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A FRESH LOOK AT THE AIM-AND-EFFECTS DEBATE: EU – PALM OIL AND THE CENTRALITY OF THE CHAPEAU OF ARTICLE XX GATT

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Increasing recourse to extraterritorial leverage in the field of environmental law can promote the uptake of environmentally beneficial practices by market actors and raise the levels of environmental ambition of exporting Members. Nonetheless, it also pulls the fabric of the multilateral trade system. This prompts a fresh look at the long-standing debate on aim-and-effects. This paper employs an analysis of the anti-deforestation npr-PPM standards under challenge in EU — Palm Oil to highlight the shortcomings of aim-and-effects approaches. Analyses of aim-and-effects to establish product "likeness" cannot address the question whether regulatory distinctions drawn on legitimate policy grounds are applied in such a way that they unjustifiably afford protection to domestic products. In the face of high levels of regulatory complexity, this is very problematic. Analyses of aim-and-effects to determine "less favourable treatment" cannot help to identify more subtle forms of potentially unjustifiable protective application. This also poses several challenges. Against this backdrop, the paper highlights the centrality of the Chapeau of Article XX and defends its role in the General Agreement on Tariffs and Trade (GATT) system. In times of environmental unilateralism, identifying all aspects in the application of a measure that are irreconcilable with good faith and that may unjustifiably afford protection to domestic products will be more important than ever before.

TABLE OF CONTENTS

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I. INTRODUCTION: AIM-AND-EFFECTS APPROACHES IN TIMES OF EXTRATERRITORIAL LEVERAGE

We are witnessing the rise of a new generation of trade-related measures that are designed to produce specific extraterritorial effects. Over the last couple of years, the European Union (EU) and the United States (US) have tabled several such proposals and pioneered new regulatory approaches. The EU proposal for a Regulation banning products made with forced labour[1] and the US Uyghur Forced Labour Prevention Act[2] provide examples in the field of labour law. Further, the EU proposal for a Directive on Corporate Sustainability Due Diligence has broadened the scope of extraterritorial leverage considerably, encompassing labour, human rights, and environmental protection aspects.[3]

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[1] *Commission Proposal for a Regulation of the European Parliament and of the Council on Prohibiting Products Made with Forced Labour on the Union Market*, COM (2022) 453 final (Sept. 14, 2022).
[2] Uyghur Forced Labour Prevention Act of 2021, Pub. L. No. 117-78, 135 Stat. 1525 (2021).
[3] *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive* (EU) 2019/1937, COM (2022) 71 final (Feb. 23, 2022).

Most importantly, as the climate crisis spirals out of control,[4] environmental law has provided fertile ground for the adoption of a "new" generation of non-product-related process and production method (npr-PPM) standards.[5] The EU measures under challenge in the *EU – Palm Oil* World Trade Organization (WTO) law disputes[6] and the EU Regulation on the importation of deforestation-free commodities and products (D-FCP Regulation)[7] provide relevant examples; both regulatory frameworks incorporate a set of anti-deforestation npr-PPM standards. These measures respectively set in place specific criteria for biofuels, bioliquids and biomass fuels to count towards the achievement of the EU-wide target for the use

[4] See the data available in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SYNTHESIS REPORT OF THE IPCC SIXTH ASSESSMENT REPORT (AR6), SUMMARY FOR POLICY-MAKERS (2023).

[5] As is well known, the notion of "npr-PPMs" refers to standards on process and production methods in cases where the latter do not leave any physical trace on the final product. The analysis of the "new" generation of environmental npr-PPMs in this part does not include the EU carbon border adjustment mechanism (CBAM). The CBAM does not qualify as a set of npr-PPM standards; nor does it qualify as a border tax adjustment under Article II:2(a) GATT. Rather, it qualifies as a regulatory border adjustment under Article III:4 GATT. For an analysis of this point, see Giulia Claudia Leonelli, *Export Rebates and the EU Carbon Border Adjustment Mechanism: WTO Law and Environmental Objections*, 56 J. WORLD TRADE 963 (2022). For another recent analysis of the CBAM, see Arwel Davies, *The EU's Proposed Carbon Border Adjustment Mechanism and Compatibility with WTO Law*, 14 TRADE L. & DEV. 94 (2022). *See* Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, 2023 O.J. (L 130) 52.

[6] *DS593: European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm [hereinafter EU – Palm Oil (Indonesia)]; *DS600: European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds600_e.htm [hereinafter EU – Palm Oil (Malaysia)]. *See* Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources, art. 3(1), 2018 O.J. (L 328) 82 [hereinafter Directive (EU) 2018/2001]; Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as Regards the Determination of High Indirect Land Use Change-Risk Feedstock for which a Significant Expansion of the Production Area into Land with High Carbon Stock is Observed and the Certification of Low Indirect Land Use Change-Risk Biofuels, Bioliquids, and Biomass Fuels, 2019 (L 133) 1 [hereinafter European Commission Delegated Regulation (EU) 2019/807].

[7] See Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010, 2023 O.J. (L 150) 206.

of renewable energy, and a mandatory due diligence system to assess and mitigate the deforestation and forest degradation risks associated with a number of commodities and products. As underlined in the Preamble to the D-FCP Regulation, deforestation and forest degradation are taking place at an alarming level and producing pervasive and potentially irreversible environmental effects. Not only do they result in biodiversity and ecosystem loss. They also undermine climate change mitigation efforts, deplete precious carbon sinks, and increase greenhouse gas (GHG) emissions through forest fires.[8] Unilateral regulatory action via the adoption of these npr-PPM standards takes into account the Union "consumption" footprint and seeks to ensure that products are sourced from deforestation-free supply chains.[9]

The academic debate on product-related (pr-) and npr-PPMs, the differences between these categories of standards and the implications of their differentiated treatment under WTO law dates back to the early 2000s.[10] Npr-PPM standards have been at the centre of a number of high-profile disputes, including the *US – Tuna* saga[11] and the *US – Shrimp*[12] and *EC – Seal Products* disputes.[13] This begs the

[8] *Id.* Recitals (2) and (3). The notion of "carbon sink" refers to forests and any other ecosystems that have the ability to absorb carbon, removing it from the atmosphere.
[9] *Id.* Recital (9).
[10] *See inter al.* Robert Howse & Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000); *See also* John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000); *See also* Robert E. Hudec, *The Product-Process Distinction in GATT/WTO Jurisprudence*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 187 (Marco Bronckers and Reinhard Quick eds., 2000); *See also* Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002); Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENV'L. L. 491 (2002); *See also* DONALD REGAN, *How to Think about PPMs (and Climate Change)*, *in* INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE: WORLD TRADE FORUM 97 (Thomas Cottier, ed. 2009).
[11] Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT B.I.S.D. DS21/R - 39S/155 (Sept. 3, 1991) [hereinafter US – Tuna II]; Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT B.I.S.D. DS29/R (Jun. 16, 1994) [hereinafter US – Tuna II].
[12] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998) [hereinafter Panel Report, US – Shrimp]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter AB Report, US – Shrimp]; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001) [hereinafter *US – Shrimp (Article 21.5 – Malaysia)* (Panel)]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to*

question what is "new" about the "new" npr-PPMs. Within the circumscribed boundaries of environmental trade-related measures, it is possible to identify at least three distinctive features of the "new" generation of npr-PPMs.

First, standards such as the anti-deforestation npr-PPMs referenced above are designed and applied *ab initio* to address and tackle specific environmental challenges materialising *in other jurisdictions*. Unlike the standards under challenge in disputes such as *US – Tuna* or *US – Shrimp*, the "new" npr-PPMs do not require compliance by foreign actors with *pre-existing domestic* environmental standards. This implies the exercise of more intense forms of environmental leverage.

Second, and relatedly, the greater level of interference associated with this group of npr-PPMs is justified by emphasising the extent to which consumption patterns in importing Members may contribute to environmentally detrimental practices and aggravate the environmental and climate crisis.[14] As explained above, the D-FCP Regulation and the restrictions on the use of high indirect land-use change (ILUC) risk biofuels that have come under challenge in *EU – Palm Oil* reflect this rationale. Thirdly, the "new" npr-PPMs are distinctive in their far-reaching extraterritorial reach, their broad scope of application, and the entity of their effects. The design, structure, and architecture of the arrangements also display increasing levels of regulatory complexity.

Questions surrounding the WTO law compatibility of recourse to npr-PPM standards, as such, have been extensively covered in the literature.[15] As is well known, the dispute settlement organs' approach has undergone considerable evolution since the *US – Tuna* saga. The focus of the WTO Panels and Appellate Body has shifted from an examination of "jurisdictional issues" to analyses of

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Article 21.5 of the DSU by Malaysia, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001) [hereinafter *US – Shrimp (Article 21.5 – Malaysia)* (AB)].

[13] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R, WT/DS401/R (adopted Jun. 18, 2014) [hereinafter Panel Report, EC – Seal Products]; Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter AB Report, EC – Seal Products].

[14] See for instance the emphasis on the EU's consumption-driven deforestation footprint in the Commission's Communication on the D-FCP Regulation and relevant Impact Assessment. *Commission Proposal for a Regulation of the European Parliament and of the Council on the Making Available on the Union Market as well as Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation* (EU) No 995/2010, COM (2021) 706 final (Nov. 17, 2021).

[15] *Supra* note 10.

