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MEANING OF THE TERMS "ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION" IN THE CHAPEAU OF GATT ARTICLE XX

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ABSTRACT: *This paper discusses the meaning of the phrase "arbitrary or unjustifiable discrimination" in the opening paragraph (the so-called "Chapeau") of Article XX of the General Agreement on Tariffs and Trade (GATT). One of the most controversial phrases in the GATT, the curious apothegm has had a profound impact on how the Disputed Settlement Body (DSB) and the Appellate Body (AB) construct, interpret, and apply article XX. The drafters of GATT realized that certain circumstances may require barriers to trade; and to this end included Article XX in GATT. GATT article XX provides a litany of circumstances that allow a nation to abrogate the ordinary provisions of GATT. This litany of defenses is preceded by a paragraph explaining the over-arching criteria for such deviation from the ordinary provisions of the GATT; this is the so-called "chapeau" (from the French for "hat") of article XX. The chapeau has been the subject of much debate, since it determines when the defenses provided for can be invoked. Of particular interest are the phrases "arbitrary or unjustified discrimination," and "a disguised restriction" that appear in the chapeau. The body of case law developed by the DSB and AB regarding the curious phraseology of the Chapeau of Article XX hinges around the decision found in the US-Gasoline case (the so-called "Gasoline Rule") and further elaborated upon in later cases such as US-Shrimp. Under this doctrine, when a member nation legislates in manner that would deviate from its commitments under GATT, and invokes article XX to justify such deviation, then said legal norm must pass three tests. First, it must be caught under one of the litany of defense given under the paragraph of article XX. Then it must be deemed to be neither "arbitrary or unjustified discrimination" nor "a disguised restriction"—in other words these two phrases are not interpreted as part of one species, but are seen as two separate criteria; meaning that the Chapeau is seen as introducing two tests. This decision has been hotly debated since its establishment. This paper analyzes the debate around this decision and finds that the AB in US-Gasoline acted with the utmost caution and impartiality in applying the Chapeau strictu sensu, and rejects the view that the AB was either ideologically partial to neo-liberal trade policy or apathetic towards environmental concerns.*

KEYWORDS: Arbitrary Discrimination, Chapeau of GATT Article XX, Unjustifiable Discrimination

INTRODUCTION

Signed on 30 October 1947, the General Agreement on Tariffs and Trade (GATT)[1] is an

[1] (1948). General Agreement on Tariffs and Trade (GATT). W. T. O. (WTO). Geneva, Geneva Canton, Switzerland.

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international treaty originally signed by 23 nations, and later expanded in scope through the World Trade Organization, which seeks to facilitate world trade through the lowering of trade barriers.[2] The drafters of GATT realized that certain circumstances may require barriers to trade; and to this end included Article XX in GATT. GATT Article XX provides a litany of circumstances that allow a nation to abrogate the ordinary provisions of GATT. This litany of defenses is preceded by a paragraph explaining the over-arching criteria for such deviation from the ordinary provisions of the GATT; this is the so-called "chapeau" (from the French for "hat") of article 20.[3] The chapeau has been the subject of much debate, since it determines when the defenses provided for can be invoked. Of particular interest are the phrases "arbitrary or unjustified discrimination," and "a disguised restriction." This paper will analyze the interpretation of these phrases by the appellate body (AB) in the jurisprudence of the WTO.

The History of GATT

The General Agreement of Tariff and Trade (GATT) is an international treaty, signed on October 30, 1947 by 23 participating nations.[4] The purpose of GATT is delineated in its preamble, which states that the function of GATT is the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." GATT was ultimately the outcome of the earlier, failed attempts of the participating states to establish an International Trade Organization (ITO). The GATT has been subject to several modifications established through multilateral agreements, called "rounds;" the most important of which was the Uruguay rounds signed in Marrakesh, Morocco by 123 signatory states on April 14, 1994. The most important achievement of the Uruguay rounds was the establishment of the World Trade Organization (WTO) on January 1, 1995. The original text of the 1947 GATT is still in effect as part of the framework of the WTO, subject to the modifications of the Uruguay and other rounds as part of the WTO framework.

