

# Does international economic law impose a duty to negotiate?

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## Abstract

In two early WTO cases, the Appellate Body found a failure to engage in negotiations to be arbitrary or unjustifiable discrimination under the GATT Article XX chapeau. Subsequent jurisprudence has not applied a negotiation requirement. Instead, it analyzes whether discrimination is arbitrary or unjustifiable by focusing on the cause of the discrimination, or the rationale put forward to explain its existence, which would exclude a duty to negotiate in many circumstances. The issue of whether there is a duty to negotiate is a systemic issue for international economic law. The Article XX chapeau language appears in other WTO agreements and in other international economic law treaties, including those that address environmental protection, regional trade and international investment. This article argues that there is no such duty in WTO law.

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## I. Introduction

1. The chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT) permits the application of trade measures, in accordance with specific exceptions, “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 [. . .].”<sup>1</sup> The source of the chapeau language was the exceptions article of

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1 General Agreement on Tariffs and Trade (GATT), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

the commercial policy chapter of the draft ITO Charter, inserted during the London session of the preparatory committee in 1946.<sup>2</sup> Originally, the phrase read as follows: “provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>3</sup> The French and Spanish texts of the chapeau present no inconsistencies with the English text.<sup>4</sup> 5

2. The correct interpretation of the chapeau language is a systemic issue for international economic law. The chapeau language appears in several international economic law treaties. Terminology from the chapeau of GATT Article XX features in many World Trade Organization (WTO) Agreements, multilateral environmental agreements (MEAs), regional trade agreements, and international investment agreements. 10  
In WTO Agreements, the language of the chapeau is used in several different contexts.<sup>5</sup> Some treaty terms incorporate GATT Article XX in its entirety, by reference,<sup>6</sup>

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2 EPCT/C.II/32; EPCT/C.II/50, 7; GATT Analytical Index I (1995), 563–64.

3 EPCT/C.II/50, 7; GATT Analytical Index I, *ibid.*, 564.

4 A reserva de que no se apliquen las medidas enumeradas a continuación en forma que constituya un medio de discriminación arbitrario o injustificable entre los países en que prevalezcan las mismas condiciones, o una restricción encubierta al comercio internacional [. . .]. Sous réserve que ces mesures ne soient pas appliquées de façon à constituer soit un moyen de discrimination arbitraire ou injustifiable entre les pays où les mêmes conditions existent, soit une restriction déguisée au commerce international [. . .].

5 General Agreement on Trade in Services (GATS), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1B, 33 ILM 1197 (1994), art. XIV chapeau; Agreement on Technical Barriers to Trade (TBT Agreement), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), preamble; Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), preamble, art. 5.5, art. 2.3.

6 North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994) (NAFTA), art. 2101 (1); Agreement on Trade-Related Investment Measures (TRIMS Agreement), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), art. 3; Agreement on Agriculture, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), footnote 1 to art. 4.2 (see Indonesia—Importation of Horticultural Products, Animals

while others reproduce the language of the chapeau in whole<sup>7</sup> or in part.<sup>8</sup> Others modify the language in a minor way, by substituting “same conditions” for “like conditions”, for example.<sup>9</sup> However, all of these treaty provisions incorporate, at a minimum, the phrase “arbitrary or unjustifiable discrimination”. For this reason, its interpretation has wide-ranging consequences in different areas of international economic law, including international trade, international investment, and international environmental law. 5

3. Early Appellate Body jurisprudence raised the issue of whether the avoidance of “arbitrary or unjustifiable discrimination” implies a duty to engage in good faith negotiations before applying unilateral trade measures.<sup>10</sup> The Appellate Body decision in *US—Shrimp* has been interpreted to require WTO Members to make serious efforts, in good faith, to negotiate a multilateral solution before resorting to unilateral measures, in order to avoid a finding of unjustifiable discrimination.<sup>11</sup> However, it is ineffective and impractical to require negotiations at the bilateral or regional level to address global issues like climate change or ozone depletion. At the same time, it is ineffective and impractical to require multilateral negotiations in the era of multilateral negotiation failure. 10 15

4. Ambiguity in treaty texts opens the door to judicial activism. In turn, judicial activism creates pressure for less ambiguity in treaty texts, making it more difficult to make progress in treaty negotiations. Where should international economic law draw the line between the functions of treaty negotiation, treaty interpretation, and dispute 20

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and Animal Products (Indonesia—Import Licensing Regimes), WTO AB Report, WT/DS477/AB/R, WT/DS478/AB/R (22 November 2017, para.5.41).

- 7 Canada–European Union Comprehensive Economic and Trade Agreement (CETA), entered into force provisionally on 21 September 2017, art. 19.3(2), (<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>, [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (23 October 2017)).
- 8 CETA, *ibid.*, art. 9.4, 15.3(4), 28.4(2); United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 4 June 1992, (1992) 31 ILM 849 (entered into force 21 March 1994), art. 3(5); Rio Declaration on Environment and Development (Rio Declaration), adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3–14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874, Principle 12; NAFTA, above n.6, art. 1106(6).
- 9 CETA, above n.7, art. 28.3(2).
- 10 United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline), WTO AB Report, WT/DS2/AB/R, 20 May 1996; and United States—Import Prohibition of Certain Shrimp and Shrimp Products (US—Shrimp), WTO AB Report, WT/DS58/AB/R (6 November 1998).
- 11 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3<sup>rd</sup> Edition (2013).

settlement? Who should decide in which circumstances there is a duty to negotiate prior to implementing public interest regulation? In 2001, Kenichiro Urakami observed that deciding such a highly contested issue would undermine the legitimacy of WTO panels and the Appellate Body.<sup>12</sup> This prescient observation applies with greater force with the demise of the Doha Round of multilateral trade negotiations and the subsequent efforts to rein in the Appellate Body.<sup>13</sup> Indeed, post *US—Shrimp*, the Appellate Body has not required good faith negotiations as a condition for compliance with the chapeau in subsequent Article XX jurisprudence.<sup>14</sup>

5. This article will argue that there is no basis in the treaty text to require negotiations in order to comply with the chapeau. The context of Article XX does not support this interpretation either. The right of States to protect human life and health cannot be interpreted to require negotiations where there is an urgent need to act, unilaterally or otherwise. Similarly, tackling urgent environmental threats like climate change requires multiple approaches to mitigation and adaptation incentives and should not be hobbled by the judicial imposition of impractical negotiation requirements.

6. The wider context of the WTO covered agreements does not support a general duty to negotiate. The WTO Agreements set out various degrees of cooperation, ranging from enquiry (SPS Agreement) or contact points (GATS), notification requirements (SPS Agreement, TBT Agreement), and consultations (DSU), to the use of good offices, conciliation, and mediation (DSU), and even specific negotiation obligations (GATS Article XIX, TRIPS Article 31(b)). For example, the DSU sets out the procedural step of consultations, which is a step below negotiations, but a panel may be validly established without being preceded by consultations.<sup>15</sup> Similarly, Article 15 of the Antidumping Agreement, which requires that “possibilities of constructive remedies [...] shall be explored before applying

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12 Kenichiro Urakami, *Unsolved Problems and Implications for the Chapeau of GATT Article XX*, in: Edith Brown Weiss and John H. Jackson (eds.), *Reconciling Environment and Trade* (2001), 182.

13 *Dispute unsettled: America holds the World Trade Organisation hostage*, *The Economist*, 23 September 2017 ([www.economist.com/news/finance-and-economics/21729462-rules-based-system-trade-faces-threats-beyond-trumps-tariffs-america-holds](http://www.economist.com/news/finance-and-economics/21729462-rules-based-system-trade-faces-threats-beyond-trumps-tariffs-america-holds)) (23 September 2017).

14 One panel appears to have applied this requirement however. See *India—Measures Concerning the Importation of Certain Agricultural Products (India—Agricultural Products)*, WTO Panel Report, WT/DS430/R (19 June 2015), para.7.434–5.

15 *Mexico—Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States (Mexico—Corn Syrup (Article 21.5—US))*, WTO AB Report, WT/DS132/AB/RW (21 November 2001), paras.61–63. Urakami has also observed that reading a negotiation requirement in the chapeau is curious in light of the DSU consultations requirement. Urakami, above n.12.

anti-dumping duties where they would affect the essential interests of developing country Members”, imposes no obligation to actually provide or accept any constructive remedy. It only requires the developed country authorities to actively undertake the “exploration” of possibilities with a willingness to reach a positive outcome.<sup>16</sup> Even where the covered agreements contain an explicit requirement of consultations or explorations, they do not require any particular outcome. In this context, it is difficult to read into the language of the Article XX chapeau a requirement for negotiations, even if they require only good faith and no specific outcome. That would read into the chapeau language that is not there, creating a requirement that requires explicit language elsewhere in the covered agreements. Where there is a negotiation requirement in the covered agreements, it is explicit, and often is carefully circumscribed.<sup>17</sup> The absence of that requirement must be interpreted in this context.

7. This article is structured as follows. First, it analyzes the Appellate Body decisions in *US—Gasoline* and *US—Shrimp*, and the subsequent literature on whether there is a duty to negotiate implied in the prohibition of “arbitrary or unjustifiable discrimination”. Second, it analyzes the subsequent jurisprudence on the GATT, the TBT Agreement, and the SPS Agreement. Third, it analyzes the relevant rules of international law. It concludes that there is no duty to negotiate and, moreover, subsequent jurisprudence has adopted a different approach. The current approach analyzes whether discrimination is arbitrary or unjustifiable by focusing on the cause of the discrimination, or the rationale put forward to explain its existence, which would exclude a duty to negotiate in many circumstances.

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16 European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC—Bed Linen), WTO Panel Report, WT/DS141/R (12 March 2001), as modified by WTO AB Report WT/DS141/AB/R, para.6.233. See also United States—Anti-Dumping and Countervailing Measures on Steel Plate from India (US—Steel Plate), WTO Panel Report, WT/DS206/R and Corr.1, adopted 29 July 2002, paras.7.113–7.115, and European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC—Tube or Pipe Fittings), WTO Panel Report, WT/DS219/R (18 August 2003), as modified by WTO AB Report WT/DS219/AB/R, para.7.72.

17 For example, art. 31(b) of the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), requires that compulsory licensing be preceded by efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. Moreover, this requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In the event that this requirement is waived, the negotiation obligation is reduced to a notification obligation.