"jurisdictional reach",[16] before leaving them both behind in more recent disputes. It is now generally accepted that, subject to compliance with relevant provisions of the GATT, regulating Members may draw npr-PPM distinctions to prevent products that have been produced in (*inter alia,* environmentally) "unacceptable" ways from being placed on their market and to help tackle transnational externalities.[17]

These points are overall uncontroversial at the present stage, and the evolution of the dispute settlement organs' approach has undoubtedly been beneficial in terms of environmental protection. Increasing recourse to extraterritorial leverage by the EU can promote the uptake of environmentally beneficial practices by market actors and raise the environmental ambition of exporting Members. Environmental unilateralism, however, poses several challenges. Recourse to unilateral standards with trade-distorting effects pulls the fabric of the multilateral trade system. This brings us to the crucial issue of the *limits* within which regulating Members may exercise leverage via environmental npr-PPMs.

In the case of npr-PPMs, violations of the National Treatment (Article III GATT) and Most Favoured Nation (Article I GATT) principles are highly likely to come into play: the WTO law system sanctions any aspects of a measure that afford protection to domestic products or that grant an advantage to specific Members, thus resulting in country-based discrimination.[18] As is well known, Article XX provides a justification route for measures that have been found in breach of the substantive obligations of the GATT. Members that have adopted measures in pursuit of legitimate policy goals may thus invoke the "limited and conditional" policy exceptions enshrined in Article XX.[19] As noted in the literature, the subparagraphs of Article XX protect the Members' *policy space* by enabling them to have recourse to specific exceptions; the Chapeau (introductory clause) of the

[16] The terminology is borrowed from Henrik Horn & Petros C. Mavroidis, *The Permissible Reach of National Environmental Policies*, 42 J. WORLD TRADE 1107 (2008); Howse & Regan, *supra* note 10; Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction*, 36 J. WORLD TRADE 353 (2002).

[17] *See, e.g.,* Panel Report, EC – Seal Products, *supra* note 13, ¶ 7.326.

[18] On the nature and purpose of the National Treatment principle, see Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 101, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter AB Report, Japan – Alcoholic Beverages II]; On the nature and purpose of the Most Favoured Nation principle, see Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 101, WTO Doc. WT/DS246/AB/R (adopted Apr. 20, 2004) [hereinafter AB Report, EC – Tariff Preferences].

[19] AB Report, US – Shrimp, *supra* note 12, ¶ 157, 158.

Article, on the other hand, prevents *protectionist or discriminatory abuse* of that *policy space*.[20]

Npr-PPM standards that are justified under Article XX have produced a disparate impact on imported products (Article III) or have granted an advantage to specific Members (Article I); the *trade effects* of the measures, however, are ultimately regarded as a *mere incidental consequence* of the *pursuit of legitimate policy objectives*. Over the years, the challenge has thus consistently been *how to define* inherently "protectionist" or "discriminatory" measures and how to *demarcate the boundaries* between *justifiable* barriers to trade and market access versus *unjustifiable* protective or discriminatory application. High levels of regulatory complexity and the nature of the "new" npr-PPMs have rendered this exercise increasingly difficult. The pervasive effects and extraterritorial reach of these standards also raise doubts about the ability of the WTO law system to strike an appropriate balance between unilateral regulatory action and the multilateral trade system, balancing competing rights and charting a middle path.

This new and evolving regulatory environment prompts a fresh look at the long-standing debate on the role and boundaries of policy justifications in the trade law system, and their location in the context of the GATT 1994. As is well known, different strands of 'aim-and-effects theory' have played a central role in this lively debate.[21] A critique of these approaches lies at the heart of the present analysis. This paper employs an examination of the anti-deforestation npr-PPM standards under challenge in *EU – Palm Oil* as a case study to shed light on the limits and shortcomings of aim-and-effects approaches.[22] The paper demonstrates that, unlike aim-and-effects tests, the Chapeau of Article XX can capture *protectionist abuse* of otherwise legitimate policy exceptions and draw a line between *justifiable* barriers to market access and *unjustifiable* protective (or discriminatory) application. Taking stock of the findings of the enquiry, the paper defends the centrality of Article XX GATT and the Chapeau thereof.

The analysis illustrates that, in times of increasing regulatory complexity and extraterritorial leverage, aim-and-effects approaches are not fit for purpose. An examination of aim-and-effects at the product "likeness" stage cannot address the question whether regulatory distinctions drawn on legitimate policy grounds are applied in such a way that they unjustifiably afford protection to domestic

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[20] For use of this specific terminology, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 44, 51 (2016).

[21] For a detailed analysis, *see infra* III, V, and VI.

[22] The analysis is limited to the EU measures and provisions under challenge in these disputes; it does not include an examination of the different Member State measures that have been challenged by Indonesia and Malaysia.

products. An analysis of aim-and-effects at this stage thus precludes an enquiry into unjustifiable protective application.[23] As the regulatory design of npr-PPM standards becomes increasingly complex, however, this analytical step is of crucial importance.

An analysis of aim-and-effects at the "less favourable treatment" stage, on the other hand, leaves "subjective" protectionist intents behind and encompasses an enquiry into "objective" unjustifiable protective application. This test ultimately resembles the dispute settlement organs' approach to the interpretation and application of Article III:2 GATT, second sentence, or Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement). Nonetheless, this test fails to capture *all aspects* in the practical application of a measure that are *irreconcilable with good faith* and that *may potentially* and *unjustifiably* afford economic protection to domestic products. This more encompassing examination can only be conducted via an analysis of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", under the Chapeau of Article XX. For this reason, these applications of aim-and-effects fall short of capturing *more subtle forms of potential unjustifiable protective application*.[24]

The paper proceeds as follows. The second part provides a concise overview of the EU measures currently under challenge in the *EU – Palm Oil* disputes. The third part takes a close look at the dispute settlement organs' approach to the interpretation and application of the National Treatment obligations. It also explores the origins and evolution of aim-and-effects theory, including a concise examination of arguments in favour of the application of aim-and-effects tests. The fourth part turns to an analysis of the interpretation and application of the Chapeau of Article XX GATT by the dispute settlement organs.

The fifth part focuses on the application of an aim-and-effects test at the "likeness" stage, employing an examination of the npr-PPM standards under challenge in *EU – Palm Oil* to highlight the shortcomings of this approach. The sixth part conducts the same form of analysis in the context of applications of aim-and-effects tests at the "less favourable treatment" stage. Against this overall backdrop, the seventh and final part draws all relevant conclusions. In the present landscape, aim-and-effects approaches cannot provide an effective framework for the analysis of unjustifiable protective application.

II. THE EU MEASURES UNDER CHALLENGE IN *EU – PALM OIL*: A CONCISE OVERVIEW

[23] For a detailed analysis, *see infra* V.

[24] For a detailed analysis, *see infra* VI.

The environmental npr-PPM standards under analysis in this paper are enshrined in the EU regulatory framework on the promotion of the use of energy from renewable sources. The relevant provisions regarding EU governance of renewables are laid out in Directive (EU) 2018/2001 and in the European Commission's Delegated Regulation (EU) 2019/807.[25]

The former legislative instrument sets out a binding 32% EU-wide target for the use of renewable energy, to be collectively met by all EU Member States by 2030.[26] Article 7(1) of the Directive provides that the gross final consumption of energy from renewable sources in each Member State shall be calculated as the sum of gross final consumption of electricity from renewables, gross final consumption of energy from renewables in the heating and cooling sectors, and final consumption of energy from renewables in the transport sector.[27] Article 25(1) lays out further specifications that apply to the transport sector.[28]

Biofuels, bioliquids, and biomass fuels may count towards the achievement of the 32% target and the Article 7(1) and 25(1) calculations *provided that* they meet the sustainability criteria enshrined in Article 29(2) to (7) and the GHG emission savings criteria of Article 29(10).[29] However, *additional requirements* are laid out for biofuels, bioliquids, and biomass fuels produced from *food and feed crops*. Crucially, Article 26(2) limits the extent to which high ILUC risk biofuels, bioliquids, and biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed may be taken into account for the purposes of the above-mentioned calculations. In this specific case, the levels of consumption of such fuels shall not exceed the Member State levels of consumption in 2019, with a gradual phase out until a 0% limit in 2030. An exception is provided for such high ILUC risk biofuels, bioliquids, and biomass fuels *provided that* the specific products have been certified to comply with a set of stringent criteria. These criteria aim to establish that the relevant products are associated with *low indirect land use change* ("low" ILUC) risks.

The Commission's Delegated Regulation of 2019 has laid out the criteria for the identification of *high ILUC risk* feedstock with a significant expansion into land with high-carbon stock, and *low ILUC risk* biofuels, bioliquids, and biomass fuels; the requirements are enshrined in Articles 3 and 4.[30] Under these criteria, *palm oil* is the only feedstock qualifying as *high ILUC risk*. As a result, biofuels, bioliquids, and

[25] Directive (EU) 2018/2001, *supra* note 6.
[26] Directive (EU) 2018/2001, *supra* note 6, art. 3(1).
[27] Directive (EU) 2018/2001, *id.* art. 7(1).
[28] Directive (EU) 2018/2001, *id.* art. 25(1).
[29] *Id.,* arts. 7(1), 29(1).
[30] European Commission Delegated Regulation (EU) 2019/807, *supra* note 6, arts. 3 and 4.

biomass fuels produced from palm oil are the only products subject to the stringent limitations of Article 26(2). The only available exception, as explained above, is for biofuel products certified as low ILUC risk.[31]

III. THE BIGGER PICTURE: NATIONAL TREATMENT AND AIM-AND-EFFECTS

A. National Treatment: An Introduction

Article III:1 GATT stipulates that domestic fiscal and non-fiscal measures, "should not be applied to imported or domestic products so as to afford protection to domestic production" (emphasis added).[32] Article III:2, first sentence, provides that imported products, "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" (emphasis added).[33] Pursuant to Article III:4, imported products "shall be accorded treatment no less favourable than that accorded to like products of national origin […]" (emphasis added) in respect of all regulatory (i.e., non-fiscal) measures.[34]

