

Environmental Unilateralism and the Chapeau of Article XX GATT: The ‘Line of Equilibrium’ and the Question of ‘Differently Situated’ Countries

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The EU is adopting a set of unilateral trade-related measures that are designed to produce specific environmental effects. Increasing recourse to environmental leverage triggers an array of questions surrounding the treatment of ‘differently situated’ (including developing and least developed) countries. This article critically examines the extent to which the Chapeau (introductory clause) of Article XX GATT requires regulating Members to differentiate the treatment of ‘differently situated’ countries where the same relevant conditions prevail, or take their different prevailing conditions into account at the regulatory design or regulatory implementation stage. It finds that the dispute settlement organs’ narrow interpretative approach cannot do justice to the claims of ‘differently situated’ countries, but has several beneficial implications in environmental protection terms. As the climate crisis spirals out of control, the environmental cost of differentiation has become too high. Regulating Members should rather combine stringent unilateral standards with truly ambitious enabling and capacity-building strategies.

Keywords: Chapeau of Article XX GATT, Environmental Unilateralism, npr-PPMs, Anti-Deforestation Standards, CBAM, *EU – Palm Oil*, Developing Countries, Least Developed Countries, Arbitrary or Unjustifiable Discrimination, Line of Equilibrium

1 SETTING THE SCENE: ENVIRONMENTAL UNILATERALISM AND THE QUESTION OF ‘DIFFERENTLY SITUATED’ COUNTRIES

The climate crisis is spiralling out of control.¹ Extractive practices have depleted invaluable natural resources for decades and are now posing unprecedented threats to precious carbon sinks.² The complexity and urgency of the current situation,

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¹ See the data available in Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC (2021).

² The notion of ‘carbon sink’ refers to forests and any other ecosystems that have the ability to absorb carbon, removing it from the atmosphere.

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however, has neither facilitated intergovernmental agreement nor laid the foundations for more ambitious international climate change mitigation commitments. On the contrary, we are yet again witnessing the failure of environmental multilateralism. The disappointing results of recent Conference of the Parties ('COPs') offer the most fitting and most painful example.³

In this very difficult context, faithful to its 'Open, Sustainable and Assertive Trade Policy' agenda,⁴ the EU is having increasing recourse to environmental unilateralism. Standards on environmental non-product related process and production methods ('npr-PPMs') provide important tools to exercise environmental 'leverage' over third countries. As is well known, npr-PPMs regulate process and production methods in circumstances where they do not leave any visible traces on the final products.⁵ The EU standards that came under challenge in the recent *EU – Palm Oil* disputes provide an example.⁶ These npr-PPM standards set a number of environmental (low indirect land use change risk, 'low ILUC risk') requirements for palm oil-based biofuels, bioliquids and biomass fuels to count towards the achievement of the EU-wide target for the use of renewable energy.⁷ These criteria aim to tackle prospective deforestation in exporting Members and to preserve carbon sinks.

Subject to compliance with the requirements of Article XX of the General Agreement on Tariffs and Trade ('GATT'), regulating Members may legitimately have recourse to npr-PPMs in order to prevent goods that have been produced or harvested in 'unacceptable' ways from gaining access to their own market. Further,

³ For further information on the disappointing results of the COP27, see the documents available on the United Nations Framework Convention on Climate Change dedicated website, <https://unfccc.int/cop27>.

⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Trade Policy Review – An Open, Sustainable and Assertive Trade Policy COM(2021) 66 Final.

⁵ A very rich literature exists on npr-PPMs and the product and non-product related distinction. See inter alia Robert Howse & Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 Eur. J. Int. L. 249 (2000), doi: 10.1093/ejil/11.2.249; John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction* 11 Eur. J. Int. L. 303 (2000), doi: 10.1093/ejil/11.2.303; Robert E. Hudec, *The Product-Process Distinction in GATT/WTO Jurisprudence*, 187–206 (Marco Bronckers & Reinhard Quick eds, Kluwer Law International 2000); Steve Charnovitz, *The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality* 27 Yale J. Int. L. 59 (2002); Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate* 27 Colum. J. Env. L. 491 (2002); Donald Regan, *How to Think about PPMs*, 97–123 (Thomas Cottier ed., Cambridge University Press 2009).

⁶ See *European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia)* [EU – Palm Oil (Indonesia)], DS593, (latest update dating back to 10 Jun. 2021); and *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia)* [EU – Palm Oil (Malaysia)], DS600 (latest update dating back to 8 Feb. 2022).

⁷ See Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 Dec. 2018 on the Promotion of the Use of Energy from Renewable Sources, OJ L 328/82, 21 Dec. 2018, Arts 7(1) and 29(1); Art. 29(2) to (7), for the sustainability criteria; and Art. 29(10), for the GHG emission savings criteria.

it is generally accepted that regulating Members may employ npr-PPMs to promote or discourage specific process and production methods with a view to tackling transnational (e.g., environmental) externalities.⁸ As a general category of measures, npr-PPMs are no longer regarded as WTO law incompatible or WTO law problematic. As is well known, the focus of the WTO Panels and Appellate Body has shifted from an examination of ‘jurisdictional issues’ to analyses of the ‘jurisdictional reach’ of npr-PPMs,⁹ before leaving them both behind in more recent disputes. At this stage, the key question rather concerns the *limits within which* regulating Members may exercise ‘leverage’ via npr-PPMs.

The EU has recently adopted several unilateral standards that are designed to produce extraterritorial environmental effects, and tensions are mounting. In May 2023, the EU institutions adopted a Regulation on the importation and exportation of ‘deforestation-free’ commodities and products.¹⁰ Inter-institutional negotiations are ongoing on the proposal for a Directive on corporate sustainability due diligence, which encompasses environmental protection (as well as human rights and labour law) aspects.¹¹ Further, in May 2023, the European institutions have adopted the EU flagship carbon border adjustment mechanism (‘CBAM’). This regulatory border adjustment scheme requires importers to purchase CBAM certificates, with a view to ensuring that imported products bear the same exact economic costs that are borne by European producers to comply with the EU Emission Trading System (‘ETS’).¹²

Increasing recourse to environmental ‘leverage’ triggers an array of questions. It is fair to acknowledge that npr-PPM standards pull the fabric of the multilateral trade system. The main controversy at present, however, regards the effects that high-ambition environmental standards are bound to have on ‘differently situated’

⁸ For a recent overview of different relevant arguments in the literature, see David Sifonios, *Environmental PPMs in WTO Law* (Springer 2018).

⁹ The terminology is borrowed from Henrik Horn & Petros C. Mavroidis, *The Permissible Reach of National Environmental Policies* 42 J. World Trade 1107 (2008), doi: 10.54648/TRAD2008045. See also Howse & Regan, *supra* n. 5; and Lorand Bartels, *Art. XX of GATT and the Problem of Extraterritorial Jurisdiction*, 36 J. World Trade 353 (2002), doi: 10.54648/404615.