## II. *US—Gasoline* and *US—Shrimp*

8. Two Appellate Body decisions have found that failure to engage in inter-governmental consultations or negotiations resulted in measures being applied in manners that constituted arbitrary or unjustifiable discrimination under the GATT Article XX chapeau. In both cases, the challenged measures were provisionally justified under paragraph (g) of Article XX. Prior to the creation of the WTO, no GATT case considering paragraph (g) had found an obligation to negotiate under either the specific paragraph or the chapeau, with the exception of *US—Tuna I (Mexico)*, an unadopted panel report which considered the US measures under both paragraph b and g of Article XX.<sup>18</sup> No Appellate Body decisions have found a duty to negotiate in cases involving GATT or GATS general exceptions that use the term “necessary”. No Appellate Body decisions after *US—Shrimp* have found a duty to negotiate in cases involving GATT Article XX(g). No Appellate Body decisions have found a duty to negotiate in other WTO agreements that incorporate requirements of the GATT Article XX chapeau. Thus far, the Appellate Body jurisprudence suggests that the chapeau contains no general duty to negotiate, that the issue of whether there is a duty to negotiate depends on the facts of the particular case, and that the constellation of facts required to apply a duty to negotiate rarely occur. This jurisprudence could also indicate that the Appellate Body has reconsidered this issue implicitly after *US—Shrimp*.

9. The Appellate Body’s approach to the analysis of the GATT Article XX and GATS Article XIV chapeaux is to focus on the manner in which a measure is applied, rather than its content (which has already been assessed under the specific exception).<sup>19</sup> After considering the drafting history of GATT Article XX, the Appellate

18 Canada—Measures Affecting Exports of Unprocessed Salmon and Herring (Canada—Salmon and Herring), GATT Panel Report, L/6268–35S/98 (22 March 1988); United States—Prohibition of Imports of Tuna and Tuna Products from Canada, GATT Panel Report (22 February 1982); and United States—Restrictions on Imports of Tuna, GATT Panel Report, GATT Doc DS29/R (1994) 33 ILM 839 (Not Adopted). In United States—Restrictions on Imports of Tuna, GATT Panel Report, GATT BISD (39th Supp) 155 (1991) 30 ILM 1594 (Not Adopted), 51, the Panel considered the negotiation of international cooperative arrangements to be a reasonably available GATT-consistent alternative in its analysis of art. XX(b) and implied that the same requirement applied to its analysis of art. XX(g) when it stated that its interpretation of art. XX would not affect the rights of individual countries to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies.

19 *US—Gasoline*, WTO AB Report, above n.10; *US—Shrimp*, WTO AB Report, above n.10; United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia (*US—Shrimp (Article 21.5—Malaysia)*), WTO AB Report, WT/DS58/AB/RW (21 November 2001); European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (*EC—Asbestos*), WTO AB Report, WT/DS135/AB/R (5 April 2001);

Body in *US—Gasoline* described the general purpose of the chapeau as “the prevention of abuse of the exceptions”.<sup>20</sup> The Appellate Body stated further that “the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”<sup>21</sup>

10. In *US—Shrimp*, the Appellate Body focused further on the theme of reasonableness in defining the role of the chapeau:

The chapeau [. . .] is, in fact, but one expression of the principle of good faith [. . .]. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges upon the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably”.<sup>22</sup>

11. The Appellate Body has broken down the Article XX chapeau analysis to first ask whether a measure is applied in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, which in turn contains three elements: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable; and (3) the discrimination occurs between countries where the same conditions prevail (between different exporting countries or between the exporting countries and the importing country).<sup>23</sup> The non-discrimination requirements in the chapeau apply to both *de jure* and *de facto* discrimination.

12. In *US—Gasoline*, American regulations under the Clean Air Act set different standards for foreign and domestic refiners. The Appellate Body held that the measures were inconsistent with GATT Article III:4. Having found that clean air qualified as an exhaustible natural resource and that clean air standards were imposed upon both foreign and domestic producers, the Appellate Body found that the regulations qualified for provisional justification under Article XX(g). However, they failed to meet the test set out in the chapeau because the discrimination was arbitrary and unjustifiable. The United States had failed to make an effort to cooperate with foreign governments and refineries to facilitate the application of the same standard to foreign producers and the difference in standards imposed higher costs on foreign than on

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and United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling), WTO AB Report, WT/DS285/AB/R (20 April 2005).

20 US—Gasoline, WTO AB Report, above n.10, 22.

21 Ibid.

22 US—Shrimp, WTO AB Report, above n.10, para.158.

23 Ibid., para.150.

domestic producers. The Appellate Body found two elements of the American measures to constitute unjustifiable discrimination:

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. [...] The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute “unjustifiable discrimination” and a “disguised restriction on international trade.”<sup>24</sup>

13. In *US—Gasoline*, the Appellate Body rejected the argument of the United States that it was justified in applying different standards to domestic and foreign gasoline refiners because verification procedures with foreign refiners would require international cooperation whereas verification of domestic refiners would not.<sup>25</sup> The *US—Gasoline* case seems to stand for the proposition that if non-discriminatory administration of a measure requires international cooperation, an effort must be made to secure that cooperation. However, it is not clear why the Article XX chapeau needs to require non-discriminatory administration of a measure, since GATT Article X(3)(a) already sets out a similar obligation to administer such laws in a “uniform, impartial and reasonable manner”. Since Article XX is an exception to Article X, they must mean different things. Moreover, the rule of treaty interpretation, *effet utile*, requires a tribunal to avoid redundancy in its interpretation of treaty terms.

14. In *US—Shrimp*, US regulations under the Endangered Species Act banned imports of shrimp from countries that did not meet unilaterally imposed US standards for the protection of migratory sea turtles. The measure met the requirements of Article XX(g), since it was primarily aimed at sea turtle conservation, the turtles were

24 *US—Gasoline*, WTO AB Report, above n.10, 28.

25 In this regard, the Appellate body stated: “The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. [...] It appeared that] the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.” See *US—Gasoline*, WTO AB Report, above n.10, 27.



an exhaustible natural resource, and the same requirements were imposed on domestic shrimp fishing. The Appellate Body held that there was a sufficient jurisdictional nexus between the turtles and the United States because they spent part of their migratory life cycle in American waters, without ruling on whether there was an jurisdictional limit implied in the language of Article XX(g). However, discrimination between different exporting countries failed the chapeau test because the United States had failed to make the same effort to negotiate an international agreement for turtle protection with Southeast Asian countries as it had for countries in the Americas. Due process discrimination between domestic and foreign shrimp industries was an additional reason the measure failed the chapeau requirements, which raises the same issue as the *Gasoline* case regarding the relationship between GATT Article X(3)(a) and the Article XX chapeau.

15. The Appellate Body found that the discrimination between different exporters failed the chapeau test for four reasons. First, the regulations required WTO members to adopt “essentially the same policy” as that applied in the United States without taking into account other policies and measures a country may have adopted that would have a comparable effect on sea turtle conservation.<sup>26</sup> Second, the United States applied the same standard without taking into consideration whether it was appropriate for the conditions prevailing in other countries.<sup>27</sup> Third, the United States failed to engage in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition”.<sup>28</sup> Fourth, the United States pursued negotiations with countries in the Americas but not in South and South-east Asia and gave the former three years to adopt the turtle exclusion devices while the latter had only four months. Having successfully negotiated an *Inter-American Convention*, the United States had demonstrated that there was an alternative course of action reasonably available to achieve its goal of turtle conservation. Moreover, international environmental law expressed a preference for cooperative solutions to transboundary or global environmental issues.

16. In *US—Shrimp (Article 21.5—Malaysia)*, Malaysia complained that the amendments to the original US regulations did not comply with the ruling of the Appellate Body. The Panel and Appellate Body both found that the amended US regulations, together with the efforts made to conclude a comparable multilateral agreement for turtle conservation in the Indian Ocean region, had addressed all of the flaws identified in *US—Shrimp*. Even though the United States did not succeed in concluding an agreement with Malaysia, the efforts the United States made to negotiate a regional agreement, together with the increased flexibility and transparency of

26 Appellate Body Report, *US—Shrimp*, WTO AB Report, above n.10, para.163.

27 *Ibid.*, para.165.

28 *Ibid.*, para.166.

the certification process, led to the conclusion that the United States no longer applied the measures in a manner that constituted arbitrary or unjustifiable discrimination under the chapeau.<sup>29</sup> However, it is not clear whether the *US—Shrimp* case stands for the proposition that WTO Members must engage in good faith negotiations on a non-discriminatory basis in cases involving transboundary or global environmental issues, or whether it merely prohibits discrimination when a State arbitrarily chooses to negotiate with some countries, but not with others. 5

17. In *US—Gasoline*, the United States was required to negotiate international cooperation in order to avoid discrimination between domestic and foreign refiners in the administration of domestic environmental law. In *US—Shrimp*, the United States was required to engage in non-discriminatory negotiations to reach a multilateral environmental agreement to address a transboundary environmental issue. 10 Neither case implies a general duty to negotiate in the chapeau, regardless of the circumstances. Rather, in both cases the negotiation requirement was linked to the issue of whether the discriminatory application of a challenged measure was justifiable in the circumstances of each case. 15

18. The Panel in *US—Shrimp (Article 21.5—Malaysia)* noted that the good faith negotiations had to be ongoing. They would be ready to revisit the case if these efforts ceased, which suggests that the decision might go the other way were this factor no longer present. The Panel emphasized that the right to take unilateral measures was provisional, not permanent, and subject to ongoing WTO supervision: 20

[I]n a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, or if they were taken further to the completion of serious good faith efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a *provisional* measure allowed for emergency reasons than as a definitive “right” to take a permanent 25

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29 In *US—Shrimp (Article 21.5—Malaysia)*, WTO AB Report, above n.19, the efforts of the United States included:

(1) initiating the negotiations with a proposal containing possible elements of a regional convention; (2) helping to organize and finance an international symposium, where participants adopted a Declaration calling for a regional agreement; (3) participating in a conference, where governments committed to developing an international agreement; (4) helping to organize and finance a further round of negotiations, which produced a MOU for South-east Asia/Indian Ocean and a plan to draft a Conservation and Management Plan (CMP); and (5) participating in the adoption of the CMP at multilateral conference, at which point the MOU came into effect. See *US—Shrimp (Article 21.5 Malaysia)*, WTO AB Report, above n.19, paras.131–134.

measure. The extent to which serious good faith efforts continue to be made may be reassessed at any time. For instance, steps which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage.<sup>30</sup> [Emphasis in original.]

