

## Do the same conditions ever prevail? Globalizing national regulation for international trade

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## Do the same conditions ever prevail? Globalizing national regulation for international trade

Dr Emily Lydgate

### Abstract

Countries craft their regulations in a specific national context. When foreign exporters apply this regulation to achieve market access, it becomes subject to a global array of implementation conditions. Several WTO disputes have ruled that regulation failed to acknowledge the conditions of foreign exporters. The WTO Appellate Body has suggested that comparing conditions or ‘situations’ is part of not discriminating between foreign and domestic products, but the implications remain vague. In fact, pulling too hard on this thread could unravel the non-discrimination principle as it leads to its inherent contradiction: regulation will never treat all trade partners *exactly* the same precisely because of their diverse conditions. Further, suggesting that it should puts a huge undue burden on regulators: deep integration run amok. Key WTO environment and development controversies centre on how to acknowledge differences between countries’ situations and still achieve the formal equality that the system promises. The case law on situational discrimination feeds into these debates. This article proposes that the focus should be on how different situations influence the comparative *effectiveness* of a regulation in meeting its goal, an approach which delimits and clarifies.

### I. Introduction

The WTO Appellate Body stated in *Canada – Wheat Exports and Grain Imports*:

*When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner.*<sup>1</sup>

The applications and implications of comparing treatment of *situations*, rather than products or services, is an under-explored area of enquiry. WTO law, and economic globalization more broadly, is based on the premise that products and services from all countries should be treated the same, despite many differences between these countries. A non-discrimination test considers whether government regulations result in worse treatment for imported products, or for one countries’ product versus another’s. Yet there can be no premise of equality of *situations* between countries trading in goods and services. What does it mean that considering these is a part of the concept of non-discrimination? And how can the Appellate Body take account of dissimilar situations and still uphold this central premise of economic integration: the interchangeability and equal treatment of goods and services?

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<sup>1</sup> WTO Appellate Body Report, *Canada – Measures Relating to the Export of Wheat and Treatment of Foreign Grain (Canada – Wheat Exports and Grain Imports)*, WT/DS276/AB/R, adopted 30 August 2004, para. 87.

The confidence of this statement belies the scant case law explaining or applying it directly. There are just a handful of disputes in which the Court explicitly compared countries' situations, or the interchangeable concept of 'conditions'. It is as if the Appellate Body has opened the window to a very different way of thinking about non-discrimination, without wanting walk through the door. At times differences between countries are so compelling that they must be factored into a dispute outcome. Yet what differences, and what circumstances, remains largely undefined. It may seem disproportionate that some ambiguous jurisprudence should prompt a fundamental enquiry, but the extent to which differing situations or conditions justify differing regulatory treatment is an important unresolved question. Taking these into account may prevent an exporter from being obliged to implement a regulatory strategy that is patently illogical or inappropriate to its circumstances in order to gain access for its goods in a foreign country. On the other hand, if comparison of situations were a strategic emphasis in every dispute under non-discrimination principles, it would introduce a great deal of noise, given the array of differences between Member States who constitute virtually all the countries in the world. It also implies an obligation to craft 'one size fits all' regulation that considers how any global situation might impact upon implementation. If this is the case, the Appellate Body becomes an agent of deep integration gone amok, forcing domestic regulation to integrate and harmonize with every market.<sup>2</sup> Globalizing domestic regulation in this manner goes far beyond its purported aim of identifying whether regulation has been crafted to favour some products and services over others. Yet, in the jurisprudence examined herein, the Appellate Body suggested that countries *should* take account of the differing conditions of exporters, thus opening a Pandora's Box.

#### i. Environment and development

Drawing from dictionary definitions, the Appellate Body stated in *EC – Seal Products* that conditions include: “a way of living or existing”; “the state of something”; “the physical state of something”; and “the physical or mental state of a person or thing”.<sup>3</sup> This doesn't help much. Yet the disputes affirm the self-evident conclusion that characteristics of the physical environment are particularly relevant. When environmental regulations target ecosystems or species whose global distribution varies, it is very likely that there will be variations between trade partners. Environmental regulations that concern issues such as animal welfare and air quality are particularly relevant.

Other differences in situations are linked to the human environment. These have to do with supply chains or production systems that differ substantially between countries. The level of capacity of exporting countries to implement regulation effectively is also relevant here.

Both of these are controversial areas. Acknowledging differences in the natural environment may equate to regulating foreign countries' production processes. For example, a country which has endangered species in its forests may face stricter regulatory requirements for its timber products. The WTO-legality of using the power of consumer demand for foreign goods to control how these goods

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<sup>2</sup> For a discussion of 'deep integration' see BA Melo Araujo, 'The EU's Deep Trade Agenda Contextualized', *The EU Deep Trade Agenda: Law and Policy*, Oxford: OUP, 2016.

<sup>3</sup> *EC – Seal Products*: WTO Appellate Body Report, *European Communities – Measures Prohibiting the Import of Seal and Seal Products (EC – Seal Products)*, WT/DS400/AB/R; WT/DS400/AB/R, adopted 18 June 2014, para. 5.299.

are produced is a very sensitive issue.<sup>4</sup> When countries specify how foreign products should be produced, it is sometimes described as green protectionism or eco-imperialism.<sup>5</sup>

From a development perspective, the issues are even more fraught. Trade partners are not just different; they are unequal. This is recognized in Doha Development Agenda ('DDA') negotiations through various mechanisms which attempt to accommodate capacity-related challenges, and an overall emphasis on correcting distributional injustice in gains from trade liberalization.<sup>6</sup> However, except for some special cases like the Enabling Clause, an assumption of equality between parties operates in WTO dispute settlement. Through situational discrimination reasoning, fairness concerns could be integrated into the non-discrimination principle. A developing country, for example, could argue that developed countries should adapt or modify their regulation to make it appropriate to its capacity limits. This would be problematic, as a presumption of equality between trade partners is key to the dispute settlement system's continued success.<sup>7</sup>

Current disputes show the potential for both of these lines of reasoning to be further developed. In both cases, the underlying issue is finding the balance between the responsibility of the regulator to make regulation accessible and the responsibility of the exporter to adapt to regulation when it is economically worthwhile to do so. The body of case law suggests that failing to take into account conditions in different exporting countries can indicate that there was no good faith effort to avoid discriminatory treatment – so, for example, regulation on species conservation must appropriately reflect ecosystem differences between trading partners. This implies a procedural obligation to foresee how differences in each exporting country might shape the impact of regulation, and to adapt regulation to overcome differences in conditions.

If taken to an extreme, this could mean that any difference between a regulator and exporter that disadvantages the exporter's goods and services automatically constitutes discriminatory treatment of that exporter. This would open the floodgates to claims of discrimination based upon innate differences between WTO Member States. It would introduce an impossible standard dependent on producing regulation that responded equally well to a global diversity of implementation conditions.