The institution that would become GATT, and more ultimately the World Trade organization, has at its roots the "United Nations Monetary and Financial Conference of July 1st-22nd, 1944" better known as the "Bretton Woods Conference," as it was attended by 730 delegates from the 44 then-allied nations in Bretton Woods, New Hampshire in the Mount Washington Hotel.[5] This is the same conference that would ultimately produce many other major institutions of the modern world financial system, such as the World Bank (WB) and the International Monetary Fund (IMF). The principal agenda of Bretton Woods was the establishment of a global-level financial and monetary establishment, and not specifically an institution for international

[2] Trebilcock, M., et al. (2013). The Regulation of International Trade. 2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN & 711 Third Avenue, New York, NY 10017, Routledge: London and New York.

[3] 房东 (2017). WTO Law, Lecture 7: General Exceptions, GATT Article XX, GATS Article XIV. A Lecture Delivered by Professor Fang Dong at the Xiamen University School of Law on December 15, 2017

[4] (1948). General Agreement on Tariffs and Trade (GATT). W. T. O. (WTO). Geneva, Geneva Canton, Switzerland.

[5] Markwell, D. (2006). John Maynard Keynes and International Relations: Economic Paths to War and Peace. Oxford, Oxford University Press.

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trade.[6] Nevertheless, the delegates, and in particular John Maynard Keynes, recognized the need for an international regime to regulate world trade as complementary to their goals.[7] To this end, the United States of America took a leading role in gathering the Allies together into a multilateral panel with the aim of establishing reciprocal mechanisms for lowering barriers to trade in December of 1945. President Truman was granted power by Congress to negotiate such an agreement in July of the same year. In February of 1946, the United Nations Economic and Social Committee produced a resolution proposing the establishment of a conference to write a charter creating an "International Trade Organization" (ITO). The ultimate fruit of this labor would be the ill-fated "Final Act of the United Nations Conference on Trade and Employment of March 1948," better known as the "Havana Charter."[8]

The ultimate vision of Keynes regarding the regulation of international trade seems to have been a political tripod resting on three legs: 1.) the International Trade Organization (ITO), which would have acted as a conduit for trade between states, settling disputes and regulating their activities; 2.) the International Clearing Union (ICU), which would stabilize world trade by offering a clearing house for states' trade deficits and surpluses; and 3.) an international, virtual currency called the "bancor" used for all trade accounts. This way, all states party to the agreement would maintain a net zero trade balance sheet; interest would be charged on deficits and surpluses, and states could overdraft a value equivalent to half the value of their trade over the preceding five years.[9] This created a negative feedback loop, encouraging balanced trade accounts between states.

In tandem with the above efforts, the General Agreement of Tariffs and Trade (GATT) was negotiated in Geneva, Switzerland. The GATT seems to have been originally conceived of as being an appendage to the ITO. However, for reasons that have never been fully articulated, the US never successfully ratified the Havana Charter.[10] Despite having taken a leading role in pushing for the establishment of an international regime for the regulation and facilitation of world trade, the US senate ultimate rejected the agreement. While submitted to the US Congress on multiple occasions, the agreement always failed to reach the senate; the senate alone being the only organ capable of ratifying the agreement.[11] On 6 December 1950, then President Truman declared that ratification of the Havana Charter by the US Senate would no longer be sought by his administration.[12] Following the American rejection of the Havana

[6] Bossche, P. v. d. (2005). The Origins of the WTO. The Law and Policy of the World Trade Organization: Text, Cases and Materials. Cambridge, MA, Cambridge University Press.
[7] Markwell, D. (2006). John Maynard Keynes and International Relations: Economic Paths to War and Peace. Oxford, Oxford University Press.
[8] (March 1948). Final Act of the United Nations Conference on Trade and Employment (The Havana Charter). Havana, Cuba.
[9] Markwell, D. (2006). John Maynard Keynes and International Relations: Economic Paths to War and Peace. Oxford, Oxford University Press.
[10] Trebilcock, M., et al. (2013). The Regulation of International Trade. 2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN & 711 Third Avenue, New York, NY 10017, Routledge: London and New York.
[11] The so-called "Treaty Clause" of the Constitution of the United States of America provides that the President of the United States (POTUS) can conclude treaties with foreign powers only if two-thirds of the US Senate concur, see: Art. II, Sec. 2, Cl. 2 of (1789). United States Constitution. P. Convention.
[12] Bossche, P. v. d. (2005). The Law and Policy of the World Trade Organization. Dispute Settlement. Palmeter-Mavroidis.