19. In *US—Shrimp*, the factual context and legal framework—including international environmental law, WTO documents on trade and environment, and the reference to sustainable development in the preamble of the WTO Agreement—were provided as the basis for finding an implicit duty to negotiate in Article XX chapeau.<sup>31</sup> In this case, the survival of highly migratory species depended on concerted and cooperative efforts on part of many countries whose waters are traversed in the course of the migration. The Panel characterized the legal framework as follows: (1) the need to protect migratory species has been recognized by the WTO and numerous international instruments; (2) sustainable development is a WTO objective; (3) there was the common opinion of WTO membership expressed in the 1996 Report of the CTE endorsing “multilateral solutions based on international cooperation and consensus as the best and most effective way [...] to tackle environmental problems of a transboundary or global nature”; and (4) the parties to the dispute had accepted almost all of the relevant MEAs.<sup>32</sup>

20. In the panel’s view, this duty imposed the following obligations:

- the United States had to take the initiative of negotiations;
- the negotiations had to be with all interested parties and aimed at establishing consensual means of sea turtle conservation;
- the United States had to make serious efforts in good faith to negotiate, taking into account conditions in different countries;<sup>33</sup>
- serious efforts in good faith had to take place before the enforcement of a unilaterally designed import prohibition;
- there must be a continuous process, including once a unilateral measure has been adopted and pending the conclusion of an agreement; and

30 *US—Shrimp* (Article 21.5—Malaysia), WTO Panel Report, above n.19, para.5.88.

31 *Ibid.*, paras.5.59–5.60.

32 *Ibid.*, paras.5.53–5.57.

33 The Panel determined that this was the standard of review that should be applied in assessing the effort to negotiate. See *ibid.*, para.5.73. However, the Panel also recognized that no single standard may be appropriate. *Ibid.*, para.5.77. The Appellate Body rejected the view expressed by the Panel that the United States should be held to a higher standard given its scientific, diplomatic and financial means, noting that the principle of good faith applies to all WTO members equally. See *ibid.*, para.5.76 and *US—Shrimp* (Article 21.5—Malaysia), WTO AB Report, above n.19, para.134, n.97.

- a multilateral, ideally non-trade restrictive, solution is generally to be preferred, in particular if it is established that it constitutes an “alternative course of action reasonably open”.<sup>34</sup>

21. The Panel’s approach is striking in its intrusiveness. In other, similar cases involving transboundary or global environmental negotiations, would a WTO panel today feel as confident about expressing its views on the adequacy of a WTO Member’s approach to international environmental negotiations? In some cases involving measures aimed at internal environmental, health, or moral issues, it would be unreasonable to require negotiations. For example, where a country bans beef imports from a WTO member that has an outbreak of mad cow disease, the importing country should not be required to negotiate with the exporting country in setting the level of risk it is willing to accept. Similarly, where a country bans imports to protect public morals, or restricts exports to conserve an exhaustible natural resource, there should be no negotiation requirement.

22. Indeed, in the *Shrimp* case, the Appellate Body rejected arguments that unilateral measures could not be included under Article XX(g), stating:

It appears to us [...] that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.<sup>35</sup>

In *US—Shrimp (Article 21.5—Malaysia)*, the Appellate Body said:

Requiring that a multilateral agreement be *concluded* by the United States in order to avoid “arbitrary and unjustifiable discrimination” in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfil its WTO obligations. Such a requirement would not be reasonable.

[...]

Principle 12 of the Rio Declaration [...] states, in part, that “[e]nvironmental measures addressing transboundary or global environmental problems should,

<sup>34</sup> *Ibid.*, paras.5.66–5.67, 5.73. Regarding this expression of the least-trade-restrictive test, also see *US—Shrimp (Article 21.5—Malaysia)*, WTO Panel Report, above n.19, para.5.51, where the Panel states: “[I]t seems that the Appellate Body meant to imply that other, less trade restrictive measures existed and also that import prohibitions, because of their impact, had to be subject to stricter disciplines”.

<sup>35</sup> *US—Shrimp*, WTO AB Report, above n.10, para.121.

as far as possible, be based on international consensus”. Clearly, and “as far as possible”, a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX [. . .]; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding “arbitrary and unjustifiable discrimination” under the chapeau [. . .]. We see, in this case, no such requirement.<sup>36</sup> [Emphasis in original.] 5

Thus, while the Article XX chapeau required the United States to make good faith efforts to reach international agreements before imposing a unilateral import ban to further international environmental objectives, it could not be required to succeed. 10  
Certainly, if trade restrictions are to be permitted for the purpose of persuading other countries to participate in multilateral environmental protection efforts, this is a logical result. Moreover, the wording of the *Rio Declaration* (“as far as possible”) clearly leaves open the possibility that unilateral measures may be needed in some circumstances. 15

23. Climate change raises similar issues to those raised in the *US—Shrimp* case. To what extent should that case serve as a precedent for action on climate change mitigation? (Adaptation measures should not require justification, since presumably they would focus on protecting the enacting State’s territory from the effects of climate change, such as rising sea levels and the geographical expansion of tropical diseases.) 20  
If unilateral action must be preceded by good faith efforts to reach a negotiated solution, would the many decades of multilateral climate negotiations qualify? If unilateral measures must be applied flexibly to take into account different conditions among countries, would there be relevant conditions beyond greenhouse gas emissions? 25  
Would the Article XX chapeau require compliance with transparency and procedural fairness beyond the requirements of GATT Article X? In what circumstances could the Appellate Body require the provision of technical assistance? To what extent would the degree of urgency be a mitigating factor that requires a lesser effort to reach a negotiated solution? These questions demonstrate the difficulty of reading into the chapeau a duty to negotiate. 30

24. Academic commentators have interpreted the *US—Shrimp* case in a variety of ways. Views range from an absence of a duty to negotiate, to a duty to avoid discrimination in negotiations with different countries, to a general duty to negotiate.

25. Howse argues that negotiation efforts in the *Shrimp* case were only relevant to determining whether the United States had discriminated between the countries around the Indian Ocean and the countries in the Americas and notes that negotiation efforts were only one of several factors that determined the outcome of this 35

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36 *US—Shrimp* (Article 21.5—Malaysia), WTO AB Report, above n.19, paras.123–124.

analysis, rather than a decisive factor.<sup>37</sup> He argues that “there is nothing in the wording of the chapeau (or any other part of Article XX) to suggest that a nation must first secure agreement by WTO Members or any other nation before exercising its rights under Article XX(g).”<sup>38</sup> Howse also makes a good argument that the duty to cooperate cuts both ways. The duty to cooperate to solve international environmental problems is not only a discipline on the country contemplating unilateralism. The duty to cooperate to solve international environmental problems is a justification for unilateral measures to create incentives for a country to negotiate in good faith towards a cooperative solution to a common problem.<sup>39</sup>

26. Marion Panizzon characterizes Howse’s view as a duty not to discriminate in one’s negotiating behavior, rather than a *sui generis* duty to negotiate. She cites Gabrielle Marceau’s view that the chapeau’s non-discrimination requirement prohibits negotiating “seriously with some but not with others.”<sup>40</sup> However, Panizzon takes the argument further:

The duty to negotiate in good faith relates to the requirement that the exercise of Article XX exceptions shall be non-discriminatory. The GATT-specific obligation to negotiate in good faith means that if a serious negotiation of a multilateral solution can be shown to precede the imposition of unilateral and extra-territorial trade restrictions, the measure is likely non-discriminatory under the chapeau of Article XX GATT 1994 standards.<sup>41</sup>

Moreover, Panizzon goes on to argue that the duty to negotiate in good faith could provide less powerful WTO Members with a means to enforce their right to participate in “green room” negotiations among more powerful Members, thereby

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37 Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 *Col. J. Envl. L.* (2002), 491, 507.

38 Howse, *ibid.*, 510. Howse further supports his argument that there is no general duty to negotiate in Article XX by comparing GATT Articles XX and XXI: “By contrast, where the drafters wanted to make the exercise of some kind of exception to GATT disciplines contingent on agreement or collective action among Members or states generally, they did so explicitly. For example, Article XXI(c) provides an exception where Members are taking action ‘in pursuance of [. . .] obligations under the United Nations Charter for the maintenance of international peace and security.’” *Ibid.*, at 510.

39 Howse, *above n.37*, 508.

40 Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (2006), 82. Also see Gabrielle Marceau, *Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO agreement and MEAs and other treaties*, 35 *J World Trade* (2001), 1081, 1125–6.

41 Panizzon, *ibid.*, 81.

enhancing transparency of and trust in the multilateral trade system.<sup>42</sup> These views go beyond the view that there is an obligation to engage in negotiations on a non-discriminatory basis.

27. In his critique of the Appellate Body’s interpretation of the Article XX chapeau in *US—Gasoline* and *US—Shrimp*, Charnovitz noted that, “the Appellate Body arrogates to itself considerable discretion and adjudicative authority”.<sup>43</sup> In *US—Shrimp*, the Appellate Body based its views on the need for environmental cooperation on Decision on Trade and Environment and the 1996 Report of the Committee on Trade and Environment, as well as on MEAs. As Charnovitz points out, the Appellate Body did not explain the relevance under the Vienna Convention on the Law of Treaties (VCLT), or the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals, which was a problematic approach when the defendant United States was not a party to either.

28. Briese argues that, since the concept of sustainable development encompasses the principle of cooperation, the inclusion of sustainable development in the WTO Agreement Preamble also includes the principle of cooperation.<sup>44</sup> While this does not mean that the principle of cooperation can supplant the treaty text of GATT or GATS, where multiple interpretations are possible, the interpretation that is consistent with the principle of cooperation should be preferred.<sup>45</sup> WTO panels may use customary international law to fill in the gaps in WTO rules where the WTO agreements do not contract out of general international law.<sup>46</sup> However, as Briese notes,

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42 Panizzon, *ibid.*, 82, citing Daniel C. Esty, 2002, 12–14 and Thomas Cottier and Krista Nadakavukaren Schefer, Good Faith and the Protection of Legitimate Expectations in the WTO, in: Marco Bronckers and Reinhard Quick (eds.), *New Directions in International Economic Law: essays in honour of John H. Jackson* (2000), 157.

43 Steve Charnovitz, *The WTO’s Environmental Progress*, 3 *JIEL* (2007), 685, 695–96. Also see Gregory Shaffer, *The Democratic Legitimacy of Extraterritorial U.S. Trade Sanctions on Environmental Grounds: The WTO Shrimp-Turtle Case*, 94 *Proceedings of the Annual Meeting (American Society of International Law)* (2000), 84 (critiquing the uncertainty the Shrimp ruling created and the disincentive to international environmental cooperation that the first rulings created, by creating an incentive for developing countries to refuse to cooperate in the negotiation of new rules).

44 Robyn Jennifer Briese, *Precaution and Cooperation in the World Trade Organization: An Environmental Perspective*, Australian Centre for Environmental Law Working Paper Series, (<http://eprints.anu.edu.au/archive/00001344/01/briese.pdf>) (13 April 2017), 11.