¹⁰ See Regulation (EU) 2023/115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010, OJ L 150/206 9 Jun. 2023.

¹¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM(2022) 71 Final.

¹² See Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, OJ L 130/52 16 May 2023. The CBAM does neither qualify as a set of npr-PPM standards, nor as a border tax adjustment under Art. II:2(a) GATT; rather, it qualifies as a regulatory border adjustment under Art. III:4 GATT. For an analysis of this point, see Giulia Claudia Leonelli, *Export Rebates and the EU Carbon Border Adjustment Mechanism: WTO Law and Environmental Objections* 56 J. World Trade 963 (2022), doi: 10.54648/TRAD2022040.

countries, and developing and least developed countries in particular. To begin with, producers in developing and least developed countries face considerable obstacles and economic burdens when implementing high-ambition environmental regulations. Further, these countries usually lack the institutional, financial and technical capacity to provide adequate support and assistance to market and societal stakeholders. These points have been raised with regards to the implementation of the CBAM's stringent reporting and embedded greenhouse gas ('GHG') emission accounting requirements, and they have been further backed up by references to the different historical responsibilities of developed, developing and least developed countries for GHG emissions. On these grounds, several stakeholders have called for *differentiated treatment* for developing countries and CBAM *exemptions* for least developed countries.¹³

More complex questions surrounding the regulatory design of npr-PPM standards also come into play. Environmental npr-PPMs usually fail to account for the (non-environmental) conditions that prevail in exporting Members. This can place products originating from specific Members at a disadvantage: in this case, the 'differently situated' Members may or may not be developing or least developed countries. Indonesia and Brazil have recently raised this kind of objections in regards of the EU Regulation on deforestation-free commodities and products.¹⁴ The most contentious point is the extent to which the EU standards may hinder market access for products originating from countries where small scale agriculture prevails. Addressing these problems would require an examination of the position of 'differently situated' countries and very complex *regulatory adjustments*. In a similar vein, in their requests for consultations in the *EU – Palm Oil* disputes, Indonesia and Malaysia have pointed to the stringent nature of the low ILUC risk requirements and relevant difficulties for palm oil-based biofuel products to qualify under the regulations.¹⁵

These observations beg the question how the trade law regime approaches the tension between unilateralism, on the one hand, and the position of 'differently situated' exporting Members, on the other. Should regulating Members *differentiate* the treatment of 'differently situated' countries, *draw regulatory distinctions*, or lay out

¹³ On the 10th of Feb. 2023, e.g., India circulated a restricted document to the Committee on Trade and the Environment expressing concerns on the CBAM. See *Concerns on Emerging Trend of Using Environmental Measures as Protectionist Non-Tariff Measures*, JOB/TE/78 (10 Feb. 2023).

¹⁴ See the Joint Letter regarding the EU proposal for a Regulation on deforestation-free products circulated in the WTO Committee on Agriculture by Indonesia and Brazil: *Joint Letter, European Union Proposal for a Regulation on Deforestation-Free Products*, G/AG/GEN/213 (29 Nov. 2022).

¹⁵ See Request for Consultations by Indonesia, *EU – Palm Oil (Indonesia)*, WT/DS593/1, G/L/1348, G/TBT/D/52, G/SCM/D128/1 (16 Dec. 2019); and Request for Consultations by Malaysia, *EU – Palm Oil (Malaysia)*, WT/DS600/1, G/L/1384, G/TBT/D/54, G/SCM/D131/1 (19 Jan. 2021).

exceptions or exemptions? Should they rather *take* the conditions prevailing in these countries *into account* when designing or implementing the relevant measures? A positive answer to the latter question triggers further considerations regarding *the extent to which* regulating Members should account for these different conditions: how should this reflect on the final regulatory standards? These questions are best addressed through an inquiry into the interpretation and application of the Chapeau (introductory clause) of Article XX GATT. As is well known, the Chapeau requirements aim to strike a 'line of equilibrium' between the rights of regulating and exporting Members, and between unilateral regulatory action and the multilateral trade system.¹⁶ Where is this 'line of equilibrium' located? And what are the relevant implications?

The article is structured as follows. The second section provides an introductory overview of the dispute settlement organs' interpretative approach to the Chapeau of Article XX GATT. This paves the way for the following in-depth analysis of two 'indicators' of compliance with the Chapeau: 'coercion', and 'situational' discrimination. Both 'indicators' address questions surrounding the treatment of 'differently situated' countries where the same relevant conditions prevail. The third section inquires whether the Chapeau requirements involve a duty for regulating Members to *differentiate* the regulatory treatment of exporting Members where the *same relevant* (e.g., environmental) conditions prevail but where other *non-relevant* (e.g., socio-economic) prevailing conditions *differ*. It finds that this is not the case. The dispute settlement organs do not pass judgment on the specific level of (e.g., environmental) protection pursued by regulating Members and the stringency of their unilateral standards. For this reason, they have consistently focused on the *regulatory means* employed in the design and application of unilateral standards. By contrast, analyses under the Chapeau do not address questions regarding the measures' specific *regulatory goals* and the balance between *trade* and legitimate *non-trade-related* policy objectives. Nor do they require regulating Members to reduce the scope and the reach of unilateral (e.g., environmental) standards via differentiation or exceptions and exemptions. Regulating Members may draw specific regulatory distinctions or lay out exceptions. However, they do not have to do so.

The fourth section focuses on the extent to which regulating Members ought to *account for* the different non-relevant conditions prevailing in exporting Members, analysing all relevant regulatory implications. It places the Appellate

¹⁶ On the notion of a 'line of equilibrium', see WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* [US – Shrimp], WT/DS58/AB/R, para. 159 (adopted 6 Nov. 1998).

Body's findings in *US – Shrimp*¹⁷ and *EC – Seal Products*¹⁸ into context, illustrating the specificities of these disputes. As this section demonstrates, regulating Members may (and should) take the (non-relevant) conditions prevailing in 'differently situated' Members into due consideration. This, however, does not involve an unconditional obligation to adopt a highly flexible regulatory approach.¹⁹ Nor does it imply a fully-fledged obligation to place countries where the same relevant conditions prevail but other prevailing conditions differ on an equal footing.²⁰ The regulating Members' duty to account for the different (non-relevant) conditions prevailing in exporting Members is circumscribed by *breaches of good faith, unjustifiable protective or discriminatory application*, and relevant *disconnections with the measures' declared policy goal*.