As is well known, a determination of "likeness" is first and foremost a determination, "about the nature and extent of a competitive relationship between and among products" (emphasis added).[35] This must be established on a case-by-case basis.[36] The dispute settlement organs have consistently taken four broad indicators into account. These are: (i) the properties, nature, and quality of the products; (ii) their end uses; (iii) consumers' tastes and habits, encompassing consumer perception and behaviour; and (iv) the tariff classification of the products.[37] Regulatory distinctions relating to the characteristics of a class of products and consumer perception or behaviour are not eschewed from the scope of the analysis. However, they will *only* be relevant in the context of a

[31] *Id.*, arts. 4, 5.
[32] Art. III:1 GATT.
[33] Art. III:2 GATT.
[34] Art. III:4 GATT.
[35] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter AB Report, EC – Asbestos].
[36] *Id.,* ¶¶ 101-102, 109 referencing the Report by the Working Party on Border Tax Adjustments (adopted Dec. 2, 1970), L/3464; AB Report, EC – Asbestos, *supra* note 35, ¶ 109, noting that Panels must examine and weigh all available evidence to make a final determination regarding product "likeness".
[37] GATT Council, *Report by the Working Party on Border Tax Adjustments*, WTO Doc. L/3464 (adopted Dec. 2, 1970).

determination of "likeness" *in so far as* they have an impact on the competitive relationship between the products under analysis.[38]

As is also well known, the "accordion" of "likeness" stretches differently under Article III:2, first sentence, and Article III:4.[39] Article III:2, second sentence, read in conjunction with paragraph 2 of the note *ad* Article III, enshrines a further obligation for regulating Members to tax *directly competitive or substitutable* products *similarly*. The Appellate Body has refrained from ruling on the question whether the scope of "like" products under Article III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products under the two sentences of Article III:2.[40] Interpreting the scope of "likeness" consistently across Articles III:2 and III:4 would give the same meaning to the notion of "like" products under the two paragraphs. However, it would also narrow down the scope of application of the National Treatment obligations in the specific case of regulatory measures as compared to fiscal measures. For this reason, the Appellate Body has concluded that the product scope of Article III:4 is broader than the one of Article III:2, first sentence.[41]

The following step involves an enquiry into the taxation of imported products "in excess" of domestic "like" products, or the existence of "less favourable treatment" for imported "like" products. Again, the dispute settlement organs have consistently focused on the extent to which the relevant fiscal or non-fiscal measures alter the *conditions of competition* and the *equality of competitive opportunities* for domestic and imported "like" products.[42]

The analysis in disputes brought under Article III:4 draws on the application of a disparate impact test. This focuses on the treatment of the *entire group* of "like"

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[38] AB Report, EC – Asbestos, *supra* note 35, ¶¶ 115, 117.

[39] For the famous reference to the "accordion" of "likeness", see AB Report, Japan – Alcoholic Beverages II, *supra* note 18, at 21.

[40] AB Report, EC – Asbestos, *supra* note 35, ¶¶ 98, 99.

[41] *Id.*

[42] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 135-137, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter AB Report, Korea – Various Measures on Beef]. As the Appellate Body emphasised in the specific context of Article III:4, a formal difference in treatment between "like" domestic and imported products is neither necessary nor sufficient to establish a violation of the National Treatment obligations. In Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 129, WTO Doc. WT/DS371/AB/R (adopted Jul. 15, 2011) [hereinafter AB Report, Thailand – Cigarettes (Philippines)], it was also clarified that the relevant adverse impact on competitive opportunities *may* but *need not* be based "on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned".

domestic and imported products and the overall results on the equality of their competitive opportunities; in other words, it lays emphasis on any disparate economic burdens borne by the entire category of "like" imported products.[43] The application of Article III:2, first sentence, has been somewhat more ambiguous. The approach of the dispute settlement organs has at times blurred the line between a diagonal and a disparate impact test; the former approach involves a narrower analysis of the extent to which specific imported products are taxed in excess of "like" domestic products.[44]

Different considerations come into play in the context of Article III:2, second sentence. The express cross-reference to Article III:1 in the second sentence of Article III has prompted the dispute settlement organs to conduct a three-step analysis.[45] The first step includes an examination of whether products are "directly competitive or substitutable". The second step focuses on the question of whether they are similarly taxed. The third step involves an analysis of the separate question of whether the fiscal measure is applied "so as to afford protection". As the Appellate Body clarified in *Japan – Alcoholic Beverages*, this step of the enquiry does *not* aim to uncover "subjective" protectionist motives or intents.[46] Since the Appellate Body Report in this dispute, these have been regarded as irrelevant under WTO law. Rather, the focus of the analysis centres on the "objective" unjustifiable protective application of a measure, as ascertained via an examination of the "design, architecture, and revealing structure" of the relevant measure.[47]

As this concise overview has illustrated, the dispute settlement organs' interpretative approach to Article III:2, first sentence, and Article III:4 is characterised by a distinctive feature. Unlike in the different case of Article III:2, second sentence, the interpretation of Article III:2, first sentence, and Article III:4 *equates* any *disparate economic impacts* on the competitive opportunities of "like" imported products with *economic protection* and a *violation of the National Treatment obligations*. This point has been expressly acknowledged by the Appellate Body in both *EC – Asbestos* and *EC – Seal Products*.[48] Measures that are caught in the net and that are found to afford protection to domestic products may then be justified under Article XX GATT; the regulating Member may invoke one of the Article

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[43] For emphasis on this point, see AB Report, EC – Asbestos, *supra* note 35, ¶ 100.

[44] For a detailed analysis, see Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?*, 36 J. WORLD TRADE 921 (2002).

[45] AB Report, Japan – Alcoholic Beverages II, *supra* note 18, at 27, 28.

[46] AB Report, Japan – Alcoholic Beverages II, *supra* note 18, at 27, 28. *See infra* III and IV.

[47] *Id.*

[48] AB Report, EC – Asbestos, *supra* note 35, ¶ 100; AB Report, EC – Seal Products, *supra* note 13, ¶ 5.112.

XX policy justifications and demonstrate that the measure under challenge meets the requirements of the Chapeau. Article XX thus renders the protective application of the measure under challenge justifiable.

In this sense, a clear division of labour exists between the economic focus of the substantive obligations of Article III:2, first sentence, and Article III:4, on the one hand, and "limited and conditional" recourse to the legitimate policy exceptions of Article XX, on the other. This division of labour brings us to the criticisms raised by the proponents of the aim-and-effects approach.

B. The Origins and Evolution of Aim-and-Effects Theory

The rich academic debate on the scope of the National Treatment obligations and the application of aim-and-effects approaches dates back to the late Nineties.[49] The GATT Panel Reports in *US – Malt Beverages*[50] and *US – Taxes on Automobiles*[51] laid the foundations for the original formulation of this theoretical approach, which was then fine-tuned and re-interpreted by different commentators over the years. These two Reports are the only instances of application of an 'aim-and-effects test' by the dispute settlement organs.

In both Reports, the GATT Panels engaged in a balancing process that accounted for the "aim" of the measures under challenge and their "effects" on the conditions of competition. In *US – Taxes on Automobiles*, this approach enabled the GATT Panel to sanction *de jure* discrimination: the measures under challenge included separate foreign fleet accounting rules, which directly placed foreign cars and foreign parts in a less favourable competitive position compared to domestic

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[49] For the first arguments and scholarly discussions in favour of aim-and-effects approaches, see Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, 32 INT'L L. 619 (1998)[hereinafter Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*] ; *See also* Robert Howse & Donald Regan, *supra* note 10; *See also* Donald Regan, *Regulatory Purpose and "Like" Products in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, 36 J. WORLD TRADE 443 (2002); *See also* Donald Regan, *Further Thoughts on the Role of Regulatory Purpose under Article III of the GATT*, 37 J. WORLD TRADE 737 (2003); *See also* Frieder Roessler, *Beyond the Ostensible. A tribute to professor Robert Hudec's Insights on the Determination of the likeness of Products Under the national Treatment Provisions of the General Agreement on Tariffs and Trade*, 37 J. WORLD TRADE 771 (2003); Amy Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783 (2003).

[50] Report of the Panel, *United States – Measures Affecting Alcoholic and Malt Beverages*, GATT B.I.S.D. 39S/206 (adopted Jun. 19, 1992) [hereinafter GATT Panel Report, US – Malt Beverages].

[51] Report of the Panel, *United States – Taxes on Automobiles*, GATT B.I.S.D. DS31/R (circulated Oct. 11, 1994) [hereinafter, GATT Panel Report, US – Taxes on Automobiles].

cars and domestic parts.[52] In *US – Malt Beverages*, the same approach and balancing process enabled a finding that *de facto* discrimination resulting from tax treatment based on geographical distinctions was unjustifiable in nature and violated Article III:2, first sentence. The GATT Panel noted that special treatment was accorded under Mississippi laws to wine produced from a specific type of grape that only grew in the south-eastern part of the United States and the Mediterranean region.[53] This "rather exceptional"[54] geographical basis for a tax distinction quite clearly suggested "subjective" protectionist intents. The Panel's analysis of the "aim" of the measure and consideration of the relevant "effects" on imported "like" products thus resulted in a finding of a violation of Article III:2.

Academic arguments in favour of aim-and-effects approaches, as inspired by these GATT Panel Reports, were borne out of a dissatisfaction with the dispute settlement organs' narrow interpretative approach to Articles III:2, first sentence, and III:4.[55] Firstly, aim-and-effects proponents have consistently emphasised that the tenet of Article III:1 should inform all the obligations enshrined in Article III, rather than being confined to analyses under Article III:2, second sentence.[56] Considerations surrounding internal consistency in the application of the different provisions of Article III also come into play. In *Japan – Alcoholic Beverages*, the Appellate Body expressly found that Article III:1 informs *all* the provisions enshrined in Article III; however, it also clarified that this principle finds a *different expression* in the *different and specific obligations* enshrined in Article III.[57] Aim-and-effects theorists have challenged this construction.

