP*, 4 *WORLD TRADE REV.* 41, 43-47 (2005), for a description of the U.S. and EU GSP programs.

²⁸⁰ 19 U.S.C. § 2462(b) (2005).

²⁸¹ Appellate Body Report, *EC-Preferences*, *supra* note 11.

ficking (the Drug Arrangements). According to India, the Enabling Clause imposed a nondiscrimination obligation on preference-giving countries, which prohibited them from differentiating between beneficiary countries, subject only to the exceptions set out in the Enabling Clause.²⁸² Because the Drug Arrangements did not fall into those exceptions, India contended that the EU scheme was unjustifiable under the Enabling Clause and therefore violated GATT Article I:1.

The term “nondiscriminatory” appears in footnote 3 of the Enabling Clause, which qualifies the term “Generalized System of Preferences” in paragraph 2(a) “[a]s described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of ‘generalized, non-reciprocal and non-discriminatory preferences beneficial to the development countries.’”²⁸³ Two key questions were raised in the interpretation of footnote 3: first, whether the term “non-discriminatory” imposes a legal obligation on preference-giving countries or merely provides a cross-reference to the description of GSP; and second, if a legal obligation of nondiscrimination is so imposed, whether such obligation requires preference-giving countries to grant the same tariff preferences to all GSP beneficiaries. The Panel in this case answered both questions in the affirmative, finding that “the term ‘non-discriminatory’ in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations.”²⁸⁴

On appeal, the Appellate Body agreed with the Panel on the first question, but reversed the Panel’s finding on the second. The AB affirmed that there is a legal obligation of nondiscrimination imposed on the preference-granting countries under the Enabling Clause.²⁸⁵ This holding is significant in that it confirmed for the first time that GSP programs are subject to WTO multilateral disciplines despite being voluntary in nature.²⁸⁶ Nonetheless, the Appellate Body disagreed with the Panel’s

²⁸² The exceptions set out in the Enabling Clause include differentiation among GSP beneficiaries for the purpose of providing special treatment to the least-developed countries pursuant to paragraph 2(d) of the Enabling Clause, and setting *a priori* import ceilings for products of individual developing countries reaching a certain competitive level. See Panel Report, *EC-Preferences*, *supra* note 278, at ¶ 7.116.

²⁸³ The Enabling Clause, *supra* note 275, n.3. The 1971 Decision referred to in footnote 3 contained the initial waiver of GATT Article I obligation with respect to the GSP for ten years. GATT Doc. L/3545 (June 25, 1971), B.I.S.D. (18th Supp.) 24 (1972).

²⁸⁴ Panel Report, *EC-Preferences*, *supra* note 278, ¶ 7.176.

²⁸⁵ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶¶ 143-147.

²⁸⁶ See Grossman & Sykes, *supra* note 279, at 63-65 (pointing out reasons for the WTO to regulate the GSP, such as limiting negative international externalities generated by GSP, despite that GSP is a gift in nature). For an opposing view, see Robert Howse, *India’s WTO Challenge to Drug Enforcement Conditions in the*

finding that this nondiscrimination obligation requires the grant of identical tariff preferences to all developing countries without differentiation. Instead, the AB held that preference-granting Members are required only to “ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the ‘development, financial and trade needs’ to which the treatment in question is intended to respond.”²⁸⁷ Applying this standard, the AB found that the Drug Arrangements were inconsistent with the non-discriminatory requirement of the Enabling Clause because they had failed to set any objective criteria that would allow all developing countries that “are similarly affected by the drug problem” to become beneficiaries thereunder.²⁸⁸

The AB decision in this case is a significant development in WTO jurisprudence on nondiscrimination, for this was the first time that the generic term “non-discriminatory” was interpreted as a requirement to treat similarly-situated Members similarly without the aid of any specific treaty language to that effect. Unlike GATT Article XX, GATS Article XIV or Article 2.3 of the SPS Agreement, in which the term “discrimination” is followed by a defining phrase “between countries where the same (or like or similar) conditions prevail,” the text of the Enabling Clause does not provide any qualifying language for the term “non-discriminatory.” The content of this nondiscrimination obligation, therefore, is completely open to interpretation.

