Panel Reports

European Communities - Measures Prohibiting the Importation and Marketing of Seal Products
(WT/DS400.401/R)

Parties
Complainants: Canada, Norway
Respondent: EU
Third Parties: Argentina, Canada (DS401), China, Colombia, Ecuador, Iceland, Japan, Mexico, Namibia (DS401), Norway (DS400), Russia, U.S.

Timeline of Dispute
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Panelists
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Key Findings

- TBT Agreement: concluded that EU Seal Regime constitutes a "technical regulation" under Annex 1.1 [AB reversed]; concluded that IC and MRM exceptions are inconsistent with Article 2.1 [AB declared moot]; rejected claim under Article 2.2 [AB declared moot].

- TBT Agreement: concluded that measure constitutes a CAP under Annex 1.3, and that the CAP violates Article 5.1.2. [AB declared moot]

- GATT: concluded that IC and MRM exceptions violate Arts. I:1 and III:4, respectively [AB upheld]; concluded that, while the exceptions provisionally meet Article XX(a) [AB upheld], they do not meet the Article XX chapeau [AB reversed legal test, but completed analysis and reached same result].
BACKGROUND

This dispute concerns certain EU measures relating to the sale of seal products. In particular, the complainants challenged the following measures, operating together as the "EU Seal Regime": Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, adopted on 16 September 2009, on trade in seal products (the "Basic Regulation"); and Commission Regulation (EU) No. 737/2010, laying down detailed rules for implementation of the Basic Regulation, adopted 10 August 2010 (the "Implementing Regulation").

Under the measures, the placing of seal products on the market is prohibited in the European Union unless certain conditions are satisfied. Article 3 of the Basic Regulation lays down the rules regarding "conditions for placing on the market" of seal products, as follows:

1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.

2. By way of derogation from paragraph 1:

   (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;

   (b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

Thus, as described by the Panel, under the measure, the placing of seal products on the market is prohibited in the EU unless the products meet any of the following conditions: (1) "seal products obtained from seals hunted by Inuit or indigenous communities (IC condition)"; (2) "seal products obtained from seals hunted for marine resource management (MRM condition)"; and (3) "[t]ravellers may be able to bring seal products into the European Union in limited circumstances (Travellers condition)."

In turn, Articles 3, 4, and 5 of the Implementing Regulation address the specific requirements for each of the three conditions mentioned in the Basic Regulation. Implementing Regulation Articles 6 through 10 then set out the procedural requirements that must be met to place seal products on the market. In particular, a seal product must be accompanied by an attesting document (Article 7) issued by a recognized body (Article 6).
As to the seal products at issue, the dispute concerns "products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and tanned fur skins, as well as articles (such as clothing and accessories, and omega-3 capsules) made from fur skins and oil."

(Paras. 2.1-7, 7.1, 7.7-24, 7.28)

Canada claimed that the measures related to the EU Seal Regime violate TBT Agreement Articles 2.1, 2.2, 5.1.2 and 5.2.1; and GATT Articles I:1, III:4, and XI:1. Norway raised the same claims, with the exception of TBT Agreement Article 2.1, and it raised an additional claim under Agriculture Agreement Article 4.2. Both parties asserted that the measures are not justified under GATT Article XX(a) or (b), and they also argued, pursuant to GATT Article XXIII:1(b), that the measures nullify or impair benefits accruing to Canada and Norway under the GATT (Canada raised its Article XXIII:1(b) claim conditionally, in the event that the EU measures are found not to violate TBT Agreement or GATT obligations; Norway raised this claim "whether or not" the measures conflict with the relevant provisions). (The Panel exercised judicial economy on the GATT Article XXIII:1(b) claims).

**SUMMARY OF PANEL'S FINDINGS**

**PROCEDURAL AND SYSTEMIC ISSUES**

**DSU Article 10 - Timing of Third Party Notification**

On 18 October 2012, subsequent to the Panel composition, Russia notified its interest to participate as a third party in the dispute. After receiving the parties' views, the Panel indicated on 5 November 2012 that Russia would be added to the list of third parties. (Para. 1.10, Footnote 13)

**Enhanced Third Party Rights**

At the organizational meeting of 15 October 2012, Canada, one of the complainants, "made a request for enhanced third-party rights to allow third-party access to both substantive meetings and all written submissions." The EU "objected to Canada's request on the grounds that no third party had submitted such a request." After considering Canada's request and the views of the other parties, the Panel declined Canada's request. In doing so, "the Panel took particular note of the fact that Canada's request was made by a party to the dispute, and that no third party had made a request for enhanced rights," and also the fact that, because the substantive meetings were to be open to public viewing, they would serve to "provide third-party access to the Panel's substantive meetings." (Para. 1.15)

On 6 March 2013, the Panel received a request from Namibia "to participate in the second substantive meeting' in order to rebut comments made by the European Union at the first substantive meeting regarding the Namibian seal hunt." After consulting the parties on Namibia's request, the Panel "informed Namibia that it had considered Namibia's request, taking into account Namibia's status as a developing country and the material on the record relating to Namibia." On "the basis of its review and in light of the parties' comments," the Panel decided that there was no need to provide Namibia with an opportunity for further rebuttal and it therefore declined Namibia's request. (Para. 1.16)

**Opening of Panel Meetings to the Public**

At an organizational meeting, the parties requested, and the Panel agreed, that the substantive meetings with the Panel would be open to public viewing subject to additional procedures to ensure the security and orderly conduct of the proceedings. The Panel adopted, on 20 December 2012, additional
Working Procedures for its open hearings at the first and second substantive meetings of the Panel, providing for public viewing by means of simultaneous closed-circuit television broadcasting of the proceedings to a separate room. (Para. 1.14)

Amicus Submissions

On 25 January 2013, the Panel received an unsolicited amicus curiae submission from a group of non-governmental organizations (NGOs). The Panel notified the parties of this submission, and advised them that such submissions would be immediately forwarded to the parties. The parties then "would be invited to provide their views on the admissibility and relevance of any amicus curiae submission either at the first or second substantive meeting." In addition, the Panel informed the parties that any amicus curiae brief submitted to the Panel after the second substantive meeting would be automatically rejected, on the grounds that "the consideration of any new information at that stage of the proceedings would risk causing undue delays." The Panel subsequently received four additional unsolicited amicus curiae submissions prior to the second substantive meeting with the parties. During the first substantive meeting with the parties, "the European Union indicated that it had incorporated the amicus curiae submission provided by the group of NGOs on 25 January 2013 as an integral part of its written submissions to the Panel." (Paras. 1.17-19)

DSU Article 9.2 - Separate Panel Reports

The Panel issued its Reports in the form of a single document constituting two separate Panel Reports. The cover page, preliminary pages, and Sections 1 through 7 are common to both Reports. By contrast, there are separate conclusions and recommendations for each report. (Cover note).

Preliminary Ruling / DSU Article 13 - Removal of Exhibits / Panel's Right to Seek Information

Preliminary Ruling

On 11 and 13 December 2012, Canada and Norway submitted letters to the Panel seeking leave to withdraw Exhibits JE-13 and NOR-75. Norway also requested leave to re-file an amended first written submission, together with new exhibits to replace those that would be removed. The EU submitted letters in response explaining that the Exhibits at issue contain classified documents that had not been authorized by the EU for disclosure to the public. The EU was confident that the complainants acted in good faith, and it invited them to informally withdraw the documents from the record; however, it considered Norway's request to re-file unnecessary and suggested that if Norway wishes to submit new exhibits and argument, then it should do so at the first substantive meeting. On 14 December 2012, Norway withdrew its application for leave to withdraw the exhibits. On 19 December 2012, pursuant to paragraph 6 of the Panel's Working Procedures covering requests for preliminary rulings, the EU filed a request for a preliminary ruling to remove the two exhibits from the record. The Panel issued a preliminary ruling on 29 January 2013 granting the EU request and inviting the complainants to submit replacement exhibits. After consulting with the parties, the Panel requested the DSB Chairperson to circulate the preliminary ruling to all WTO Members, and the Panel further decided to incorporate the circulated ruling as an integral part of the Panel's findings in its Report. (Paras. 1.20-21, Preliminary Ruling, paras. 1.1-6)