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Charter, the instrument subsequently failed to be ratified by other states. As such, GATT became the *de facto* instrument for the regulation of international trade; a predicament which would prevail until the creation of the World Trade Organization (WTO) in the 1990s, though a number of the provisions of Havana would find their way into use through many of the subsequent rounds modifying the GATT.[13]

GATT came into force on January 1, 1948. The second round of negotiations to occur thereafter was the Annecy Round, which took place in Annecy, France in 1949. A total of 13 states participated in the Annecy Rounds. These talks focused primarily on a variety of tariff reductions. The third rounds of negotiations to modify the GATT was the Torquay Round of 1951. As the name implies, the Torquay Rounds occurred in the municipality of Torquay in England. A total of thirty-eight nation-states participated in this round of negotiation. The failure of the US Senate to ratify the Havana Charter lead to the failure of the establishment of the International Trade Organization (ITO) to occur. As such, GATT assumed the role that had originally been intended for the ITO by default.

The two Geneva Rounds constitute the fourth and fifth rounds of negotiation regarding the GATT. The fourth round, that of Geneva 1955, concluded in May of 1956. This round saw an agreement between the twenty-six participating states to further reduce tariffs in their jurisdictions. The fifth round, that is the Geneva round of 1960~1962, sometimes also called the "Dillon Round" after U.S. Treasury Secretary Douglas A. Dillon, saw a further reduction in tariffs and other trade barriers by the twenty-six participating states. The so-called "Dillion Round" was also notable for early inclusion of discussions relating to what would become the European Economic Community (EEC).

Named after the titular US President at the time these talks were negotiated, the so-called "Kennedy Rounds" constitute the sixth round of multilateral negotiations relating to GATT. The Kennedy round grew out of some of the conflicts underscoring the earlier Dillon round. The Kennedy round saw greater anticipation of the emerging European Economic Community (EEC), European Free Trade Area (EFTA), the greater role of Japan as a major exporter, and greater participation by developing nations. The adoption of Part IV of GATT reduced the burden on developing countries in relation to developed ones in terms of reciprocal trade policy. The Anti-Dumping Code also clarified Article VI of GATT.

The Tokyo Round of 1973-1979 constitute the seventh round of negotiations regarding GATT. A total of 102 sovereign states and other non-state jurisdictions participated in the round. This round saw further reduction in tariffs and other trade barriers.

Beginning in 1986, the so-called "Uruguay round" (named after the Latin American nation-state of Uruguay, where the rounds took place) was the eighth round of negotiation relating to

2: 80.

[13] Trebilcock, M., et al. (2013). The Regulation of International Trade. 2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN & 711 Third Avenue, New York, NY 10017, Routledge: London and New York.

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GATT. The Uruguay round was notable in expanding the ambit of GATT to include capital, textiles, intellectual property, services, and most notably agriculture. The conclusion of the Uruguay Round would also see the establishment of the World Trade Organization (WTO).

The ninth round of multilateral negotiation, the so-called "Doha Round," was convened in 2001. This round of negotiation is still as yet on-going. However, the "Bali Package" was introduced on December 7th, 2013.

Figure 1: Rounds of GATT

GATT Round	
Round	Year
Geneva I	1947
Annecy	1949
Torquay	1951
Geneva II	1955~1956
Geneva III (Dillon)	1960~1962
Geneva IV (Kennedy)	1964
Tokyo	1973~1979
Uruguay	1986
Doha	2001~Present

The Text of GATT Article XX

The following is the text of the 20th article of the General Agreement on Tariffs and Trade, quoted here verbatim for the benefit of discussion:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver;
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and

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the prevention of deceptive practices;

(e) relating to the products of prison labor;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;[14]

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960."