On the flip side, a regulating country could argue that situational differences in exporting countries made it impossible for exporters to implement the regulation effectively, justifying more trade-restrictive regulation – for example, an exporting developing country does not have the capacity to implement a standards-based label so an all-out export ban is justified. The argument that regulation cannot be effectively implemented in an exporting country because it is foreign (which means its situation differs) quickly shades into formal discrimination. Or countries could introduce stricter 'extraterritorial' regulation if it appropriately reflects different conditions (for example, fishing restrictions that only apply to foreign territories which have dolphin populations). In sum, the applications and implications of this line of reasoning are unsettled, and an unbounded application of situational discrimination analysis could derail the National Treatment Principle.

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<sup>4</sup> See 'Mexico, etc. versus US: "tuna-dolphin"', WTO website, available at [http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm) (visited 16 March 2015).

<sup>5</sup> See P Sorsa, 'Environmental Protectionism, North-South Trade, and the Uruguay Round', IMF Working Paper No. 95/6, January 1995; CF Runge, 'Trade Protectionism and Environmental Regulations: The New Nontariff Barriers' 11(47) *Northwestern Journal of International Law and Business* (1990-1991).

<sup>6</sup> See the WTO website, 'Development: The Heart of the Doha Development Agenda', [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#development](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development) (visited 16 March 2015).

<sup>7</sup> In contrast to DDA negotiations which have been stymied by geopolitical complexities and endemic conflicts regarding inequality and relative gain. For two interesting recent accounts of this problem see: R Wolfe, 'First Diagnose, Then Treat: What Ails the Doha Round?' 14(1) *World Trade Review* 7-28 (2015); R Wilkinson, *What's Wrong with the WTO and How to Fix it* (Oxford: Wiley, 2014).

## ii. How to acknowledge differences in national conditions: Uniqueness versus market integration

It is clearly necessary to delimit situational discrimination, and we should ignore the Appellate Body's curious statement,<sup>8</sup> that appropriate differentiation of 'situations' should form part of the non-discrimination principle in general. This article advocates an approach that prevents the concept from being abused. It builds on case law, yet existing dicta are vague and at times even contradictory. Therefore it is necessary to develop a more codified approach. To counteract the bias evident in existing case law, this approach also embodies the caution that exporting countries bear some responsibility to adapt their production processes. There is no right to market access, and globalizing national regulation is not on the National Treatment Principle's list of objectives.

There are two main criteria. First, analysis of situations should only be utilized in discrimination tests which impose inherent limits on which situations are relevant. Some WTO non-discrimination tests take into account the policy rationale of a regulation, while others analyse the presence of discrimination on market-based criteria (ie, under GATT Article III, negative impacts on conditions of competition).<sup>9</sup> Situational discrimination analysis should only be applicable to the former. Applicable WTO provisions include GATT Article XX's chapeau and the parallel GATS Article XIV,<sup>10</sup> as well as the TBT Agreement's non-discrimination provision, Article 2.1. In this context, the Appellate Body can examine how differential situations influence the comparative effectiveness of a regulation in meeting its goal. This narrows the applicable situations as they must pertain to the achievement of the regulatory objective. Also, this avoids creating an unrealistic standard for regulatory flexibility. Crucially, a regulating country will only be obliged to adapt to differing situations in order to meet its own regulatory goals.

Second, situational discrimination analysis should only be applied when the regulatory goal is linked to production conditions, and thus relies upon factors outside of the regulating state.<sup>11</sup> It is only when the regulations target a harm that occurs as well in foreign production processes that a comparative analysis of conditions becomes necessary. This prevents complainants from linking their production processes to discrimination claims unless these are explicitly part of the regulatory goal being achieved, which also narrows the applicability of the concept.

## iii. Structure of the article

Two strands of case law demonstrate situational discrimination. The first falls under GATT Article XX and TBT Article 2.1. In this context, the Appellate Body has analysed whether a regulatory strategy applied equally well in the exporting country. If it did not, the Appellate Body suggested that there was not a rational relationship between the regulator's aims and its measure.

The second falls under the Enabling Clause. Under the Enabling Clause, the assumption of equality of treatment of all trade partners does not apply. Instead, it enables developed countries to award

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<sup>8</sup> See, eg, *Canada – Wheat Exports and Grain Imports*, above n. 1; the Panel in *US – Clove Cigarettes* also quoted the same language as a definition of 'what discrimination is and how it can manifest'; WTO Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/R, circulated 2 December 2011, para. 7.287.

<sup>9</sup> See *EC – Seal Products*, above n. 3, para. 5.116.

<sup>10</sup> The emphasis on differential situations which pertain to production processes means that it is more generally applicable to products rather than services. However, to the extent that service preparation and delivery occurs within the exporting country, situational discrimination analysis may well be relevant.

<sup>11</sup> These are often described as product-related or non-product-related process and production methods (PPMs). Product-related PPMs are visible or quantifiable product standards and non-product-related PPMs regulate the manner in which the product was produced and are invisible in the final product.

preferences to developing countries, often based upon a non-trade related policy rationale. This discrimination analysis focuses on equality of treatment with respect to particular policy criteria, and is relevant only to a specific subset of disputes.

Due to its wider applicability, the majority of this article focuses on the first category: situational discrimination as a failure of regulatory rationality. The following sections examine how cases under both Article XX and TBT Article 2.1 have incorporated situational discrimination reasoning to consider whether identical *and* differential treatment is justified. More specifically, situational discrimination might constitute extending *identical* treatment to different situations. Conversely, counterintuitive to the basic principles of international trade law, regulation that treats countries differently may *not* be discriminatory, if the differential treatment reflects these countries' differing situations. Situational discrimination might also constitute drawing distinctions between situations improperly. In this scenario, regulation must re-draw its differential categories in a way that more accurately reflects the situations of exporting countries. All of these interpretations are found in current WTO jurisprudence. The article considers both environment- and development-related disputes and the issues they raise. It proposes a more rigorous approach to applying situational discrimination reasoning. Finally it examines the importance of situational discrimination to the special case of the Enabling Clause.

## II. Situational discrimination in tests of regulatory rationality

The chapeau of GATT Article XX reads in part: '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*. . . nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures...' <sup>12</sup> specified in the subparagraphs. [emphasis added] These subparagraphs cover goals including protecting public morals and human animal and plant health, preventing deceptive practices and conserving exhaustible natural resources.

The meaning of 'arbitrary or unjustifiable discrimination' has been extensively elaborated. In contrast, 'in countries where the same conditions prevail' has received little attention. The clause came from the International Convention for the Abolition of Import and Export Prohibition and Restrictions of 1927, negotiated by the League of Nations, which never came into force. Thus this requirement was formulated by 1930 and then incorporated into the later GATT Agreement. However there is no elucidation of the meaning of 'conditions'. <sup>13</sup>

The Appellate Body concluded in an early dispute that it should be assumed that the same conditions always prevail, and this seems to be the working premise in the majority of Article XX disputes. <sup>14</sup> Curiously, this was just after the Member States included this treaty language in the Preamble of the Agreement on Sanitary and Phytosanitary Measures ('SPS Agreement') and the Agreement on Technical Barriers to Trade ('TBT Agreement') both of which specify that they apply to

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<sup>12</sup> Article XX of the GATT 1994.