The AB began the interpretation of the term “nondiscrimination” by examining its ordinary meanings. Upon acknowledging that the term “discriminate” can convey both a neutral meaning of making a distinction and a negative connotation of a distinction that is unjust or prejudicial, the AB concluded: “Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of ‘discriminate’ converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory.”²⁸⁹ According to the AB, both India and EU agreed that similarly-situated GSP beneficiaries should not be treated differently, and they disagreed only “as to the basis for determining whether beneficiaries are similarly-situated.”²⁹⁰ While India’s argument suggested that all GSP beneficiaries should be deemed as similarly-situ-

European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for ‘Political’ Conditionality in US Trade Policy, 4 CHI. J. INT’L L. 385 (2003); and Robert Howse, et al, *Internet Roundtable: The Appellate Body’s GSP Decision*, 3 World Trade Rev. 239, 246 (2004) (arguing that nondiscrimination is not a binding legal obligation under the Enabling Clause).

²⁸⁷ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 173.

²⁸⁸ *Id.* ¶¶ 180-189.

²⁸⁹ *Id.* ¶ 153.

²⁹⁰ *Id.*

ated under a Member's scheme, EU believed that GSP beneficiaries were similarly-situated only when they had "similar development needs."²⁹¹

The central issue raised here is whether the nondiscrimination obligation of the Enabling Clause permits the preference-giving Member to draw distinctions among GSP beneficiaries based on a need shared only by a subgroup of the beneficiaries. The Panel and the AB reached opposite conclusions on this issue. Because the differing approaches taken by the Panel and the AB bear upon the "similarly-situated" analysis, both their views are discussed below.

A major difference of opinion between the Panel and the AB appears in their interpretation of paragraph 3(c) of the Enabling Clause, to which both the Panel and the AB paid special attention as part of the relevant context for the term "nondiscriminatory."²⁹² Paragraph 3(c) provides:

Any differential and more favorable treatment provided under this clause . . . shall in the case of such treatment accorded by developed contracting parties to developing countries *be designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries.* (emphasis added)

Evidently, this provision is most relevant to the interpretation of the "nondiscriminatory" obligation because it embodies the purpose of the GSP and in turn the purpose of the Enabling Clause. The critical issue in interpreting paragraph 3(c) is to determine whether "the development, financial and trade needs of developing countries" refer to the needs of *all* developing countries or the needs of selected *individual* developing countries. The text is ambiguous.

In resolving this ambiguity, the Panel chose to interpret "the development, financial and trade needs of developing countries" to mean the needs of *all* developing countries. In reaching this conclusion, the Panel examined the origin and drafting history of the Enabling Clause. The Panel found that nothing in the drafting history supported the view that paragraph 3(c) permitted preference-giving countries to respond to the needs of *selected* developing countries.²⁹³ Moreover, the Panel believed that "[t]here is no reasonable basis to distinguish between different types of development needs, whether they are caused by drug production and trafficking, or by poverty, natural disasters, political turmoil, poor education, the spread of epidemics, the magnitude of the population, or by other problems."²⁹⁴ Given the practical difficulties in elaborating any reasonable "objective criteria," the Panel concluded that differentiation between GSP beneficiaries could not have been intended by the Enabling

²⁹¹ *Id.*

²⁹² Both tribunals discussed paragraph 3(c) in length. See Panel Report, *EC-Preferences*, *supra* note 278, ¶¶ 7.66-7.116; Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶¶ 157-165.

²⁹³ Panel Report, *EC-Preferences*, *supra* note 278, ¶ 7.100.

²⁹⁴ *Id.* ¶ 7.103.

Clause except where explicitly stated in the Clause.²⁹⁵ Furthermore, the Panel expressed the view that to allow differentiation among GSP beneficiaries according to their individual needs would lead to “the collapse of the whole GSP system and a return back to special preferences favoring selected developing countries, precisely the situation that negotiators aimed to eliminate in the late 1960’s.”²⁹⁶

By contrast, the AB interpreted paragraph 3(c) to mean that preference-granting countries may respond to needs that are common only to some but not all developing countries. According to the AB, since the very purpose of the special and differential treatment permitted under the Enabling Clause is to foster economic development of developing countries, and since such development will not be in lockstep for all developing countries, the “needs of developing countries” should be understood to mean varying needs of developing countries at the different stages of economic development. The AB found support for this view in paragraph 7 of the Enabling Clause, which refers to the “progressive development” of the economies of developing countries, and the Preamble to the WTO Agreement, which recognizes the need for positive efforts designed to ensure that developing countries secure a share in the growth in international trade “commensurate with the needs of their economic development.”²⁹⁷ The AB then explained that a development “need” cannot be based merely on an assertion by a preference-granting country or a beneficiary country; rather, it must be assessed according to an *objective* standard.²⁹⁸ Disagreeing with the Panel’s belief that no reasonable objective standard for differentiating development needs could be elaborated, the AB stated that “[b]road-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.”²⁹⁹ As to the Panel’s view that allowing differentiation among GSP beneficiaries would result in the collapse of the GSP system, the AB responded by stating that such a conclusion was “unwarranted” and that the Enabling Clause contained sufficient conditions on the granting of preferences to protect against such an outcome.³⁰⁰

²⁹⁵ *Id.* ¶ 7.104.