As the final section concludes, this narrow interpretation of the Chapeau requirements is beneficial in environmental protection terms. Both differentiation and an expansive interpretation of 'coercion' and 'situational' discrimination undermine the effectiveness and the stringency of unilateral (e.g., environmental) standards. Further, the 'line of equilibrium' between the rights of regulating and exporting Members should not be stretched too far. The Chapeau should capture *breaches of good faith* and *protectionist or discriminatory abuse* of the legitimate policy exceptions of Article XX GATT.²¹ It should neither strike a *different balance* between legitimate (e.g., environmental) policy goals and trade-related rights, nor broaden *market access* for products originating from 'differently situated' Members.

The flipside of this approach lies in the limited extent to which regulating Members have to account for the different conditions prevailing in 'differently situated' exporting Members. Nonetheless, these questions can be addressed in different contexts and by embracing a different perspective. As the climate crisis unfolds before our eyes, both differentiation and regulatory flexibility come at an environmental price that we can no longer afford. Radically different strategies are needed to remedy the failures of environmental multilateralism *while* adequately supporting developing, least developed and 'differently situated' countries. The fifth and conclusive section briefly develops this final point.

¹⁷ *Ibid.*

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

¹⁹ See s. 4 *infra* for an in-depth analysis of 'coercion'.

²⁰ See s. 4 *infra* for an in-depth analysis of 'situational' discrimination.

²¹ For emphasis on this point, see Robert Howse, *The World Trade Organization 20 Years on: Global Governance by Judiciary*, 27 *Eur. J. Int. L.* 9, 44 and 51 (2016), doi: 10.1093/ejil/chw011.

2 THE CHAPEAU OF ARTICLE XX GATT AND THE 'LINE OF EQUILIBRIUM'

Under the dispute settlement organs' well-entrenched 'two-tiered' approach,²² a measure that has been found to violate the substantive obligations of the GATT must be provisionally justified under the subparagraphs of Article XX *and* comply with the further requirements of the Chapeau. This stipulates that measures shall not be applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or a *disguised restriction* on international trade (emphasis added).

Unlike the more superficial examination under the subparagraphs,²³ analyses under the Chapeau focus on the manner in which a measure is *applied in practice*.²⁴ This also involves an in-depth examination of the design, architecture and revealing structure of all aspects of a measure.²⁵ The aim is to ascertain whether regulatory distinctions drawn on legitimate policy grounds or any other relevant aspects of the measures under challenge are applied in such a way that they may unjustifiably afford protection to domestic products or result in country-based discrimination. Any aspects of unjustifiable protective ('National Treatment-type') or discriminatory ('Most Favoured Nation-type') application will fall foul of the Chapeau.²⁶

The dispute settlement organs have found that the notions of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and 'disguised restriction on international trade' impart meaning to each other.²⁷ As a matter of fact, however, they have consistently focused on the former concept. Throughout the years, the dispute settlement organs have conducted their case-by-case assessment²⁸ by fleshing out different 'indicators' of compliance with the Chapeau requirements. The conditions that are '*relevantly the same*' for the purposes of the inquiry into 'arbitrary or unjustifiable' discrimination²⁹ are usually

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

²³ As is well known, provisional justification under the subparagraphs of Art. XX focuses on the measures' capability to achieve the policy goals invoked by the defending Member, or their necessity.

²⁴ WTO Appellate Body Report, *supra* n. 22, at 22.

²⁵ WTO Appellate Body Reports, *supra* n. 18, para. 5.302.

²⁶ WTO Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum [China – Rare Earths]*, WT/DS431/R, WT/DS432/R, WT/DS433/R, paras 7.148, 7.190 and 7.351 (adopted 29 Aug. 2014).

²⁷ WTO Appellate Body Report, *supra* n. 22, at 25.

²⁸ See WTO Appellate Body Report, *supra* n. 16, para. 159: 'The location of the line of equilibrium, as expressed in the Chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'.

²⁹ For a discussion on the conditions that are 'relevantly the same' for the purposes of the analysis, see WTO Appellate Body Reports, *supra* n. 18, para. 5.299.

identified by reference to the policy goal invoked at the provisional justification stage. Environmental npr-PPMs, for example, must not arbitrarily or unjustifiably discriminate between countries where the same *environmental* conditions prevail or where the same *environmental* problems may materialize.

Under the most straight forward scenario, the Chapeau captures aspects in the application of a measure that directly undermine the measure's alleged policy goal and unjustifiably discriminate between countries with the same relevant prevailing (e.g., environmental) conditions.³⁰ This is the famous *Brazil – Retreaded Tyres* 'rational relationship' test.³¹ In other cases, as occurred in *US – Gasoline* or *US – Shrimp*, the dispute settlement organs focus on aspects in the measure's application that do not undermine the measure's policy goal *but that* unjustifiably afford protection to domestic products or discriminate between Members with the same relevant (e.g., environmental) prevailing conditions.³² More complex forms of assessment via different 'indicators' of compliance with the Chapeau involve an analysis of due process and transparency,³³ an obligation to treat (e.g., environmentally) 'equivalent' products in the same way and 'inequivalent' products differently,³⁴ and specific even-handedness and calibration requirements.³⁵

What all these 'indicators' have in common is a focus on the regulatory treatment of countries with the *same relevant* (e.g., environmental) prevailing

³⁰ Two caveats are in order. First, as explained in s. 3 *infra*, the Appellate Body has left one question unanswered in *EC – Seal Products*. In its Reports in this dispute, it has failed to clarify whether aspects in the application of a measure that discriminate between countries with the same relevant prevailing conditions *and* that run counter to the measures' policy goals may still be condoned on the basis that discrimination is not 'arbitrary' or 'unjustifiable' in nature. This scenario materialized in *EC – Seal Products*, where a set of multi-purpose measures pursuing conflicting policy goals came under challenge. Second, Members may also attempt to justify forms of discrimination that undermine a measure's primary policy goal on the basis that the conditions prevailing in different countries are not 'relevantly the same'. This argument has been put forward in the literature: see Lorand Bartels, *The Chapeau of the General Exceptions in the WTO, GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int. L. 95 (2015), doi: 10.2139/ssrn.2557971. The US followed this course of action in *US – Gasoline*. However, it is worth noting that the discriminatory aspects in *US – Gasoline* did not undermine the measures' policy goals.

³¹ See WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* [*Brazil – Retreaded Tyres*], WT/DS332/AB/R, para. 227 (adopted 17 Dec. 2007).

³² See WTO Appellate Body Report, *supra* n. 22, at 25 to 28 (on the use of individual versus statutory baselines); and WTO Appellate Body Report, *supra* n. 16, paras 173 ff. (on cooperative arrangements and technology transfer).

³³ WTO Appellate Body Report, *supra* n. 16, paras 180 and 181; and WTO Appellate Body Reports, *supra* n. 18, paras 5.324 to 5.328.

³⁴ WTO Appellate Body Report, *supra* n. 16, para. 165.