<sup>13</sup> EPCT/C.11/50, 7; quoted in *Analytical Index: Guide to GATT Law and Practice*, Volume I, 564 (1995).

<sup>14</sup> WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, adopted 29 April 1996, p. 29.

countries where the same conditions prevail.<sup>15</sup> Similar language appears in the parallel ‘General Exception’ provision of the GATS, Article XIV.<sup>16</sup> The expanded use of the 1948 GATT treaty language in WTO Agreements concluded in 1995 demonstrates a renewed commitment to the qualifier.

The recent interpretation provided in the 2014 *EC – Seal Products* is the most comprehensive to date. Though parties to Article XX disputes have almost always assumed that conditions are relevantly the same, it seems likely that they will employ the guidance of *EC – Seal Products* to justify more arguments about prevailing conditions in the future. Therefore it is timely to examine the interpretation of this qualifier in more depth.

The disputes which take into account situational discrimination, examined below, fall under both GATT Article XX and TBT Article 2.1. TBT Article 2.1 reads:

*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*<sup>17</sup>

The parallels between disputes under TBT Article 2.1, which does not contain the phrase ‘same conditions prevail’, and the Article XX chapeau, which does, demonstrate that situational discrimination analysis is tied not to particular treaty language but rather a non-discrimination test that considers regulatory *rationality* or *legitimacy*. The analysis below reveals how the ‘regulatory rationality’ test is similar in both contexts, and how situational discrimination analysis is embedded in this test.

These disputes also demonstrate how case law on situational discrimination corresponds only loosely with any precise legal obligation. Only in *US – Shrimp* was the application of relevant Article XX chapeau language on the ‘conditions’ at stake straightforward (if cursory). In *EC – Seal Products*, the Appellate Body concluded that the same conditions did prevail though its substantive analysis suggested the opposite. In *US – Gasoline*, the Appellate Body concluded it should be assumed that the same conditions always prevail. In *US – Tuna II*, there was no mention of conditions or situations.

#### i. Regulator responsibility

There is another parallel: when the Appellate Body has examined meaningful differentiation between countries’ conditions, it has done so in favour of the complaining (exporting) country. As detailed below, in *US – Shrimp*, the United States should have recognized that different environmental conditions suggested the need for regulatory flexibility. In *US – Tuna II*, it should not have applied trade-restrictive regulatory criteria only to the parts of the ocean in which primarily the Complainant

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<sup>15</sup> Here its influence is more oblique, as Preamble language is non-binding. However, it can be cited in support of dispute settlement bodies’ decisions, though this has not occurred to date. The Appellate Body has employed situational discrimination reasoning in a TBT dispute and there is scope for formalizing this analysis by citing this Preamble language.

The GATT Article XX chapeau has a parallel provision in the General Exception to the GATS, Article XIV. Despite similar structure and application, there is a slight wording difference: instead of ‘the same’ conditions, GATS Article XIV specifies ‘like’ conditions. ‘Like’ is a less strict requirement than ‘the same; a wider set of conditions are considered to be comparable under the GATS than the GATT. The implication is that it is *less* likely there will be differences in conditions. Given the lack of any relevant case law under the GATS, these fine distinctions are not that useful. Yet it is possible to imagine a GATS dispute in which conditions impacted upon the delivery of exported services; if so, the analytical approach proposed herein is applicable because of the similarities in structure and function between the two provisions.

<sup>16</sup> Article XIV of the GATS 1994.

<sup>17</sup> Agreement on Technical Barriers to Trade (‘TBT Agreement’) 1994, Article 2.1.

fished. In *EC – Seal Products* and *US – Gasoline*, the respondents should have pursued cooperative arrangements with foreign governments to overcome obstacles in implementation. At least in the first three cases, evaluating the rational relationship between the measure and the regulatory objective was key to the finding of situational discrimination. This suggests a ‘pro-exporter’ interpretation, though in principle it is possible to imagine a ‘pro-regulator’ one. The argument would be that differences in conditions make it impossible for exporters to achieve the desired goals. As argued below, in *US – Gasoline*, if the US had made efforts toward cooperative arrangements, and proven that foreign enforcement was ineffective, perhaps this could justify exporting a less flexible regulatory standard.

The fact that the case law so firmly supports a ‘pro-exporter’ interpretation means that the potential excesses of this approach should be subject to particular scrutiny. Yes, an uneven approach to different exporting countries can indicate that there was no good faith effort to avoid discriminatory treatment. Yet these disputes also suggest an obligation to foresee how differences in each exporting country might shape the impact of regulation. Such an obligation could make it labour intensive for regulators to pre-empt or fend off claims that their regulation does not take into account the conditions particular to an exporting country.

## A. Differences in environmental/physical factors

### i. Different conditions, identical treatment

In the 1998 *US – Shrimp*,<sup>18</sup> a benchmark dispute for ‘trade and the environment’,<sup>19</sup> identical treatment of *different* environmental situations contributed to a finding of discrimination. The regulation was a US ban on shrimp caught without the use of a special device to prevent endangered sea turtle by-catch. Several developing countries (Malaysia, India, Thailand and Pakistan) complained that the ban was in violation of GATT Article XI, which prevents quantitative trade restrictions applied at the border. Though the US argued that its measure was justified to protect exhaustible natural resources under Article XX(g), the Appellate Body found that it constituted arbitrary or unjustifiable discrimination under the Article XX chapeau.<sup>20</sup>

The Appellate Body focused on the rigidity of the US’s regulation.<sup>21</sup> The US required all fishermen to utilize the exact same approach, the installation of a Turtle Excluding Device, or TED. The Appellate Body stated:

*Section 609 [the US regulation] . . . imposes a single, rigid and unbending requirement that countries applying for certification . . . adopt a comprehensive regulatory program that is essentially the same as the United States’ program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries.*<sup>22</sup> [Emphasis added]

As the Appellate Body put it, the US’s regulation constituted unjustifiable discrimination because its approach did not have anything to do with ‘the declared policy objective of protecting and conserving sea turtles.’<sup>23</sup> Whether by carelessness or design, the US failed to enquire about whether it

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<sup>18</sup> WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 15 June 2001.

<sup>19</sup> See eg R Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’, 27 *Columbia Journal of International Law* (2002).

<sup>20</sup> *US – Shrimp*, above n. 18, at para. 186.

<sup>21</sup> *Ibid*, at para. 163.

<sup>22</sup> *Ibid*, at para. 177.