The preliminary ruling, circulated on 5 February 2013 in documents WT/DS400/6 and WT/DS401/7, sets forth the Panel's reasoning as follows. The documents at issue were two legal opinions written by the Legal Service of the Council of the European Union concerning the legal basis for, and the WTO compatibility of, the proposal for an EU Regulation governing trade in seal products. The EU argued that both legal opinions are classified under the applicable EU regulations and have not been
authorized for public disclosure, although it recognized that both complainants acted in good faith when submitting copies of these documents. (Preliminary Ruling, paras. 2.1-2)

The Panel observed that both complainants are "in principle willing to withdraw the exhibits in question." In these circumstances, the Panel found it unnecessary to "pronounce on the legal status of the documents or the relevance thereof," and nor would it be necessary to determine whether the EU would suffer any impairment in its ability to defend itself were the documents to remain on the record. Moreover, the Panel said it was "mindful of the fact," as acknowledged by the EU, that Canada and Norway have acted in good faith in submitting these exhibits to the Panel. The Panel also considered that the complainants' due process rights would not be affected by the removal of the two exhibits, in light of their agreement to withdraw the documents from the record and their undertaking to refrain from making any reference thereto. (Preliminary Ruling, paras. 3.1-3)

Commensurate with this determination, the Panel considered that "the complainants should have an opportunity to file replacement evidence together with explanations in demonstrating how such new documents relate to the relevant arguments made in their first written submissions." In turn, it said that the EU would be given an opportunity to respond to any replacement exhibits and explanations during the first substantive meeting. (Preliminary Ruling, para. 3.3)

On this basis, and without prejudice to Norway's request under DSU Article 13, the Panel granted the EU request to remove the Exhibits from the record of the proceedings. While recognizing the complainants' view that there is no need for a formal ruling in light of their willingness to withdraw the Exhibits, the Panel considered it "in the interest of procedural clarity to issue this ruling and explain the reasons therefor" and also found it "useful to set out procedural directions for giving effect to this ruling." (Preliminary Ruling, paras. 3.4-9)

**DSU Article 13**

On 16 January 2013, Norway submitted a request for the Panel to exercise its authority under DSU Article 13 to seek copies of the two legal opinions that were the documents at issue in the Preliminary Ruling. The Panel denied Norway's request in a letter dated 8 April 2013, and it explained its reasons in its Report as follows. (Paras. 1.22, 7.1)

At the outset, the Panel noted Appellate Body precedent regarding DSU Article 13, finding "particularly relevant in this case the considerations of the need for the requested information for the Panel's assessment of the matter before it and the consistency with due process for all parties." (Paras. 7.77-78) Here, it recalled that Norway submitted replacement exhibits for the opinions following the Panel's preliminary ruling expunging them from the record and Norway had acknowledged that the facts revealed by the Exhibits could also be demonstrated by other evidence. The Panel stated, "[h]aving reviewed the replacement exhibits filed by Norway in light of the claims before us, we did not consider that the requested information was needed to complete the record." (Para. 7.79)

In respect of due process, the Panel recalled its observation in its preliminary ruling "that the complainants had agreed to withdraw the exhibits at issue and that their due process rights would not be affected by the removal of the exhibits from the record." In addition, it noted that Norway had cited due process concerns in requesting leave to file replacement exhibits, and the Panel had in fact permitted Norway to do so. Thus, the Panel considered that "Norway had been 'permitted to make its case before the Panel' and that the requirements of due process had been fully satisfied." (Para. 7.80)

On this basis, the Panel "did not consider the circumstances of Norway's request to warrant the exercise of authority under Article 13," and it denied Norway's request. (Para. 7.81)
Submission of New Evidence During Interim Review

In its comments on the Interim Report, the EU submitted additional documents, consisting of letters between EU and Canadian Government officials, and also Nunavut authorities, and it requested that the Panel make reference to these new documents in its report. The complainants objected to the EU request on the grounds that the information constitutes new evidence that should have been introduced earlier in the proceedings in accordance with the Panel's working procedures, and, in addition, that submission at this stage is inconsistent with the requirements of due process. (Paras. 6.53-54)

The Panel stated the following: it considered that the documents "constitute new evidence"; it noted that, given that the letters at issue are dated May 2013, "they could have been introduced at an earlier time in the proceedings in accordance with the Panel's working procedures"; and it recalled that, in paragraph 301 of EC - Sardines, the Appellate Body stated that the interim review stage is "not an appropriate time to introduce new evidence." For these reasons, the Panel "declined to amend" relevant parts of its Report to reflect the documents submitted by the EU. (Para. 6.55)

Characterization of Measures (Single or Multiple Measures)

The Panel observed that the two measures at issue in this dispute, the Basic Regulation and the Implementing Regulation, "operate in conjunction with each other in governing the importation and the placing of seal products on the EU market." In this regard, the Panel noted the parties' agreement that "the EU Seal Regime should be treated as a single measure." As a result, the Panel said that it would "consider that these two legal instruments must be examined as an integrated whole." However, it also explained that "[t]reating both [measures] as a single measure does not mean that different aspects of the EU Seal Regime cannot be challenged under different provisions of the WTO covered agreements." (Paras. 7.25-27)

Characterization of Measures (Conditions for Sale Versus a Ban)

The parties disagreed as to how the EU Seal Regime should be characterized, with the complainants arguing that the measures provide for "three sets of specific requirements concerning the importation and/or the placing on the market of seal products," while the EU asserted that the Regime consists of a "general ban on seal products with certain exceptions." The Panel said that it would turn to this question of how the EU Seal Regime must be characterized, "[a]s it is important for the Panel to start its analysis with the proper understanding of the measure at issue." (Paras. 7.28-29)

Turning first to the text of the measure, the Panel considered that "the practical implication of Article 3 is that seal products derived from hunts other than IC or MRM hunts cannot be imported and/or placed on the EU market." While recognizing that the Basic Regulation did not use words such as "prohibit" or "ban," the Panel considered that "having regard to the design and structure of the Basic Regulation, and in light of the text of that Regulation, the measure effectively operates as a prohibition on seal products that do not meet the conditions under the measure." In particular, the Panel considered that "[b]y allowing seal products only under a defined condition complemented by two derogations, the measure effectively prohibits all seal products that do not fit into the specifications of those three requirements." However, in light of the exceptions under the EU Seal Regime, citing paragraph 64 of the Appellate Body's report in EC - Asbestos, the Panel agreed with the complainants that the measure cannot be characterized as a "general" ban as described by the EU. Rather, "the Regime consists of both prohibitive and permissive components and should be examined as such." Thus, the Panel concluded that "the EU Seal Regime in its entirety operates as a ban on seal products, combined with an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation (i.e. seal
products obtained from IC hunts, MRM hunts, and those imported under the Travellers imports category." (Paras. 7.39-56)

**Order of Analysis**

While recognizing that panels should normally first examine a measure in relation to the agreement that deals specifically with the subject matter addressed, the complainants suggested that "it is open to the Panel to follow the sequence of claims and arguments set out in the complainants' first written submissions." Here, the complainants both presented arguments under the GATT first, followed by claims and arguments under the TBT Agreement. In this regard, Canada invited the Panel, should it find violations under GATT Articles I:1 and III:4 which are not justifiable under GATT Article XX, to then exercise judicial economy with respect Canada's claims under TBT Agreement Article 2.1. (Paras. 7.57-59) In response, the EU suggested that the Panel should begin its analysis under the TBT Agreement, leaving the analysis under the Agriculture Agreement for last. (Para. 7.60)

At the outset, the Panel noted that the complainants raised claims under the GATT and the TBT Agreement, and Norway also brought a claim under the Agriculture Agreement. In this regard, the Panel noted the complainants' arguments that the Panel may wish to begin its analysis under the GATT, because (1) this is the agreement under which most of the complainants' common claims are presented (i.e., because Canada alone presented a claim under TBT Agreement Article 2.1) and (2) this approach would allow the Panel to exercise judicial economy with respect to the claim under Article 2.1. (Paras. 7.61-62)

The Panel then recalled the Appellate Body's statement that "as a general rule, panels are free to structure the order of their analysis as they see fit." That is, as understood by the Panel, "unless there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself, panels have the discretion to structure the order of their analysis." Here, the Panel considered that it is presented with "no such mandatory sequence of analysis," such that it must determine the order of its analysis "by focusing on the 'structure and logic' of the provisions at issue in this dispute." (Paras. 7.63-64)