²⁹⁶ *Id.* ¶ 7.102.

²⁹⁷ See Appellate Body Report, *EC–Preferences*, *supra* note 11, ¶¶ 160-161.

²⁹⁸ *Id.* ¶ 163.

²⁹⁹ *Id.*

³⁰⁰ *Id.* ¶ 156. According to the AB, for example, the term “generalized” requires the GSP schemes of preference-giving countries remain “generally applicable.” The AB, however, did not explain why the drug preferences should be considered a “generally applicable” GSP scheme. Given that only a subset of developing countries are ever affected by the drug problem, it is difficult to see how the drug preferences can be viewed as *generally* applicable to developing countries. Making the preferences *de jure* available to all developing countries that are similarly affected by the drug

The divergent conclusions drawn by the Panel and the AB from the ambiguous text of paragraph 3(c) reflect the different values that the Panel and the AB placed on the GSP and the developing country exception to the MFN principle. When the determination of the proper basis for classification involves a normative decision, as was the case here, the relevant values held by the tribunal will determine the outcome, as will be shown below.

2. Applying the Similarly-Situated Analysis

Applying the similarly-situated analysis to this case provides a conceptual perspective to the tribunals' interpretations of the nondiscrimination obligation of the Enabling Clause. As indicated above, the central question raised in this case is whether the Enabling Clause permits the classification of a subgroup of GSP beneficiaries as "similarly situated" on the basis of a specific need shared by them. In order to answer this question, one must first identify the purpose of the Enabling Clause that contains the nondiscrimination obligation. To be relevant, a criterion for drawing distinctions between GSP beneficiaries must be conducive to or useful in furthering that purpose. Unless the criterion is indispensable for achieving that purpose, however, whether to allow it in determining similarity between the beneficiaries is a matter of normative judgment.

(a) The Purpose of the Enabling Clause

The Appellate Body has recognized two objectives of the Enabling Clause in this case. First, the Enabling Clause enables developed countries to provide preferential treatment to developing countries so as to "foster economic development of developing countries."³⁰¹ This objective is based on the assumption that developing countries have different economic and trade needs from developed countries and that such special needs can be addressed through tariff and other preferential treatment permitted under the Enabling Clause. This objective is also embodied in the provision of paragraph 3(c) which, as indicated above, requires that any special treatment provided under the Clause be designed "to respond positively to the development, financial and trade needs of developing countries."

Second, the Enabling Clause was intended to address the then-existing "special" preferences granted by developed countries to selected developing countries. Prior to the UNCTAD negotiations, there had been a patchwork of discriminatory preferences in the trade policies of developed nations that were largely based on colonial ties.³⁰² Such discriminatory preferences gave rise to the same type of problems addressed by the

problem, as the EC should have done in the AB's opinion, will not change the lack of general applicability of this criterion.

³⁰¹ *Id.* ¶ 160.

³⁰² Grossman & Sykes, *supra* note 279, at 53.

MFN obligation.³⁰³ The “generalized system of preferences” drawn up by the UNCTAD was designed to replace the historical patchwork of discriminatory preferences. As the AB acknowledged, “one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies.”³⁰⁴ This objective underscores the “generalized” and “non-discriminatory” requirements of the GSP.

(b) Relevance of the Drug Criterion

In view of these two objectives of the Enabling Clause, whether a subgroup of developing countries may be classified as similarly-situated on the basis of drug problems will depend on whether using the drug criterion serves to advance these two objectives. In order to determine whether the drug criterion furthers the objective of fostering economic development of the drug-affected countries, it will be necessary to assess whether the drug problem experienced by these countries can be alleviated by the new market access created by tariff preferences. Indeed, the AB has articulated the following standard: “In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.”³⁰⁵ Despite this articulation, however, the AB did not proceed to examine whether the particular need of the drug-affected countries can be effectively addressed through tariff preferences, on the ground that the Panel had made no finding on the issue.³⁰⁶ As a result, in reaching the conclusion that the drug criterion is not discriminatory, the AB had simply assumed the efficacy of tariff preferences in combating the drug problem.³⁰⁷ Based on this

³⁰³ *Id.* at 64 (indicating that the arguments for limiting differential treatment in GSP schemes parallel those that have made by economists and legal scholars to justify the MFN rule in GATT).