<sup>23</sup> *Ibid*, at para. 165.

made sense to apply its own regulatory strategy to exporting countries. The particular condition of relevance was whether these endangered sea turtles actually swam in exporters' fishing waters with the same frequency.

The Appellate Body assumed that the conditions between other shrimp exporting countries and the complainant were the same, and that the US had improperly distinguished them.<sup>24</sup> Countries in the Caribbean/western Atlantic region had been given three years to adjust to the TED requirement, while complainant countries had received only four months.<sup>25</sup> The Appellate Body concluded that this approach constituted unjustifiable discrimination 'between exporting countries desiring certification in order to gain access to the US shrimp market.' When defining the relevant *countries* at stake, it affirmed that these included all competing exporters seeking certification.<sup>26</sup>

This demonstrates two different applications of situational discrimination reasoning. The Appellate Body admonished the US for applying to exporters an identical regulatory programme to its own domestic one without inquiring into its appropriateness. This implies a procedural obligation to anticipate the impacts of domestic regulation on the conditions of exporting countries. The other implication is that, while measures can require comparability in effectiveness, they should be flexible with respect to the exact policies by which this is achieved. The US requirement that countries install a contraption to exclude non-existent species of sea turtles exemplifies discrimination as defined in *Canada – Wheat Exports and Grain Imports*: 'treating dissimilar situations in a formally identical manner.'<sup>27</sup>

It also introduced a type of Most Favoured Nation reasoning into the chapeau, not limited to Parties in the dispute: considering even-handedness of treatment of *all* exporters. However the Appellate Body only briefly articulated the specific parameters of comparison of conditions between countries. It did not make a principled argument that the exporters had the same conditions, and only very briefly examined the relevant difference in species distribution of endangered sea turtles. All this makes the precedent elusive.

## ii. Conditions differentiated improperly

While *US – Tuna II* (2012) was a dispute under the TBT Agreement, it reveals the further evolution of the reasoning employed in *US – Shrimp*. The dispute also focused on US fishing regulations that aimed to prevent bycatch of valuable species. In this case, tuna could not be labelled dolphin safe if it was fished by encircling dolphins to catch the tuna that congregated underneath. This requirement applied within the Eastern Tropical Pacific ('ETP').<sup>28</sup> Tuna caught outside the ETP using other methods automatically qualified for the label. Most Mexican fisherman caught tuna inside the ETP by setting nets on dolphins, while most US fisherman caught tuna outside the ETP by other means. In the context

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<sup>24</sup> This interpretation accords with L Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements', Draft 15 December 2014, p. 19, available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2557971](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557971) (visited 16 March 2015), and J Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization' 23 *Boston University International Law Journal*, p 264.

<sup>25</sup> *US – Shrimp*, above n. 18, at para. 173.

<sup>26</sup> *Ibid*, at para. 176.

<sup>27</sup> *Canada – Wheat Exports and Grain Imports*, above n. 1.

<sup>28</sup> WTO Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/R, circulated 15 September 2011, para 2.15.

of TBT Article 2.1, its non-discrimination provision, the Appellate Body concluded that there was a detrimental impact on Mexican tuna.<sup>29</sup>

The Appellate Body then considered whether the United States demonstrated that the difference in labelling conditions was based on a legitimate regulatory distinction.<sup>30</sup> It examined the US's rationale for limiting where, and how, the dolphin-safe criteria was applied (its regulatory distinction), to discern whether this could be justified based on its objective of preventing harm to dolphins.

The US dolphin-safe labelling requirement was based upon its differentiation of environmental conditions within and outside of the ETP.<sup>31</sup> The species of tuna and dolphins found inside the ETP congregated together. Outside of the ETP, this did not occur. The US label barred a fishing practice that responded to a particular species inter-relationship. It argued that encircling dolphins was responsible for their continuing deaths and other detrimental impacts.<sup>32</sup>

The fact that this was the fishing grounds primarily of foreign fleets gave rise to the question of whether the regulation was in fact motivated by protectionism. To make this determination, the Appellate Body evaluated the Panel's factual assessment of the Parties' arguments to determine whether the labeling requirements were 'calibrated' to different threat levels to dolphins arising from various fishing techniques. It concluded that the label 'does not address mortality . . . arising from fishing methods other than setting on dolphins outside the ETP.' Thus, it was 'not persuaded that the United States has demonstrated that the measure is evenhanded, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.'<sup>33</sup>

Though it did so in the context of the TBT Article 2.1 'even-handedness' test, the Appellate Body essentially evaluated how the US differentiation between ETP- and non-ETP dolphins impacted upon the rational relationship between the regulation and its objective. The US introduced an improper regulatory distinction between environmental conditions inside and outside the ETP. This undermined its objective of protecting dolphins, revealing that the regulation was discriminatory.

### iii. Implications of comparative analysis of environmental conditions

Global diversity of natural environments makes environmental regulation complex. When regulations address species or ecosystems whose global distribution varies, it is very likely that there will be variations in the harm being regulated. One question that arises is whether situational discrimination analysis could provide a line of argumentation to support trade-restrictive environmental regulation. In *US – Shrimp* there were fewer endangered sea turtles in the exporting countries, justifying a less strict regulatory approach. Instead, imagine that there were more. Article XX(g) has to do with measures 'relating to the conservation of exhaustible natural resources', but these 'must be taken in conjunction with restrictions on domestic production or consumption'.<sup>34</sup> In this case, the introduction of situational discrimination analysis could justify differential treatment: the conditions differ, because the regulating country does not have as many endangered sea turtles subject to the harm of becoming by-catch. A

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<sup>29</sup> WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/AB/R, adopted 16 May 2012, at paras. 234 – 235.

<sup>30</sup> *Ibid.*, at para. 284.

<sup>31</sup> *US – Tuna II*, WTO Panel Report, above n. 28, at para. 4.74.

<sup>32</sup> *Ibid.*, at para 2.15.

<sup>33</sup> *US – Tuna II*, WTO Appellate Body Report, above n. 29, at para. 297.

<sup>34</sup> Article XX(g) of the GATT 1994.

country could argue that if more harm results from a particular place, due to its natural conditions, this justifies stricter regulation.

If the latter scenario is prohibited, the comparative analysis of regulatory harm is essentially an asymmetric test. The regulatory restriction can be *as* or *less* strict when applied to exporters. It cannot be *more* strict, even if the regulatory harm is more severe in these countries. Formalizing this asymmetric test would provide a means for limiting the impact of extra-territorial regulation, but poses the question of whether such asymmetry is fair. Enabling stricter criteria to respond to greater risk, regardless of the jurisdiction of that risk, would achieve a fuller expression of regulatory rationality. However, this would open the door for trade-restrictive regulation to be applied purely to the production processes in foreign countries, leaving domestic production of the same product unregulated.