³⁵ See WTO Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Art. 21.5 of the DSU by Mexico* [*US – Tuna II (Mexico) (Art. 21.5 – Mexico)*], WT/DS381/RW, paras 7.577 et seq. (adopted 3 Dec. 2015); and WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Art. 21.5 of the DSU by Mexico* [*US – Tuna II (Mexico) (Art. 21.5 – Mexico)*], WT/DS381/RW, paras 7.359 et seq. (adopted 3 Dec. 2015).

conditions. To a greater or lesser extent,³⁶ all these ‘indicators’ point to a disconnection between specific aspects in the design and application of a measure and the measure’s alleged policy goal. This disconnection, in turn, reveals *breaches of good faith* and helps identify *unjustifiable protective or discriminatory application*. Indeed, as openly acknowledged by the dispute settlement organs, the Chapeau of Article XX is *an expression* of the principle of good faith.³⁷ The Chapeau should capture all aspects in the practical application of a measure that are irreconcilable with good faith, that suggest abusive recourse to the ‘limited and conditional’ policy exceptions of Article XX GATT,³⁸ and that may potentially and unjustifiably afford economic protection to domestic products or result in country-based discrimination.

Two further ‘indicators’ of compliance focus on the treatment of countries where the *same relevant* (e.g., environmental) conditions prevail but where *other non-relevant* (e.g., socio-economic or agricultural) prevailing conditions *differ*. In *US – Shrimp*, the Appellate Body famously found that:

‘discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the *appropriateness* of the regulatory programme for the *conditions prevailing* in those *exporting countries*’ (emphasis added).³⁹

This laid the foundations for an inquiry into the regulatory treatment of ‘differently situated’ Members. The concept of ‘coercion’ was introduced in *US – Shrimp*. The notion of ‘situational’ discrimination surfaced in *EC – Seal Products*.

The following sections conduct an in-depth examination of these two ‘indicators’ of compliance. A broad interpretation of the dispute settlement organs’ ‘inquiry into the appropriateness ... for the conditions prevailing in exporting countries’ may potentially involve a duty for regulating Members to *draw specific regulatory distinctions, differentiate the treatment* of different exporting Members, and *lay out exceptions or exemptions*. Nonetheless, as demonstrated in the next sections, this approach would also draw a radically different ‘line of equilibrium’ between (e.g., environmental) unilateralism and the multilateral trade system, striking a different balance between the legitimate non-trade-related policy goals of regulating Members and the trade-related rights of exporting Members.

³⁶ See the clarification in this section and *supra* n. 30, regarding arbitrary or unjustifiable discrimination that does not undermine the measures’ policy goals. In these cases, the Chapeau does not capture any disconnection between the measures under challenge and their policy goal; as in *US – Gasoline*, the ‘arbitrary’ or ‘unjustifiable’ nature of discrimination is established on the basis of different breaches of good faith.

³⁷ WTO Appellate Body Report, *US – Shrimp*, *supra* n.16 para. 158. For an in-depth analysis of this point and an argument in favour of a good faith-centred interpretative approach, see Giulia Claudia Leonelli, *Anti-Deforestation npr-PPMs and Carbon Border Measures: Thinking about the Chapeau of Article XX GATT in Times of Climate Crisis*, *J. Int. Econ. L.* (2023), doi: <https://doi.org/10.1093/jiel/jgad016>.

³⁸ *Ibid.*

³⁹ *Ibid.*, para. 165.

Further, both ‘coercion’ and ‘situational’ discrimination potentially lend themselves to an expansive interpretation. This interpretative approach would involve a general and unconditional requirement for regulating Members to adjust the treatment of ‘differently situated’ countries at the regulatory design or regulatory implementation stage. This overly broad interpretation, however, would also strike a different balance between the legitimate non-trade-related policy goals of regulating Members and the trade-related rights of exporting Members. This would reduce the effectiveness of unilateral standards and the level of protection that they can achieve. Further, it would not be faithful to the function of the Chapeau in the GATT system. An expansive interpretation of ‘coercion’ and ‘situational’ discrimination would capture more than breaches of good faith and unjustifiable protective or discriminatory application, and would go well beyond the traditional Chapeau focus on the measures’ alleged policy goal. Rather, it would target incidental barriers to trade and broaden market access for exporting Members.

3 THE ‘LINE OF EQUILIBRIUM’: *DIFFERENTIATING THE TREATMENT OF ‘DIFFERENTLY SITUATED’ COUNTRIES?*

The first relevant question boils down to whether the dispute settlement organs’ ‘inquiry into the appropriateness’ of regulatory standards for the different conditions prevailing in exporting Members involves a duty for regulating Members to *differentiate* the treatment of ‘differently situated’ countries, *draw specific regulatory distinctions*, or provide for ad hoc *exceptions or exemptions*. An expansive interpretation of this requirement under the Chapeau could potentially vindicate the claims of developing and least developed countries, setting a requirement for developed countries to differentiate the regulatory treatment of countries with more limited institutional, financial and technical capacity. This would reduce regulatory burdens and compliance costs for market actors operating in lower-capacity countries, thereby facilitating market access for products originating from these exporting Members. Under this hypothetical scenario, by way of example, the EU would have to differentiate the treatment of products originating from developing countries in the implementation of the CBAM and presumably exclude products originating from least developed countries from its scope of application. This would acknowledge the different position of developing and least developed countries in respect of their financial and technical capabilities to decarbonize their economy and historical responsibilities for GHG emission levels.⁴⁰

⁴⁰ A very rich literature exists on the principle of common but differentiated responsibilities and respective capabilities (‘CBDR-RC’) in climate change law. For an all-encompassing overview, see Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford university Press 2006). For a recent discussion of the principle in the context of an analysis of the CBAM and its WTO

An analysis of the Appellate Body's findings regarding 'coercion' and 'situational' discrimination, however, does not lend support to this broad interpretation and construction. On the contrary, the Appellate Body Reports in both *US – Shrimp* and *EC – Seal Products* reflect a narrow interpretation of these 'indicators' of compliance with the Chapeau.

The measures under challenge in *US – Shrimp* provided for a ban on shrimp products originating from countries that had not been certified by the US authorities. At the practical application stage, the certification procedures required exporting Members to mandate the use of the same turtle excluder devices that were employed in the US. The Appellate Body found that these measures were applied in such a way that they did not allow for an inquiry into the appropriateness of the (US-specific) standards for the different conditions prevailing in other Members. As the Appellate Body emphasized, the certification procedures required exporting Members to adopt the *very same regulatory means* employed in the US. For this reason, US officers had failed to consider whether exporting Members had set in place or could have set in place *comparably effective regulatory strategies*.⁴¹

The Appellate Body did not call into question the 'line of equilibrium' between the legitimate (environmental) non-trade-related policy objectives of the US and the trade-related (market access) interests of exporting countries; nor did it inquire into the balance between the measures' *environmental objectives* and the *other different* (e.g., *socio-economic*) conditions prevailing in exporting Members. In other words, it did *not* pass judgment on the stringency of the level of protection pursued by the US measures and their *regulatory goals*; rather, it focused on questions surrounding *regulatory means*.