As to the "structure and logic" of the provisions at issue, citing the Appellate Body's statement in paragraph 80 of EC - Asbestos, the Panel considered that "if a measure at issue is found to fall within the scope of the TBT Agreement, it is reasonable for such measure to be examined first under the obligations set out in that agreement." In this regard, it noted that this approach was used by the panels in all three of the recent TBT disputes (U.S. - Clove Cigarettes, U.S. - Tuna II and U.S. - COOL), where they first addressed non-discrimination claims under the TBT Agreement and then exercised judicial economy on the GATT non-discrimination claims where appropriate. (Paras. 7.65-66)

In addition, the Panel considered that, in the case at hand, the complainants' TBT Agreement challenges are "as broad in scope as their common claims under the GATT," such that "it would not necessarily prove more efficient to proceed with one agreement rather than another because the claims under both agreements are extensive." Moreover, the Panel was "not persuaded" of the possibility of exercising judicial economy with respect to Canada's Article 2.1 claim, given that "there are several claims under each agreement" and, "as mentioned by the Appellate Body in Tuna II," the obligations under the non-discrimination provisions of the TBT Agreement and the GATT "cannot be assumed to be the same." (Paras. 7.67-68)

On this basis, the Panel "[did] not consider that starting with the complainants' claims under the GATT 1994 would be the most logical or economical order of analysis under the circumstances of this dispute." The Panel therefore found it "appropriate" to begin its analysis with the complainants' claims under the TBT Agreement, followed by those under the GATT. (Para. 7.69)
Evidence - Panel's Review of Video Evidence

In the context of Canada's claim under TBT Agreement Article 2.1, the Panel undertook an examination of the factual aspects of commercial seal hunts. In doing so, it examined all factual evidence submitted by the parties, including video recordings. In this regard, the Panel noted that the parties made "various contentions as to the credibility and weight of certain evidence," and, in particular, the complainants cited the Scientific Opinion of the European Food Safety Authority ("EFSA Scientific Opinion") in support of their argument that video evidence is of limited value. In response, however, the Panel did not read the cited passage from the Opinion as denying the probative value and reliability of evidence, but, rather, it considered that the statement suggests "reason for caution in the interpretation of video evidence." The Panel concluded therefore that "video recordings may be usefully consulted as part of the totality of the evidence," and it pointed out that the complainants did not argue that the evidence should be disregarded. Moreover, the Panel found "acknowledgement from both Canada and Norway of the utility of video technology in the monitoring of seal hunts and enforcement of regulations." (Para. 7.184, footnote 245)

Judicial Economy (GATT Article XXIII:1(b))

The Panel discussed whether or not to exercise judicial economy in the context of the complainants' non-violation nullification or impairment claims under GATT Article XXIII:1(b). In considering this issue, the Panel found the relevant question to be "whether compliance by the European Union with the … findings of violation [(under GATT Articles I:1 and III:4 and TBT Agreement Article 2.1)] would remove the basis of the complainants' non-violation claim under GATT Article XXIII:1(b)." (Para. 7.679) In answering this question, the Panel observed "certain parallels" between the elements of the legal tests under GATT Articles I:1 and III:4, and Article XXIII:1(b). In this regard, it noted that the parties each cross-referenced their own arguments regarding the discriminatory nature of the EU Seal Regime under Articles I:1 and III:4 to support their positions under Article XXIII:1(b). Indeed, the Panel opined that "the 'relative conditions of competition' that the complainants claim are upset by the IC and MRM exceptions [(under Article XXIII:1(b))] are precisely those that have been addressed in [the Panel's] findings of violations under Articles I:1 and III:4 … and Article 2.1." Thus, the Panel concluded that compliance by the EU with its findings of violations "would remove the basis of the complainants' non-violation claims of nullification or impairment." Accordingly, the Panel said that it would refrain from examining the complainants' non-violation claims under Article XXIII:1(b). (Paras. 7.677-682)

SUBSTANTIVE ISSUES

TBT Agreement Annex 1.1 - "Technical Regulation"

The Panel noted that before considering the complainants' claims under the TBT Agreement, it must first determine whether the EU Seal Regime constitutes a "technical regulation" within the meaning of TBT Agreement Annex 1.1. That provision defines the term "technical regulation" as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.
The Panel noted that, based on this definition, the Appellate Body has developed a three-tier test to establish whether a document qualifies as a "technical regulation": (1) the document must apply to an "identifiable product or group of products"; (2) the document must "lay down one or more characteristics of the product"; and (3) compliance with the product characteristics must be "mandatory." Here, the Panel noted that the parties did not contest that the EU Seal Regime meets the first and third criteria of the definition. The parties disagreed, however, on the second criterion, namely "whether the EU Seal Regime lays down product characteristics or their related processes and production methods [(PPMs)], including administrative provisions." Noting that the criteria are "cumulative, and there is no particular order of analysis" that it must follow, the Panel said that it would begin with the second criterion, which is the main issue of contention between the parties, and it would then address the two other elements. (Paras. 7.82-87)

Whether the EU Seal Regime lays down one or more characteristics of the products

The complainants argued that the EU Seal Regime lays down product characteristics in both positive and negative form. If a product meets the requirements of the IC, MRM or Travellers exceptions, it may possess the characteristic of containing seal; if it does not, then it may not contain seal. In addition, the complainants argued that because products falling within one of the three categories must satisfy certain administrative requirements, the EU Seal Regime also sets forth "applicable administrative provisions" within the meaning of Annex 1.1. As an alternative argument, Norway asserted that the EU Seal Regime prescribes related PPMs in that the IC and MRM requirements prescribe a "process" involving a particular course of action with a defined end. (Paras. 7.88-90) In response, the EU contended that the EU Seal Regime prohibits products which consist exclusively of seal, whether processed or not, in a manner similar to the prohibition of asbestos fibres "as such" in the measure at issue in EC - Asbestos, which the Appellate Body found did not constitute a technical regulation. As for products containing seal and other ingredients, the EU argues that it would be inappropriate for the Panel to limit its analysis to the fact that the EU Seal Regime lays down intrinsic characteristics in the negative form. Rather, in the EU view, what is decisive is the fact that none of the three exceptions lays down product characteristics. (Paras. 7.92-94)

At the outset, the Panel noted the parties' agreement that it should consider the measure "as a whole." However, the parties then disagreed on "whether both the prohibition and the exceptions under the Regime must individually lay down product characteristics or their related PPMs in order for the measure to qualify as a technical regulation." (Para. 7.97) In this regard, the Panel recalled that in EC - Asbestos, the Appellate Body emphasized that the measure should be examined as a whole, "taking into account both the prohibitive and permissive aspects." With these considerations in mind, the Panel said it would "examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1." (Paras. 7.99-102)

Based on the text of the Regulations, and in light of the Appellate Body's reasoning in Asbestos, the Panel considered that "the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal." In this regard, it recalled that in Asbestos, while the prohibition on asbestos fibres as such did not, in itself, lay down product characteristics, the prohibition was found to lay down a product characteristic in the negative form by requiring that all products must not contain asbestos. Here, it noted, the EU Seal Regime prohibits all seal products, but it makes an exception in three situations and the Implementing Regulation sets out the specific requirements that seal products must fulfil in each of these three situations. Like the Appellate Body in Asbestos, the Panel considered that the EU Seal Regime "sets out, through its exceptions, the 'applicable administrative provisions with which compliance is mandatory' for products with certain objective 'characteristics.'" It explained: the exceptions "define the scope of the
prohibition in the EU Seal Regime, albeit implicitly”; "the nature of the exceptions is to allow products containing seal on the EU market, subject to compliance with strict administrative requirements”; and "the scope of the exemptions is determined under the Regime based on a set of criteria." That is, in order to fall under the IC or MRM exceptions, products containing seal must meet the following criteria relating to seal hunts: "the identity of the hunter (Inuit or indigenous); the type of hunt (traditional Inuit hunts); the purpose of the hunt (subsistence or marine resource management); and the way in which the products are marketed (non-systematically and on a non-profit basis)." Such products must be certified by a recognized body as meeting the necessary criteria and they must be accompanied by an attesting document at the time of placing on the market. Thus, the Panel found that "[t]he criteria under the exceptions … identify the seal products that are allowed to be placed on the European Union market … by defining the categories of seal that can be used as an input for such products." The Panel considered that these criteria "constitute 'objectively definable features' of the seal products that are allowed to be placed on the EU market and consequently lay down particular 'characteristics' of the final products." (Paras. 7.103-110)