³⁰⁴ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 155 (footnote omitted).

³⁰⁵ *Id.* ¶ 164.

³⁰⁶ *Id.* ¶¶ 178-179 (stating that the Panel did not determine whether the Drug Arrangements satisfy the conditions set out in paragraph 3(c)). It should be noted that the Panel assessed the role of tariff preferences in combating the drug problem in the context of discussing whether the EC drug program was designed to protect human life and health within the meaning of GATT Article XX(b). The Panel was of the view that the market access created by additional tariff preferences “plays a supportive role” in relation to alternative development, but “is not itself a significant component” of the comprehensive strategy of the United Nations to combat drugs. See Panel Report, *EC-Preferences*, *supra* note 278, ¶ 7.206.

³⁰⁷ *Cf.* Grossman & Sykes, *supra* note 279, at 55-56 (suggesting that “the drug-related preferences were enacted for the benefit of Europe, to reward cooperation in its efforts to reduce traffic in drugs toward Europe, rather than to assist the beneficiaries in addressing any perceived ‘development need’ of their own.”).

assumption, of course, one can logically conclude that the drug criterion is conducive to furthering the first objective of the Enabling Clause.

Examining the drug criterion against the second objective of the Enabling Clause is rather straightforward. If the elimination of a “fragmented system of special preferences” is the goal, then allowing the grant of special preferences to some but not all GSP beneficiaries (with the exceptions explicitly provided in the Enabling Clause) will be inconsistent with this goal because it necessarily leads to the fragmentation of the system. Therefore, the drug criterion detracts from, rather than serves, the second objective of the Enabling Clause.

Based on the above analysis, one can conclude that the drug criterion for classifying GSP beneficiaries is (presumably) conducive to furthering the first, but not the second, objective of the Enabling Clause. This inconsistency stems from the tension between the two objectives as interpreted by the AB. Once the AB construed paragraph 3(c) as authorizing the preference-giving country to respond to different needs of individual developing countries, it introduced a conflict between the two objectives of the Enabling Clause, since granting preferences according to the need shared by selected beneficiaries would inevitably lead to fragmentation of the system.

(c) The Normative Decisions and Standards of Review

When there is a potential conflict between the two objectives of the Enabling Clause, the tribunals face a normative decision as to which of the two objectives ought to be the primary one in interpreting the term “nondiscrimination.” In this instance, the Panel and the AB made different choices.

The Panel was evidently more concerned with the potential fragmentation and abuse of the GSP system. Under the Panel’s interpretation, all beneficiaries of a GSP program must receive identical preferences, except for the limited differentiation explicitly permitted by the Enabling Clause. This interpretation would have the effect of preserving the MFN norm within the GSP system. The Panel’s view is apparently in line with the substantial doubts raised by economists about the wisdom of the GSP programs as currently implemented³⁰⁸ and the concern shared by many

³⁰⁸ For a summary of criticism of the GSP as implemented, see THE FUTURE OF THE WTO, *Addressing institutional challenges in the new millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (2005), ¶¶ 93-101, available at www.wto.org. The major arguments of the critics include concerns that developing countries have been burdened with conditions unrelated to trade imposed by the preference-granting countries, that the product coverage and preference margins in GSP schemes are determined by the preference-giving countries rather than by the need of developing countries, that empirical studies have shown little benefits have in fact accrued to developing countries under the GSP, and that GSP beneficiaries tend to become over-reliant on preferences or trapped by the nature of the system at the expense of industrial and agricultural diversification. See also Grossman & Sykes, *supra* note 279, at 57-66, for an economic analysis of tariff

that the world trading system faces a grave danger of fragmentation due to serious erosions of the MFN principle.³⁰⁹ Hence, while acknowledging that one of the WTO objectives is to secure for the developing countries a share in the growth in international trade commensurate with their development needs, the Panel emphasized the WTO objective of promoting general liberalization of trade and the function of the nondiscrimination principle in achieving that objective. According to the Panel, the function of the term “non-discriminatory” in footnote 3 is to prevent abuse caused by discrimination in granting GSP benefits; and given that function, the objective of promoting general trade liberalization “contributes more to guiding the interpretation of “non-discriminatory” than the objective of promoting the trade of developing countries.³¹⁰ On the whole, the Panel’s opinion is more rooted in the economic rationale of the nondiscrimination principle.