45 Briese, *ibid.*, 15.

46 *Korea—Measures Affecting Government Procurement*, WT/DS163/R, WTO Panel Report, 19 June 2000, para.7.96 and *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, 15 April 1994; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,

the principle of cooperation “can [. . .] only meaningfully be invoked in situations where there are interdependencies and states are seeking to achieve common or related goals”.<sup>47</sup>

29. Scott predicted that the negotiation requirement was here to stay.<sup>48</sup> Scott also pointed out that the *US—Shrimp* Panel distinguished between the safety of specific products and the safety of the processing and production methods (PPMs) used in an entire country, suggesting that the former is permissible, while the latter is not:

[W]e are limiting our finding to measures—taken independently of any such international obligation—conditioning access to the US market for a given product on the adoption by the exporting Member of certain conservation policies. In this regard, we note that banning the importation of a particular product does not per se imply that a change in policy is required from the country whose exports are subject to the import prohibition. For instance, a Member may ban a product on the ground that it is dangerous, and accept a similar product that is safe. This is clearly different from adopting a policy pursuant to which only countries that adopt measures restricting all of their production to products considered safe by a particular Member may export to the market of that Member.<sup>49</sup>

This view assumes that the chapeau does imply a duty to negotiate in some circumstances, and seeks to define those circumstances based on the distinction between products as such and PPMs.

30. Both Howse and Marceau present a fair characterization of how negotiation behavior can represent a specific instance of discriminatory conduct, which could fail the test of the chapeau. Charnovitz rightly criticizes the intrusiveness of imposing a negotiation requirement, without fully explaining this interpretation of the chapeau. Scott suggests a distinction between the safety of specific products and the safety of the PPMs used in an entire country, in determining when a country may act

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Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art. 3.2. Also see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AJIL (2001), 535, 542–543; Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J World Trade (2001), 499; and Donald McRae, “The WTO in International Law: Tradition Continued or New Frontier?” 3 JIEL (2000), 27.

47 Brieze, above n.44, 20. Also see P.T. Stoll, *The International Environmental Law of Cooperation*, in: R. Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996), 47.

48 Joanne Scott, *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO*, Harvard Jean Monnet Working Paper 3/99 (2000), 16 (<https://jeanmonnetprogram.org/archive/papers/99/990301.html>) (13 October 2017).

49 *US—Shrimp*, WTO Panel Report, above n.10, para.7.50.



unilaterally. However, while such a distinction may be relevant in determining the competitive relationship between products in the context of MFN and national treatment obligations, it seems a step too far to use this distinction to justify a duty to negotiate that is not supported by the text of the chapeau or the context of the WTO covered agreements.

31. A widely acknowledged general principle of international environmental law is that States are required to cooperate with each other in mitigating transboundary environmental risks.<sup>50</sup> In cases involving measures aimed at global or transboundary environmental protection, it may be useful to negotiate before imposing unilateral measures, in order to avoid conflicts between WTO law and international environmental law. In cases that involve transboundary or global environmental issues there is a basis for invoking the duty to cooperate because there are interdependencies and States are seeking to achieve common or related goals. However, in order to ground the duty in the text of the chapeau, the incorporation of this duty must be linked to the issue of discrimination, as it was in *US—Shrimp* and *US—Gasoline*. Moreover, any such duty must be considered in light of the justification for the discrimination, since the chapeau permits justifiable discrimination.

32. One can envisage a case in which a WTO Member uses unilateral measures to induce another WTO Member to cooperate in addressing a global environmental issue, without specific negotiations with that Member and without a MEA that

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50 In the Lac Lanoux arbitration, the tribunal held that France had complied with its treaty and customary international law obligations to consult and negotiate in good faith before diverting a watercourse shared with Spain. However, the duty to negotiate did not require France to obtain Spain's consent. See Lac Lanoux (Spain v. France) 24 ILR (1957), 101. Also see Nuclear Tests Cases (New Zealand v. France), 1974 ICJ 457. Similarly, the Stockholm Declaration, Principle 24 provides that 'co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states'. Declaration of the United Nations Conference on the Human Environment 5–16 June 1972, UN Doc A/Conf/48/14/Rev.1 and Corr.1 (1973), (1972) 11 ILM 1416 (Stockholm Declaration). The United Nations General Assembly endorsed this principle but noted that it should not be construed to enable other States to delay or impede the exploitation and development of natural resources within the territory of States. See UNGA Res 2995 XXVII (1972). See generally, Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (1992), 102–109. Also see H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Law—The Precautionary Principle: International Environmental Law Between Exploitation and Protection* (1994), 197; F. X. Perrez, *Cooperative Sovereignty—From Independence to Interdependence in the Structure of International Environmental Law* (2000), 330; P.M. Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EJIL (2000), 19, 22; and Briese, above n.44, 14.

contains specific obligations. Climate change is a prime example. The Paris Agreement relies on soft law and broad objectives. This result reflects the difficulty of multilateral negotiations, rather than the urgency of addressing climate change. In these circumstances, there are many arguments in favour of unilateral action to create incentive to mitigate climate change and many reasons to doubt the effectiveness of seeking negotiations with recalcitrant countries. In such a case, discrimination in negotiations could prove to be perfectly justifiable in the context of the chapeau. 5

### III. Subsequent Chapeau jurisprudence

33. GATT Article XX and GATS Article XIV use similar, though not identical, language in several paragraphs and in the chapeau. In cases where measures have been provisionally justified as “necessary” under GATT Article XX or GATS Article XIV, the Appellate Body has not required WTO members to engage in consultations or negotiations in order to comply with the requirements of either the specific paragraph at issue or the chapeau.<sup>51</sup> 10

34. In *US—Gambling*,<sup>52</sup> the WTO Appellate Body overturned the Panel’s ruling<sup>53</sup> that the United States could not justify its measures on Internet gambling services as “necessary” under Article XIV(a) of the GATS. The Panel had decided that the United States had not “explored and exhausted all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure”,<sup>54</sup> because it had failed to consult or negotiate with Antigua before imposing the measures.<sup>55</sup> The result of the Panel’s interpretation was to impose an obligation on the United States to negotiate with Antigua and Barbuda in order to accommodate the latter’s concerns regarding the design of American criminal laws related to Internet gambling. The Appellate Body reasoned that negotiations, which have an uncertain outcome, could not qualify as a reasonably available alternative measure that would achieve the 20 25

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51 *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea—Beef)*, WTO AB Report, WT/DS161/AB/R (10 January 2001); *EC—Asbestos*, WTO AB Report, above n.19; *Brazil—Measures Affecting Imports of Retreaded Tyres (Brazil—Retreaded Tyres)*, WTO AB Report, WT/DS332/AB/R (17 Dec. 2007); *US—Gambling*, WTO AB Report, above n.19; *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Publications)*, WTO AB Report, WT/DS363/AB/R (19 January 2010); and *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (EC—Seal Products)*, WTO Panel Reports, WT/DS400/R, WT/DS401/R (25 November 2013), as modified by WTO AB Reports WT/DS400/AB/R, WT/DS401/AB/R.

52 *US—Gambling*, WTO AB Report, above n.19.

53 *US—Gambling*, WTO Panel Report, above n.19.

54 *Ibid.*, *US—Gambling*, para.6.528.

55 *Ibid.*, *US—Gambling*, para.6.531.

desired level of protection of public morals. This case demonstrates at least one clear limit on the viability of reading a duty to negotiate into the chapeau: a WTO Member has no obligation to subject its moral standards to international negotiation.

35. In *Brazil—Retreaded Tyres*, the Appellate Body noted that it would “have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.”<sup>56</sup> In that case, the objective was to protect the environment and public health. Similarly, in *EC—Seal Products*, the Appellate Body stated that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX “should focus on the cause of the discrimination, or the rationale put forward to explain its existence.”<sup>57</sup> In that case, the objective was to protect public morals. It is easy to foresee the need for unilateral action to address an urgent health crisis, in which taking time to negotiate with the affected countries would go against the objective of protecting public health in a timely and effective manner. This is another clear limit on the viability of reading a duty to negotiate into the chapeau: a negotiation requirement could go against the objective of a measure that aims to protect the environment, public health, or public morals.

36. In *Indonesia — Import Licensing Regimes*, Indonesia argued that, in contrast to the *US—Shrimp* case, information on its import licensing regime, the application procedures, as well as the rationale underpinning the granting of import licenses, were readily accessible to all. Therefore, its measures did not constitute “arbitrary discrimination”. Indonesia further argued that it should not be obliged to engage in negotiations with the complainants regarding a domestic law over which it has full autonomy.<sup>58</sup> In addressing this argument, the Panel avoided addressing the issue of whether there was an obligation to negotiate. Instead, the Panel observed that Indonesia misunderstood the Appellate Body’s reasoning in *US—Shrimp*, since knowledge of the application procedures and their rationales was not a determining factor in deciding whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been

56 *Brazil—Retreaded Tyres*, WTO AB Report, above n.51, para.227. See also *Indonesia—Import Licensing Regimes*, WTO AB Report, above n.5, para.5.98.

57 *EC—Seal Products*, WTO AB Report, above n.51, para.5.303 (quoting *Brazil—Retreaded Tyres*, WTO AB Report, above n.51, para.226, in turn referring to *US—Gasoline*, WTO AB Report, above n.10; *US—Shrimp*, WTO AB Report, above n.10; and *US—Shrimp (Article 21.5—Malaysia)*, WTO AB Report, above n.19).

58 *Indonesia—Import Licensing Regimes*, WTO Panel Report, above n.5, paras.7.540, 7.818.

provisionally justified under one of the subparagraphs of Article XX.<sup>59</sup> Like the Appellate Body in *Brazil—Retreaded Tyres*, the Panel found that the discrimination did not comply with the chapeau of Article XX because the alleged rationale for discriminating did not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.<sup>60</sup>

37. In *China—Rare Earths*, the Panel interpreted the term “conservation” in GATT Article XX(g) in light of the concept of sustainable development and the principle of sovereignty over natural resources.<sup>61</sup> A State’s permanent sovereignty over its natural resources entitles it to determine its own conservation objectives, including whether its conservation measures should decrease the quantity of materials extracted or control the speed of such extraction, provided that its measures do not cause damage to the environment of other States or of areas beyond the limits of the regulating Member’s national jurisdiction.<sup>62</sup> Moreover, the analysis of whether a measure’s application results in arbitrary or unjustifiable discrimination should be based on the cause of the discrimination and not exclusively on the effects of such discrimination. Therefore, any discrimination with respect to resource conservation should be justified on the basis of conservation-related criteria.<sup>63</sup> This is another limit on the viability of reading a duty to negotiate into the chapeau. If conservation requires unilateral measures to create incentives for conservation, for example in the case of climate change, discrimination could be justified even in the absence of negotiations to find a cooperative solution to global resource depletion.