In sum, the Panel stated that "the EU Seal Regime considered as a whole lays down characteristics for all products that might contain seal," and it "also lays down the applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition under the measure." (On appeal, the Appellate Body reversed the Panel's findings that the EU Seal Regime lays down product characteristics. See DSC for EC - Seal Products (AB).) In light of its finding that the measure lays down product characteristics under Annex 1.1, the Panel found it unnecessary to examine whether the EU Seal Regime also lays down PPMs. (Paras. 7.111-112)

Whether the EU Seal Regime applies to an identifiable product or group of products

The parties did not contest that the EU Seal Regime applies to an identifiable group of products. The Panel agreed based on the following: (1) the EU Seal Regime establishes rules concerning the placing on the market of seal products; (2) in EC - Asbestos, the measure similarly prescribed a characteristic that effectively applied to all products; and (3) numerous product categories to which the EU Seal Regime applies were identified in the European Commission's Technical Guidance Note. (Paras. 7.113-117)

Whether compliance with the EU Seal Regime is "mandatory"

In respect of whether compliance with the EU Seal Regime is "mandatory," the Panel first noted the Appellate Body's clarification of this term in EC - Asbestos as regulating products in a "binding or compulsory fashion," and its finding that enforceability through the application of sanctions indicates mandatory compliance. Here, the Panel recalled that the combined effect of the Basic and Implementing Regulations "is to prohibit seal products from the European Union market, except in cases where the products meet the prescribed conditions." These conditions, it noted, "are compulsory from the point of view of seal products being placed on the market; unless these conditions are met, seal products are denied access to the EU market." In addition, the Basic Regulation contains language of a "mandatory nature," and the EU Seal Regime "is also supported by enforcement measures, as penalties may apply in case of infringement of the regulation.” (Paras. 7.118-123) On this basis, the Panel concluded that the EU Seal Regime is mandatory within the meaning of the definition in Annex 1.1. (Para. 7.124)

Conclusion

Based on its analysis of the three criteria set out in TBT Agreement Annex 1.1, the Panel concluded that the EU Seal Regime constitutes a technical regulation within the meaning of TBT Agreement Annex 1.1. (Para. 7.125) (On appeal, the Appellate Body reversed this conclusion. The
The Appellate Body was unable to complete the legal analysis, and it therefore declared "moot and of no legal effect" the Panel's subsequent findings under Articles 2.1, 2.2, 5.1.2 and 5.2.1. See DSC for EC - Seal Products (AB).

**TBT Agreement Article 2.1 - MFN and National Treatment**

TBT Agreement Article 2.1 provides:

> With respect to their central government bodies ... Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

The Panel noted that this provision contains both a most-favoured-nation (MFN) obligation and a national treatment obligation, and that Canada raised claims under both obligations. With respect to MFN, Canada asserted that the EU Seal Regime gives less favourable treatment to Canadian imports of seal products than to like seal products originating from Greenland. As to national treatment, Canada argued that the EU Seal Regime gives less favourable treatment to its imports of seal products as compared to the treatment accorded to like domestic products. (Paras. 7.127-128)

The Panel stated that in order to establish a violation of Article 2.1, Canada must demonstrate the following: "(a) the imported and domestic/other foreign products at issue are like products; and (b) the treatment accorded to imported products is less favourable than that accorded to like domestic and/or other foreign products." Citing paragraphs 180-182 of the Appellate Body report in *U.S. - Clove Cigarettes*, the Panel elaborated that "once imported and domestic/other foreign products are found to be like, two elements must be examined to determine whether the measure at issue accords imported products less favourable treatment than that accorded to like domestic/other foreign products: (a) whether the measure causes a detrimental impact on competitive opportunities for the group of imported products vis-à-vis the group of domestic/other foreign products; and (b) whether the detrimental impact on imports, if found to exist, stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products." The Panel said that it would examine these elements in turn. (Paras. 7.129-133)

**Like Products**

The Panel said that it would first examine "whether imported seal products are like domestic and/or other foreign seal products at issue." Citing past Appellate Body precedent, the Panel said that it would "assess the likeness of products based on *inter alia* the following criteria: (a) the properties, nature, and quality of the products; (b) the end-uses of the products; (c) consumers' tastes and habits; and (d) the tariff classification of the products." Here, the Panel noted that the claims relate to the treatment of seal products in general and that the dispute between the parties is based on the distinction made between seal products that are prohibited (non-conforming) and those that are allowed because they meet specific requirements under the exceptions (conforming). In this regard, the Panel recalled that the complainants argue that conforming and non-conforming seal products are like, and the EU did not contest this. The Panel agreed that "the type or purpose of the seal hunt does not affect in any way the final product's physical characteristics, end-use, or tariff classification." The Panel also noted evidence submitted by the complainants (and never contested by the EU) demonstrating that, prior to the EU Seal Regime, consumers did not make any distinction between seal products based on the type or purpose of the hunt. On this basis, the Panel concluded that "conforming and non-conforming seal products are like products" within the meaning of Article 2.1. (Paras. 7.134-140)
Whether the EU Seal Regime causes a detrimental impact on imported products

Turning to a consideration of whether the EU Seal Regime causes a detrimental impact on imported products, the Panel said that it "must first determine the groups of products to be compared." Here, it explained, "the 'universe' of products covered in this dispute, as agreed by the parties," is as follows:

<table>
<thead>
<tr>
<th>Distinction</th>
<th>Domestic Seal Products</th>
<th>Norwegian Seal Products</th>
<th>Canadian Seal Products</th>
<th>Other Foreign Seal Products</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-conforming</td>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>E</td>
</tr>
<tr>
<td>Conforming (IC and MRM hunts)</td>
<td>F</td>
<td>G</td>
<td>H</td>
<td>I</td>
</tr>
<tr>
<td></td>
<td></td>
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<td>J</td>
</tr>
</tbody>
</table>

(Paras. 7.149-150) The Panel noted that while the parties agree in principle that all seal products are like, "they disagree on the groups of like products to compare for the purpose of determining whether the EU Seal Regime is consistent with Article 2.1." Canada asserted that "the entire group of imported seal products (including conforming and non-conforming products) should be compared to the entire group of domestic and/or Greenlandic seal products." The EU, however, considered that "the treatment granted under the EU Seal Regime to conforming and non-conforming seal products cannot be compared because these products are in 'different situations.'" (Paras. 7.151-152)

Citing paragraphs 197-200 of the Appellate Body report in *U.S. - Clove Cigarettes*, the Panel said that "contrary to the European Union's position, the Appellate Body's approach suggests that the group of imported products should be compared with the group of domestic or other origin products." Thus, it said that, here, it would compare Canada's seal products (cells C+H), "the vast majority of which are non-conforming products," to domestic seal products (cells A+F) and to Greenlandic seal products (cells D+I) respectively. (Paras. 7.153-154)

With this in mind, the Panel turned to the question of "whether the EU Seal Regime causes a detrimental impact on competitive opportunities for the group of Canadian imported products vis-à-vis the group of other imported or domestic like seal products." It elaborated, "[t]he Appellate Body confirmed that this question requires consideration of the totality of the facts and circumstances before the panel, and an assessment of the implications for competitive conditions discernible from the design, structure, and expected operation of the measure." For this purpose, citing paragraph 269 of the Appellate Body report in *U.S. - COOL*, the Panel said that it must "therefore assess the 'design, structure, and expected operation' of the EU Seal Regime, as well as any other relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, as well as historical trade patterns." (Paras. 7.155-157)