Jurisprudence: "Arbitrary or Unjustifiable Discrimination"

The Appellate Body (AB) has produced a wide corpus of jurisprudence relating to the phraseology "arbitrary or unjustifiable discrimination" as it appears in Article XX of the General Agreement on Tariffs and Trade (GATT).[15] Article XX of GATT can be considered as constituting two discrete parts, "the Chapeau" and "the defenses" (or "the paragraphs"). The term "the defenses" or "the paragraphs" refers to the litany of individual exceptions or defenses themselves, that can be invoked as caveats to allow a state to enact policy contrary to the wording or intention of GATT. The "chapeau" refers to the preamble of article XX

[14] Interpretative Note Ad Article XX from Annex I: Sub-paragraph (h) The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

[15] For example, see: Organization, T. W. T. (2007). WTO Analytical Index: A Guide to WTO Law and Practice. The Edinburgh Building, Cambridge CB2 8RU, UK, CAMBRIDGE UNIVERSITY PRESS.
Especially pp. 264-268

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establishing the context for invoking said defenses.

In interpreting the Chapeau, the phrase "arbitrary or unjustifiable discrimination" has been the subject of much jurisprudential interpretation. The precise interpretation of this phrase is the subject of this paper. Below are a list of legal instruments and court cases of relevance to this discussion.

Figure 2: Legal Instruments relevant to the Interpretation of the Chapeau

Important Legal Instruments
General Agreement on Tariffs and Trade (GATT)
Vienna Convention on the Law of Treaties (VCLT)
Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (CTE)

Figure 3: Cases of Relevance to the Interpretation of the Chapeau

Important Cases
US-Gasoline
US-Shrimp
EC-Tariff Preferences
US-Spring Assemblies

In article XX of GATT we read: "Subject to the requirement that such measures are not applied in a manner which would constitute a means *of arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or *a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…"[16] However, what constitutes so-called "of arbitrary or unjustifiable discrimination" ?

In the case of *US-Shrimp*, the AB determined that the concept of "arbitrary or unjustifiable discrimination" (as between countries wherein the same conditions prevail) is composed of three constitutive elements: "First, the application of the measure must result in discrimination…the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994…Second, the discrimination must be arbitrary or unjustifiable in character…Third, this discrimination must occur between countries where the same conditions prevail…we accept…the assumption…that such discrimination could occur not only between different exporting Members, but also between exporting

[16] Emphasis Added.

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Members and the importing Member concerned."[17] With regards to the first and third points, the AB cited the earlier case of *US-Gasoline*.

With respect to the first point made by the AB in the above citation, in *US-Gasoline*, it was determined that the type of "discrimination" spoken of in the Chapeau is not of the same type as the "discrimination" already covered elsewhere in GATT, such as at Articles I, II or XI, reasoning that if the Chapeau were describing discrimination of the same character as that described elsewhere, this would be redundant. As stated in *US-Gasoline*: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."[18] Further, in the same case, the Appellate Body (AB) positively determined that relevant standard appropriate for determining "discrimination" under the Chapeau could not be the same as that under GATT Article III:4; such would be contrary to the 'general rule of interpretation' in the Vienna Convention on the Law of Treaties[19] as it would reduce Article XX "discrimination" as redundant to Article III:4 "discrimination."[20] In the Appellate Bodies own words: "The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4…An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility…The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute: (a) 'arbitrary discrimination' (between countries where the same conditions prevail); (b) 'unjustifiable discrimination' (with the same qualifier); or (c) 'disguised restriction' on international trade."[21] This standard of determination is called the "Gasoline Rule." The Gasoline Rule was used in the case of *US-Gasoline* to determine that the conduct that the US displayed towards other WTO members failed to consider the impact that its own gasoline refinement policies would have on the other members' own trade policies; and so the US's attempt to invoke Article XX with regards to its restrictions on gasoline refinement were denied. This same Gasoline Rule was reiterated in *US-Shrimp* in respect of the first constitutive element of "arbitrary or unjustifiable discrimination."[22]

With respect to the third point made by the AB in the citation above from *US-Shrimp* regarding

[17] (1998). US - Shrimp. Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
Appellate Body Report para. 150.