38. The Panel in *China—Rare Earths* also invoked *US—Gasoline* to argue that discrimination may be arbitrary or unjustifiable in cases where it is avoidable and foreseeable, including those in which alternative measures exist which would have avoided or at least diminished the discriminatory treatment. The Panel noted that alternatives are considered during the analysis under the paragraph in the case of Article XX exceptions that apply to measures “necessary to” the achievement of a particular objective. However, in the context of Article XX(g), the Panel reasoned that alternatives may be considered during the chapeau analysis.<sup>64</sup> However, negotiation could not be viewed as an alternative measure in the chapeau analysis; as the Appellate Body observed in *US—Gambling*, since negotiation has an uncertain

59 *Ibid.*, paras.7.818–824.

60 *Ibid.*, para.7.823.

61 *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China—Rare Earths)*, WTO Panel Report, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (29 August 2014), paras.7.256–7.277.

62 *Ibid.*, paras.7.266–7.268.

63 *Ibid.*, para.7.352.

64 *Ibid.*, para.7.354, n.549, citing *US—Gasoline*, WTO AB Report, above n.10, 26–27.

outcome, it is not a reasonable alternative to a measure for which the outcome is more certain.

39. The Panel in *China—Rare Earths* also argued that WTO disciplines on justifiable trade restrictions are not redistributive, but rather seek to maintain what the relative market situation would be absent the challenged restriction; it is not the purpose of WTO law to correct inequalities in shares of goods and resources. In the Panel’s view, the WTO concern for non-discrimination is limited to ensuring equality in competitive opportunities when non-trade considerations are regulated.<sup>65</sup> This reasoning would support an argument against a duty to negotiate in the chapeau, since the negotiation, such as one regarding climate change, could have as its objective the redistribution of rights, obligations, and resources, via the principle of common but differentiated responsibilities. 5 10

40. In *China—Rare Earths*, the Appellate Body held that, for the purposes of Article XX(g), the word “conservation” must be understood in the context of the exhaustible natural resource at issue. For example, conservation of an exhaustible mineral resource may require a reduction in its extraction or stopping its extraction altogether. For a living natural resource, such as an endangered species, conservation may require not only limits on the activities that risk extinction, but also replenishing the endangered species.<sup>66</sup> This further supports the view that the application of the chapeau can vary with the interest at stake and the nature of the measure that addresses that interest, which would militate against an implicit duty to negotiate to avoid arbitrary or unjustifiable discrimination, even in cases involving exhaustible natural resources. 15 20

#### IV. TBT Agreement

41. Article 2.1 of the TBT Agreement does not explicitly incorporate the language of the chapeau, but the Appellate Body imported a requirement that is similar to the chapeau language into Article 2.1 from the preamble of the TBT Agreement. According to the Appellate Body, the “treatment no less favourable” requirement in Article 2.1 of the TBT Agreement permits technical regulations that pursue legitimate objectives, but not those applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.<sup>67</sup> This requires analyzing “whether the 25 30

65 Ibid., para.7.360.

66 *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China—Rare Earths)*, WTO AB Report, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (29 August 2014), para.5.89.

67 *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US—Tuna II (Mexico))*, WTO AB Report, WT/DS381/AB/R (13 June 2012), para.213.

detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.”<sup>68</sup>

42. In *US—Tuna II (Mexico)*, Mexico argued that “the Appellate Body’s statement in *US—Shrimp* that the United States’s failure to engage the appellees in that case in ‘serious, across the board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles’” “bears heavily in any appraisal of justifiable or unjustifiable discrimination”. Mexico argued that the situation was even more aggravated because the United States entered into the Agreement on the International Dolphin Conservation Program (AIDCP), a MEA for protecting dolphins, and then disregarded the standard established by the AIDCP in maintaining its own unilateral measure.<sup>69</sup> Mexico also argued that the situation in *US—Gasoline* was “closely analogous” to the situation in *US—Tuna II (Mexico)*; in that case, the basis of the GATT inconsistency was that the United States had acted unilaterally, without first attempting to achieve its goal through cooperation, which made it similar to the United States’s disregard for a multilateral agreement on the same subject of the protection of dolphins and labelling tuna as “dolphin-safe”.<sup>70</sup> While the Appellate Body acknowledged these arguments regarding cooperation or negotiation requirements, it did not address them in its decision. Instead, it found that access to the dolphin-safe label based on distinctions between fishing methods and geographic areas was not a legitimate regulatory distinction, because there was scientific evidence that the different fishing methods could harm dolphins.

43. In the first compliance proceedings in this dispute, the Appellate Body held that the issue of whether a detrimental impact stems exclusively from a legitimate regulatory distinction can be assessed by examining whether the detrimental impact can be reconciled with, or is rationally related to, the policy objective pursued by the measure at issue, so long as it does not preclude consideration of other factors that may also be relevant to the analysis.<sup>71</sup> Depending on the nature of the measure at issue and the circumstances of the case, additional factors could also be relevant to the analysis of whether the discrimination is arbitrary or unjustifiable, beyond the question of whether the discrimination can be reconciled with the policy objective.<sup>72</sup>

68 *Ibid.*, para.215. United States—Measures Affecting the Production and Sale of Clove Cigarettes (US—Clove Cigarettes), WTO AB Report, WT/DS406/AB/R (24 April 2012), para.182.

69 *US—Tuna II (Mexico)*, WTO AB Report, above n.67, para.86.

70 *Ibid.*, paras.97, 335.

71 United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Recourse to Article 21.5 of the DSU by Mexico (US—Tuna II (Mexico) (Article 21.5—Mexico)), WTO AB Report, WT/DS381/AB/RW (3 December 2015), para.7.95.

72 *Ibid.*, para.7.93 (citing EC—Seal Products, WTO AB Report, above n.51, para.5.321).

One way of assessing whether a measure is “even-handed” is to consider whether the measure or regulatory distinction is designed or applied in a manner that constitutes a means of “arbitrary or unjustifiable discrimination”. However, this is not the only permissible way to assess “arbitrary or unjustifiable discrimination”.<sup>73</sup> In *US—Tuna II (Mexico) (Second Recourse to Article 21.5—Mexico)*, the Panel characterized *US—Gasoline* and *US—Shrimp* as WTO cases in which “the manner in which the measures under review were adopted was taken into consideration by the Appellate Body in its determination of whether they constituted ‘arbitrary or unjustifiable discrimination’.”<sup>74</sup> All of the foregoing decisions in *US—Tuna II (Mexico)* support the view that there is no requirement to engage in negotiation or cooperation in order to avoid a finding of arbitrary or unjustifiable discrimination, in the context of Article 2.1 of the TBT Agreement. Moreover, since it is permissible to rely on reasoning regarding arbitrary or unjustifiable discrimination in the context of one agreement for purposes of an analysis under the other, the same should hold true for GATT Article XX.<sup>75</sup>

44. In *EC—Seal Products*, Canada argued that the European Union’s willingness to accommodate the interests of its member States while “completely ignor[ing]” the interests of other WTO Members was “plainly discriminatory” and “unjustifiable”. Canada argued that, where a measure is premised on an objection to conduct that takes place outside the territory of the regulating Member, there should be additional efforts to engage in negotiations to regulate the conduct in question.<sup>76</sup> Similarly, Norway cited arbitrary and unjustifiable discrimination between countries where the same animal welfare and resource management conditions prevail, and the European Union’s failure to engage in international negotiations (referencing *US—Shrimp*).<sup>77</sup> In *EC—Seal Products*, the Appellate Body did not address the negotiation arguments of Canada and Norway. Rather, it stated that “[o]ne 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

73 United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Second Recourse to Article 21.5 of the DSU by Mexico (US—Tuna II (Mexico) (Second Recourse to Article 21.5—Mexico)), WTO Panel Report, WT/DS381/AB/RW/2 (6 December 2017), para.7.83 (citing US—Tuna II (Mexico) (Article 21.5—Mexico), WTO AB Report, above n.71, para.7.93).

74 Ibid., note 205 (citing US—Shrimp, WTO AB Report, above n.10, paras.171-172 and US—Gasoline, WTO AB Report, above n.10, 27–29).

75 Ibid., para.7.734 (citing US—Tuna II (Mexico) (Article 21.5—Mexico), WTO AB Report, above n.71, paras.7.346–7.347).

76 EC—Seal Products, WTO Panel Report, above n.51, para.7.323, n.518.

77 Ibid., para.7.663.

objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”<sup>78</sup>

45. In other TBT Agreement cases, there have been no arguments by the parties or tribunal decisions regarding the existence of a negotiation requirement in the chapeau language, but the facts have revealed some degree of cooperation prior to the dispute. In *Indonesia—Chicken*, Brazil and Indonesia held consultations within the framework of a bilateral agricultural consultation mechanism.<sup>79</sup> In *US—Clove Cigarettes*, the parties and the Panel referred to the cooperation and negotiations that took place in the context of the WHO Framework Convention on Tobacco Control, but did not use the WHO agreement in any analysis of arbitrary or unjustifiable discrimination.<sup>80</sup>

46. In sum, in TBT Agreement cases, the existence of cooperation and the arguments of parties regarding negotiation requirements have not been relevant to determining whether there is arbitrary or unjustifiable discrimination.

## V. SPS Agreement

47. In the Article XX chapeau, the Appellate Body has focused on the cause of the discrimination, or the rationale put forward to explain its existence, in order to determine whether discrimination is arbitrary or unjustifiable.<sup>81</sup> Panels have adopted this approach in analyzing whether discrimination is arbitrary or unjustifiable in the context of Article 2.3 of the SPS Agreement.<sup>82</sup>

78 EC—Seal Products, WTO AB Report, above n.51, para.5.306 (referring to US—Shrimp, WTO AB Report, above n.10, para.165; and Brazil—Retreaded Tyres, WTO AB Report, above n.51, paras.227–228, 232).

79 Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products (Indonesia—Chicken), WTO Panel Report, WT/DS484/R (22 November 2017), paras.7.504-5. These were meetings of the Consultative Committee on Agriculture (CCA), which is part of the formal bilateral cooperation that had been set up. Brazil reiterated its interest to export chicken products to Indonesia during several CCA meetings that took place between 2009 and 2011.

80 United States—Measures Affecting the Production and Sale of Clove Cigarettes (US—Clove Cigarettes), WTO Panel Report, WT/DS406/R (24 April 2012), paras.2.29–2.30.

81 Brazil—Retreaded Tyres, WTO AB Report, above n.51, paras.225–226; US—Gasoline, WTO AB Report, above n.10, 25–26, 28; US—Shrimp, WTO AB Report, above n.10, paras.163–172; US—Shrimp (Article 21.5—Malaysia), WTO AB Report, above n.19, paras.144, 147; and EC—Seal Products, WTO AB Report, above n.51, para.5.303.