In comparison, the AB appears to be much less concerned with a fragmented GSP system and more willing to assume the positive impact of GSP on the economic development of developing countries. The AB reasoned: “An interpretation of ‘non-discriminatory’ that does not require the granting of ‘identical tariff preferences’ allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of *additional preference* for developing countries with particular needs.”³¹¹ (emphasis added) As a result, the AB also appears to be more sensitive to the political reality of the GSP system.³¹² Given that the existing GSP programs impose various eligibility criteria on the beneficiaries, a strict interpretation of the “nondiscriminatory” requirement could invalidate some of such programs, which may lead to the withdrawal of GSP benefits altogether. Hence, with its positive view of the GSP, the AB made its normative decision that fostering the economic development of developing countries should be the primary goal in interpreting the “nondiscrimination” requirement. Correspondingly, the AB downplayed the risk that special preferences granted to selected beneficiaries could lead to a fragmented system.

preferences (concluding that the benefits generated by tariff preferences are likely to be small and pointing out that differentiation among GSP beneficiaries generates negative international externalities).

³⁰⁹ See THE FUTURE OF THE WTO, *supra* note 308, ch. II (The erosion of nondiscrimination)

³¹⁰ Panel Report, *EC-Preferences*, *supra* note 278, ¶¶ 7.155-7.158.

³¹¹ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 169 (footnote omitted).

³¹² See Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C.J. INT’L L. & COM. REG. 515 (Spring 2005), for an analysis on the role the AB has played in balancing the political forces behind the GSP system through its decision in *EC-Preferences*.

Having decided that the first objective of the Enabling Clause is more important in interpreting the “nondiscriminatory” requirement, the AB went a step further in upholding the drug criterion under the Enabling Clause. As previously noted, the AB did not examine whether tariff preferences can effectively address the special needs of the countries affected by the drug problem. Given the lack of evidence that the drug preferences can “effectively” address the developmental needs of the drug-affected countries, and given that such preferences necessarily cause fragmentation of the system, the AB could have disallowed the drug criterion as a legitimate basis for classification of GSP beneficiaries. Instead, the AB made its normative decision to allow the drug criterion to enter into the similarity decision despite its tenuous connection with the two objectives of the Enabling Clause.

It is clear that in making these normative decisions the AB applied a rather lenient standard of review to scrutinize a Member’s GSP program. Despite its articulated “effectiveness” standard, the actual standard applied by the AB in this case is close to that of a rational connection, which would not require empirical proof of effectiveness.³¹³ In comparison, the Panel sought to apply a stricter standard of scrutiny in order to impose a higher degree of multilateral discipline on the GSP program.

The minimum level of scrutiny applied by the AB under the Enabling Clause contrasts with the strict standard of scrutiny it has applied under the chapeau of GATT Article XX,³¹⁴ even though both the Enabling Clause and Article XX provide exceptions to the MFN obligation in GATT Article I. The application of a low standard of scrutiny under the Enabling Clause makes sense, however, for the following reasons. First, given that GSP benefits are gift-like in nature, a minimum level of multilateral discipline seems appropriate for GSP programs. As long as GSP programs are perceived as playing a positive role in international trade, the WTO may not wish to discourage their existence by over-policing their operations. Second, the application of the Enabling Clause has very different trade effects from that of Article XX. While an exception under Article XX leads to the authorization of an increase in trade restrictions, the Enabling Clause departs from MFN provisions in the direction of lowering trade barriers from the MFN level. Although GSP programs may produce trade-distorting effects,³¹⁵ such effects are to a large extent limited by the margin of the MFN rates, which have lowered considerably since the GSP scheme was first established. Moreover, in this particular case, the drug preferences offered by the EU were additional benefits to its existing GSP scheme, which would translate into further reduction of its overall level of trade barriers. Thus, considering the differences in trade effects between the two exceptions, it seems reasonable to apply a

³¹³ See Robert Howse, *Internet Roundtable*, *supra* note 286, at 248.

³¹⁴ See *supra* Section IV.A.3(b).