Secondly, arguments in favour of an aim-and-effects test were borne out of a concern that policy-neutral measures that are not applied "so as to afford protection" would be inadvertently sanctioned under the "catch-all" competition-centred interpretation of Articles III:2, first sentence, and III:4. This scenario is best exemplified by disputes on policy-neutral fiscal measures that result in imported products being taxed "in excess of" domestic "like" products due to the specific "composition" of the domestic industry.[58]

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[52] *Id.* ¶ 5.47 ff.
[53] GATT Panel Report, US – Malt Beverages, *supra* note 50, ¶ 5.26.
[54] *Id.*
[55] Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, *supra* note 49, 626-627.
[56] For the first argument in this respect, see Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, *supra* note 49.
[57] AB Report, Japan – Alcoholic Beverages II, *supra* note 18, at 18; AB Report, EC – Asbestos, *supra* note 35, ¶ 98.
[58] For a reference to this point, see for instance Ehring, *supra* note 44, at 972.

Thirdly, aim-and-effects proponents have laid emphasis on the preconditions for recourse to Article XX GATT: particular attention has been paid to its closed list of policy justifications, the requirements of the subparagraphs, and the conditions of the Chapeau. On these grounds, they have all questioned whether Article XX provides an appropriate "site" for the justification of non-protectionist measures.[59] All strands of aim-and-effects theory advocate an enquiry into the *aims* of a measure in the context of analyses of violations of National Treatment obligations. For this reason, all advocates of aim-and-effects have sought to broaden the scope of the enquiry under Article III and correspondingly narrow down analyses under Article XX and the Chapeau thereof. The role of *effects* under aim-and-effects balancing is more unclear; over time, accounts of aim-and-effects have ultimately left this element behind.[60] Another difference, as anticipated in the introduction and explained in further detail in the next parts, lies in the context of the application of an aim-and-effects test. Several commentators have located this test within determinations regarding product "likeness". Others have advocated an aim-and-effects approach in the context of determinations of "less favourable treatment".[61]

The dispute settlement organs' findings against aim-and-effects approaches are confined to a narrow textual or systematic interpretation. The first argument emphasises the absence of explicit cross-references to Article III:1 in Articles III:2, first sentence, and III:4.[62] This remark has not prompted any further clarifications by the dispute settlement organs surrounding the rationale for this difference. By way of example, the dispute settlement organs have neither made the point nor suggested that the differences between "like" and "directly competitive or substitutable" products warrant the application of a different standard of scrutiny under the first and second sentence of Article III:2.[63] Under the second line of

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[59] See the literature cited above in this part, *supra* note 49.

[60] *See infra* V and VI.

[61] *See infra* V and VI.

[62] AB Report, Japan – Alcoholic Beverages II, *supra* note 18, at 18, 19; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (hereinafter AB Report, EC – Bananas III), ¶ 216, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997) [hereinafter AB Report, EC – Bananas III]; In AB Report EC – Seal Products, *supra* note 13, ¶¶ 5.111-5.130, the EU argued in favour of transposing the interpretative approach followed under Article 2.1 TBT Agreement to analyses under Article III:4 GATT. On these grounds, the EU ultimately advocated the application of an aim-and-effects test in the context of a finding of "less favourable treatment". The Appellate Body rejected this construction by emphasising the differences between the GATT and TBT Agreement, and by reiterating that Article III:4 does not include any express references to Article III:1.

[63] I.e., the narrow group of "like" products as identified under the first sentence of Article III:2 is subject to strict scrutiny (taxation "in excess"); a violation of the National

argumentation, the dispute settlement organs have found that the application of an aim-and-effects test would make Article XX inutile.[64]

Both counter-arguments are largely unsatisfactory. As the next parts illustrate, the Chapeau of Article XX plays a fundamental role in the GATT system. A focus on "subjective" protectionist intents or non-protectionist regulatory distinctions in the context of analyses of product "likeness", just like enquiries into protective application in the context of analyses of "less favourable treatment", cannot yield the same results as the comprehensive examination under the Chapeau. This point, however, has never been fully acknowledged or fleshed out.

IV. THE CHAPEAU OF ARTICLE XX GATT: BREACHES OF GOOD FAITH AND UNJUSTIFIABLE PROTECTIVE OR DISCRIMINATORY APPLICATION

Under the dispute settlement organs' well-established "two-tiered" approach, an analysis of compliance with the Chapeau follows the more superficial examination under the subparagraphs of Article XX.[65] Provisional justification under the subparagraphs focuses on a measure's capability to achieve legitimate policy goals or its necessity.[66] An analysis of compliance with the Chapeau, by contrast, involves an in-depth enquiry into the *practical application* of *all aspects* of the measure under challenge.[67] This form of analysis is bound to encompass an examination of

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Treatment obligations will then trigger the justification process under Article XX and the Chapeau thereof. The much broader "pool" of "directly competitive or substitutable" products, on the other hand, is the object of a softer standard of scrutiny. First, the relevant products must be "similarly taxed". Second, the application of the "so as to afford protection" test under the second sentence of Article III:2 does neither involve a burden of provisional justification as per Article XX, nor the more encompassing analysis of potential unjustifiable protective or discriminatory application conducted under the Chapeau. On this point, *see infra* IV and VI. Article III:1 employs the term *should* rather than *shall*. This may be interpreted as *justifying* the "catch-all" competition-centred focus of "taxation in excess" under Articles III:2, first sentence, and "less favourable treatment" under Article III:4. However, admittedly, this reading does not achieve perfect coherence in that the "pool" of "like" products under Article III:4 is broader than the same group under Article III:2, first sentence.

[64] AB Report, *supra* note 13, EC – Seal Products, ¶¶ 5.111-5.130.

[65] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter AB Report, US – Gasoline].

[66] Depending on the specific subparagraph invoked at the provisional justification stage. Environmental protection measures, by way of example, may be provisionally justified under subparagraph (b) or (g): the former includes a necessity requirement, whereas the latter does not.

[67] AB Report, US – Gasoline, *supra* note 65, at 22.

the "design, architecture, and revealing structure" of the relevant measures,[68] which is necessary to uncover *the manner* in which different aspects of a measure are *applied in practice*. However, an examination of the regulatory design and structure of a measure is a mere preliminary step in the analysis of compliance with the Chapeau requirements. The distinction may appear slippery in conceptual terms.[69] Nonetheless, the dispute settlement organs have demarcated the scope of an analysis of regulatory versus practical application aspects rather clearly in their interpretative practice.[70]

As is well known, the Chapeau stipulates that measures shall not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. The Appellate Body has found that the two "limbs" of this provision impart meaning to each other.[71] However, throughout the years, the dispute settlement organs have consistently focused on the first "limb" and its requirements.[72] As is also well known, the Chapeau requirements are meant to strike a "line of equilibrium" between the right of a Member to invoke the policy exceptions of Article XX, and the rights of the other Members under the GATT 1994.[73] Interpreting and applying the Chapeau requirements thus involves striking a balance between the rights of the exporting Members and the rights of the importing (regulating) Member, and between the multilateral trade system and unilateral measures pursuing different legitimate policy goals. The location of the "line of equilibrium" underlying 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".[74] Further, and crucially, the Appellate Body has

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[68] AB Report, EC – Seal Products, *supra* note 13, ¶ 5.302.

[69] Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil – Tyres*, 43 J. WORLD TRADE 507, 522 (2003); Lorand Bartels, *The Chapeau of the General Exceptions in the WTO, GATT and GATS Agreements: A Reconstruction*, 109 AM. J. INT'L L. 95, 98 (2015).

[70] This explains the finding that, "The policy goal of a measure […] cannot provide its rationale or justification under the standards of the Chapeau […]. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under [the subparagraphs]. It does not follow from the fact that a measure [is provisionally justified] that that measure also will necessarily comply with the requirements of the Chapeau". *See* AB Report, US – Shrimp, *supra* note 12, ¶ 149.

[71] AB Report, US – Gasoline, *supra* note 65, at 25.

[72] The dispute settlement organs have rather engaged in a close analysis of the requirement that a measure shall not be applied in such a way as to (i) arbitrarily or unjustifiably; (ii) discriminate; (iii) between countries where the same conditions prevail. *See* AB Report, US – Shrimp, *supra* note 12, ¶ 150.

[73] AB Report, US – Shrimp, *supra* note 12, ¶ 159.

[74] *Id.*

expressly acknowledged that the Chapeau is an expression of the principle of *good faith*.[75] While largely neglected in the literature, this explicit reference to the notion of good faith shines a light on the function of assessments under the Chapeau.

The Chapeau captures *all aspects* in the *practical application of a measure* that are *irreconcilable with good faith*, that suggest *abusive recourse to the* "limited and conditional" *policy exceptions* of Article XX GATT, and that *may potentially* and *unjustifiably* afford economic protection to domestic products or result in country-based discrimination.[76] The notion of good faith plays a key role in the context of analyses under the Chapeau. Identifying *breaches of good faith*, as reflected in specific aspects in the practical application of a measure, enables the dispute settlement organs to draw a line between *justifiable* barriers to trade and the notion of *unjustifiable* protective ("National Treatment-type") or discriminatory ("Most Favoured Nation-type") application.[77] The Chapeau only targets the latter notion; questions surrounding a measure's effects on trade and its necessity, just like questions regarding a measure's capability to achieve its alleged policy goals, are dealt with under the subparagraphs.[78]

This concise analysis of the role of the Chapeau calls for two clarifications. First of all, an enquiry under the Chapeau is different from an analysis of "subjective" *protectionist or discriminatory intents* and from a broader focus on *regulatory purpose*.[79] Policy-makers may not at all seek to afford protection to domestic products or may not aim to discriminate against specific Members. Further, they may draw regulatory distinctions on perfectly legitimate (e.g., environmental) policy grounds. These regulatory distinctions, however, may be applied in a manner that is *irreconcilable with conduct in good faith* and that *unjustifiably* affords protection to domestic products or *unjustifiably* discriminates against products originating from specific Members. As illustrated in the next part, these aspects in the practical application of a measure are beyond the radar of aim-and-effects tests as applied at the product "likeness" stage. By contrast, they are directly targeted and captured by the Chapeau.