The Appellate Body has approached regulation applied to products produced in foreign countries with caution.<sup>35</sup> It gave no strict prohibition on disproportionate extraterritorial impacts in *US – Tuna II*, in which the regulation in dispute focused more on extra-territorial ecosystems. Yet even without taking the controversial step of declaring such regulation to be categorically WTO-illegal, the outcomes of *US – Shrimp* and *US – Tuna* suggest that it is likely to be found discriminatory on a case-by-case basis.

## **B. Differences in human factors**

### **i. Different conditions, identical treatment**

In *EC – Seal Products*, the Appellate Body’s finding of arbitrary and unjustifiable discrimination under the Article XX chapeau had to do in part with differences in the *level of development* of the supply chain of competing exporting countries. Canada and Norway challenged the ‘EU Seal Regime’, which banned seal products. The ban had an exception for seal products from hunts traditionally conducted by Inuit and other Arctic indigenous communities (IC exception). The Appellate Body found that the Regime was not in conformity with Article I:1 of the GATT, its Most Favoured Nation provision, as more Greenlandic seal products qualified than Canadian or Norwegian seal products. The EU argued that the Seal Regime was justified under Article XX(a), which applies to measures necessary to protect public morals.

In the chapeau analysis, the Appellate Body compared the ability of exporting countries, Canada versus Greenland, to take advantage of the IC exception. The EU established different categories of hunt, indigenous versus commercial. It banned the latter while permitting the former. Yet in Canada, unlike Greenland, products from Inuit hunters were integrated into commercial hunts. Also, Canadian Inuits’ supply chains were less well-developed, and focused locally; in the words of the EU: ‘the level of development in the organisation of the marketing structures’<sup>36</sup> differed.

The Appellate Body concluded that the EU’s measure constituted arbitrary or unjustifiable discrimination. One component of its finding was that:

*...we were not persuaded that the European Union has made “comparable efforts” to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We*

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<sup>35</sup> This caution reflects the divided opinions of WTO Member States about the WTO-legality of production-process regulation with extra-territorial impacts. For example, the Appellate Body affirmed in *US – Shrimp* that there was a territorial ‘nexus’ between the US and the complainant countries because sea turtles were a migratory species. *US – Shrimp*, above n. 18, at para. 133.

<sup>36</sup> *EC – Seal Products*, above n. 3, at para. 5.317.

also noted that setting up a “recognized body” that fulfils all the requirements of [the relevant Article of the exception] may entail significant burdens in some instances.<sup>37</sup>

To undertake ‘comparable efforts’, the EU should have responded appropriately to the more limited development of the Canadian supply chain. Establishing a recognized body to award certification, achievable in Greenland, was burdensome in Canada;<sup>38</sup> Canadian Inuits had less capacity to implement the regulation. In this context, quoting the precedent from *US – Shrimp*, the Appellate Body concluded that the EU had not inquired into ‘the appropriateness of the regulatory program for the *conditions prevailing* in those exporting countries’.<sup>39</sup> [Emphasis added]

Curiously, after quoting this treaty language, the Appellate Body then concluded that conditions were the same, affirming the Panel’s finding that “the same animal welfare concerns as those that arising in seal hunting in general also exist in IC hunts”.<sup>40</sup> It quoted the ‘conditions prevailing’ language in service of two seemingly opposite conclusions.

The contradiction lies in the definition of the relevant regulatory objective. This was a complex dispute because the EU pursued distinct, even clashing regulatory objectives under the umbrella of Article XX(a)’s ‘protecting public morals’. One objective was to protect seal welfare. A second was to prevent commercial seal products from entering the EU seal market, while enabling products of hunts conducted by Inuit peoples to do so. A third was to ensure the subsistence of Inuit populations.<sup>41</sup>

The appeal focused on the IC exception, and not the overall ban on seal products. Therefore the relevant regulatory objective *should* have pertained to the subsistence of Inuit populations, and not seal welfare. The EU acknowledged that the IC exception was not related to seal welfare, *per se*, but the risk of endangering the subsistence of Inuit and other indigenous communities protected by International Law. It exempted these products ‘...to mitigate the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals.’<sup>42</sup>

It seems likely that the Appellate Body refused to confirm explicitly that conditions differed in order to avoid giving a clear road sign toward utilizing such argumentation in future disputes. Substantively, however, the conclusion that the EU should have extended itself more to the Canadian Inuits (through seeking eg ‘cooperative arrangements’) suggests that the regulation was crafted with Greenlandic Inuits in mind, just as the US’s shrimp regulation was crafted with its domestic market in mind. Its reasoning echoes *US – Shrimp*: there is a procedural necessity of making regulation evenly available to all exporters. It also emphasized the responsibility of the regulator as opposed to the choice of the exporter. Yet according to the EU, no Canadian Inuits had even *tried* to apply for the IC exception:

*... it is only natural and the result of internal Canadian administrative and market realities based on choice, (including any lack of effort towards implementing the IC exception) that the Canadian Inuit communities do not yet benefit from the IC exception. They could do so at any time in the future if and when they so wish, based on their assessment of whether exports to the EU are desirable.*<sup>43</sup>

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<sup>37</sup> Ibid, at para. 5.338.

<sup>38</sup> Ibid, at para. 5.337.

<sup>39</sup> Ibid, at para. 5.337.

<sup>40</sup> Ibid, at para. 5.317.

<sup>41</sup> Ibid, at para. 5.319.

<sup>42</sup> Ibid, at para. 5.319.

<sup>43</sup> *EC – Seal Products*, Other Appellant Submission by the European Union (AB-2014-1,2, DS/400, DS/401), Geneva, 29 January 2014, para 203.

Some potential implications of requiring the EU to make its regulation pre-emptively available to a ‘less developed’ supply chain are discussed further below.

ii. Conditions differentiated on an improper basis

To end at the beginning, one early (1996) WTO dispute, *US – Gasoline*, demonstrates situational discrimination reasoning applied by a regulating country, the US.<sup>44</sup> The US used situational discrimination reasoning to defend *more* trade-restrictive regulation. Its argument shows how this shades into formal discrimination, and can thus easily be problematized.

The Appellate Body proclaimed that it would be easier to integrate the chapeau into the remainder of the GATT if it is assumed that the same conditions apply *whenever* there is an allegation of a GATT violation covered by Article XX.<sup>45</sup> Despite this, comparison of the conditions of the exporting versus regulating country was a central component of its reasoning.<sup>46</sup>

The dispute focused on US standards for composition and emissions of gasoline; Venezuela and Brazil were the complainants. The US Gasoline Rule obligated refineries to meet at least 1990 US levels of cleanliness. While domestic refineries could define their own 1990 statutory baseline, an average statutory baseline was applied to new refineries and, crucially, importers and blenders of gasoline. After a finding of violation of GATT Article III(4), the US argued its measure was necessary for the protection of exhaustible natural resources under Article XX(g).