This narrow focus on 'regulatory means' and their 'comparable effectiveness' is both different from and impossible to reconcile with a duty for regulating Members to differentiate the treatment of countries where different (e.g., socio-economic) conditions prevail, draw regulatory distinctions, or provide for exceptions or exemptions. To a greater or lesser extent, differentiation is *bound* to reduce the stringency, scope and reach of the relevant (e.g., environmental) obligations. This limits the extent to which the measures under analysis can achieve their intended policy goals. Exceptions or exemptions may also promote and entrench unsustainable practices in specific countries, or incentivize the relocation of production to the exempted jurisdictions. The hypothetical CBAM scenario mentioned above in this section provides a clear example: differentiated treatment for developing countries or a blanket exemption for least developed countries would

law compatibility, see Ingo Venzke & Geraldo Vidigal, *Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism*, 187–225 (Maarten den Heijer & Harmen van der Wilt eds, Springer 2020).

⁴¹ WTO Appellate Body Report, *supra* n. 16, para. 163.

undermine the scheme's decarbonization goals and directly promote carbon leakage in the exempted jurisdictions.⁴²

These outcomes are all irreconcilable with the centrality of the 'rational relationship' test under the Chapeau. As explained in the second section, the Chapeau captures any aspect in a measure's application that is arbitrarily or unjustifiably disconnected from the measure's alleged policy goals. By implication, the Chapeau criteria should neither undermine nor weaken the level of protection pursued by the relevant measures.

In a different vein, the *US – Shrimp* 'coercion' criterion sets a circumscribed obligation for regulating Members to *account* for any (non-relevant) *different conditions* prevailing in exporting Members by embracing a sufficiently flexible regulatory approach.⁴³ This enables exporting Members to tailor their regulatory responses to their own different prevailing conditions, allowing them to pursue the same exact goals and levels of protection via different ('comparably effective') regulatory strategies. This narrow approach to 'coercion' was later confirmed by the Appellate Body in *US – Shrimp (Article 21.5 – Malaysia)*. Malaysia sought to expand the dispute settlement organs' framing of 'coercion', arguing that regulating Members should take into due consideration the different conditions prevailing in every Member. This pointed in the direction of a fully-fledged duty of differentiation. The Appellate Body clarified that a measure:

should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member ... Yet, this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member.⁴⁴

Overall, the dispute settlement organs' findings on 'coercion' do *not* set any requirement for regulating Members to account for the different conditions prevailing in exporting Members by drawing regulatory distinctions. As clarified in *EC – Tariff Preferences*, regulating Members *may* draw specific regulatory distinctions if they wish.⁴⁵ Any differentiation in the regulatory treatment of countries

⁴² See Giulia Claudia Leonelli, *Carbon Border Measures, Environmental Effectiveness and WTO Law Compatibility: Is There a Way Forward for the Steel and Aluminium Climate Club?*, 21 World Trade Rev. 619 (2022), doi: 10.1017/S1474745622000209; and Giulia Claudia Leonelli, *Practical Obstacles and Structural Legal Constraints in the Adoption of 'Defensive' Policies: Comparing the EU Carbon Border Adjustment Mechanism and the US Proposal for a Border Carbon Adjustment*, 42 Legal Stud. 696 (2022), doi: 10.1017/lst.2022.20.

⁴³ See s. 4 *infra* for a more detailed analysis of the boundaries within which this 'indicator' of compliance with the Chapeau applies.

⁴⁴ WTO Appellate Body Report, *supra* n.16 (*Art. 21.5 – Malaysia*), para. 149.

⁴⁵ See WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences in Developing Countries [EC – Tariff Preferences]*, WT/DS246/R, paras 162, 165, 173 and 180 (adopted 20 Apr. 2004). For an analysis, see Lorand Bartels, Robert Howse et al., *The Appellate Body's GSP Decision*, 3 World Trade Rev. 239 (2004), doi: 10.1017/S1474745604001831.

will be subject to close scrutiny: as explained by the Appellate Body, the regulatory distinctions must be designed and applied in such a way as not to discriminate between ‘similarly situated’ Members.⁴⁶ Further caveats apply under circumstances where the relevant regulatory distinctions run counter to the measure’s alleged (or primary) policy goal. In *EC – Seal Products*, the Appellate Body did not settle this issue; the question whether regulating Members may draw specific distinctions in cases where differentiated treatment *undermines* the measure’s policy goals has remained unanswered.⁴⁷ What is certain, however, is that regulating Members are *not* under an *obligation* of regulatory differentiation.

An analysis of ‘situational’ discrimination confirms and lends further support to these findings. In *EC – Seal Products*, the Appellate Body found that the Indigenous Communities (‘IC’) exception had been designed and applied in such a way that it arbitrarily and unjustifiably discriminated against Canadian Inuit communities. The EU had failed to take into due consideration the different (socio-economic) conditions prevailing in countries where the same relevant (IC) conditions prevailed. As a result, Canadian Inuit communities had not been able to make use of the IC exception.⁴⁸

The Appellate Body found that the EU had failed to cooperatively engage with Canadian Inuit and assist them in their attempts to meet the IC exception requirements.⁴⁹ This can be defined as ‘situational’ discrimination at the regulatory implementation stage. Further, the EU had failed to consider the different socio-economic conditions prevailing in Canadian Inuit Communities when designing

⁴⁶ In this dispute, where (different yet analytically relevant) questions surrounding the interpretation of the Enabling Clause came into play, the Appellate Body held that the term ‘non-discriminatory’ in footnote 3 to para. 2(a) of the Enabling Clause did not prohibit the granting of different tariffs to products originating in different GSP beneficiaries, *provided that identical treatment* was made available to all ‘similarly situated’ GSP beneficiaries. In *US – Gasoline*, on the other hand, the US failed to establish that differentiated treatment of domestic and imported products (use of individual versus statutory baselines) was justified. However, the Appellate Body did *not* find that the US *had failed* to establish that the conditions prevailing in ‘differently situated’ exporting Members were *not relevantly the same*. Rather, the Appellate Body found that the differentiated treatment (discrimination) was *arbitrary or unjustifiable* in nature; the US had failed to cooperatively engage with ‘differently situated’ exporting Members with a view to identifying alternative (non-discriminatory) solutions and had thus acted in bad faith.