The second clarification regards the relationship between the Chapeau and the notion of "objective" protective application as per Article III:2, second sentence.

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[75] *Id.*, ¶ 158.

[76] For an in-depth analysis of these points and an argument in favour of a *good faith-centred* interpretation of the Chapeau, see Giulia Claudia Leonelli, *Anti-Deforestation npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis*, 26 J. INT'L ECON. L. 1 (2023).

[77] *Id.*; *See also* Panel Report, *European – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶¶ 7.190, 7.350, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted Aug. 29, 2014) Panel Report, European – Rare Earths].

[78] Leonelli, *supra* note 76.

[79] AB Report, Japan – Alcoholic Beverages II, *supra* note 18.

This point is relevant in that the application of an aim-and-effects approach at the "less favourable treatment" stage draws on the latter test.

An enquiry into unjustifiable protective or discriminatory application under the Chapeau overlaps in part with the dispute settlement organs' interpretative approach to Article III:2, second sentence. Since *Japan – Alcoholic Beverages*, as briefly mentioned in the third part, the Appellate Body has stressed that the question of whether fiscal measures are applied "so as to afford protection" must be addressed by focusing on "objective" protective application.[80] The Article III:2, second sentence analysis of "objective" protective application involves recourse to criteria that *also* come into play in the context of an analysis under the Chapeau. The latter form of analysis includes an examination of the structural coherence and even-handed application of the measures and a focus on regulatory exceptions that could undermine the measures' alleged policy goal. Further, an enquiry into unjustifiable protective or discriminatory application under the Chapeau bears some resemblance to the final step in the examination conducted under Article 2.1 TBT Agreement. As is well known, this involves an analysis of whether a detrimental impact on "like" products stems exclusively from a legitimate regulatory distinction. The Article 2.1 test also encompasses an analysis of even-handedness and calibration.[81]

At first sight, this may suggest that analyses under the second sentence of Article III:2 (and Article 2.1 TBT Agreement) ultimately correspond to the examination conducted under the Chapeau. By implication, the application of aim-and-effects tests at the "less favourable treatment" stage would also correspond to an examination under the Chapeau. However, this is not the case. The Chapeau targets *all aspects* in the application of a measure that are irreconcilable with good faith and that may potentially result in unjustifiable protective or discriminatory application. Several commentators have criticised the dispute settlement organs' interpretation of the Chapeau on the grounds that it captures more than "arbitrary or unjustifiable discrimination with an economically discriminatory result" (emphasis added).[82] By way of example, scholarly analyses have challenged the

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[80] *Id.*

[81] *See, e.g.* Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, ¶ 7.554 ff., WTO Doc. WT/DS381/RW (adopted Dec. 3, 2015) [hereinafter Panel Report, US – Tuna II (Mexico) (Article 21.5 – Mexico)]; *See also* Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, ¶ 7.308 ff, WTO Doc. WT/DS381/AB/RW, (adopted Dec. 3, 2015) [hereinafter AB Report, US – Tuna II (Mexico) (Article 21.5 – Mexico)].

[82] *See* Bartels, *supra* note 69, at 120, 122.

dispute settlement organs' focus on breaches of due process or coercion.[83] Nonetheless, as illustrated in the sixth part, this broad focus on *breaches of good faith* and on *more subtle forms of potential unjustifiable* protective or discriminatory application is a distinctive and very important feature of the Chapeau.

It is against the backdrop of this overview that the next parts turn to aim-and-effects approaches to the determination of product "likeness" and "less favourable treatment". The examination compares and contrasts these tests with the more encompassing analysis conducted under the Chapeau, employing an analysis of the measures under challenge in *EU – Palm Oil* to unpack all relevant implications.

V. AIM-AND-EFFECTS, PRODUCT "LIKENESS", AND THE STANDARDS UNDER CHALLENGE IN *EU – PALM OIL*

A. Aim-and-Effects and Product "Likeness": Rationale and Evolution

The original proponents of an aim-and-effects approach located this test at the stage of product "likeness" determinations. They advocated a balancing process that, just like in *US – Malt Beverages* and *US – Taxes on Automobiles*, would account for both the "aim" of the measures under challenge and their "effects"; this would encompass considerations regarding *regulatory purpose* and an analysis of the measures' *effects on conditions of competition*.[84] Compared to the following elaborations of aim-and-effects theory, the original formulation of this approach laid particular emphasis on the search for overt and covert protectionist motives, i.e., "subjective" intents.[85] Unlike following elaborations of aim-and-effects

[83] See in particular Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L L. 739, 825 (2001), focusing on due process; *See also* Julia Qin, *Defining Non-Discrimination under the Law of the World Trade Organisation* 23 B. U. INT'L L. J. 215, 269 (2005), focusing on coercion; *See also* Gracia Marín Durán, *Measures with Multiple Competing Purposes after EC – Seal Products: Avoiding a Conflict Between GATT Article XX-Chapeau and Article 2.1 TBT Agreement* J. INT. ECON. L. 19 467, 469 (2016), raising the question, "whether the different regulatory treatment causing disparate impact can or cannot be justified" under the Chapeau.

[84] Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, *supra* note 49, at 626, 627.

[85] *Id.*, at 631. Some advocates of aim-and-effects approaches have called into question the distinction between the notions of "subjective" intents and "objective" protective application, suggesting that the concept of "protective application" ultimately corresponds to the one of "protective purpose". *See* for instance Hudec, *supra* note 49, at 631; *See also* Regan, *Regulatory Purpose and "Like" Products in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, *supra* note 49, at 477; *See also* Regan, *Further Thoughts on the Role of Regulatory Purpose under Article III of the GATT*, *supra* note 49, at 741. As explained in this part, however, this is far from being a mere terminological distinction.

approaches, the original formulation also took into account the specific effects of a measure in the context of the balancing process.

In the following years, several scholars have refined and re-interpreted aim-and-effects approaches to determinations of product "likeness". These accounts are characterised by two distinctive features. Firstly, the "effects" component of aim-and-effects balancing has ultimately been left behind. Secondly, the focus has gradually shifted away from questions surrounding "subjective" *protectionist* intents and determinations of product "likeness"; following accounts have re-framed the relevant questions by emphasising the pursuit of *legitimate non-protectionist policy goals* by regulators and the resulting "unlikeness" of products.[86] The discussion on aim-and-effects approaches was then incorporated into the debate on npr-PPMs and their justification. It is in this light that, according to a famous account, npr-PPM regulatory distinctions drawn on legitimate policy grounds should render conforming and non-conforming products "unlike".[87] From this perspective, "like" products have been defined as products in a competitive relationship that do not differ "in any respect relevant to an actual non-protectionist policy goal".[88] New and increasingly sophisticated readings of the provisions of Article III GATT and of the two sentences of Article III:2 have been put forward to lend support to this argument.[89]

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[86] In other words, the assumption that products shall be regarded as "like" in the absence of any specific *protectionist* aims has been gradually replaced by the argument that the pursuit of *legitimate non-protectionist policy goals* should render (otherwise "like") products "unlike". *See* for instance Howse & Regan, *supra* note 10, at 257.

[87] Howse & Regan, *supra* note 10, at 258; Regan, *Regulatory Purpose and "Like" Products in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, *supra* note 49, at 444; Regan, *Further Thoughts on the Role of Regulatory Purpose under Article III of the GATT*, *supra* note 49, at 752. In Panel Report, EC – Seal Products, *supra* note 13, ¶¶ 7.141–7.169, the EU put forward a different argument which would have achieved the same exact results; this was developed in the context of the analysis under Article 2.1 TBT Agreement. The EU did *not* object to the complaining Members' argument that seal products that conformed with the EU npr-PPM standards and seal products that did not conform with them should qualify as "like" products. However, it argued that the existence of a detrimental impact should be established by assessing the *respective treatment* of domestic and imported *conforming* seal products, and domestic and imported *non-conforming* seal products. This would have achieved the same results as a finding that conforming seal products were "unlike" non-conforming products.

[88] Howse & Regan, *supra* note 10, at 260; Regan, *Regulatory Purpose and "Like" Products in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, *supra* note 49, at 444; Regan, *Further Thoughts on the Role of Regulatory Purpose under Article III of the GATT*, *supra* note 49, at 752.