³¹⁵ See *supra* note 308.

lower standard of scrutiny under the Enabling Clause than under the chapeau of Article XX.³¹⁶

3. The Issue of GSP Conditionality

A related but more general issue that can also benefit from the similarly-situated analysis is the issue of GSP conditionality. The AB's holding in *EC-Preferences* that a binding legal obligation of nondiscrimination exists under the Enabling Clause has opened the door for questioning the legality of GSP conditionality. In contrast with GATT Article I:1, which requires that MFN treatment be extended to all WTO Members "unconditionally," the Enabling Clause is silent as to whether preferential treatment for developing countries must be unconditional. In practice, preference-giving countries have attached various types of conditions or incentives to their GSP schemes, ranging from antiterrorism, enforcement of arbitral award, expropriation protection, to labor and environmental standards, to "unfair trade practices."³¹⁷ Unlike drug production and trafficking, which is a condition prevailing in only a subset of developing countries, many of the above-mentioned conditions are generally applicable to the developing world.

However, does a generally applicable condition also satisfy the non-discriminatory requirement of the Enabling Clause? The issue has not been contested at the WTO dispute settlement forum, although it was initially raised by India in *EC-Preferences*.³¹⁸ Intuitively, one might think that a generally applicable condition must be nondiscriminatory in

³¹⁶ It is interesting to note that the AB's holding that differently situated GSP beneficiaries should be treated differently seems to be consistent with its ruling in *U.S.-Shrimp* that formally identical treatment of differently situated countries is discriminatory. There is however a difference between the two rulings. In *U.S.-Shrimp*, the AB applied a strict standard of review, obligating the United States to provide different treatment to differently situated countries. In comparison, applying a less strict level of scrutiny, the AB permits, rather than requires, a Member to treat differently situated countries differently under the Enabling Clause.

³¹⁷ See *supra* text at note 280 for examples of eligibility criteria imposed under U.S. law. For a summary of EU GSP conditions, see Grossman & Sykes, *supra* note 279, at 46. See also Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507 (2003).

³¹⁸ In addition to the drug program, India originally brought claims with respect to the EC's special incentive programs for the protection of environment and labor rights. It subsequently dropped those claims, but reserved its right to bring separate new complaints on the special incentive programs. Panel Report, *EC-Preferences*, *supra* note 278, ¶ 1.5. India had also charged the EC's incentive programs as "discriminatory" in a Trade Policy Review of the European Union. Bartels, *supra* note 317, at 525 (citing WTO Document, *Trade Policy Review - The European Union - Minutes of Meeting on 12 and 14 July 2000*, WT/TPR/M/72, 26 October 2000, ¶ 173.)

nature.³¹⁹ The similarly-situated analysis, however, will direct us to focus on the purpose, rather than the generality, of the condition at issue, which may lead us to a different conclusion.

Conceptually, any condition on the eligibility for tariff preferences is also a criterion for classifying similarly-situated groups. For example, a GSP scheme requiring that the beneficiaries observe certain labor standards would divide developing countries into a group that is eligible for the benefits and a group that is ineligible for the benefits. In order to determine whether such differentiation is discriminatory, one must assess whether the basis of classification is conducive to advancing the purpose of the Enabling Clause.

In accordance with the AB decision in *EC-Preferences*, the primary purpose of the Enabling Clause is to foster economic development of developing countries based on their “development, financial and trade needs”; therefore, to be nondiscriminatory a condition differentiating between GSP beneficiaries must be at least rationally related to the advancement of that purpose. In addition, what constitute the “development, financial and trade needs” of developing countries can be determined by broad-based recognition of such needs set out in the WTO Agreement or other multilateral treaties.³²⁰ Against this standard, different conditions might fare differently. For conditions that are imposed completely out of the national interests of the preference-giving country, such as enforcement of arbitral awards in favor of its citizens and protection of the property of its nationals, it might be very difficult to argue that these conditions are rationally related to the advancement of economic development of developing countries. In comparison, for conditions such as compliance with certain labor and environmental standards, although they are imposed to address primarily the concerns of preference-giving countries, it is possible to argue that these standards will benefit the economic growth of the developing countries in the long run based on the broad recognition of these standards in international agreements. In this regard, one may further distinguish between “positive” and “negative” conditionality of the GSP programs.³²¹ Positive conditionality operates as incentives that provide *additional* preferences to GSP beneficiaries that meet certain conditions, such as compliance with certain labor and environmental standards or combating drug trafficking. Negative conditionality, on the other hand, allows the preference-giving country to withdraw existing GSP benefits when the GSP beneficiary fails to observe specific conditions. It is therefore arguable that positive conditionality contributes

³¹⁹ See Bartels, *supra* note 317, at 525-26 (suggesting that generally applicable conditions do not discriminate between developing countries on a *de jure* basis, although they may discriminate on a *de facto* basis if on the facts certain countries are unable to comply with these standards).