82 Russian Federation—Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (Russia—Pigs (EU)), WTO Panel Report, WT/DS475/R (21 March 2017), para.7.1321; United States—Certain Measures Affecting Imports of Poultry from China (US—Poultry (China)), WTO Panel Report, WT/DS392/R (25 October 2010), para.7.261; India—Agricultural



48. In *Russia—Pigs (EU)*, Russia applied an EU-wide import ban on live pigs and pork products, based on a requirement regarding African swine fever (ASF) contained in veterinary certificates negotiated with the European Union. The Panel held that this was a measure susceptible to challenge under the WTO dispute settlement mechanism, which was upheld on appeal. While the basis for the import ban was not set out in Russian law, it was nevertheless attributable to Russia.<sup>83</sup> The parties made various efforts to adjust the text of the bilateral veterinary export certificates in light of the ASF situation in the European Union. However, the Panel considered that the parties' efforts to negotiate or their lack thereof were not dispositive of its task to undertake an objective assessment of the matter before it, as required by Article 11 of the DSU.<sup>84</sup>

49. What is notable about this case is that the bilateral negotiations were relevant to the issue of whether the measure fell within the mandate of the Panel. However, these negotiation efforts were not relevant to determine whether the discrimination in Russia's measures was "arbitrary or unjustifiable". Instead, that determination was based on whether the regulatory distinction between the two situations or sets of imports bore a rational connection to the stated objective of the measures, which was allegedly to prevent the spread of ASF.<sup>85</sup> Russia allowed for the establishment of particular ASF-free regions, zones or compartments from which internal trade of the products at issue is allowed. However, Russia imposed a nation-wide import ban from the four ASF affected EU member States, as well as an EU-wide ban on the rest of the European Union's territory. Neither ban was based on the relevant international standards.<sup>86</sup> However, neither the bilateral negotiation efforts nor the negotiations behind the international standards were relevant to determine whether Russia's measures were arbitrary or unjustifiable. Rather, the Panel's findings were based on the similarity of the conditions relevant to the risks of ASF in the relevant geographic areas, between which Russia arbitrarily discriminated.

50. In the SPS Agreement, Article 3.1 obligates Members to base SPS measures on international standards, guidelines or recommendations, unless they can justify a higher level of protection in accordance with Article 3.3. In this regard, the SPS

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Products, WTO Panel Report, above n.14, para.7.429. See also United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina (US—Animals), WTO Panel Report, WT/DS447/R (31 August 2015), paras.7.574, 7.588.

83 *Russia—Pigs (EU)*, WTO Panel Report, *ibid.*, para.8.1. Russian Federation—Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (*Russia—Pigs (EU)*), WTO AB Report, WT/DS475/AB/R (21 March 2017), paras.6.1–6.2.

84 *Russia—Pigs (EU)*, WTO Panel Report, above n.82, para.7.112.

85 *Ibid.*, para.7.1323.

86 *Ibid.*, paras.7.1335, 7.1342.

Agreement already contains a type of negotiation requirement, in the sense that it requires adoption of internationally negotiated standards, guidelines or recommendations. This context differs from the context of the chapeau of GATT Article XX, which contains no such explicit requirement. Nevertheless, panels have relied on GATT Article XX jurisprudence to interpret the chapeau language in Article 2.3 of the SPS Agreement. 5

51. The Appellate Body found in *Brazil—Retreaded Tyres* that an analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX should focus on the cause of the discrimination, or the rationale put forward to explain its existence. Relying on the Appellate Body’s reasoning in that case, the Panel in *US—Poultry (China)* concluded that the meaning of “arbitrary or unjustifiable discrimination” in Article 2.3 of the SPS Agreement involves a consideration of whether there is a “rational connection” between the reasons given for the discriminatory treatment and “the stated objective of the measure”.<sup>87</sup> 10

52. This approach, which focuses on whether the regulatory distinction between the two sets of imports bears a rational connection to the stated objective of the measures,<sup>88</sup> does not imply any negotiation requirement. For example, in *US—Animals*, the United States’s failure to conduct a risk assessment and reach a final conclusion within a reasonable period of time could not justify discrimination between Argentina and Uruguay under Article 2.3 of the SPS Agreement.<sup>89</sup> Had the United States negotiated SPS compliance with Uruguay, but not with Argentina, it is possible that the source of the discrimination could have been a failure to negotiate SPS compliance in that case.<sup>90</sup> However, that is not the same as a general negotiation requirement, such as the one that is implicit in SPS Article 3. 15

53. The Panel in *India—Agricultural Products* is the only case since *US—Shrimp* in which a tribunal has even suggested that there may be an obligation to engage in cooperation in order to avoid arbitrary or unjustifiable discrimination. In this case, 20

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87 *US—Animals*, WTO Panel Report, above n.82, para.7.574, citing *Brazil—Retreaded Tyres*, WTO AB Report, above n.51, para.226 (referring to *US—Gasoline*, WTO AB Report, above n.10; *US—Shrimp*, WTO AB Report, above n.10; and *US—Shrimp (Article 21.5—Malaysia)*, WTO AB Report, above n.19). See also *EC—Seal Products*, WTO AB Report, above n.51, para.5.303; *US—Poultry (China)*, WTO Panel Report, above n.82, para.7.261; and *India—Agricultural Products*, WTO Panel Report, above n.14, para.7.429.

88 *US—Animals*, WTO Panel Report, above n.82, para.7.589.

89 *Ibid.*, para.7.592.

90 Indeed, discrimination may stem not only from “substantive’ SPS measures’, but also from ‘procedural and information requirements’. *US—Poultry (China)*, WTO Panel Report, above n.82, para.7.147; *US—Animals*, WTO Panel Report, above n.82, para.7.620. In the context of the chapeau of Article XX of the GATT 1994, see *US—Shrimp*, WTO AB Report, above n.10, para.160; *EC—Seal Products*, WTO AB Report, above n.51, para.5.302.

the Panel found that India's measures did not take account of the fact that different conditions may prevail in an exporting country that affect the likelihood that avian influenza will infect consignments of exported poultry. The Panel criticized the absence of good faith efforts by India to assess the measures applied by its trading partners with the aim of addressing avian influenza outbreaks within their territory. India's measures represented a "rigid and unbending" requirement and did not exhibit any flexibility with regard to such differences among exporting countries. This did not "connect with" the rationale India had put forward to explain this form of discrimination, that the risk associated with foreign outbreaks avian influenza is always different from that associated with domestic outbreaks, because India's measures did not account for circumstances in which there is no risk associated with a foreign outbreak. The Panel found that India's treatment of foreign poultry products amounted to unjustifiable discrimination within the meaning of Article 2.3 of the SPS Agreement.<sup>91</sup> In this context, the Panel noted that the Appellate Body in *US—Shrimp* was critical of the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members".<sup>92</sup>

54. In *US—Poultry (China)*, the Panel made reference to a series of US measures that had addressed SPS problems in China, including that the FDA in 2007 negotiated a Memorandum of Understanding (MOU) with China to address its concerns about a crisis involving melamine in poultry feed.<sup>93</sup> The United States pointed out that China's food safety enforcement problems and food safety crises had been the subject of reports and articles by numerous well-regarded international organizations (including the WHO) and academics.<sup>94</sup> However, these were not relevant to determining whether there was arbitrary or unjustifiable discrimination under SPS Agreement Article 5.5. Instead, the Panel reasoned that the absence of scientific evidence supporting discrimination in SPS measures was sufficient to determine whether a difference is arbitrary or unjustifiable. Indeed, in the context of Article 5.5, to show that the distinction is not arbitrary or unjustifiable, a Member must demonstrate that there are differing levels of risk between the comparable situations.<sup>95</sup>

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91 India—Agricultural Products, WTO Panel Report, above n.14, paras.7.434-7.436.

92 Ibid., paras.7.434-7.436, citing *US—Shrimp*, WTO AB Report, above n.10, para.166. The Appellate Body Report did not address the Panel's remarks regarding the need for India to engage in good faith efforts.

93 *US—Poultry (China)*, WTO Panel Report, above n.82, para. 4.222.

94 Ibid., para.7.257.

95 Ibid., para.7.263.

55. The *EC—Biotech* case provides a good example of an area where it is unreasonable to require negotiations in the context of SPS measures. In that case, the Panel noted that governments address the question of how to regulate GMOs in a great variety of ways. Regulatory approaches range from complete bans to laissez faire, often are based on a precautionary approach, and decisions are sometimes made dependent on considerations other than scientific factors, such as socio-economic considerations. Moreover, given the constant evolution of the science, regulatory approaches are under constant review. Governments have also sought international consensus in various international fora. After long and difficult negotiations, they adopted the Cartagena Protocol on Biosafety in 2000. In addition, work on specific issues related to GMOs is ongoing in specialized agencies and other international bodies or organizations such as Codex Alimentarius, FAO, WHO, UN, OECD, ASEAN and the African Union. The guidance documents established by these fora recognize the need for a case-by-case decision on individual GMOs based on a scientific risk assessment and on risk management considerations.<sup>96</sup>

56. The approach in the SPS Agreement has been consistent with more recent jurisprudence under the GATT, and with jurisprudence under the TBT Agreement, with the exception of one panel decision. However, the Panel in *India—Agricultural Products* avoided imposing an explicit negotiation requirement and, on appeal, the Appellate Body made no mention of any negotiation requirement. This panel decision does not bring back the negotiation requirement that appeared in *US—Gasoline* and *US—Shrimp*. On the contrary, it seems to confirm that there is an ongoing need to clarify whether there is a negotiation requirement in the chapeau language.

57. The ordinary meaning of the treaty text indicates that the chapeau requirements are the same, regardless of the specific paragraph in Article XX, which means that the existence of a duty to negotiate would have to be addressed in a similar way for all the exceptions in Article XX. However, the WTO jurisprudence has gone in a different direction, particularly the line of cases following the reasoning in *Brazil—Retreaded Tyres*, in which the justification varies with the objective of the measure, as analyzed in the context of a specific paragraph. This indicates that the manner in which the chapeau is applied will vary with the specific paragraph of Article XX under which a party seeks provisional justification. This approach eliminates the notion that there is a general duty to negotiate before applying unilateral measures, since such a requirement is not reasonable in the case of public morals or health crises.

58. However, it opens the door to a more nuanced approach to the issue of whether such a duty exists, which depends on the characterization of the objective of a particular measure and the nature of any negotiations that have taken place. It also

96 European Communities—Measures Affecting the Approval and Marketing of Biotech Products (EC—Biotech), WTO Panel Report, WT/DS291/R (21 November 2006), paras.4.339–4.342.

allows a re-characterization of the approach to transboundary and global environmental issues in *US—Shrimp*. In the latter, the discrimination was not justifiable because cooperation in one region, but not in another region, contradicted the purported objective of protecting migratory turtles that lived in both geographic areas. Thus, *US—Shrimp* does not stand for the proposition that the use of unilateral measures to address transboundary and global environmental issues must be preceded by good faith efforts to negotiate a cooperative solution. Instead, what is required to justify discrimination is an approach to the transboundary or global environmental issue that contributes to the realization of the objective of a particular measure.