[89] Howse & Regan, for instance, have laid particular emphasis on the different scope of application of Article III:2, second sentence ("directly competitive or substitutable" products) and Articles III:2, first sentence, and III:4 ("like" products). According to Howse

Different and more recent accounts have laid particular emphasis on the criterion of consumer perception and behaviour, with a view to narrowing down the "pool" of "like" products.[90] In *EC – Asbestos*, the Appellate Body noted that "as products that are in a competitive relationship in the marketplace could be affected through treatment of imports less favourable than the treatment accorded to domestic products, it follows that the word like […] is to be interpreted to apply to products that are in such a competitive relationship" (emphasis added).[91] While unequivocally framing the notion of "likeness" in terms of market competition, the Appellate Body also acknowledged that non-economic factors may determine the existence of a competitive relationship between products. These factors include product characteristics that have prompted policy-makers to draw specific regulatory distinctions; the public health risks associated with exposure to asbestos offer one example.[92] Further, these non-economic factors include the "extent to which consumers are, or would be, willing to choose one product instead of another to perform [specific] end-uses […]".[93] The Appellate Body has found that this evidence is "highly relevant in assessing the likeness of products".[94] Consumer behaviour may of course be influenced by the (pr- or npr-) PPM characteristics of a product; this kind of considerations also came into play in both *EC – Asbestos*[95]

& Regan, the same results achieved via the application of the "so as to afford protection" test under the second sentence of Article III:2 should be achieved in the context of the first sentence of Article III:2 and Article III:4: under this construction, as explained above, this should be done by taking regulatory purpose into account to establish product "likeness" under the first sentence of Article III:2 and Article III:4. *See* Howse & Regan, *supra* note 10, at 266, 267; *See also* Regan, *Regulatory Purpose and "Like" Products in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, *supra* note 49, at 474.

[90] For an argument in favour of greater consideration of consumer perception and regulatory purpose in the context of product "likeness", see e.g., Emily Barrett Lydgate, *Consumer Preferences and the National Treatment Principle: Emerging Environmental Regulations Prompt a New Look at an Old Problem*, 10 WORLD TRADE REV. 165 (2011). For an overview of these arguments, see the in-depth analysis in Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT. ECON. L. 639 (2011); Ming Du, *Taking Stock: What Do We Know, and Do Not Know, About the National Treatment Obligation in the GATT/WTO Legal System?* 1 THE CHINESE J. GLOB. GOVERNANCE 67 (2015).

[91] AB Report, EC – Asbestos, *supra* note 35, ¶ 99.

[92] The hazardous properties of asbestos had prompted policy-makers to draw a regulatory distinction between asbestos fibres and other (non-hazardous) fibres, resulting in a ban against the former. In AB Report, EC – Asbestos, *supra* note 35, ¶ 115 ff, it was found that the public health risks posed by asbestos fibres were relevant in assessing its competitive relationship on the marketplace with other (non-hazardous) fibres.

[93] AB Report, EC – Asbestos, *supra* note 35, ¶ 117.

[94] *Id.*

[95] *Id.* ¶ 122 ff. In AB Report, EC – Asbestos, *supra* note 35, ¶ 123, the Appellate Body rejected the argument that consumer behaviour ceases to be relevant in so far as regulatory

and *US – Tuna II (Mexico)*[96]. Overall, this close focus on non-economic factors may yield similar results to a direct analysis of regulatory purpose. Strengthening the role of consumer perception and behaviour reduces the importance of both physical and economic "likeness", further circumscribing the boundaries of the group of "like" products. This, in turn, reduces the probabilities of finding of disparate impact.

B. The EU Standards on High ILUC Risk Biofuels, Product "Likeness", and the Chapeau of Article XX

The preceding analysis triggers a number of questions regarding the high/low ILUC risk npr-PPM standards enshrined in the EU regulatory framework on renewables. How would questions surrounding compatibility with Article III:4 GATT be framed if an aim-and-effects approach to product "likeness" were employed? And what would be the relevant implications?

A focus on npr-PPM regulatory distinctions drawn on legitimate environmental policy grounds would lend support to the argument that high ILUC risk (such as palm oil-based) biofuels and different non-high ILUC risk categories of biofuels are "unlike". From this perspective, the differentiation in their regulatory treatment is warranted and would not result in a finding of a violation of Article III:4. More specifically, high ILUC risk palm oil-based biofuels and different (non-high ILUC risk) categories of biofuels would not be included in the same "pool" of "like" products; this prevents a finding of a disparate impact and therefore a finding of "less favourable treatment" of imported products vis-à-vis domestic "like" products. In a similar vein, laying emphasis on consumer behaviour and consumer perception could potentially support the view that high ILUC risk biofuels and other categories of biofuels are not in a competitive relationship and are thus "unlike" in economic competition (rather than in regulatory and policy) terms. Yet again, this narrows down the "pool" of "like" products and thus prevents a finding of "less favourable treatment".

An analysis under the original "aim-and-effects" test would encompass an enquiry into the existence of "subjective" protectionist aims as well as an examination of the trade effects of the measures. An analysis of "subjective" intents may lead to

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interventions have affected consumer choice on the market; under these circumstances, a Panel should rather engage in an analysis of latent demand.

[96] In Panel Report, US – Tuna II (Mexico) (Article 21.5 – Mexico), *supra* note 81, ¶ 7.247 ff, it was acknowledged that consumer preferences relating to product compliance with specific npr-PPM standards may have an impact on the competitive relationship between products and make products "unlike". In Panel Report, EC – Seal Products, *supra* note 13, ¶ 7.139, the Panel found that consumers did not distinguish between npr-PPM compliant and non-compliant products prior to the adoption of the EU regulations.

the conclusion that the regulatory distinction between high ILUC risk biofuels and different categories of biofuels pursues legitimate environmental as opposed to illegitimate protectionist goals. In *US – Malt Beverages*, for example, the GATT Panel Report relied on the legislative history of the relevant measures to find that state restrictions on points of sale, distribution, and labelling based on the alcohol content of beer above 3.2, 4, or 5% by weight were either aimed at protecting human health and public morals or at promoting new sources of government revenue.[97] Symmetrically, it emphasised the absence of any evidence that the alcohol content of beer had been singled out to favour domestic producers.[98] On these grounds, it concluded that different regulatory distinctions made at state level were not applied so as to afford protection and that high and low alcohol beer should not be regarded as "like" products.[99] In a similar vein, in *US – Taxes on Automobiles*, the Panel found that the regulatory distinctions created under the gas guzzler law and the methodology applied to the calculations did not aim to afford protection to domestic products but responded to different policy goals.[100]

The presumption that the ILUC risk npr-PPM distinction does not aim to afford protection to domestic biofuel products would then have to be balanced with the trade effects of the measures. The considerable distortions of competitive opportunities for palm oil-based biofuels, which are singled out as the only group of high ILUC risk biofuels, may suggest a violation of Article III:4. Nonetheless, the application of this limb of the aim-and-effects test would be very problematic.

As a preliminary point, it is worth noting that the application of aim-and-effects test at the product "likeness" stage precludes a structured analysis of the existence of a disparate impact on imported products; the reason is that aim-and-effects balancing in the context of determinations of "likeness" implies that the "pool" of relevant "like" products has not yet been identified. For this reason, the application of a disparate impact test can only be fully reconciled with aim-and-effects balancing in the context of determinations of "less favourable treatment".[101] Further, the process of balancing "aims" and "effects" triggers several questions. How the relative importance of non-protectionist "aims" should or may be balanced against the relative trade-distorting "effects" is far from clear.

More worryingly, aim-and-effects balancing puts the accent on the magnitude of the relevant trade effects. This is the third and main problem. In *US – Taxes on Automobiles*, by way of example, the Panel found that the 22.5 mpg threshold "did

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[97] GATT Panel Report, US – Malt Beverages, *supra* note 50, ¶ 5.74.
[98] *Id.,* ¶ 5.74.
[99] *Id.*, ¶¶ 5.75-5.77.
[100] GATT Panel Report, US – Taxes on Automobiles, *supra* note 51, ¶ 5.29.
[101] *See infra* VI.

not seem excessive" and for this reason "did not have the effect of affording protection".[102] In a similar vein, in its analysis of the luxury tax threshold, the Panel noted that, "the conditions of competition accorded to products just above the $30,000 threshold did not differ markedly from those just below the threshold […]".[103] This is highly problematic.

The magnitude of a measure's effects on trade does not provide any meaningful indications as to the question of its unjustifiable protective application. Unjustifiable protective application, as explained in the fourth part, is connected to specific breaches of good faith and abusive recourse to the policy exceptions of Article XX. A measure's impact on the equality of competitive opportunities between domestic and imported products may be relatively limited. Nonetheless, the measure may still be applied in such a way that it unjustifiably affords protection. On these grounds, aim-and-effects balancing may fail to capture unjustifiable protective application that is not significant in its trade-distorting effects. Symmetrically, a measure's effects on the equality of competitive opportunities between domestic and imported products may be significant in the absence of any aspects of unjustifiable protective application; the regulatory distinctions that have caused the relevant disparate impact, for example, may be applied in a perfectly even-handed and calibrated manner.

This brings us to the crucial limitation and shortcoming of the application of aim-and-effects tests at the product "likeness" stage. A focus on "subjective" aims and relevant trade effects, references to legitimate policy distinctions, or an emphasis on consumer perception and behaviour cannot target the practical application of specific aspects of a measure. For this reason, these tests cannot address the question of whether regulatory distinctions that have been drawn on legitimate policy grounds are applied in such a way that they unjustifiably afford protection to domestic products. This question, by contrast, is fully addressed under the Chapeau of Article XX. An analysis of the EU renewables framework's compatibility with the Chapeau helps illustrate this point in practice.

In *US – Shrimp*, the Appellate Body took issue with a US ban on shrimp that had been caught with the same turtle excluder devices employed in the US but that originated from non-certified countries.[104] This aspect in the application of the US measures failed to treat "environmentally equivalent" products originating from the US, the complaining Members and other importing Members in the same way. For this reason, a regulatory distinction drawn on (otherwise legitimate) environmental policy grounds had been applied in a manner that was irreconcilable

[102] GATT Panel Report, US – Taxes on Automobiles, *supra* note 51, ¶ 5.25.
[103] *Id.,* ¶ 5.12.
[104] AB Report, US – Shrimp, *supra* note 12, ¶ 165.

with conduct in good faith, that unjustifiably afforded protection to domestic ("environmentally equivalent" shrimp) products, and that unjustifiably discriminated against ("environmentally equivalent" shrimp) products originating from countries that had not been certified by the US authorities vis-à-vis products originating from certified countries.