³²⁰ Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 163.

³²¹ See generally Bartels, *supra* note 317.

more to the economic development of developing countries than negative conditionality.³²²

In addition, it should be noted that if a condition attached to GSP benefits is consistent with other exceptions to GATT Article I:1, it should not run afoul with the non-discriminatory requirement of the Enabling Clause. The relationship between the Enabling Clause and other MFN exceptions has not been examined by the WTO tribunals.³²³ Nonetheless, being a general exception to GATT Article I:1, the Enabling Clause cannot logically have a broader scope of application than that of Article I:1 itself. Accordingly, if a Member can be justified in withholding MFN benefits from another Member based on a regulatory concern recognized by GATT Article XX (e.g., protection of public morals) or a national security concern under GATT Article XXI (e.g., international terrorism), it should be allowed to do the same with respect to the GSP benefits. The only question then is whether the same standard of review should apply in the context of the Enabling Clause as in the context of Articles XX and XXI with respect to these grounds.³²⁴ If the above reasoning is correct, then the generally applicable conditions that could be found as inconsistent with the non-discriminatory requirement of the Enabling Clause would be limited to those that go beyond the scope of other permitted MFN exceptions under GATT.

In sum, under the similarly-situated analysis, whether or not a generally applicable condition attached to a GSP program is discriminatory will depend on whether compliance with the condition serves to advance the purpose of the Enabling Clause. Such purpose has been interpreted by the AB as primarily that of fostering economic development of developing countries based on their internationally-recognized developmental

³²² In *EC-Preferences*, the AB mentioned EU's special incentive arrangements for the protection of labor rights and environment as a positive example for their procedural fairness, in contrast with the drug arrangements. Appellate Body Report, *EC-Preferences*, *supra* note 11, ¶ 182. One might take this mention as a sign that the AB would uphold these particular programs under the Enabling Clause.

³²³ The issue was raised in *EC-Preferences*, in which the EC defended its drug program as necessary for protecting human life or health under GATT Article XX(b). India argued that Article XX(b) cannot be used to justify tariff preferences because to allow such a use would have the effect of transferring resources from a country that is not the source of health problem to countries that are actually the source of the problem. *See* Panel Report, *EC-Preferences*, *supra* note 278, ¶ 7.208. The Panel, however, did not address the issue directly, stating only that "tariff preferences should not be lightly assumed to be an appropriate means to achieve health objectives under Article XX(b) because any tariff preferences deviating from obligations assumed in the multilateral framework would necessarily have a direct and negative impact on the multilateral system." *Id.* ¶ 7.209.

³²⁴ *See supra* text at notes 314-316 for discussion regarding different standards of scrutiny applied by the AB under the Enabling Clause and the chapeau of Article XX.

needs. In light of the degree of scrutiny applied by the AB in *EC-Preferences*, a condition will not be held to be discriminatory if it appears to be rationally related to the advancement of such purpose. Given this minimum standard of review, many of the generally applicable conditions currently in use should be able to withstand challenge under the nondiscrimination obligation of the Enabling Clause.

V. CONCLUSIONS

In *EC-Preferences*, the Appellate Body interpreted nondiscrimination as a requirement not to treat the “similarly situated” countries differently. Indeed, the notion of treating the “similarly situated” alike is inherent in the term “nondiscrimination.” Within the WTO context, the concept of “similarly situated” is embodied not only in some of the generally-worded nondiscrimination provisions of the WTO agreements, which function outside the realm of the MFN and NT obligations, but also in the terms “like products,” “like services” and “like service suppliers,” which define MFN and NT obligations under GATT and GATS. Despite the importance of the “similarly situated” concept for WTO nondiscrimination obligations, however, how to determine likeness or similarity between products, services or countries remains one of most controversial and perplexing issues in WTO jurisprudence.

This paper seeks to explore and develop a general approach to analyzing the likeness or similarity issues within the WTO context. Under this approach, we are directed to focus on the object and purpose of the WTO rule that contains the “likeness” or “similarity” concept or otherwise requires a “likeness” or “similarity” comparison between the concerned subjects. The criteria for determining likeness or similarity, or the bases for drawing distinctions, between the concerned subjects must be *relevant* to the rule’s object and purpose – that is, such criteria must be conducive to, useful, or necessary for the advancement of the object and purpose of the rule. The identification of the relationship between the purpose of the rule and the basis for determining likeness or similarity under the rule is of pivotal importance. Without a clear understanding of this relationship, we will be at loss how to choose a relevant criterion for determining likeness or similarity. Unless a criterion is indispensable for furthering the goal of the rule, however, whether to use it in determining likeness or similarity is a matter of normative decision.