In denying foreign refineries the same flexibility, the US treated them differently. Essentially, the US argued that this differential treatment responded to different conditions, as verification of origin and enforcement were too difficult to carry out. It raised concerns about the administrative difficulties of enabling foreign governments to calculate their own statutory baseline.<sup>47</sup>

The Appellate Body essentially concluded that the US had made this regulatory distinction on an improper basis, by foregoing its procedural obligation to attempt to overcome these differences. It decided that the measure constituted ‘unjustifiable discrimination’ and a ‘disguised restriction on trade’, elements of the chapeau, as the United States had not cooperated with the complainant governments to adequately explore the possibility of mitigating these administrative difficulties. Also, the United States had not considered the costs for foreign refineries of meeting its imposed baselines.<sup>48</sup> The differences related to the exporting countries simply being foreign. If being foreign is a condition meriting differential treatment, and this treatment is less favourable, then situational discrimination equates with formal discrimination.

An interesting question is whether the Appellate Body would have accepted the US’s reasoning if some parameters were shifted. Imagine that the US had made efforts to cooperate with the complainant governments, but these efforts had failed. The US might have argued that it could not guarantee that the complainant countries would be able to meet its regulatory standard if they were given this flexibility. If the failure of cooperation stemmed from lack of development in the supply chain, disorganization, lack of enforcement capability, or other ‘capacity’ limitations, the US might have turned the Appellate

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<sup>44</sup> *US – Gasoline*, above n. 14.

<sup>45</sup> *Ibid*, at p. 29.

<sup>46</sup> Davies offers a similar reading that the Appellate Body actually took into account whether there same conditions prevailed. A Davies, ‘Interpreting the GATT Article XX chapeau in the light of the ‘new’ approach under *Brazil – Tyres*’ 43(3) *Journal of World Trade* 520-521 (2009).

<sup>47</sup> *US – Gasoline*, at pp. 25-26.

<sup>48</sup> *Ibid*, at pp. 28-29.

Body's reasoning in *EC – Seal Products* on its head. Davies supports this interpretation, arguing that: 'Had the United States demonstrated the existence of insurmountable difficulties with verification, it seems likely that the measure would have been both 'necessary' under Article XX(b) and would have satisfied the chapeau'.<sup>49</sup>

### iii. Implications – development and capacity

In *EC – Seal Products*, the Appellate Body recognized it was not realistic for rural, subsistence Inuit populations to establish a regulatory body that the EU approved of for certifying seal products. Capacity limitations were not those of a particular country (Canada) but of a particular group within that country (Inuits). Yet the example can be generalized to a broader debate: the way in which the complex regulatory requirements of developed countries constitute market access barriers and disguised protectionism that targets developing countries' products.<sup>50</sup> Considering capacity-related differences more explicitly is appealing on one level as a route to greater fairness. Existing WTO Special and Differential Treatment provisions recognize different capacity of developed countries to implement regulation.<sup>51</sup> However, except in special circumstances, this concept is not integrated into dispute settlement. The overall outcome of this application of situational discrimination would be to shift more responsibility onto regulating countries to make regulation easier to implement in cases where there are capacity-related constraints.

Yet that way madness may lie. If level of development is an explicit part of the conversation, a host of controversies and constraints enter the picture. One question is whether it would be permissible to use Special and Differential Treatment as an explicit justification for capacity-restraints in implementing regulation. The Appellate Body's guidance in *EC – Seal Products* limits relevant 'conditions' to factors that it has already identified under the primary violation or the Article XX subparagraphs.<sup>52</sup> However, capacity constraints may be relevant to the achievement of the policy objective and thus relevant.

There may be only a small subset of disputes in which capacity constraints form a serious barrier to implementing regulation. However, the conclusion that there are asymmetries between developed and developing countries in the application of the non-discrimination principle might open dispute settlement to standoffs about defining the degree of asymmetry, the nature and type of capacity-constraints, and even how differential *capacity* to implement regulation should result in differential *responsibility*.<sup>53</sup>

## C. An interpretive approach

In addition to examining whether the same conditions prevailed in *EC – Seal Products*, the Appellate Body made some interpretive comments. The following approach builds on the foundation of these comments, but provides a higher level of clarity and specificity. Most importantly, the Appellate Body affirmed that 'conditions relating to the particular policy objective under the applicable [Article XX]

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<sup>49</sup> Davies, above n. 46, at 520-521.

<sup>50</sup> See above n. 5.

<sup>51</sup> Marrakesh Agreement Establishing the World Trade Organization, 1994, Preamble, second paragraph.

<sup>52</sup> See next section

<sup>53</sup> See above n. 7.

subparagraph are relevant for the analysis under the chapeau'.<sup>54</sup> Also, rather intuitively, what conditions are relevant will be informed by the broader context of the violation,<sup>55</sup> and provisions with which the measure was found to violate could provide 'useful guidance'. The significance of these statements can be illustrated with reference to the chapeau's non-discrimination test. This test has evolved on a case-by-case basis,<sup>56</sup> but in *EC – Seal Products*, the Appellate Body emphasized one key strand:

*One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under... Article XX.*<sup>57</sup>

Similarly, in discerning whether there is less favourable treatment of 'like' products originating in other countries under TBT Article 2.1, the Appellate Body has introduced an analysis of whether a regulation in dispute is based upon a 'legitimate regulatory distinction'. Part of this test involves examining whether the regulation is applied 'evenhandedly'.<sup>58</sup>

TBT Article 2.1 and TBT Article 2.2 parallel GATT Article III and GATT Article XX in the balance they strike between recognizing a Member State's right to regulate and preventing unnecessary obstacles to trade.<sup>59</sup> The Appellate Body has made clear that the Article XX chapeau is not functionally equivalent to the 'legitimate regulatory distinction' test.<sup>60</sup> However, they have a key parallel, in that both examine the regulatory goal at stake as part of the non-discrimination analysis, and both consider rationality or legitimacy.

Building on this reasoning leads to a basic test for which conditions are 'relevant' in these contexts. The rational relationship between the measure and the prevention of the regulatory harm should be 'the same' between trade partners; *relevant conditions are the ones that change this relationship*. In other words, there should be an equivalent risk of the harm being regulated between trade partners. To determine whether a failure to differentiate between differing conditions results in discriminatory treatment, it is necessary to examine the *efficacy* of applying the same regulation to different conditions, with respect to the achievement of the regulatory objective. It is also necessary to examine the *reasonableness* of expecting a complaining exporter to apply the same regulation as other trade partners.

This is the basic approach, but a few more points of clarification should be made. First, examining the effectiveness of a measure in fulfilling the regulatory objective may seem to recall the analysis undertaken in the Article XX subparagraphs of whether a measure is 'necessary'. However,

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<sup>54</sup> *EC – Seal Products*, above n. 3, para. 5.000.

<sup>55</sup> *Ibid*, at paras 159-160.