⁴⁷ See *supra* n. 30 and s. 4 *infra*. In *EC – Seal Products*, the indigenous communities exception undermined the measures’ primary (animal welfare) policy goals. For this reason, differentiated treatment for countries where the same (*indigenous communities*) conditions prevailed ultimately discriminated between countries with the same prevailing *animal welfare* conditions. For different analyses in the literature, see Bartels, *supra* n. 30; Patrick Levy and Donald Regan, *EC – Seal Products: Seals and Sensitivities (TBT Aspects of the Panel and Appellate Body Reports)*, 14 *World Trade Rev.* 337 (2015), doi: 10.1017/S1474745615000051; Julia Qin, *Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC – Seal Products* 108 *Am. J. Int. L. Unbound* 309 (2015), doi: 10.1017/S2398772300009466; and Donald Regan, *Measures with Multiple Purposes: Puzzles from EC – Seal Products* 108 *Am. J. Int. L. Unbound* 315 (2015).

⁴⁸ WTO Appellate Body Report, *supra* n.18 para. 5.329.

⁴⁹ *Ibid.*, para. 5.337.

the IC exception.⁵⁰ This finding points to more problematic forms of ‘situational’ discrimination in regulatory design.

Assisting Canadian Inuit communities and designing the IC exception more carefully would have enabled the EU to *treat* ‘differently situated’ IC where the same relevant conditions prevailed *in the same way in practice*. The Appellate Body thus stressed that the EU had failed to place different Inuit Communities on an equal footing. However, it did not point to a fully-fledged duty to differentiate the treatment of different Inuit communities. Rather than focusing on different treatment of ‘differently situated’ Inuit communities, the Appellate Body assessed the extent to which the measures had treated these communities *in the same way in practice*. Achieving this result did *not* require the EU to *draw regulatory distinctions* between Inuit. *Rather*, it required the EU to *take the different conditions* prevailing in different Inuit communities *into due consideration*.

Further, it is worth noting that assisting Canadian Inuit communities and designing the IC exception more carefully would have *strengthened the effectiveness* of the measures. Accounting for the different (socio-economic) conditions prevailing in countries where the same relevant (IC) conditions prevailed would have enhanced rather than weakened the levels of (IC) protection pursued by the measures. This conforms to the centrality of the ‘rational relationship’ test under the Chapeau.

This leads us to the conclusions of this section. Neither ‘coercion’ nor ‘situational’ discrimination set an obligation of regulatory differentiation. As seen in the first section, this narrow approach may be the object of criticism. However, it spares regulating Members the unattainable task of identifying any non-relevant prevailing conditions that exporting Members may invoke in different disputes. In a similar vein, it also spares them the very challenging exercise of drawing ad hoc regulatory distinctions. In this perspective, this narrow approach has positive implications. Further, and crucially, this interpretative approach has beneficial policy (e.g., environmental protection) results. As already explained, differentiation reduces the scope and reach of the relevant (e.g., environmental) obligations and limits the extent to which the measures can achieve their intended policy goals. For this reason, differentiation would strike a different ‘line of equilibrium’ between non-trade-related policy goals and trade-related (market access) interests.

⁵⁰ *Ibid.*

4 THE 'LINE OF EQUILIBRIUM' AND THE DUTY TO ACCOUNT FOR THE CONDITIONS PREVAILING IN 'DIFFERENTLY SITUATED' COUNTRIES

As illustrated in the previous section, both 'coercion' and 'situational' discrimination set a requirement for regulating Members to *take* the other (non-relevant) conditions prevailing in exporting Members *into account*. The *boundaries* within which regulating Members should do so and the question *how* this should reflect on the final regulatory standards are the object of analysis of this section. Putting the Appellate Body's findings in *US – Shrimp* and *EC – Seal Products* into context is crucial to provide an answer to these questions.

In *US – Shrimp*, the Appellate Body found that the US certification procedures had been applied in a rigid and inflexible manner. As explained in the previous section, the regulations did not allow exporting Members to pursue the same turtle protection goals via different but 'comparably effective' regulatory strategies. For the purposes of the present analysis, it is necessary to highlight two further distinctive features of the measures under challenge in *US – Shrimp*. First, the measures did not seek to incentivize the adoption of environmentally beneficial practices by market actors; rather, they directly sought to leverage exporting Members via the establishment of ad hoc certification procedures. Second, the US enforced a ban on shrimp that had been caught with the very same turtle excluder devices employed in the US *but* that originated from non-certified countries. As the Appellate Body underlined, this was rather difficult to reconcile with the alleged environmental policy goals of the measures.⁵¹

Taken together, these elements suggested that the US was more concerned about the *regulatory means* that would be employed in different jurisdictions than with the pursuit of turtle protection *goals*. To put it differently, the US was more concerned with *exporting its own regulatory approach* than with the pursuit of *environmental protection objectives*.⁵² This element in the design and application of the measures was irreconcilable with conduct in good faith, and suggested abusive recourse to the policy exceptions of Article XX. These aspects in the US measures were applied in such a way that they could potentially and unjustifiably afford protection to domestic (shrimp) products; further, they marked a clear disconnection with the measures' alleged (environmental protection) policy goals. The design, structure and application of these npr-PPM standards suggested an attempt

⁵¹ WTO Appellate Body Report, *supra* n.16, para. 165.

⁵² *Ibid.* The Appellate Body suggested that the measure, in its application, was 'more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States ...' than with the achievement of environmental protection goals.

by the US to level the economic playing field.⁵³ Requiring exporting Members to adopt the very same regulatory strategies employed in the US ensured that foreign market actors would bear the same exact regulatory compliance costs borne by US stakeholders.

As this concise examination has illustrated, the Appellate Body identified clear breaches of good faith, elements of unjustifiable protective application, and a disconnection with the measures' declared policy goal. It is in this light that the Appellate Body conducted its examination and drew the 'line of equilibrium'. The notion of 'coercion' potentially lends itself to an expansive interpretation. Under a broad interpretation of 'coercion', regulating Members would have to design and apply *all of their npr-PPM standards* in such a way as to enable exporting Members or market actors to adopt 'comparably effective' regulatory means. This would require high levels of regulatory flexibility. The very specific and detailed low ILUC risk requirements under challenge in *EU – Palm Oil*, for instance, would certainly fall foul of this interpretation of 'coercion'. However, such an expansive framing of this 'indicator' of compliance does not at all resonate with the Appellate Body's interpretative approach in *US – Shrimp*.