When it is not possible to identify in advance all the relevant criteria for determining likeness or similarity under a given WTO rule, it is conceptually sound to focus on the purpose of a Member’s measure that has allegedly made an impermissible classification of products, services or countries under that rule. The purpose of the measure may be identified objectively or based on the assertion of the Member, depending on the decision of the treaty interpreter. For a challenged classification effected by the measure to be permissible, the purpose of the measure must be

legitimate – i.e., consistent with the requirements of the WTO rule – and the basis for classification must be relevant to the advancement of that purpose. Again, unless that classification is indispensable for achieving a legitimate purpose of the measure, whether to allow such classification is a matter of normative decision.

The normative questions raised in the likeness or similarity determinations not only concern whether a particular criterion for comparison should be allowed, but also whether the purpose of a Member's measure is permissible, what ought to be the purpose of a given rule, and what the primary purpose of a given rule is if multiple purposes are identified. In making these normative decisions, the WTO tribunal will consider the values it deems important to the multilateral system. A fundamental issue to be determined is how to strike a balance between the values of international coordination through WTO policing of Member measures and the values of preserving the national autonomy of Member governments. The normative judgment made in each likeness or similarity determination also reflects a certain standard of review applied by the tribunal in scrutinizing the measure. Although WTO tribunals have not articulated the standards of scrutiny applicable in the likeness or similarity determinations under WTO provisions, the particular standard applied in a given case may be discernible.

Based on the formulation of this general approach, the paper has examined the concept of “like products” within the context of GATT Article III, where WTO likeness jurisprudence is most developed, and the concept of “like conditions” under GATT Article XX, GATS Article XIV, SPS Agreement, and the Enabling Clause, where such jurisprudence is still at an early stage of development. With respect to “like products,” the paper has applied the “similarly situated” paradigm to evaluate the AB's approach, as well as the controversial “aim and effects” test, in defining the concept. The examination revealed a certain inconsistency in the AB's position with respect to the relevance of the regulatory aim of a measure to the interpretation of Article III, and suggested that a strict standard of scrutiny has been applied by the AB in defining “like products” under the provision.

With respect to the concept of “like conditions,” the paper has introduced the handful of WTO cases in which the concept has been discussed under GATT Article XX, GATS Article XIV, and the SPS Agreement. Upon examination of the relevant discussions in these cases, it becomes clear that WTO tribunals have not sufficiently focused on an analysis of the concept, much less formed a coherent approach towards its interpretation. This lack of adequate attention to the concept of like conditions in turn has confused the analysis under these provisions and created some gaps, ambiguities and inconsistencies in their interpretation. In particular, insufficient analysis of the concept of like conditions has led the AB to generate potentially problematic jurisprudence under the chapeau of GATT Article XX. The examination of these cases has also revealed that

the tribunals applied a strict standard of review under the chapeau of GATT Article XX, especially with respect to a measure that was formally origin-neutral and had a legitimate regulatory purpose. In an interesting contrast, the AB appears to have adopted a less strict standard when a measure having a bona fide regulatory purpose was scrutinized under the nondiscrimination provision of the SPS Agreement.

Lastly, the similarly-situated paradigm has been applied to examine the “nondiscriminatory” requirement of the Enabling Clause. The analysis of the case *EC–Preferences* has shown how different norms and values could guide the tribunals to reach different conclusions on the basis for determining similarly-situated countries. The analysis has also revealed that the AB set a rather lenient standard of review for scrutinizing GSP’s compliance with the nondiscriminatory requirement of the Enabling Clause. Utilizing the similarly-situated paradigm to address the issue of GSP conditionality, the paper further suggests that generally applicable conditions of the GSP do not necessarily comply with the nondiscriminatory requirement of the Enabling Clause.

This paper has provided an analytical framework for assessing the “similarly situated” issues within the context of the WTO. Given that the notion of treating the similarly situated alike is inherent in the notion of nondiscrimination and that the concept of likeness or similarity lies at the heart of major WTO nondiscrimination obligations, this analytical framework makes it possible to define nondiscrimination under WTO law in an inherently coherent manner.