Here, the Panel found that, "[c]onsidered in light of the specific requirements of the IC [(Inuit or indigenous communities)] and MRM [(marine resource management)] categories, the majority of seals hunted in Canada would not qualify under the exceptions." In this regard, the Panel noted that the EU did not dispute evidence submitted by Canada suggesting that the EU legislation on seals was in fact primarily aimed at excluding seal products resulting from the non-conforming seal hunt in Canada and that some 95 percent of all Canadian seal products derive from this category of seal products. With the IC exception in mind, the Panel observed that relevant data demonstrate that "most if not all of Greenlandic seal products are expected to conform to the requirements under the IC exception, as compared to roughly
5% in Canada, where only a small portion of the overall seal harvest is hunted by Inuit communities." Thus, "the share of the total production that would not be eligible to be placed on the market under the IC exception is relatively high (i.e. some 95%) for Canada, whereas most if not all of Greenland's seal products are eligible." In response to the EU argument that seal products from Canada could be eligible for placement on the market under the IC exception, the Panel recalled the Appellate Body's clarification in *U.S. - Clove Cigarettes* that the fact that a small group of imported products was exempted from the ban was not relevant when assessing the ban's overall impact on the vast majority of imported products. Here, it noted, "all, or virtually all, seal products from Greenland are eligible to access the EU market under the IC exception, while the majority of like products produced by Canada do not conform to the requirements of the IC exception and thus are ineligible to benefit under the EU Seal Regime." (Paras. 7.159-164)

Similarly, in respect of the MRM exception, the Panel found that the relevant evidence suggests that "while European Union seal products are likely to benefit from the MRM exception [(namely, seal products from Sweden accompanied by the required documentation)], Canadian seal products are not expected to benefit from the same market access opportunities under the EU Seal Regime." In this regard, the Panel observed that "the volume of seal products derived from seal hunts covered or potentially covered by the MRM exception is limited," and, in any event, the limited impact of the exception is not relevant here given that most of the EU seal products are potentially eligible for placement on the EU market under this exception. "While virtually all Canadian seal products are not." On this basis, the Panel considered that "the requirements under the IC and MRM exceptions were designed, structured, and expected to operate so as to exclude seal products deriving from the majority of Canadian seal hunts, which are not IC or MRM hunts, from being placed on the EU market." That is, it explained, "by virtue of its design, the measure excludes all but a very small percentage of potential products from Canada, while at the same time permitting the majority of all of like products from certain EU members." (Paras. 7.165-168)

Finally, the Panel addressed the EU position that despite the fact that conforming and non-conforming seal products are "like" they cannot be compared because they are in "different situations" with regard to the type of hunt from which each category is derived. In response, the Panel opined that "because the two groups of products were found to be 'like,' such products can be compared for the purpose of determining the implications of the measure on their competitive relationship on the EU market." It added, "the European Union's argument that conforming and non-conforming seal products are in 'different situations' is relevant to the justification of the regulatory distinction under the EU Seal Regime," such that "this argument can be more appropriately assessed in the context of [the Panel's] subsequent analysis of whether any detrimental impact caused by the measure to the imported products reflects discrimination against such products." (Para. 7.169)

The Panel concluded that, on the basis of its "examination of the design, structure, and expected operation of the EU Seal Regime, as well as evidence relating to other features of the market ..., the Regime has a detrimental impact on the competitive opportunities of Canadian imported products vis-à-vis Greenlandic imported and EU domestic products." (Para. 7.170)

*Whether the detrimental impact "stems exclusively from legitimate regulatory distinctions"*

The Panel recalled past Appellate Body precedent from three recent decisions under the TBT Agreement that the "treatment no less favourable" requirement of Article 2.1 "should not be interpreted as prohibiting detrimental impacts on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions rather than reflecting discrimination against imported products." Based on guidance from these earlier Appellate Body decisions, the Panel said that it would "proceed to examine whether the European Union has established
that such detrimental impact stems exclusively from legitimate regulatory distinctions," and, as part of that analysis, it would "evaluate whether the regulatory distinctions are designed and applied in an even-handed manner and thus do not reflect discrimination against Canadian seal products." Its examination, it explained, entails an analysis of two main questions: (1) what are the relevant regulatory distinctions under the EU Seal Regime; and (2) are such regulatory distinctions "legitimate?" (Paras. 7.171-174)

Relevant regulatory distinctions

The Panel noted that the EU Seal Regime "distinguishes between seal products that conform to the IC or the MRM requirements under the exceptions (conforming products), on the one hand, and those that do not conform to these requirements (non-conforming products), on the other hand." It recalled that the distinction between these two categories "is based on specific criteria relating to seal hunts from which seals are derived and used as inputs in the final products," including "the identity of the hunter (Inuit or indigenous); the type of hunt (traditional Inuit hunts); the purpose of the hunt (subsistence or marine resource management); and the way in which the products are marketed (nonsystematically and on a non-profit basis)," such that the criteria at issue thus do not contain any requirements concerning specific hunting methods. Accordingly, it explained, the regulatory distinction drawn by the measure is linked to seal hunts, such that products with seal inputs derived from IC or MRM hunts are allowed, whereas products with seal inputs derived from any other hunts are prohibited. Thus, the regulatory distinction that the EU must justify is between IC and MRM hunts and hunts that are not IC or MRM hunts. (Paras. 7.175-177)

The EU asserted that this distinction reflects the fact that IC and MRM hunts are conducted for "non-commercial purposes" and the seal products derived therefrom are allowed, while those that are disallowed derive from "commercial hunts." In particular, the EU argued that the two types of hunts "present different moral considerations and different levels of animal welfare risks in seal hunting." Canada disagreed, arguing that the distinction is not legitimate, in that "seal welfare concerns exist equally in all seal hunts, irrespective of the type and purpose of the hunt" and that such a distinction is "illusory because all seal hunts have commercial dimensions." In light of these differing positions, the Panel said it must determine whether the distinction is legitimate and does not reflect discrimination against imported seal products derived from non-IC and non-MRM hunts. (Paras. 7.178-179)

The Panel began its analysis by examining the factual aspects of commercial hunts. The Panel explained that to make an objective assessment of the factual assertions made by the parties in this regard, it examined "all factual evidence including scientific opinions and video recordings, submitted by the parties regarding seal hunting." In this regard, the Panel noted that it gave "due consideration to the arguments of the parties regarding the reliability and credibility of various sources," taking into account, inter alia, "analytical and empirical rigor; relevant expertise of the authors; and the purpose and/or mandate of the studies, statements, and reports submitted to the Panel." It noted that both parties cited extensively to the findings and conclusions of the Scientific Opinion of the European Food Safety Authority (EFSA Scientific Opinion) on the animal welfare aspects of the killing and skinning of seals and that the reliability and accuracy of the EFSA Scientific Opinion has not been challenged by any party." (Para. 7.184) The Panel then set out its analysis of the characteristics of seal hunting in general, focusing on physical environment, characteristics of seals, methods for hunting seals (paras. 7.185-224), and the characteristics of commercial seal hunting (paras. 7.225-245).

The Panel then considered separately whether the disparate impact under the IC and MRM exceptions "stems exclusively from a legitimate regulatory distinction."
**IC exception**

**Whether the distinction is "legitimate"**

The Panel examined whether the distinction drawn under the EU Seal Regime between commercial hunts and IC hunts is "legitimate" within the meaning of Article 2.1. It recalled the Appellate Body's explanation in paragraph 271 of *U.S. - COOL* that "the 'legitimacy' of the regulatory distinctions drawn by a measure must be analysed in light of the objective of the measure and based on *inter alia* the particular circumstances of the dispute, including the measure's design, architecture, structure, operation, and application of the measure." In addition, the Panel understood the Appellate Body to have found that "where a regulatory distinction is not designed and applied in an even-handed manner -- because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination -- that distinction cannot be considered 'legitimate.'" In addition, "[g]iven the close relationship between the TBT Agreement and the GATT," the Panel found it "useful ... to recall the Appellate Body's guidance in previous disputes concerning the obligations under the chapeau of Article XX of the GATT." In particular, the Panel considered that, according to the Appellate Body, "whether discrimination is 'arbitrary or unjustifiable' under the chapeau would entail an analysis that relates primarily to the 'cause' or the 'rationale' of the discrimination 'put forward [by a regulating Member] to explain its existence.'" According to the Panel, this guidance "suggests that the legitimacy of the regulatory distinction between commercial hunts and IC hunts should be determined by examining the following questions": (1) "is the distinction rationally connected to the objective of the EU Seal Regime"; (2) "if not, is there any cause or rationale that can justify the distinction (i.e. 'explain the existence of the distinction') despite the absence of the connection to the objective of the Regime, taking into account the particular circumstances of the current dispute"; and (3) "is the distinction concerned, as reflected in the measure, 'designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination' such that it lacks 'even-handedness.'" The Panel said that it would examine these questions in turn. (Paras. 7.256-260)