Throughout the *US – Tuna II (Mexico)* saga, the dispute settlement organs pointed to the lack of calibration and uneven-handed application of the (otherwise legitimate) US tuna labelling scheme.[105] Yet again, the dispute settlement organs did not object to the regulatory purpose of the measure or to the US decision to draw regulatory distinctions between "like" products;[106] rather, they took issue with the manner in which the measures would apply in practice.

The Panel in the compliance proceedings held that the *relevant* conditions in the analysis of the measure's "eligibility" requirements related to the different unobservable harms caused to dolphins by different fishing methods. It then found that the conditions prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used were *not the same*; on these grounds, the differentiation of treatment and the total disqualification of setting on dolphins did not arbitrarily and unjustifiably discriminate between countries with the same prevailing conditions.[107] Turning to the measure's "certification" and "tracking and verification" requirements, by contrast, the Panel found that the *relevant* conditions related to the harms to dolphins arising from death and serious injury. Dolphins, as the Panel noted, may be injured or killed both within and outside of the Eastern Tropical Pacific Ocean (ETP) large purse seine fishery. For this reason, in this instance, the Panel found that the conditions were relevantly *the same*; the different treatment accorded to operators within and outside of the ETP large purse seine fishery was thus tantamount to arbitrary or unjustifiable discrimination.

The Appellate Body reversed the Panel's findings by noting that the relevant conditions at stake related to the risks of adverse effects on dolphins arising from different tuna fishing practices in different areas of the ocean.[108] Against this backdrop, it found that the measure's design was difficult to reconcile with the

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[105] Panel Report, US – Tuna II (Mexico) (Article 21.5 – Mexico), *supra* note 81, ¶ 7.554 ff.; AB Report, US – Tuna II (Mexico) (Article 21.5 – Mexico), *supra* note 81, ¶ 7.308 ff.

[106] In fact, the dispute settlement organs' findings surrounding calibration prompted the US to broaden the scope of application of the relevant environmental protection measures and increase their stringency.

[107] Panel Report, US – Tuna II (Mexico) (Article 21.5 – Mexico), *supra* note 81, ¶ 7.577 ff.

[108] AB Report, US – Tuna II (Mexico) (Article 21.5 – Mexico), *supra* note 81, ¶¶ 7.308, 7.359.

objective of dolphin protection in so far as it did "not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse seine fishery".[109] Despite its different framing of the relevant conditions at stake, yet again, the Appellate Body found that the measures' uneven-handed application was irreconcilable with conduct in good faith and unjustifiably afforded protection to tuna products caught by US fishermen out of the ETP.

Just like in *US – Shrimp*, an assessment of the EU renewables framework against the Chapeau requirements is highly likely to result in a finding that the high/low ILUC risk npr-PPM standards fail to treat "environmentally equivalent" biofuel products in the same way. Further, like in *US – Tuna II (Mexico)*, the ILUC risk npr-PPMs are neither even-handedly applied nor calibrated.

As explained in the second part, the Commission's 2019 Regulation has singled out palm oil as the only high ILUC risk feedstock with a significant expansion into land with high-carbon stock; consequently, palm oil-based biofuels are the object of specific regulatory restrictions unless they are certified as low ILUC risk. This reference to the absolute ILUC risks posed by palm oil as a feedstock cannot possibly capture the relative ILUC risks posed by specific palm oil-based biofuel products as well as other specific (e.g., soybean or rapeseed oil-based) biofuel products.[110] This has several implications. First, the measures fail to treat "environmentally equivalent" (e.g., palm oil-based and rapeseed oil-based) biofuel products associated with the same relative ILUC risks in the same way. Second, the measures are neither calibrated to the relative ILUC risks posed by different biofuel products nor even-handedly applied. A palm oil-based biofuel product associated with limited ILUC risks has to meet stringent requirements and be certified as low ILUC risk; a rapeseed oil-based biofuel product associated with comparatively higher ILUC risks, however, does not have to be certified. Third, due to their uneven-handed application, the measures also fail to differentiate the regulatory treatment of different non-palm oil-based biofuel products (e.g., "green" and "non-green" rapeseed oil-based biofuels associated with different ILUC risks).

In their practical application, the EU measures thus fall foul of the Chapeau requirements. The uneven-handed application of the regulations reveals breaches of good faith; it is difficult to reconcile with the environmental policy goals of the

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[109] *Id.,* ¶ 7.359.

[110] For a similar point, see Andrew D. Mitchell & Dean Merriman, *Indonesia's WTO Challenge to the European Union's Renewable Energy Directive: Palm Oil and Indirect Land Use Change*, 12 TRADE L. & DEV. 548 (2021).

EU renewables framework and undermines their achievement. This aspect in the application of the measures suggests abusive recourse to the policy exceptions of Article XX and unjustifiably affords protection to domestic (e.g., soybean or rapeseed oil-based) biofuel products.

As the analysis of this subpart has demonstrated, the Chapeau of Article XX captures aspects of unjustifiable protective application. The opposite applies to aim-and-effects tests at the product "likeness" stage; as illustrated above, these approaches fail to address the question of whether regulatory distinctions drawn on legitimate policy grounds are applied in such a way that they afford protection to domestic products. This casts some light on the limitations associated with aim-and-effects approaches.

VI. AIM-AND-EFFECTS, "LESS FAVOURABLE TREATMENT", AND THE STANDARDS UNDER CHALLENGE IN *EU – PALM OIL*

A. Aim-and-Effects and "Less Favourable Treatment": Rationale and Evolution

Over the years, the focus of advocates of aim-and-effects approaches has gradually shifted towards determinations surrounding "less favourable treatment".[111] Analyses of aim-and-effects at the product "likeness" stage came under challenge on conceptual grounds: an examination of different legal regimes, for instance, lends support to the argument that the "aim" and "effects" of a measure should influence findings of discrimination as opposed to findings surrounding product comparators.[112] The first arguments included both "objective" protective application as well as "the effects of the regulation on the group of imports as opposed to the group of like domestic products" within the overall aim-and-effects balancing process.[113] Over time, the "effects" component has again been left behind.

More recent analyses have advocated the extension of the "so as to afford protection" test employed under Article III:2, second sentence. Under these constructions, the "so as to afford protection" test should also apply to analyses conducted under Articles III:4 and III:2, first sentence.[114] As already mentioned in

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[111] Or symmetrically, towards findings regarding internal taxes or other internal charges "in excess" of those applied to "like" domestic products under Article III:2, first sentence.

[112] Joost Pauwelyn, *The Unbearable Lightness of Likeness. A Review of Mireille Cossy, Some Thoughts on the Concept of "Likeness" in the GATS*, WTO Staff Working Paper ERSD-2006-08 (2006), 7.

[113] *Id.,* at 11.

[114] *See inter al.* Ole K. Fauchald, *Flexibility and Predictability under the World Trade Organization's Non-Discrimination Clauses*, 37 J. WORLD TRADE 443, 477 (2003); Weihuan Zhou, *The Role of*

the second part, this test involves a focus on "objective" protective application as opposed to "subjective" protectionist intents.

This begs the question whether an analysis as per Article III:2, second sentence, could achieve the same results as the interpretation and application of the Chapeau of Article XX. Were this to be the case, it may be reasonable to defend a "so as to afford protection" test in the context of the National Treatment obligations; this would relieve regulating Members from the burden of provisionally justifying their measures under the subparagraphs of Article XX.

Analyses under Article III:2, second sentence, place the rationale and the application of any regulatory distinctions in the treatment of domestic and imported products under the spotlight, "relating the observable structural features of a measure with its declared purpose".[115] The rational relationship between a measure and any relevant policy goals pursued by regulators thus comes into play directly.[116] They also encompass an examination of the even-handedness of a measure's application and its overall structural consistency. Nonetheless, as the next subpart demonstrates through an analysis of the paper's case study, analyses under Article III:2, second sentence, cannot capture different aspects resulting in "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

B. The EU Standards on High ILUC Risk Biofuels, "Less Favourable Treatment", and the Chapeau of Article XX

The examination of the previous subpart begs the question of how compatibility with Article III:4 GATT would be framed if an aim-and-effects approach at the "less favourable treatment" stage were to be employed. As suggested above, an analysis of "objective" protective application (as opposed to "subjective" protectionist intents) as per Article III:2, second sentence, would capture the uneven-handed application of the EU high/low ILUC risk npr-PPM standards. On these grounds, an examination of aim-and-effects under "less favourable

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Regulatory Purpose under Articles III:2 and III:4 – Toward Consistency Between Negotiating History and WTO Jurisprudence, 11 WORLD TRADE REV. 81 (2012); Emily Lydgate, *Sorting Out Mixed Messages Under the WTO National Treatment Principle: A Proposed Approach*, 15 WORLD TRADE REV. 423 (2016); *See also* Amicus Curiae Written Submission of Veblen Institute for Economic Reforms, *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia)*, at 12-21, WTO Doc. WT/DS600 (Apr. 16, 2021) [hereinafter Amicus Curiae Submission, EU – Palm Oil (Malaysia)].

[115] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, at 12-21, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted Jan. 12, 2000) [hereinafter AB Report, Chile – Alcoholic Beverages].

[116] *Id.,* ¶¶ 69-76.

treatment" would probably result in the same findings illustrated in subpart B of the fifth part.

Nonetheless, as anticipated above, this test fails to identify breaches of good faith and more subtle forms of unjustifiable protective application that are captured by an analysis through the lens of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail". For this reason, analyses under Article III:2, second sentence (and Article 2.1 TBT Agreement) and assessments under the Chapeau of Article XX are not co-extensive. An examination of the dispute settlement organs' findings regarding due process, negotiations in good faith, and coercion helps illustrate these points in practice.