59. This opens the door to the justification of measures that aim to create incentives for high-emission countries to mitigate climate change via emissions reductions, provided such measures have a rational relationship to the emissions produced by those countries, whether on a per capita basis, as a percentage of economic activity, or on an absolute total emissions basis. The inability of States to achieve adequate reductions via multilateral negotiations would not require the same scrutiny under this approach, meaning that WTO tribunals could avoid overly intrusive examinations of a WTO Member's approach to international negotiations.

## VI. Relevant rules of international law

60. The Appellate Body has recognized that the principles of treaty interpretation set out in Article 31 of the VCLT “neither require nor condone the imputation into a treaty of words that are not there”.<sup>97</sup> The ordinary meaning and the context of the Article XX chapeau do not support the existence of a general duty to negotiate. The object and purpose of the chapeau, which is to avoid the abuse of the specific exception in Article XX, supports the approach to this issue following *Brazil—Retreaded Tyres*, which focuses on whether the justification for discrimination is in accordance with the objective of the specific paragraph in which it has provisional justification. The object and purpose of the chapeau do not support a general duty to negotiate. The relevant rules of international law do not support a duty to negotiate in the Article XX chapeau either.

61. Public international law requires the consent of States to be bound by an international obligation, and there is no evidence of a negotiation obligation in WTO law. In *US—Shrimp (Article 21.5—Malaysia)*, the United States was not required to conclude an agreement with Malaysia, but only to make a good faith effort to engage in negotiations. While this decision could be justifiable in the context of the

97 *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products (India—Patents (US))*, WTO AB Report, WT/DS50/AB/R (16 January 1998), para.45, cited in *EC—Biotech*, WTO Panel Report, above n.96, para.7.1461. Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, art. 31.

*US—Shrimp* case, given that the United States had engaged in negotiations in Latin America, there is nothing in the WTO agreements that supports a general duty to negotiate, or in public international law. To imply such a duty would mean that the Appellate Body would create an obligation to which the United States did not consent.

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62. A similar approach to that of the Panel in *US—Shrimp* is that of the ICJ in *North Sea Continental Shelf*. The ICJ abstained from delivering a legal conclusion, instead ordering the parties to “negotiate meaningfully” within a set of criteria.<sup>98</sup> In the WTO context, this approach might avoid the difficulty of a judicial balancing of competing objectives, with its risks to the legitimacy of the WTO dispute settlement system.<sup>99</sup> Indeed, soft law approaches to difficult global issues have been gaining ground, as a means to preserve sovereignty and to avoid the challenge of implementing binding international treaty obligations in domestic legislation, which often requires further negotiation with other branches of government. Examples range from the recommendations of the Financial Stability Board<sup>100</sup> to the Paris Agreement on climate change.<sup>101</sup> However, ordering the parties to “negotiate meaningfully” within a set of criteria is an intrusive approach to dispute settlement that is not supported by the language, context, or object and purpose of the chapeau.

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63. The intrusiveness of requiring parties to negotiate does not find solid support in public international law. The purposes of the United Nations include, “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character”.<sup>102</sup> The UN Charter does not create any obligations to cooperate, but rather makes references such as “The General Assembly may consider the general principles of cooperation [ . . . ]” (Art. 11), and “promoting international cooperation” (Art 13(1)(a), (b)).<sup>103</sup>

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64. The provision of global public goods benefits all countries, even the ones that do not help to provide them. Some global goods depend on the cooperation of every country (keeping nuclear weapons out of the hands of terrorists, preventing pandemics), while many require only the cooperation of key countries (climate change mitigation, protection of the ozone layer, mitigating systemic risks to the global financial system), and others can be supplied unilaterally or “minilaterally” (deflecting an

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98 *North Sea Continental Shelf* (Germany v. Denmark and the Netherlands) [1969] ICJ 1 (International Court of Justice).

99 *Urakami*, above n.12, 182–3.

100 Financial Stability Board ([www.fsb.org](http://www.fsb.org)) (13 December 2017).

101 Paris Agreement ([https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf)) (13 December 2017).

102 UN Charter, art. 1.3.

103 *Ibid.*

asteroid that would otherwise collide with Earth).<sup>104</sup> Incentives to cooperate vary with the nature of the global public good. “Weakest link” public goods, such as avoiding terrorism, depend on the cooperation of States that contribute the least. “Aggregate efforts” public goods require the combined efforts of all States. “Single best efforts” public goods can be supplied unilaterally.

65. In a world where the incentives to negotiate vary with the issue and there are few instances in which there is an institutional framework that requires specific and concrete types of cooperation, it cannot be said that there is a general obligation to negotiate. To insist on the existence of a duty to negotiate in these circumstances, absent clear treaty text, is “to confuse the desirable with the mandatory”.<sup>105</sup>

66. The relevant rules of international law do not support a general duty to negotiate in GATT Article XX. International environmental law and international health law are two areas of international law that are relevant to GATT Article XX(b) and XX(g). Both support the view that there is no duty to negotiate implied in the chapeau of Article XX.

67. It is inappropriate to require international cooperation or negotiations to address domestic health issues, since each WTO Member has the right to determine its appropriate level of health protection<sup>106</sup> and this issue is entirely within each Member’s jurisdiction. It is possible for countries to set up cooperation *ex ante*, but not with all WTO Members and not with respect to all possible risks to human life and health.<sup>107</sup> A close examination of such fast-moving epidemics as A/H1N1 influenza and the SARS epidemic reveals the complexity of recognizing and responding to an unexpected public health emergency.<sup>108</sup> The WHO International Health Regulations (IHR 2005) preserve the right of countries to impose travel and trade restrictions to address health emergencies, which also indicates an absence of a duty to negotiate with respect to human health and life protection.<sup>109</sup>

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104 Scott Barrett, *Why Cooperate?: The Incentive to Supply Global Public Goods* (2007).

105 Alejandro Rodiles Bretón, interview, 3 October 2017.

106 EC—Asbestos, WTO AB Report, above n.19, paras.167–168

107 See the Global Health Security Initiative website ([www.ghsi.ca/english/background.asp](http://www.ghsi.ca/english/background.asp)) (3 April 2009).

108 Bradley J. Condon & Tapen Sinha, *Chronicle of a Pandemic Foretold: Lessons from the 2009 Influenza Epidemic* (SSRN: <http://ssrn.com/abstract=1398445>) (3 May 2009).

109 International Health Regulations (2005), WHA 58.3, Fifty-Eighth World Health Assembly ([www.who.int/gb/ebwha/pdf\\_files/WHA58/WHA58\\_3-en.pdf](http://www.who.int/gb/ebwha/pdf_files/WHA58/WHA58_3-en.pdf)) (13 March 2009). Also see B. von Tigerstrom, *The Revised International Health Regulations and Restraint of National Health Measures*, 13 *Health LJ* (2005), 35; Bradley J. Condon & Tapen Sinha, *The Effectiveness of Pandemic Preparations: Legal Lessons from the 2009 Influenza Epidemic*, 22 *FJIL* (2010), 1.

68. WTO jurisprudence confirms that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation and that they are not obliged to use an alternative measure that fails to achieve their desired level of health protection.<sup>110</sup> Article 3.3 of the SPS Agreement confirms the right of a WTO Member to establish its own level of sanitary protection. The drafters of the IHR 2005 have attempted to facilitate the compatibility between temporary or standing recommendations under the IHR 2005 and trade-related obligations by establishing criteria that are similar to those used in WTO law, especially the SPS Agreement.<sup>111</sup> Similarly, the IHR 2005 provides that States are entitled to implement health measures in response to specific public health risks or public health emergencies of international concern, which achieve the same or greater level of health protection than WHO recommendations (Article 43.1(a)).<sup>112</sup> As long as the same conditions prevail in different countries with respect to the level of health risk, any discrimination likely would be arbitrary and unjustifiable. However, it would be unreasonable to impose a duty to negotiate prior to addressing public health emergencies, in which evidence regarding the conditions in different countries might only come to light after the emergency has passed.

69. While documents such as the Rio Declaration state a preference for negotiation, there is no obligation in that regard. Indeed, even the circumstances of that preference are carefully circumscribed, in Principle 12:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.

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110 EC—Asbestos, WTO AB Report, above n.19.

111 See Committee on Sanitary and Phytosanitary Measures, International Health Regulations Revision, Communication from the World Health Organization, WTO Doc. G/SPS/GEN/522 (21 October 2004), para.6.

112 The mutually reinforcing features of the IHR (2005) and WTO law have been well analyzed elsewhere. See John D. Blum, *Law as Development: Reshaping the Global Legal Structures of Public Health*, 12 *Mich. St. JIL* (2004), 207; David Byrne, *Is There a Lawyer in the House: The Law of Global Public Health*, 33 *JL Med & Ethics* (2005), 19; Emily Lee, *The World Health Organization's Global Strategy on Diet, Physical Activity, and Health: Turning Strategy Into Action*, 60 *Food Drug LJ* (2005), 569; Timothy J. Miano, *Understanding and Applying International Infectious Disease Law: U.N. Regulations During an H5N1 Avian Flu Epidemic*, 6 *Chi-Kent J Intl & Comp L* (2006), 26; Jason Sapsin, *International Trade Agreements: Vehicle for Better Public Health?* 33 *JL Med & Ethics* (2005), 111.



Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.<sup>113</sup>

The Rio Declaration implicitly recognizes that a preference for international consensus does not exclude unilateral actions. The extent to which States have jurisdiction to unilaterally regulate transboundary and global environmental issues is an unresolved issue in international environmental law. It is difficult to see how this uncertainty supports the insertion of a negotiation requirement into the chapeau of Article XX.

70. Arguments in favour of a negotiation requirement in the chapeau sometimes assume that unilateral measures are always unjustifiable. However, this assumption is wrong. Climate change presents a good example, in which unilateral responses to multilateral negotiation failure could prove to be very helpful. The WTO also serves as an example. Multilateral negotiation failure led to unilateral, bilateral and regional policy responses during the Uruguay Round, and ultimately helped to move the multilateral process forward. The same may happen with respect to the more recent failure of multilateral trade negotiations and difficulties in multilateral climate change negotiations. Unilateral measures represent only a partial solution. However, they can still be used to create incentives for multilateral action.

71. UNFCCC Article 3(5) does not rule out the use of unilateral measures, as long as they comply with some of the language of GATT Article XX chapeau: “Measures taken to combat climate change, *including unilateral ones*, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade [emphasis added].”<sup>114</sup> Similarly, paragraph 6 of the Doha Ministerial Declaration implicitly recognizes a right to take unilateral environmental and health measures, in accordance with GATT Article XX:

We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment *at the levels it considers appropriate*, subject to the requirement that they 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, and are otherwise in accordance with the provisions of the WTO Agreements.<sup>115</sup> [Emphasis added.]