<sup>56</sup> In *EC – Seal Products*, for example, the Appellate Body reviewed a number of factors that had been considered in past disputes to determine the presence of discrimination under the chapeau. *Ibid*, at para. 5.305.

<sup>57</sup> *Ibid*, at para. 5.306.

<sup>58</sup> In the first of a spate of recent TBT disputes, *US – Clove Cigarettes*, the Appellate Body stated that "a panel must further analyze whether the detrimental impact on [conditions of competition for] imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products." In making this determination, "a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is *even-handed*, in order to determine whether it discriminates against the group of imported products." WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/R, adopted 4 April 2012, paras. 181-182.

<sup>59</sup> See *ibid*, at paras. 93-96.

<sup>60</sup> *EC – Seal Products*, above n. 3, at paras. 5.310-5.314.

crucially, this is a comparative analysis: do different conditions between trade partners create an asymmetric result? It is thus inextricable from determining what constitutes arbitrary or unjustifiable discrimination. This point is made by Bartels:

*...it is essentially the same thing to say that there is no discrimination when unequal treatment responds appropriately to unequal situations [ie, unequal treatment where the same conditions do not prevail], and to say that unequal treatment can be justified on the basis that it is an appropriate response to unequal situations [ie, unequal treatment that does not constitute unjustifiable discrimination].<sup>61</sup>*

Second, when a harm only takes place in an importing country, the ‘conditions’ are the same because the production conditions of the exported product do not matter. For example, in the dispute *Brazil – Tyres*, there were harmful public health impacts in Brazil, the regulating country, from used tyres: dengue fever and pollution from toxic fumes.<sup>62</sup> It was the tropical environment and sanitation conditions in Brazil that led to the risk from these harms. Conditions in the EU were irrelevant to the degree or type of risk; used tyres would have posed the same risk in Brazil no matter how they were produced, and which country they were imported from. Furthermore this was a product ban, so the EU was not implementing Brazil’s regulation in its production process. Thus there is no role for a comparative analysis. If the harm occurred during the production process, the risk of the harm is inextricable from the ‘conditions’ in which the regulation is being implemented. Taking these conditions into account thus becomes necessary to the non-discrimination analysis.

Also, in *EC – Seal Products*, the Appellate Body clarified that the ‘type or cause’ of the primary violation may inform *which* countries’ conditions to compare.<sup>63</sup> For example, the National Treatment principle examines the treatment of domestic products versus products from the Complainants; thus these may be relevant conditions to compare. The Most Favoured Nation Principle examines treatment of one exporter’s products versus another’s; these may be relevant conditions to compare.

The word ‘may’ is important here, as the conditions compared may also include *all* exporting countries or subgroups of exporting countries, even those who are not directly involved in the dispute.<sup>64</sup> Applying different (ie less trade-restrictive) regulation to a group of exporting countries with the same conditions could constitute arbitrary or unjustifiable discrimination, even if these exporting countries are not parties to the dispute. Similarly, discrimination could result from applying the same regulation to a group of exporting countries with different conditions (ie, if the conditions in some countries seemed to merit a much more trade-restrictive approach which was not being applied).<sup>65</sup>

This approach resolves one puzzling aspect of this qualifier, which is that it appears to impose a jurisdictional limitation: only between countries where the same conditions prevail can there be arbitrary or unjustifiable discrimination. That the qualifier places a limit on the chapeau’s applicability

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<sup>61</sup> L Bartels, ‘The Chapeau of Article XX GATT: a New Interpretation’, University of Cambridge Faculty of Law Working Paper 20/2014, 9, 22 July 2014.

<sup>62</sup> WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 3 December 2007, para. 119.

<sup>63</sup> *Ibid*, at paras. 5.299-5.300.

<sup>64</sup> In *US – Shrimp* the Appellate Body affirmed that the relevant countries in the chapeau are ‘exporting countries desiring certification in order to gain access to the United States shrimp market.’ Above n. 3, para. 176.

<sup>65</sup> In *Brazil – Tyres*, for example, used tyres from MERCOSUR trade bloc countries were not subject to a ban that the EU, the complainant, faced. This uneven treatment between exporters was the basis for a finding of arbitrary or unjustifiable discrimination. *Brazil – Tyres*, above n. 19, at para. 228. Similarly, in *US – Shrimp*, the US had made concessions that favoured some shrimp-exporting countries over the complainant countries. *US – Shrimp*, *ibid*, at paras. 173, 176. In both cases, this discrimination analysis was distinct from the one that had taken place in the context of the primary GATT violation, in that it considered treatment of exporting countries more broadly, and not just the Parties to the dispute.

makes little sense. Perhaps the only way of accounting for this would be to consider that the relevant ‘condition’ is simply being an exporter of the product in dispute. However, this seems impossible to reconcile with any interpretation that emphasizes the role of the policy objective in defining what conditions are relevant. Instead of placing a limitation on which countries, the qualifier underlines the necessity of comparative analysis between them. The guidance from *EC – Seal Products* gives authority to this interpretation.

A final point is that ‘treating different conditions the same’ or differentiating them improperly does not automatically equate to a finding of arbitrary or unjustifiable discrimination. The individual circumstances will shape this in ways that are too complex to codify, but being clearer about the criteria is important to understanding their influence.

### III. Situational discrimination under the Enabling Clause

In *Canada – Wheat Exports and Grain Imports*, the Appellate Body succinctly summarized the Appellate Body’s reasoning in *EC – Tariff Preferences*:

*The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory" [footnote EC – Tariff Preferences], and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions per se, and drawing distinctions on an improper basis. [footnote EC – Tariff Preferences] Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited.*<sup>66</sup>

The precedent established in this dispute has been cited in other rulings,<sup>67</sup> suggesting that the Appellate Body’s interpretation of non-discrimination is broadly applicable. Yet the Enabling Clause should be seen as a special case rather than a justification for integrating a comparative ‘situations’ analysis into all non-discrimination provisions.

The Enabling Clause, recognized by the Appellate Body as ‘an integral part of the GATT 1994’,<sup>68</sup> was described by the EC in *EC – Tariff Preferences* as the ‘most concrete, comprehensive and important application of the principle of Special and Differential Treatment.’<sup>69</sup> The WTO principle of Special and Differential Treatment specifies the need for preferential treatment for developing country Member States. Yet this contravenes the Most Favoured Nation Principle of Article I:1, the cornerstone non-discrimination obligation of the GATT Agreement, which requires that WTO Members not discriminate between Member States. The 1979 Enabling Clause allows developed country Members to depart from the Most Favoured Nation obligation and give developing country Members differential and more favourable treatment. In most cases this has been provided through the Generalized System of Preferences (‘GSP’) adopted by UNCTAD in 1968, which enables a high proportion of developing countries’ exports to receive preferential tariff treatment.<sup>70</sup>

The key issue for the non-discrimination test in the Enabling Clause is whether it is possible to discriminate between various developing country Member States by providing some with preferential tariff treatment and not others, and on what basis. The 2004 *EC – Tariff Preferences* helped clarify this

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<sup>66</sup> *Canada – Wheat Exports and Grain Imports*, above n. 1, at para. 87.