**Whether the distinction is connected to the objective of the EU Seal Regime**

As to whether the IC distinction is connected to the objective of the EU Seal Regime, the Panel first recalled the characteristics of IC hunts: the identity of the hunter, the purpose of the hunt, the scale of the hunt, the seal hunting period, the hunting methods, the organization and control of the hunt and the use of products derived from the hunt. (Paras. 7.261-271) In this regard, the Panel found that there are "certain characteristics that are unique to IC hunts," namely: "they are conducted by Inuit and indigenous communities with a tradition of seal hunting dating back thousands of years; they are normally carried out on an individual basis using small boats; and they take place throughout the year." In addition, "by-products of the hunted seals are usually used and consumed by the community and, depending on the Inuit or indigenous community concerned, also sold on the market to generate income." At the same time, it recalled from its discussion of the characteristics of seal hunts generally above that "the circumstances and conditions of seal hunts present certain challenges to effecting humane killing of seals and that there is a risk in any given seal hunt that the targeted animals may suffer poor animal welfare outcomes of varying intensity and duration," and it stated that IC hunts are no different in that similar challenges to effecting humane killing of seals exist in IC hunts as well. Moreover, the Panel noted that "hunting methods used by Inuit or indigenous communities such as 'trapping and netting' are not consistent with humane killing methods." (Paras. 7.272-273)

The Panel noted that, as it would discuss in more detail below, "the objective of the EU Seal Regime is to address the moral concerns of the EU public with regard to the welfare of seals." In particular, the EU described two public moral concerns as follows: "(a) the incidence of inhumane killing of seals; and (b) EU citizens' individual and collective participation as consumers in, and their exposure
to, the economic activity which sustains the market for seal products derived from inhumane hunts." In addition, as discussed below, the Panel also found that "the EU public concerns on seal welfare relate to seal hunting in general and are not confined to any particular type of hunts." In response, the Panel said that, "[g]iven that the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts, and considering the evidence showing the use by Inuit hunters of methods such as 'trapping and netting,' … IC hunts can cause the very pain and suffering for seals that the EU public is concerned about." Thus, it concluded, "the IC distinction does not bear a rational relationship to the objective of addressing the moral concerns of the EU public on seal welfare." (Paras. 7.274-275)

**Whether the EU rationale is "justifiable"**

Canada asserted that this "disconnection" between the regulatory distinction and the overall regulatory objective "indicates that the distinction in question is not justifiable, and hence discriminatory contrary to Article 2.1." The EU did not contest that seal products qualifying under the IC exception do not conform to the objective of protecting animal welfare, but it responded that "the application of certain hunting methods such as 'trapping and netting' is indispensable for the subsistence of the Inuit, who otherwise would not be able to hunt during almost half of the year, and this therefore overrides the animal welfare concerns." The Panel said that it would examine the EU's rationale. (Paras. 7.276-277)

The Panel understood the EU rationale to rest on "two premises": (1) "if the objective of the IC exception is found to be legitimate, then, a fortiori, the regulatory distinction should also be considered legitimate"; and (2) "highlighting the alleged uniqueness of IC hunts, the European Union argues that IC hunts, which are conducted for the 'subsistence' of Inuit and indigenous communities, benefit from an 'inherent legitimacy' that 'overrides the general concerns over the killing methods for purely commercial motives.'" Thus, in the EU view, "the purpose of the hunt distinguishes IC hunts from commercial hunts and justifies any risk of suffering inflicted upon seals as a result of the hunts conducted by those communities." In this regard, the EU asserted that the benefits to humans provided by the subsistence of the Inuit and other indigenous communities outweigh the risk of suffering inflicted upon seals. (Para. 7.278)

At the outset, the Panel said that it was not persuaded by the first premise, that a distinction is justified on the basis of the legitimacy of the objective of the distinction itself. In particular, the Panel said that it did not read the Appellate Body's guidance on Article 2.1 to support this interpretation. It stated, "[t]he objective of the IC exception is an element that may be examined as part of the 'cause' or 'rationale' put forward by the European Union to seek to justify the IC distinction," but "it is not determinative of the issue of the legitimacy of the regulatory distinction." (Para. 7.279)

As to the second premise, the Panel explained that "[t]o assess the issue of whether the alleged difference in the purpose of the hunt constitutes a justifiable rationale or cause for the distinction in question, despite its disconnection from the objective of the measure," two questions must be examined: (1) "whether, and, if so, how, the purpose of the IC hunts differs from the purpose of commercial hunts"; and (2) "whether any distinction found in the purpose of the hunt justifies the distinction drawn under the measure between commercial and IC hunts." (Para. 7.282) As to the first question, after reviewing the evidence before it, the Panel opined that "the commercial aspect of IC hunts resembles the purpose of commercial hunts, which is to earn income (and make profits) by selling by-products of the hunted seals." It also considered that "this commercial aspect of IC hunts is related more to their need to adjust to modern society rather than to continuing their cultural heritage of bartering." Nonetheless, based on the definition of the term "subsistence" (as being closely linked to the notion of providing food or income to support life or livelihood), as well as the evidence concerning communities with a tradition of seal hunting, the Panel found that "the subsistence purpose of IC hunts encompasses not only direct use and consumption of by-products of the hunted seals as part of their culture and tradition, but also a
commercial component, to the extent that Inuit or indigenous communities also exchange some by-products of the hunted seals for economic gain." The Panel concluded, "while IC hunts may also have a commercial aspect, we are persuaded that the subsistence aspect of IC hunts, combined with the identity of the hunter as Inuit, has significance for their culture and tradition as well as for their livelihood." Thus, "the primary purpose of IC hunts is distinguishable from that of commercial hunts." (Paras. 7.283-289)

Next, the Panel considered whether this difference in purpose justifies the distinction drawn under the measure, and it referred to an Appellate Body statement concerning the GATT Article XX chapeau in this regard. In support of its position, the EU pointed out that the protection of the economic and social interests of Inuit or indigenous communities is recognized at the international level, as illustrated by a UN Declaration and an ILO Convention and also in the legislative history of the EU Seal Regime and in Canadian sealing regulations. The Panel considered that this factual evidence "demonstrate[s] the recognized interests of Inuit and indigenous peoples in preserving their traditions and cultures," showing that "seal hunting represents a vital element of the tradition, culture, and livelihood of Inuit and indigenous communities." (Paras. 7.290-295)

While the Panel agreed with Canada that a distinction may not be justifiable if such a cause or rationale is not connected to the main objective of the measure, the Panel said that it was also "mindful that the justifiability of a specific cause or rationale provided for a given distinction must be examined on a case-by-case basis." Here, it explained, "the interests to be balanced against the objective of the measure at issue are grounded in the importance, recognized broadly in national and international instruments, of the need to preserve Inuit culture and tradition and to sustain their livelihood, particularly in relation to the significance of seal hunting in Inuit communities." The Panel distinguished the facts in this case from those in U.S. - Clove Cigarettes and Brazil - Retreaded Tyres, noting that "the cause or rationale for the exception granted under the EU Seal Regime to products derived from IC hunts is justifiable despite the rational disconnection to protecting seal welfare, because it is founded on the unique interests of Inuit and indigenous communities, which are and have been recognized broadly." It also recalled that the evidence "shows that Inuit interests have always been raised as an important consideration when adopting a resolution relating to seal products, including the current measure." Under these circumstances, the Panel said that it was "persuaded that the protection of Inuit interests justifies the distinction between commercial and IC hunts," and it therefore considered that the EU "has explained sufficiently the basis for distinguishing IC hunts from commercial hunts through the IC exception." (Paras. 7.296-298) In addition, before reaching its final conclusion, the Panel rejected the EU reference to alleged moral concerns of the EU public concerning the economic and social interests of Inuit and indigenous communities, finding that the evidence did not support the position that the EU public attributes a higher moral value to the protection of Inuit interests as compared to seal welfare. (Para. 7.299)