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113 Rio Declaration, above n.8.

114 UNFCCC, above n.8.

115 Ministerial Declaration, Fourth Ministerial Conference, Doha, Qatar (14 November 2001) WT/MIN(01)/DEC/1 (20 November 2001).

None of the foregoing sources supports the existence of an obligation to negotiate prior to adopting unilateral measures to protect health, life, or the environment.

72. Environmental instruments that are more closely linked to trade and environment do not support a duty to negotiate. Even though environmental protection and sustainable development are recognized as legitimate goals in the NAFTA Preamble<sup>116</sup> and environmental goals are reconfirmed in the subsequent North American Agreement on Environmental Cooperation,<sup>117</sup> negotiation is not a prerequisite for domestic environmental regulation. 5

73. More recent international environmental law, such as the Paris Agreement on climate change, takes a soft law approach, which provides national governments with more flexibility in implementing multilateral environmental objectives within their domestic legal and economic systems. This soft law approach implicitly acknowledges the difficulty of achieving multilateral consensus on more intrusive hard law obligations. It also indicates that States value their regulatory autonomy, even in the face of an urgent global environmental threat. 10 15

74. Under customary international law, a State acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction.<sup>118</sup> The territorial foundation of jurisdiction fails to resolve some modern jurisdictional conflicts (for example, the management of migratory species). Thus, the territorial basis for jurisdiction is subject to a developing principle of substantial and genuine connection between the subject matter of jurisdiction, on the one hand, and the territorial basis and reasonable interests of the jurisdiction sought to be exercised, on the other.<sup>119</sup> 20

75. A widely acknowledged general principle of international environmental law is that States are required to co-operate with each other in mitigating transboundary environmental risks. In the *Lac Lanoux* arbitration, the tribunal held that France had complied with its treaty and customary international law obligations to consult and negotiate in good faith before diverting a watercourse shared with Spain. However, the duty to negotiate did not require France to obtain Spain's consent.<sup>120</sup> Similarly, 25 30

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116 NAFTA, above n.6.

117 North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (1 January 1994) ([www.cec.org/about-us/NAAEC](http://www.cec.org/about-us/NAAEC)) (13 December 2017).

118 Ian Brownlie, *Principles of Public International Law* (2<sup>nd</sup> ed, OUP, Oxford 1973), 299–301.

119 Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, OUP, Oxford 2003), 297.

120 *Lac Lanoux* (Spain v. France) (1957) 24 ILR 101; *Nuclear Tests Cases* (New Zealand v. France) (1974) ICJ 457.

the *Stockholm Declaration*, Principle 24 provides that “co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states”. The United Nations General Assembly endorsed this principle but noted that it should not be construed to enable other States to delay or impede the exploitation and development of natural resources within the territory of States.<sup>121</sup> Similarly, it should not be construed to enable other States to delay or impede action on urgent issues such as climate change or pandemics.

76. The European Court of Justice (ECJ) case of EU Directive 2008/101 (Aviation Directive) considered the validity of a unilateral climate change measure, in light of the Kyoto Protocol and customary international law. Kyoto Article 2(2) requires Annex I Parties to “pursue limitation or reduction of emissions of greenhouse gases [. . .] from aviation [. . .] bunker fuels, working through the International Civil Aviation Organization [. . .].”<sup>122</sup> After insufficient progress on limiting emissions from airlines under Kyoto Protocol Article 2(2), the EU acted unilaterally and applied the directive to both EU and non-EU airlines. The ECJ ruled that the Kyoto Protocol does not provide a legal basis for challenging EU action and it does not breach customary international law principles of state sovereignty because it applies only to aircraft that choose to operate in EU airspace.<sup>123</sup> Even though the Kyoto Protocol imposed quantified greenhouse gas reduction commitments for 2008 to 2012, the Parties to the Protocol could comply with their obligations in the manner and at the speed upon which they agree.<sup>124</sup>

77. The US Safe Climate Act, which was not implemented, was an example of a unilateral measure designed to pressure other countries to limit their GHG emissions. A stated purpose was to address the threat of carbon leakage, and it provided that an international agreement with GHG-emitting nations would be a preferable alternative. It would have required an annual report to Congress regarding whether China and India have adopted GHG standards at least as strict as those adopted by the

121 UNGA Res 2995 XXVII (1972); Birnie & Boyle, above n.50, 102–109.

122 Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998 (entered into force 16 February 2005).

123 Meltzer; Air Transp Ass’n of Am v. Sec’y of State for Energy & Climate Change of the United Kingdom of Great Britain & N Ireland (ECJ Aviation), Case C-366/10, ECR (2011) (<http://curia.europa.eu/juris/document/document.jsf?docid=117193&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1730266>) (2 December 2012); Council Directive 2008/101/EC, 2009 OJ (L 8/3) (EC) (amending Council Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the community) (Aviation Directive).

124 ECJ Aviation, *ibid.*, paras.50–54, 75–78.

United States. While this type of regime requires careful design and implementation in order to avoid violating WTO rules,<sup>125</sup> it is difficult to see how good faith negotiations with the targeted countries would be a reasonable condition to impose, since its purpose was to induce those countries to negotiate more seriously to address climate change.

78. Like the EU Aviation Directive, the US Safe Climate Act shows that it is possible to make progress on climate change unilaterally, not just multilaterally. The same is true with respect to international economic law. In the case of the WTO, for example, countries can eliminate trade barriers unilaterally, as long as the MFN rule is observed, and bilaterally or plurilaterally, as long as GATT Article XXIV, GATS Article V and the Enabling Clause are observed. In the case of climate change, however, the regime is less developed and there is greater uncertainty than in the WTO (and this in spite of some uncertainty in the WTO regarding the compliance of many free trade agreements with WTO rules). As with the WTO, unilateral, bilateral and plurilateral approaches can complement multilateral approaches to climate change regulation, by pushing countries to follow suit multilaterally.

79. The structure of a treaty—the manner in which its provisions limit the general scope of the treaty’s application, limit the scope of positive obligations, establish positive obligations, or establish general or specific exceptions to positive obligations—has important implications for the allocation of the burden of proof between the complainant and the respondent and, subsequently, for regulatory autonomy. Particularly in cases that involve complex factual or scientific issues, the allocation of the burden of proof can play a pivotal role, since unclear or insufficient evidence can lead to a ruling against the party who bears the burden of proof. In the case of climate change or emerging pandemics, where the science can only identify a range of probabilities and potential risks, the burden of proof is likely to take on greater significance.

80. Based on treaty structure, we can categorize the allocation of the burden of proof according to five types of argument. The complainant bears the burden of proving: (1) the treaty applies to a measure (general scope of application); (2) a specific obligation applies to a measure (scope of obligation); and (3) the measure violates the applicable obligation. The respondent bears the burden of proving: (4) a specific exception applies to a measure (scope of exception) and (5) the requirements of the exception have been met.<sup>126</sup>

81. In the chapeau of GATT Article XX and GATS Article XIV, the respondent has the burden of proof. However, in Article 2.1 of the TBT Agreement and in

125 Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law*, Nicholas Institute for Environmental Policy Solutions Working Paper NI WP 07-02 (2007).

126 Bradly J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 *JIEL* (2014), 333.

Article 2.3 of the SPS Agreement, the complainant has the burden of proof. Moreover, unlike GATT and GATS, the TBT Agreement and the SPS Agreement do not contain general exceptions. Treaty structure, particularly the presence or absence of general exceptions, is relevant for interpreting the scope of obligations. GATT and GATS obligations can be interpreted more broadly, since public interest measures can still be saved in the general exceptions. In contrast, the TBT Agreement and the SPS Agreement obligations should be interpreted more narrowly, because public interest measures cannot be saved in any general exceptions. Nevertheless, since exceptions are interpreted more restrictively than obligations, measures should be held to a higher standard in GATT Article XX and GATS Article XIV than in Article 2.1 of the TBT Agreement and in Article 2.3 of the SPS Agreement.

82. If WTO tribunals require good faith negotiations on specific issues, in order to comply with these provisions, how is the adequacy of the negotiations to be proved and who bears the burden of proof? Will the standard for negotiations vary with the WTO agreement that is being applied? The difficulty of addressing these structural issues is another reason that tribunals should not impose intrusive negotiation requirements that may restrict regulatory autonomy, particularly regarding public interest issues such as public health and environmental protection, particularly when the burden of proof shifts between the complainant and the respondent from one WTO Agreement to the next, and particularly when there is no textual or contextual basis.

## VII. Conclusion

83. The question that remains is whether there are any circumstances in which a WTO Member would be obliged to engage in good faith negotiations in order to comply with the Article XX chapeau. In the Appellate Body decisions in *US—Gasoline* and *US—Shrimp*, challenged measures have failed the chapeau test in GATT Article XX due, at least in part, to the failure to engage in consultations or negotiations in order to avoid discrimination. However, subsequent jurisprudence has not applied a negotiation requirement under the chapeau of GATT Article XX, the chapeau of GATS Article XIV, or other WTO agreements that use the chapeau language, notably the SPS Agreement and the TBT Agreement.

84. The current approach to the chapeau language eliminates the notion that there is a general duty to negotiate before applying unilateral measures. In *US—Shrimp*, the discrimination was not justifiable because cooperation in only one part of the world and not another contradicted the purported objective of protecting migratory turtles that lived in both geographic areas. Thus, *US—Shrimp* does not stand for the proposition that the use of unilateral measures to address transboundary and global environmental issues must be preceded by good faith efforts to negotiate a cooperative solution. Instead, what is required to justify discrimination is an approach to the

transboundary or global environmental issue that contributes to the realization of the objective of a particular measure. The approach in the SPS and TBT Agreements has been consistent with more recent GATT jurisprudence, with the exception of one panel decision.

85. The principles of treaty interpretation in Article 31 of the VCLT do not support a duty to negotiate in the chapeau. The ordinary meaning, the context, the object and purpose, and the relevant rules of international law do not support a duty to negotiate in the Article XX chapeau. They do support the approach in *Brazil—Retreaded Tyres*, which focuses on whether the justification for discrimination is in accordance with the objective of the specific paragraph in which it has provisional justification. 5 10

86. Sometimes unilateral action is necessary to trigger a broader response to global issues like climate change. Good faith negotiations to achieve bilateral, plurilateral and multilateral responses to climate change may serve as a defense for unilateral actions to address climate change, but should not be mandatory. The outcome of negotiations is uncertain, perhaps more so today, and requiring parties to negotiate cooperative solutions before addressing urgent health and environmental issues is impractical and ineffective. 15