Breaches of due process and untransparent arrangements are rather straightforward "indicators" that the Chapeau requirements have not been complied with. *US – Shrimp* provides the clearest example. In this dispute, the Appellate Body found that the certification procedures laid out in Section 609 did not establish a "transparent [and] predictable certification process".[117] The regulatory arrangements failed to provide any opportunity for the applicant countries to be heard. Further, the regulations neither required US officers to issue any written and reasoned decision nor provided for a review process.[118] As the Appellate Body concluded, the application of this "singularly informal and casual" process[119] resulted in arbitrary discrimination between countries where the same conditions prevailed. Breaches of due process reveal bad faith, and untransparent arrangements may be applied in such a way as to afford protection to domestic products (or discriminate against specific Members).

This element in the practical application of a measure is encompassed within the broader Chapeau analysis. However, it is beyond the reach of a narrower "so as to afford protection" test. This "indicator" of compliance with the Chapeau could come into play in the context of the EU high ILUC risk npr-PPM standards, casting light on aspects of potential unjustifiable protective application. The EU criteria for the determination of high ILUC risk feedstock with a significant expansion into land with high-carbon stock, which have resulted in palm oil-based biofuels being singled out on environmental policy grounds, have been the object of intense criticism. The methodological robustness and transparency of the criteria have been fiercely disputed.[120] This suggests that these aspects in the

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[117] AB Report, US – Shrimp, *supra* note 12, ¶ 180.
[118] *Id.*
[119] *Id.,* ¶ 181.
[120] See for instance *Request for the Establishment of a Panel by Indonesia*, European Union – Certain measures concerning palm oil and oil palm crop-based biofuels (EU – Palm Oil

application of the EU measures may be captured by an assessment under the Chapeau. By contrast, they are unlikely to come into play under a narrower "so as to afford protection" test.

Similar considerations apply to negotiations in good faith and engagement with third countries, as in *US – Gasoline*. In this dispute, the US differentiated the regulatory treatment of domestic and imported gasoline by respectively applying individual and (more burdensome) statutory baseline values. It attempted to justify this regulatory distinction by claiming that the (regulatory implementation) conditions prevailing in the US and exporting Members were not relevantly the same, and that the application of (more burdensome) statutory baseline values was warranted to enhance the environmental effectiveness of the measures. The Appellate Body, by contrast, found that the US decision to apply statutory baseline values to imported gasoline was irreconcilable with conduct in good faith and unjustifiably afforded protection to domestic gasoline. The Appellate Body did *not* find that the (regulatory implementation) conditions prevailing in the US and exporting Members were relevantly the same, or suggest that this was the reason why differentiated treatment resulted in arbitrary or unjustifiable discrimination. Rather, it emphasised that the US had failed to engage in good faith with exporting Members with a view to identifying equally environmentally effective but non-discriminatory criteria.[121] This rendered the differentiated treatment (discrimination) "arbitrary or unjustifiable" in nature. This element may also potentially come into play under an analysis of the EU high ILUC risk npr-PPM standards.[122] An application of the "so as to afford protection" test to the high ILUC risk requirements, by contrast, would fail to capture this aspect.

Finally, an analysis through the lens of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" also allows for an examination of coercion. However, in accordance with the dispute settlement organs' good faith-centred approach to the interpretation of the Chapeau requirements, the EU ILUC risk npr-PPM standards are overall unlikely to involve a breach of this "indicator".[123]

(Indonesia)), WTO Doc. WT/DS593/9 (Mar. 24, 2020); *See also* EU – Palm Oil (Malaysia), *supra* note 6.

[121] AB Report, US – Gasoline, *supra* note 65, at 25-28.

[122] Similar considerations would apply if, by way of example, the low ILUC risk npr-PPM requirements applied to *all* biofuels but were laid out and framed in such a way as to make it considerably more difficult for palm oil-based biofuels specifically to qualify. This would also reflect breaches of good faith and aspects of unjustifiable protective or discriminatory application.

[123] Leonelli, *supra* note 76.

In *US – Shrimp*, the Appellate Body found that US officers had applied the Section 609 certification procedures in a rigid and inflexible manner; more specifically, they had only enquired whether the relevant countries mandated the use of turtle excluder devices. On these grounds, the US certification procedures required "other WTO Members to adopt a regulatory programme that is not merely comparable but rather essentially the same as that applied to the United States shrimp trawl vessels" (emphasis added).[124] The Appellate Body held that this resulted in an "intended and actual coercive effect on the specific policy decisions made by foreign governments […]".[125] Further, the rigid requirement that exporting countries shall mandate recourse to turtle excluder devices did not allow "for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries" (emphasis added).[126]

At first glance, these findings on coercion may suggest that regulating Members should design their npr-PPM standards in a sufficiently flexible manner. First, this would allow exporting Members to tailor their regulatory responses to their own prevailing conditions. Second, it would also enable them to pursue the relevant regulatory goals via recourse to comparably effective (as opposed to "essentially the same") regulatory measures and programmes. Nonetheless, a careful analysis of *US – Shrimp* and following disputes lends support to the view that regulatory flexibility is *not* an unconditional and self-standing requirement under the Chapeau.[127] Rather, the boundaries of coercion are circumscribed by a good faith-centred interpretation and application of the Chapeau criteria.[128]

In *US – Shrimp*, the US measures leveraged (and coerced) *states* rather than market actors. Further, as already explained in the fifth part, the US had enforced a ban on *shrimp* that had been caught with the same turtle excluder devices employed in the US *but that originated from non-certified countries*. When combined with the *rigidity* of the US certification procedures, as highlighted above, these elements suggested that the US was more concerned about *exporting its own regulatory approach* than about *turtle protection*. These revealed *breaches of good faith* and an attempt to *afford protection to domestic* (shrimp) *products* by levelling the economic playing field.[129] Under this

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[124] AB Report, US – Shrimp, *supra* note 12, ¶ 163.
[125] *Id.,* ¶ 161.
[126] *Id.,* ¶ 165.
[127] By way of example, coercion did not come into play at all in *EC – Seal Products*. However, the npr-PPM standards under challenge in this dispute were not designed in a flexible way and did not enable exporting countries to differentiate their regulatory responses with a view to tailoring them to their own prevailing conditions.
[128] For an in-depth analysis, *see* Leonelli, *supra* note 76.
[129] *Id.*

reading of *US – Shrimp*, the Appellate Body's findings in this dispute conform to a narrow good faith-centred interpretative approach.

The EU low ILUC risk npr-PPM standards are not designed in a flexible manner and do not allow for self-differentiation by third countries that export palm oil-based biofuels. However, the EU high ILUC risk regulatory framework and the low ILUC risk standards do not reflect any of the breaches of good faith that came into play in *US – Shrimp*, as explained above in this subpart. This suggests that a finding of coercion will not (and should not) come into play in the *EU – Palm Oil* disputes. Nonetheless, as this subpart has illustrated, an analysis through the lens of "arbitrary or unjustifiable discrimination between countries where the same relevant conditions prevail" can help capture breaches of good faith and aspects of unjustifiable protective application that are beyond the radar of aim-and-effects tests applied at the "less favourable treatment" stage.

VII. CONCLUSIONS: THE LIMITS OF AIM-AND-EFFECTS APPROACHES AND THE CENTRALITY OF THE CHAPEAU OF ARTICLE XX IN TIMES OF EXTRATERRITORIAL LEVERAGE

Recourse to extraterritorial leverage by the EU can promote the uptake of environmentally beneficial practices by market actors and raise the environmental ambition of exporting Members. Nonetheless, it also pulls the fabric of the multilateral trade system. Over the following years, we will certainly witness increasing recourse to unilateral standards and a further shift towards environmental unilateralism. This makes it all the more important to draw a clear distinction between *justifiable* barriers to trade and market access and *unjustifiable* protective (or discriminatory) applications.

It is against this backdrop that this paper has taken a fresh look at the long-standing debate on aim-and-effects. The fifth and sixth parts have employed an analysis of the npr-PPM standards under challenge in *EU – Palm Oil* to highlight the shortcomings of aim-and-effects approaches. Analyses of aim-and-effects to establish product "likeness", as illustrated in the fifth part, cannot address the question whether regulatory distinctions drawn on legitimate policy grounds are applied in such a way that they unjustifiably afford protection to domestic products. In the face of high levels of regulatory complexity, this is very problematic. Analyses of aim-and-effects to determine "less favourable treatment", as argued in the sixth part, cannot help identify more subtle forms of potential unjustifiable protective application. This also poses several challenges.

The examination has thus cast light on the shortcomings of aim-and-effects approaches while emphasising the crucial function of the Chapeau of Article XX.

An assessment through the lens of "arbitrary or unjustifiable discrimination between countries where the same relevant conditions prevail", as the fifth and sixth parts have demonstrated, can help capture breaches of good faith and aspects of unjustifiable protective application that are beyond the radar of aim-and-effects approaches.

Much has been written about the Chapeau throughout the years; nonetheless, its distinctive features and its key role in the context of the GATT system have never been fully acknowledged in the literature. Arguments surrounding the application of aim-and-effects approaches are bound to resurface in WTO dispute settlement and in the literature.[130] Defending the centrality of the Chapeau will be crucial for a comprehensive assessment of whether regulating Members are acting in good faith, with a view to identifying aspects of unjustifiable protective application. In times of increasing recourse to extraterritorial leverage, a full acknowledgment of the value of the Chapeau will be more important than ever before.

[130] *See*, *e.g.,* Amicus Curiae Submission, EU – Palm Oil (Malaysia) *supra* note 114.