First, a failure to embrace a flexible regulatory approach does not imply that the regulating Member is acting in bad faith. On the contrary, a flexible approach may be inappropriate, ineffective or unfeasible under specific circumstances. Second, a failure to embrace a flexible regulatory approach will not necessarily result in any aspects of unjustifiable protective or discriminatory application. A general and unconditional obligation to adopt a flexible regulatory approach targets any barriers to trade posed by npr-PPMs, facilitating market access for foreign products. This stretches the Chapeau well beyond its circumscribed focus on protectionist or discriminatory abuse of the policy exceptions of Article XX. Finally, an expansive interpretation of 'coercion' is highly likely to undermine the policy goals pursued by the relevant measures. Flexibility comes at an (e.g., environmental) cost: as briefly mentioned above, a highly flexible regulatory approach could be unsuitable and counter-productive under specific circumstances. These detrimental (e.g., environmental) effects would be very difficult to reconcile with the Chapeau's close focus on any disconnection between the measures' application and their alleged policy goals.

As this analysis demonstrates, an expansive interpretation of 'coercion' would result in a very different balance between the policy goals pursued by regulating Members and the trade-related interests of exporting Members. It would facilitate market access for products originating from 'differently situated' exporting Members, while reducing the stringency and effectiveness of unilateral standards.

⁵³ For a similar point, see Charnovitz, *supra* n. 5, at 106.

Further, it would not be faithful to the function of the Chapeau in the context of the GATT system.

A careful analysis of *US – Shrimp* does not lend any support to such expansive interpretative approach. Nor did ‘coercion’ come into play in following disputes. The measures under challenge in both *US – Tuna II (Mexico)* and *EC – Seal Products* did not allow market actors to demonstrate compliance with ‘comparably effective’ strategies: nonetheless, the dispute settlement organs did not identify any ‘coercive’ elements in their application. This confirms that the dispute settlement organs adhere to a narrow interpretation of ‘coercion’. Regulating Members should take the conditions prevailing in ‘differently situated’ Members into consideration. This, however, does *not* translate into a *self-standing and unconditional obligation* to adopt a *flexible regulatory approach*. The duty to account for any different prevailing conditions in the context of ‘coercion’ is *circumscribed by breaches of good faith, unjustifiable protective or discriminatory application*, and any relevant *disconnection with the measures’ alleged policy goals*.

Similar considerations apply to ‘situational’ discrimination. Yet again, the findings in *EC – Seal Products* must be put into context. The npr-PPM standards under challenge in this dispute pursued animal welfare goals. However, as already mentioned, they provided a specific exception for seal products marketed by IC. This aspect undermined the regulations’ primary policy goal and failed the ‘rational relationship’ test.⁵⁴ The EU invoked the development of IC as a countervailing policy goal. The specific circumstances of this dispute thus justified a close focus on the structure, design and application of the IC exception.

The Appellate Body found that the EU had failed to design and implement the IC exception in a non-discriminatory manner. More specifically, as explained in the previous section, the EU had failed to *take* the socio-economic conditions prevailing in different IC *into due consideration* when *designing and implementing* the IC exception. As a result, it had failed to treat countries where the *same relevant* (IC) conditions prevailed but where *other non-relevant* (socio-economic) prevailing conditions *differed in the same way* in practice.

At first sight, the findings in this dispute may seem to lend support to a broad interpretation of ‘situational’ discrimination. Nonetheless, the Appellate Body’s reasoning in *EC – Seal Products* conforms to a narrow interpretative approach. First, as highlighted by the complaining Parties since the Panel proceedings, the EU was well aware that specific (e.g., Canadian) Inuit communities would not be able to have recourse to the IC exception due to their different levels of socio-economic development.⁵⁵ The failure by the EU to account for different levels of

⁵⁴ For more details on this aspect and for some references to the literature, see *supra* n. 30 and n. 47.

⁵⁵ See in particular WTO Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* [*EC – Seal Products*], WT/DS400/R, WT/DS401/R, paras 7.314 et seq. (adopted 18 Jun. 2014).

socio-economic development in different communities thus suggested breaches of good faith. For the same reason, the design and application of the IC exception arbitrarily and unjustifiably discriminated against Canadian Inuit communities, affording protection to domestic (Greenlandic Inuit) products. This is the second relevant consideration. Third, the EU failure to consider how different IC were 'differently situated' had also *undermined* the effectiveness of the IC exception. The EU had invoked the protection of IC as a countervailing policy goal. Nonetheless, this exception could *not* genuinely serve its alleged purpose. This revealed a disconnection with the measures' declared policy goals, as per the 'rational relationship' test.

Just like 'coercion', 'situational' discrimination in regulatory design lends itself to an expansive interpretation. A broad interpretation of 'situational' discrimination at the regulatory design stage would sanction any failure to design a measure in such a way as to treat 'differently situated' countries where the same relevant (e.g., environmental) conditions prevail in the same way in practice. Such an expansive interpretative approach, however, would not resonate with the findings in *EC – Seal Products* and would be impossible to reconcile with the function of the Chapeau.

First, an overly broad interpretation of 'situational' discrimination at the regulatory design stage does not capture breaches of good faith. The conditions prevailing in 'differently situated' countries where the same relevant conditions prevail will always differ, to some extent.⁵⁶ This has two implications. To begin with, as briefly mentioned in the previous section, regulating Members could hardly predict what (non-relevant) conditions exporting Members may invoke in a dispute. Further, they could not possibly adjust the regulatory design of their standards with a view to placing all 'differently situated' countries on an equal footing.⁵⁷ This point can be illustrated by looking back to the Indonesian and Brazilian objections to the EU Regulation on deforestation-free commodities and products. Treating countries where the same relevant (deforestation) conditions prevail but other prevailing (agricultural) conditions differ in the same way in practice is impossible. For this reason, the EU could not possibly adjust the regulatory design of its anti-deforestation Regulation with a view to placing all 'differently situated' exporting Members on an equal footing.

Second, this overly broad approach would not capture any aspects of unjustifiable protective or discriminatory application. Rather, as noted in the analysis of 'coercion', it would target (incidental and justifiable) barriers to trade and facilitate market access for products originating from specific exporting Members. Third, the inability to adjust the regulatory design of their standards to accommodate 'differently situated' countries may

⁵⁶ For a similar point, see Emily Lydgate, *Do the Same Conditions Ever Prevail? Globalizing National Regulation for International Trade*, 50 J. World Trade 971 (2016).

⁵⁷ For an indirect acknowledgment of this point, as explained in the previous section, see WTO Appellate Body Report, *supra* n.16 (*Art. 21.5 – Malaysia*), para. 149.

prompt regulating Members to follow a different course of action. This, however, would compromise the stringency of the relevant npr-PPM standards. Under the anti-deforestation Regulation hypothetical example, the EU would have to either *differentiate* the treatment of ‘differently situated’ countries and draw specific regulatory distinctions, or *lower the stringency* of the generally applicable standards. These options would undermine the effectiveness of npr-PPM standards and lower the level of protection that they pursue. Again, this would be difficult to reconcile with the Chapeau’s focus on disconnections between the measures’ practical application and their alleged policy goals.