[18] (1996). US - Gasoline. Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
original footnote on pp. 23

[19] (1969). Vienna Convention on the Law of Treaties (VCLT). I. L. C. I. o. t. U. Nations.

[20] Appellate Body Report on (1996). US - Gasoline. Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
on pp. 23

[21] Appellate Body Report on ibid.
on pp. 23

[22] See: Organization, T. W. T. (2007). WTO Analytical Index: A Guide to WTO Law and Practice. The Edinburgh Building, Cambridge CB2 8RU, UK, CAMBRIDGE UNIVERSITY PRESS.
pp. 266-267

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

the three constitutive elements of "arbitrary or unjustifiable discrimination," namely that discrimination "between countries where the same conditions prevail" was discrimination of the type "that…could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned" the Appellate Body (AB) drew from an earlier inference made in the case of *US-Gasoline* in response to a query given to the United States during that case: "[The United States] was asked whether the words…'between countries where the same conditions prevail' refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply…was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries."[23] In this same case, the Appellate Body (AB) noted three additional points. Firstly, none of the other parties to *US-Gasoline* raised any challenge to the USA's interpretation of the phrase "between countries where the same conditions prevail" as applying to "both the exporting countries and importing countries and as between exporting countries." Secondly, the Appellate Body (AB) noted that the language of the Chapeau in fact reinforced this claim; noting that the language "nothing in this agreement" would seem to imply that the exculpatory clauses of Article XX were to apply uniformly across all of GATT, and therefore apply to importing, exporting as well as between exporting countries. Thirdly, the Appellate Body (AB) noted that the term "countries" in the Chapeau were left unqualified; citing a similar inference made during *US-Spring Assemblies*.[24] This is in contrast to other like agreements, which used the term "foreign countries" in this same capacity; implying that the authors intended not to restrict the application in like manner.[25]

Finally, as regards the curious phrase "disguised restriction on international trade" from the Chapeau of Article XX of the General Agreements on Tariffs and Trade (GATT), the Appellate Body (AB) noted that "It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.'"[26] In other words, the AB determined that these three terms could be read "side-by-side" and "imparted meaning towards one another." While 'disguised restriction' carries a somewhat broader meaning than 'arbitrary or unjustifiable discrimination,' these three nonetheless amount to essentially the same activity, which is "abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[27]

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[23] (1996). US - Gasoline. Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3. Appellate Body Report on US – Gasoline, pp. 23–24.

[24] Ibid. pp. 23–24

[25] Appellate Body Report on ibid. pp. 23–24; also footnote. The "like agreements" referred to are: (1927). League of Nations International Convention for the Abolition of Import and Export Prohibitions and Restrictions. 97 L.N.T.S. 393. and (1934). Reciprocal Trade Agreements Act; e.g. the Trade Agreement between the United States of America and Canada. 15 November 1935, 168 L.N.T.S. 356 (1936). . The AB noted that "treaties are here noted, not as pertaining to the *travaux preparatoires* of the General Agreement, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer's ink in the General Agreement.."

[26] Appellate Body Report on (1996). US - Gasoline. Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3. ,p.25

[27] Appellate Body Report on ibid. ,p.25

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Essentially, then, Jurisprudence as relates to the phraseology "of arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade" in GATT Article XX hinges around the language developed in the *US-Gasoline* case, later solidified and further elaborated on in *US-Shrimp*. The determination of the "Gasoline Rule" drew somewhat from the jurisprudence of *US-Spring Assemblies*. We see an example of the use of this jurisprudence as relates to "arbitrary or unjustifiable discrimination" in the *EC-Tariff Preferences*.[28] The juristic reasoning relating to the phrases "arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade" can be paraphrased with the following diagram:

Figure 4: Outline of Jurisprudence[29]