In conclusion, the Panel said that it was "persuaded by the European Union's explanation that the primary purpose of IC hunts, namely to preserve the tradition and culture of Inuit and to sustain their livelihood, is distinguishable from that of commercial hunts, and justifies the IC distinction, which protects IC interests." It did not find, however, that the rationale or cause of the distinction can be linked to the alleged "standard of the EU public's morality" in general. (Para. 7.300)

**Whether the distinction is designed and applied in an even-handed manner**

In considering whether the distinction is designed and applied in an even-handed manner, the Panel recalled the text of Article 3(1) of the Basic Regulation. Canada argued that "with respect to Greenland in particular and its qualification under the IC exception, Greenland's commercialization of output is considerably more extensive and organized than Inuit elsewhere, with a large-scale commercial enterprise (Great Greenland A/S), significant capital investment, such as processing and manufacturing
facilities, and sophisticated distribution channels," such that the hunts occurring in Greenland and Canada both have "strong commercial elements" and the "artificial distinction created by the European Union by virtue of IC hunts has no basis and is simply unjustified." (Paras. 7.302-304)

At the outset, the Panel observed that Canada does not contest the status of Greenland as Inuit, but rather focuses on the alleged arbitrariness in the design and application of the distinction. In considering this issue, the Panel noted that "Greenland has been the only Inuit community that has applied for and obtained the benefits of the IC exception under the measure," indicating that a certain "inherent flaw in the design and structure of the IC exception prevents other potentially qualifying Inuit and indigenous communities from benefiting from the exception." The Panel considered that the evidence (in particular, the level of development in the commercial aspect of Greenlandic seal hunts; the volume of sealskins traded in Greenland; and the integrated nature of the seal product industries in Greenland, Canada, and Norway) "indicate[s] that the purpose of seal hunts in Greenland has characteristics that are closely related to that of commercial hunts." (Paras. 7.305-313) In addition, the Panel found that, "based on available evidence … Inuit in Greenland and Canada are the most likely, if not the only, beneficiaries under the measure," but that given the factual circumstances in Canada, currently Greenland, with the most commercialized of IC hunts, is the only beneficiary. It also found that "[t]he legislative history of the EU Seal Regime suggests that this is not merely an incidental effect of the application of the measure," noting that seal hunts in Greenland were considered to be the only Inuit hunts that could benefit from the IC exception. In this regard, the Panel set forth Canada's explanation that it is not economically feasible for Canadian Inuit to develop their own processing and distribution chains, given that they have relied on synergies with southern producers, networks that may no longer be viable because of the EU Seal Regime. Finally, the Panel recognized that, in the actual operation of the IC exception, Danish customs authorities processed imports based on certificates issued by the Greenlandic authorities prior to the Greenlandic entity obtaining recognized body status under the Implementing Regulation. (Paras. 7.314-316)

The Panel concluded that these considerations "cast serious doubt on the even-handedness of the design and application of the IC exception." While the rationale or cause of the exception was the "subsistence" of Inuit and indigenous communities, under the measure, the IC exemption is available de facto exclusively to Greenland, where the Inuit hunt bears the greatest similarities to the commercial characteristics of commercial hunts. This "suggests … that the IC exception was not designed or applied in an even-handed manner so as to make the benefits of the exception available for all potential beneficiaries." The Panel rejected the EU argument that these effects should be attributed to the fact that Canadian operators choose not to apply for the IC exception, responding that the fact that only those in Greenland have been able to benefit from the exception is directly attributable to the regime itself and not to the actions of operators. (Paras. 7.317-318)

**Conclusion (IC exception)**

On this basis, the Panel stated that "although the distinction between commercial and IC hunts based on the purpose of the hunt is justifiable having regard to the explanations given by the European Union concerning the benefits to Inuit or indigenous communities, it is not designed and applied in an even-handed manner." Thus, it concluded that "the IC exception of the EU Seal Regime "is inconsistent" with TBT Agreement Article 2.1 "as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction."" (Para. 7.319) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)
Whether the distinction is "legitimate"

Canada asserted that "the EU Seal Regime draws an arbitrary distinction between commercial and MRM hunts by imposing conditions that are unrelated to the Regime's underlying policy objectives." (Para. 7.320) The EU responded that "the MRM exception was intended to exempt from the ban seal products deriving from small-scale, occasional hunts conducted with the purpose of managing marine resources." (Para. 7.324)

At the outset, the Panel explained that it would "examine whether the distinction drawn by the measure between commercial and MRM hunts, and consequently between products derived from each category of hunt, is legitimate within the meaning of Article 2.1." As it did above for the IC exception, the Panel said that it would "assess the legitimacy of the regulatory distinction between commercial hunts and MRM hunts by examining the following questions": (1) "is the distinction rationally connected to the objective of the EU Seal Regime"; (2) "if not, is there any cause or rationale that can justify the distinction (i.e. 'explain the existence of the distinction') despite the absence of the rationale connection to the objective of the Regime, taking into account the particular circumstances of the current dispute"; and, (3) "is the distinction concerned, as reflected in the measure, 'designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination' such that it lacks 'even-handedness.'" (Para. 7.328)

Whether the distinction is rationally connected to the objective of the EU Seal Regime

To determine whether the MRM distinction is rationally connected to the objective of the EU Seal Regime, the Panel first examined the characteristics of MRM hunts (including, the identity of the hunter, the purpose of the hunt, the scale of the hunt, the seal hunting period, hunting methods, organization and control of the hunt and use of products derived from the hunt). (Paras. 7.329-335) Based on this description, the Panel considered that "MRM hunts are characterized by the fact that they are conducted occasionally on a small scale, primarily for sustainable marine resource management, particularly for controlling nuisance seals and seal culling." In addition, the Panel found that the "evidence shows that MRM hunts ... also give rise to concerns regarding seal welfare that are present in seal hunting in general" and that "it would seem that seal hunts conducted in EU member States are not subject to onerous animal welfare requirements." The Panel did "not consider that the limited scope of the MRM hunts and the small volume of potential trade concerned by this exception as such are relevant factors" in this assessment. In addition, the Panel found it "speculative that the possibility for the hunters to recover the costs of the hunt through the placing on the market of seal products under the MRM exception encourages more responsible behavior on the part of the hunter with respect to the welfare of seals." (Paras. 7.336-340)

On this basis, the Panel concluded that "the MRM distinction is not rationally connected to the objective of addressing the EU public moral concerns on seal welfare." The EU, however, argued that any risk of suffering inflicted on seals in this context is justified by "the purpose of the hunt, which distinguishes MRM hunts from commercial hunts, combined with its small scale and occasional occurrences." The Panel said it would examine whether this explanation justifies the MRM distinction. (Para. 7.340)

Whether the EU rationale is "justifiable"

In addressing whether the cause or rationale put forward by the EU for the distinction is justifiable, the Panel said it would examine: (1) "the purpose of MRM hunts, specially controlling nuisance seals and seal culling, compared to that of commercial hunts," and (2) "the question of whether
any distinction found between the purpose of the MRM hunts and the purpose of commercial hunts is justified despite the lack of a rational connection to the objective of the EU Seal Regime as a whole." (Para. 7.341) Here, based on the evidence, the Panel agreed with the complainants that there is a commercial dimension to the MRM hunts and also that "the costs associated with damage caused by seals can be significant thereby creating an economic incentive for fishermen to conduct an MRM hunt." It noted that while the MRM exception aims to eliminate profit at the hunt level, it still allows profit-making at the downstream level." Thus, the Panel was "not convinced that the purpose of MRM hunts and the purpose of commercial hunts are of a different character or nature." (Paras. 7.341-344)

Finally, the Panel addressed the EU argument that "the placing on the EU market of seal products derived from MRM hunts conforms with the 'EU's standard of morality' because the potential suffering of seals is outweighed by the benefits accruing to other animals." However, in response, the Panel recalled its finding above that "the evidence adduced by the European Union on the EU public's moral concerns regarding seal welfare does not clearly establish that the concerns of EU citizens vary according to the type of hunt." (Para. 7.345)