As this examination demonstrates, a broad interpretation of ‘situational’ discrimination at the regulatory design stage would stretch the ‘line of equilibrium’ too far and tip the balance between legitimate (e.g., environmental) policy goals and market access in favour of the latter. Further, it would not resonate with the dispute settlement organs’ traditional interpretation of the Chapeau and with their focus on good faith and unjustifiable protective or discriminatory application. Regulating Members should take the other different (non-relevant) conditions prevailing in exporting Members into consideration. This, however, does *not* translate into an obligation to treat *all ‘differently situated’ countries in the same way in practice*. Just like in the case of ‘coercion’, the duty to account for any different prevailing conditions is *circumscribed by breaches of good faith, unjustifiable protective or discriminatory application, and any relevant disconnection with the measures’ alleged policy goals*.⁵⁸

These considerations do not apply to the notion of ‘situational’ discrimination at the regulatory implementation stage, also developed in *EC – Seal Products*: this is far less problematic.⁵⁹ An obligation for regulating Members to cooperatively engage with ‘differently situated’ Members and place them on an equal footing at the practical implementation stage resonates with a good faith-centred interpretation of the Chapeau and a focus on discriminatory application. Nor does it undermine the stringency of npr-PPM standards. On the contrary, it facilitates their implementation by ‘differently situated’ exporting Members and thereby enhances their effectiveness.

This brings us to the conclusions of this section. It is fair to conclude that the boundaries within which regulating Members ought to take the different conditions prevailing in exporting Members into account are rather narrow. The ‘line of equilibrium’ between unilateral (e.g., environmental) action and trade-related rights preserves the margins for regulating Members to pursue legitimate policy goals, no matter how

⁵⁸ To put it differently, a Member should only be expected to adjust its regulatory responses and account for the position of *differently situated* countries (where the same relevant conditions prevail) in so far as a failure to do so reveals *breaches of good faith* and *run counter to the objectives of the measures*. Indeed, the Appellate Body’s findings in *US – Gasoline* suggest that regulating Members should pay particular attention when drawing regulatory distinctions and treating ‘differently situated’ Members (where the same relevant conditions prevail) differently; in this dispute, differentiated treatment aimed to further the measures’ (environmental) policy goals. *See supra* n. 46.

⁵⁹ *See s. 3 supra*.

ambitious the intended level of protection may be. This narrow framing of the Chapeau requirements has played a key role to safeguard (environmental) unilateralism. The flipside of this approach lies in the limited extent to which it can do justice to the claims of 'differently situated' Members, including developing and least developed countries. In times of increasing recourse to environmental 'leverage', we can only expect these objections to become more widespread. Doing justice to these claims, however, need not compromise the environmental stringency of unilateral standards or trigger a race to the bottom. The notion of 'situational' discrimination at the regulatory implementation stage points us in a different and more appropriate direction. The following and conclusive section addresses this final point.

5 CONCLUSIONS: SAFEGUARDING HIGH LEVELS OF ENVIRONMENTAL PROTECTION AND DOING JUSTICE TO DEVELOPING, LEAST DEVELOPED AND 'DIFFERENTLY SITUATED' COUNTRIES. THE WAY FORWARD

This article has critically examined the boundaries within which the Chapeau of Article XX GATT requires regulating Members that have had recourse to unilateral action to account for the different conditions prevailing in 'differently situated' countries where the same relevant conditions prevail. Analyses under the Chapeau could potentially vindicate the claims of developing and least developed countries or address the objections of other 'differently situated' countries. The dispute settlement organs could draw a different 'line of equilibrium' between unilateral regulatory action and the multilateral trade system, and strike a different balance between non-trade and trade-related interests. This could help remove the barriers to trade that are posed by high-ambition unilateral standards, facilitating market access for products originating from developing, least developed or other 'differently situated' countries.

As illustrated in the third section, the Chapeau does *not* involve an obligation for regulating Members to *differentiate* the treatment of countries with different (non-relevant) prevailing conditions. Regulating Members should rather take these different conditions into consideration under specific circumstances. The fourth section has focused on the boundaries within which regulating Members should do so, and how this should reflect on the final regulatory standards. As the in-depth analysis of 'coercion' and 'situational' discrimination has demonstrated, the *duty to account* for any different prevailing conditions is *circumscribed* by breaches of good faith, unjustifiable protective or discriminatory application, and disconnections with the measures' alleged policy goals.

The findings of the inquiry leave very few doubts: the dispute settlement organs' narrow interpretative approach can hardly do justice to the claims of developing, least developed or 'differently situated' countries. As emphasized throughout

the analysis, however, this narrow approach has positive implications for the pursuit of legitimate (non-trade-related) policy goals. These beneficial policy results are all the more valuable in times of climate crisis and environmental leverage.

The failure of environmental multilateralism has prompted increasing recourse to unilateral standards by environmentally ‘virtuous’ jurisdictions. This new generation of npr-PPMs provides precious opportunities to tackle transnational environmental externalities. In the future, we are likely to need more rather than less environmental leverage. While differentiation would be the fairest course of action, it is no longer an environmentally tenable option. Regulatory distinctions, exceptions and exemptions all come at an environmental price; at present, however, this price has become too high. As explained in the fourth section, similar considerations apply to an expansive interpretation of ‘coercion’ and ‘situational’ discrimination. Albeit to a different extent, an overly broad interpretation of these Chapeau requirements is bound to undermine the environmental effectiveness of npr-PPM standards.

The time is ripe to rethink the limits to environmental unilateralism. The notion of ‘situational’ discrimination at the regulatory implementation stage points us in the most appropriate direction. As the climate crisis spirals out of control, regulating (developed) countries that have had recourse to unilateral standards should cooperatively engage with developing and least developed countries, embrace truly ambitious enabling strategies, and make unprecedented efforts to help build capabilities. In the years to come, tailored support to developing and least developing countries and finance and technology transfer will be increasingly important to remedy the institutional, administrative and financial capacity gap. In a similar vein, regulating Members should also address the concerns of other ‘differently situated’ countries and seek to remedy the regulatory compliance obstacles that they face. Innovative partnerships and tailored assistance to all relevant stakeholders will be key in this context.

The texts of the Regulation on deforestation-free commodities and products and of the CBAM Regulation have signalled positive developments by including further and more detailed references to capacity-building, international cooperation, active support, and technical and financial assistance by the EU.⁶⁰ Aspirational statements, however, are clearly insufficient at this stage. Combining stringent unilateral standards with substantial efforts to build capabilities could tackle the climate crisis and trigger a race to the top, without leaving anyone behind. Robust action, however, must now follow words and declarations.

⁶⁰ See the text of the Regulation on deforestation-free commodities and products, *supra* n. 10, Recitals (20), (20a), (21), (22), and Arts 10a and 28; and the text of the CBAM Regulation, *supra* n. 12, Recital (54) and Art. 30.