- 'Disguised Restriction on International Trade' > 'Arbitrary or Unjustifiable Use'
  - 3 Constitutive Elements (1998)
    - 1.) the application of the measure must result in discrimination. As we stated in United States – Gasoline, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.
      - General Rule of interpretation from Vienna Convention on Law of Treaties; therefore, not the same as Article III.4
    - 2.) the discrimination must be arbitrary or unjustifiable in character.
      - Gasoline Rule (1996): The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute:
        - (a) 'arbitrary discrimination' (between countries where the same conditions prevail);
        - (b) 'unjustifiable discrimination' (with the same qualifier); or
        - (c) 'disguised restriction' on international trade
    - 3.) this discrimination must occur between countries where the same conditions prevail. In United States – Gasoline, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.

[28] (2004). EC - Tariff Preferences. WT/DS246/AB/R, DSR 2004:III.
[29] Updated from: Organization, T. W. T. (2007). WTO Analytical Index: A Guide to WTO Law and Practice. The Edinburgh Building, Cambridge CB2 8RU, UK, CAMBRIDGE UNIVERSITY PRESS pp.264-268

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

- 1.) No objection to the USA's interpretation of "between countries where the same conditions prevail" as applying to "both the exporting countries and importing countries and as between exporting countries."
- 2.) language of the Chapeau: "nothing in this agreement" – clauses of Article XX are to apply uniformly across all of GATT, and therefore apply to importing, exporting as well as between exporting countries.
- 3.) term "countries" in the Chapeau were left unqualified; citing a similar inference made during *US-Spring Assemblies*. Also, compare (1927, 1934)

DISCUSSION

Ahn (1999) noted that the *US-Shrimp* case was a milestone in WTO dispute resolution as regards WTO/GATT and environmentalism; writing at the time: "To date, no case before GATT/WTO dispute settlement panels has successfully defended the application of trade policies with environmental implication under Article XX of the GATT."[30] Nevertheless, while not suggesting that WTO/GATT harbored any anti-environmental agenda, even Ahn (1999) noted "Such uniformly negative outcomes have raised serious concerns in environmental communities."[31] Many regard the Appellate Body (AB)'s approach to interpreting the Chapeau as 'analytically unsound.'[32] For instance, Bartels (2014) argues: "In the first dispute to deal with the chapeau, *US – Gasoline*, the Appellate Body said that the 'purpose and object [of the chapeau] is generally the prevention of 'abuse of the [general] exceptions' and its approach has barely evolved since then. Rather than establishing workable tests for the application of its conditions, the Appellate Body has preferred to focus on the facts of individual cases. This is not only regrettable from a rule of law perspective, but it has also arguably encouraged unsuccessful respondents to claim that they essentially succeeded and now only need to improve the 'design and implementation' of their measures." Bartels (2014) essentially argues that the Appellate Body (AB) incorrectly draws a distinction between 'content' and 'application' of a state's policy when determining whether said policy falls under Article XX's exclusions, and that this is exacerbated by the aforementioned "abuse or rights" doctrine invented by the AB. Bartels (2014) suggests a more economic approach to the interpretation of Article XX. Gaines (2001) is even more blithe than Bartels (2014), arguing that the chapeau, whether intentionally or otherwise, amounts to a hidden restriction imposed on environmentalism; essentially amounting to a defense of corporate and transnational interests over environmental ones.

Howse (2002), however, takes a more sober approach; pointing out that while dissatisfied with

[30] Ahn, D. (1999). "NOTE: Environmental Disputes in the GATT/WTO: Before and After US-ShrimpCase." Michigan Journal of International Law **20**(4): 820-865. , pp. 860
[31] Ibid. , pp. 860
[32] Bartels, L. (2014). The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements**:** 1-26.