<sup>67</sup> See above n. 8.

<sup>68</sup> 1979 Decision on Differential and More Favourable Treatment (‘Enabling Clause’), elaborating Part IV of the GATT 1994.

<sup>69</sup> WTO Appellate Body Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries* (‘*EC – Tariff Preferences*’), WT/DS246/AB/R, adopted 7 April 2004, para. 90.

<sup>70</sup> P Van Den Bossche, UNCTAD Course on International Dispute Settlement 32 (2003).

question. At issue was the EU's GSP plus, through which it extended preferential tariffs to certain developing countries contingent upon their compliance with particular policy standards. This included protection of labour rights and the environment, as well as efforts to combat drug production and trafficking. India claimed that the EU was discriminating under the terms of the MFN principle and the GSP by providing tariff preferences to Pakistan in exchange for cooperation on drug production and trafficking, and not extending these benefits to India.

Footnote 3 to paragraph 2(a) of the Enabling Clause specifies that preferences established under the GSP should be 'generalized, non-reciprocal and *non discriminatory* [emphasis added].'<sup>71</sup> The Appellate Body recognized that benefits should be conferred in a non-discriminatory manner among *similarly-situated* developing countries. It recognized that 'certain needs may be common to only a certain number of developing countries'. Therefore the GSP could be non-discriminatory without giving identical tariff treatment to all GSP beneficiaries.<sup>72</sup> However, it concluded that the EC's GSP plus programme was not justified under the Enabling Clause because it contained a closed list of beneficiaries and there was no objective criteria or standard applied to the countries on this list.<sup>73</sup>

Interestingly, the Appellate Body's conclusions echoed the Panel's reasoning under the Article XX chapeau (as the Panel's finding was not appealed, the Appellate Body did not examine the measure's compatibility with Article XX). The Panel cited *US – Shrimp* that discrimination can result from a measure not taking account of differences in prevailing conditions; the relevant 'condition' was the seriousness of the drug problem. The Panel questioned the EU's logic in applying the tariff preferences to some developing countries and not others.<sup>74</sup> It concluded:

*The Panel finds no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other preferential tariff scheme are not the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries.*<sup>75</sup>

This demonstrates transference of a 'conditions' analysis in the chapeau to a 'situations' analysis under the Enabling Clause. In both cases, the situation was the severity of the drug problem. This was important to the fairness with which the GSP plus responded to countries' development needs. This dispute thus linked the concept of Special and Differential Treatment with situational discrimination reasoning.

The way this reasoning has been generalized might suggest that consideration of development-related differences between countries forms a component of non-discrimination provisions. However, the development-related focus of the non-discrimination test reflected the overall emphasis and intent of the Enabling Clause. When examining whether countries were relevantly the same, the Appellate Body focused on the appropriateness of the policy conditions in such countries to targeted GSP schemes. Imagining that this is generally applicable would authorize an unbounded application of situational discrimination claims that take into account development-related differences between countries, making the application of the non-discrimination principle effectively impossible for reasons elaborated above.

#### IV. Conclusion

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<sup>71</sup> Enabling Clause, above n. 68

<sup>72</sup> *EC – Tariff Preferences*, Appellate Body Report, above n. 69, paras. 154-165.

<sup>73</sup> *Ibid.*, at paras. 187-189.

<sup>74</sup> WTO Panel Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries* ('*EC – Tariff Preferences*'), WT/DS246/R, circulated 1 December 2003, para. 7.229.

<sup>75</sup> *Ibid.*, at para. 7.234.

When are differences between countries compelling enough to determine that one country's regulation discriminates against another? A specific national context shapes domestic regulation but when it is applied to exported goods it becomes global in impact and jurisdiction. Appropriately acknowledging these differences pulls at the thread of the non-discrimination principle and its premise of equality between countries, threatening to unravel it from the seams.

Building on incomplete and contradictory case law, this article has identified scenarios in which comparison of conditions between countries is conceptually necessary. These are disputes on process (or PPM)-based regulation in non-discrimination provisions that examine regulatory rationality, such as the GATT Article XX chapeau and TBT Article 2.1. More specifically, the Appellate Body should consider whether differences in conditions impact upon the rational relationship between the measure and its aim. This makes clear that the level of regulatory risk remains equivalent even if conditions differ. In this scenario, situational discrimination reasoning protects *exporters* from extremely inappropriate regulatory requirements while preserving *regulators'* goals. Situational discrimination analysis also includes comparing the situations of developing countries under the Enabling Clause. In both cases, the legal test imposes constraints on which situations are relevant.

This article also identified problems with taking account of differing conditions. The approach outlined here eliminates some of these but others remain. For example, even under this approach, a regulating country could justify stricter trade controls against countries that failed to meet standards. Or the concept could justify extra-territorial regulatory management of foreign ecosystems. Yet the strongly 'pro-exporter' case law suggests that these negative implications for exporters are very unlikely.

Instead, the main problems impact upon regulators. The case law affirms the need to take into account the fitness of regulation to the exporter and its ability to implement the regulation, with respect to their environmental and also capacity-related differences. There is a risk of blurring the line between facilitating market access on the one hand, and requiring compromised, negotiated solutions on the other. Shifting the burden onto regulators to make regulation accessible may lead to the latter, as introducing flexibilities to respond to differing conditions can result in regulation whose aims have been compromised.<sup>76</sup>

This underscores the need for caution. Differences in situations should not imply an automatic obligation on regulators to adapt to these differences. Achieving market access involves a balance of responsibility between exporting and regulating countries. In this context, when considering the extent to which countries should adapt their regulation to promote market access, the role of qualifying concepts such as appropriateness and reasonableness should be crucial to the analysis.

Another complex issue that remains is whether capacity constraints in exporting countries should justify special efforts to make regulation accessible. The least problematic answer is 'no', as the issue leads to a morass of controversy about fairness in WTO law. Yet the premise of total equality of treatment between trade partners can have perverse outcomes, as *EC – Seal Products* demonstrates.

In sum, the concept of situational discrimination empowers the Appellate Body on an *ad hoc* basis to undertake actions which, if applied more widely, would lead to major problems. The first is to harmonize domestic regulation with foreign exporters' requirements. The second is to integrate Special and Differential Treatment into the nondiscrimination principle in dispute settlement. What is fascinating about situational discrimination is how it reveals the tension between integration and independence, and how it can never be fully resolved through economic 'non-discrimination'.

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<sup>76</sup> EB Lydgate, 'Biofuels, Sustainability and Trade-related Regulatory Chill' 15(1) *Journal of International Economic Law* 9-13 (2012).