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

the AB panel's ruling in *US-Shrimp*, he nonetheless defends the AB's impartiality. Howse (2002) makes two objectives clear in his article, that the AB ruling in *US-Shrimp* and the legal test regarding the "arbitrary or unjustifiable discrimination" established thereby, reflect judicial conservatism and an attempt to rectify incautious or even partial rulings (such as *US-Tuna*) that seem to overly favor free trade. In *US-Shrimp*, the AB established a set doctrine for interpreting the chapeau. In so doing, the AB ensured that future cases of this nature would always be subject to a uniform rule, thereby making such rulings more impartial and dismissing accusations of partiality on the part of the AB. More practically, this also gave the AB and the juristic world at large, a largely mechanical mechanism for determining whether Article XX could or could not be applied. Howse (2002)'s only objection is that in applying so rigid a test in its attempt to avoid any notions of judicial activism, the AB may have erred to greatly on the side of caution. Howse (1999) makes a similar argument regarding worker's rights. Indeed, it is known that the only case to successfully invoke GATT article XX was the *EC-Asbestos* case.[33] Speaking of the ruling in *US-Shrimp*, Bowen (2000) wrote optimistically: "In recent years, however, the Appellate Body has taken a stance more consistent with the plain wording of the GATT. The Appellate Body also articulated a two-tiered test, requiring scrutiny, first, under the specific exception and then, under the chapeau. This method of review can effectively ensure that regulations are proper in purpose and fair in execution." Bowen (2000) expresses concern, however, that the AB may be regressing into a cryptic anti-environmentalist stance, despite his praise of the AB's impartiality with regards the chapeau. In discussing the exculpatory character of carbon tariffs under GATT article XX, Ma & Liu (2012) argue that carbon tariffs should meet both the requirements of Article XX(g) and the Chapeau. Ma & Liu base their first assertion on an analysis of cases by the WTO AB regarding Article XX(g); and their second assertion on a survey of countries that have instituted carbon tariffs.

CONCLUSION

In *US-Gasoline*, the AB wrote: "The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards its contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application."[34] This foreboding passage foreshadows much of the ambiguity and trepidation surrounding the GATT Article XX and its confounding chapeau. Chang (1997) famously pointed out that as long as regulation, even meaningful regulation, imposes transaction costs, whether of a Pigouvian character or otherwise, entrepreneurs and capitalists will be incentivized to negotiate alternatives.

[33] 房东 (2017). WTO Law, Lecture 7: General Exceptions, GATT Article XX, GATS Article XIV. A Lecture Delivered by Professor Fang Dong at the Xiamen University School of Law on December 15, 2017

[34] Appellate Body Report on (1996). US - Gasoline. Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
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ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

Charnovitz (1998) similarly pointed out that striking the balance between interests requires prioritization of those interests, but also, understanding of what those interests constitute in themselves. The "moral exception" to trade policy requires one to weigh the economic costs of imposing protections on moral grounds that will require at least some limits on trade; but this also requires one to define morality in light of economics – leading to a potential circular conundrum, but also the risk of disguised restrictions.

The jurisprudence of WTO Appellate Body relating to the interpretation and application of the chapeau of GATT Article XX, especially the meaning of the terms "arbitrary or unjustified discrimination" and a "disguised restriction on trade," seems to be based on a juristic caution and conservatism. The earlier case of *US-Tuna*[35], while not specifically related to this language, was hotly criticized for being partial towards free trade interests. Some, such as Bowen (2000) and Howse (2002), have argued that the AB, in *US-Gasoline* and *US-Shrimp* were attempting to rectify this criticism by moving towards an impartial and neutral mechanism for determining when exceptions to the GATT vision of free trade could be invoked. Howse (2002) even suggests that they erred too far on the side of caution. Still others have argued that the AB has concocted an overly literal interpretation of the chapeau in this instance, precisely as a clandestine means to stymie environmental interests that pose even the slightest inconvenience to free trade. Conversely, others read the jurisprudence surrounding the chapeau as opening the door for potential change; suggesting that the mechanism produced in *US-Shrimp* and *US-Gasoline* may invoke a panacea of change. If the AB had an ulterior motive at all, which is unlikely, it is hard to deduce what it may have been. Though the results of the decisions in *US-Gasoline* and *US-Shrimp* continue to have fascinating consequences, such as for example, that seen in *US-Gambling*.[36]

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