On this basis, the Panel did not find that the rationale put forward by the EU based on the purpose of MRM hunts, combined with their small scale and occasional occurrences, justifies the MRM distinction in the absence of a rational connection to the objective of the EU Seal Regime concerning seal welfare. Thus, the Panel concluded that the EU failed to establish that a detrimental impact caused by the MRM distinction stems exclusively from a legitimate regulatory distinction. Nonetheless, the Panel said that, for completeness, it would consider the design and application of this regulatory distinction. (Paras. 7.346-347)

**Whether the distinction is designed and applied in an even-handed manner**

As to whether the distinction is designed and applied in an even-handed manner, the Panel recalled the specific requirements of the MRM exception as set out in Article 5(1) of the Implementing Regulation. It noted that currently only Sweden has entities registered as recognized bodies entitled to deliver attesting documents under this exception, and it concurred with Canada's argument that the legislative history of the exception suggests that the MRM exception was "designed with the situation of EU member States in mind." Thus, the Panel concluded that the MRM exception is not designed in an even-handed manner. (Paras. 7.348-352)

**Conclusion (MRM exception)**

On this basis, the Panel concluded that the MRM exception of the EU Seal Regime is inconsistent with TBT Agreement Article 2.1, as the EU has failed to demonstrate that the detrimental impact caused by the MRM exception stems exclusively from a legitimate regulatory distinction. (Para. 7.353) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)

**TBT Agreement Article 2.2 - More Trade-Restrictive than Necessary**

The complainants argued that "the EU Seal Regime creates an unnecessary obstacle to trade that is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to fulfil a legitimate objective." (Para. 7.2)
TBT Agreement Article 2.2 states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

Before examining the claims under this provision, the Panel explained that this provision can be "parsed into several different elements: 'legitimate objective'; 'fulfilment'; 'not ... more trade-restrictive than necessary'; and 'taking account of the risks non-fulfilment would create.'" The Panel then quoted paragraphs 314-322 of the Appellate Body report in U.S. - Tuna II, as an explanation of what is to be considered "necessary" in the sense of Article 2.2:

[A] panel must assess what a Member seeks to achieve by means of a technical regulation. ... Subsequently, the analysis must turn to the question of whether a particular objective is legitimate ...

In sum, ... an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken ....

(Paras. 7.354-356) The Panel considered each element in turn.

Identification of the objective(s) pursued through the EU Seal Regime

The Panel explained that, in order to assess a measure's consistency with Article 2.2, it "must first identify the objective pursued by a regulating Member through the measure at issue." Here, it noted that the parties "disagree on what objectives the European Union aims to fulfil through the EU Seal Regime." The EU asserted that the EU Seal Regime pursues two closely related objectives: (1) addressing the public moral concerns of the EU population on seal welfare; and (2) contributing to the welfare of seals by reducing the number of seals killed in an inhumane way. The complainants countered that the EU "failed to identify any coherent and consistent standard of right and wrong conduct held within the European Union with respect to seal welfare concerns," and, instead, the EU "pursues a multiplicity of objectives through the measure such as protection of seal welfare, including the EU public's concerns on seal welfare; protection of the IC [(Inuit or indigenous communities)] interests; and promotion of marine resource management ["MRM"]." (Paras. 7.372-376)
The Panel considered that "the disagreements between the parties on the objective of the EU Seal Regime come down, in essence, to two issues": (1) "while not disputing that the EU Seal Regime is aimed at addressing the public concerns on seal welfare, the parties disagree on whether the public concerns at issue are moral concerns for the EU public"; and (2) "whether other interests addressed through the exceptions in the measure (i.e. IC, MRM, and Travellers exceptions) constitute objectives of the EU Seal Regime that are separate and independent from the objective of addressing seal welfare concerns." The Panel said that it "must assess the objectives of the EU Seal Regime on the basis of available evidence such as the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue." It was "mindful that a panel is not bound by the objectives asserted by the regulating Member, and 'may also find guidance' in contrary evidence proffered by the complainant in determining the objective pursued by the regulating Member." (Paras. 7.377-378)

At the outset, the Panel found it "useful to recall the meaning and scope of 'public morals' as discussed in previous disputes," in relation to other WTO Agreements. Referring to the panel reports in U.S. - Gambling and China - Audiovisual Products, the Panel considered that "the question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires … an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of 'public morals' as 'defined and applied' by a regulating Member 'in its territory, according to its own systems and scales of values.'" Thus, in the context of this dispute, the Panel said it "must … examine whether the evidence as a whole shows (a) the existence of the EU public's concerns on seal welfare and/or any other concerns or issues that the European Union seeks to address; and, (b) the connection between such concerns, if proven to exist, and the 'public morals' (i.e. standards of right or wrong) as defined and applied within the European Union." (Paras. 7.379-384)

The Panel began its assessment of the first factor, the existence of EU public concerns, with the text of the EU Seal Regime. Overall, it discerned from the text that, "in designing the Regime, the European Union sought to address the public concerns on seal welfare," and, in doing so, the EU also took into account certain other interests (i.e., IC, MRM, and Travellers interests). (Paras. 7.385-389) It then examined the legislative history of the EU Seal Regime. As with the text of the EU Seal Regime, the Panel considered that the legislative history "demonstrates the existence of the EU public's concerns about seal welfare." (Paras. 7.390-398)

In addition, based on the text and evidence referred to above, the Panel concluded that "in drawing up the measure, the European Union accommodated other interests or considerations, such as the Inuit communities engaged in seal hunting, seals hunted for marine management purposes, and seal products brought into the European Union for personal use." In this regard, the Panel noted the parties' disagreement as to "whether these interests should be considered as separate objectives of the EU Seal Regime independent from the objective of addressing seal welfare concerns." In response, citing paragraphs 113 and 115 of the Appellate Body report in U.S. - Clove Cigarettes, the Panel said that "it may not be uncommon for a measure to have 'a multiplicity of objectives,'" such that "there is no reason in principle why the measure at issue could not have several objectives." However, based on its text, legislative history, structure and design, the Panel was "not convinced that the 'aim,' 'target,' or 'goal' of the EU Seal Regime was to protect the interests of IC, MRM, and Travellers." That is, the Panel considered that "the interests that were accommodated in the measure through the exceptions must be distinguished from the main objective of the measure as a whole." Here, it observed that "unlike the issue of seal welfare," it "[did] not find in the evidence submitted that the interests covered by the IC, MRM, and Travellers exceptions are grounded in the concerns of EU citizens," but they were rather "included in the course of the legislative process." Thus, the Panel did "not consider that the interests incorporated in the IC, MRM, and Travellers exceptions form independent policy objectives of the EU Seal Regime as a whole." (Paras. 7.399-402)
Next, the Panel considered the second factor, whether the EU public's concerns on seal welfare "fall within the scope of 'public morals' in the European Union" (that is, whether they are "anchored in the morality of European societies"). In response, the Panel found that the legislative history "suggests a link between the public concerns on seal welfare and an ethical or moral consideration." Similarly, examining additional evidence presented by the EU, the Panel found that "taken as a whole," it illustrates "standards of right and wrong conduct maintained by or on behalf of [the European Union] concerning seal welfare." Like the panel in U.S. - Gambling, the Panel considered that "Members should be given some scope to define and apply for the themselves the concepts of 'public morals' in their respective territories, according to their own systems and scales of values." Thus, while not all evidence presented makes an "explicit link between seal or animal welfare and the morals of the EU public," the Panel was nevertheless persuaded that the evidence as a whole sufficiently demonstrates that animal welfare "is an issue of ethical or moral nature in the European Union." (Paras. 7.403-409)

In sum, the Panel concluded that "the objective of the EU Seal Regime is 'to address the moral concerns of the EU public with regard to the welfare of seals,'" and it noted that these concerns have two specific aspects: (1) "the incidence of inhumane killing of seals"; and (2) "EU citizens' individual and collective participation as consumers in, and exposure to ('abetting'), the economic activity which sustains the market for' seal products derived from inhumane hunts." Moreover, the Panel noted that "the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts," such that the second aspect of the objective "pertains to seal products derived from inhumane hunts rather than 'commercially-hunted seal products' as submitted by the European Union." In this regard, the Panel said that "contributing to the welfare of seals by reducing the number of seals killed in an inhumane way, which the European Union claims can constitute the second objective of the measure, is closely linked to the first aspect of the public moral concerns," such that it would "consider this as one aspect of the moral concerns in question, rather than as a separate, second objective of the measure." (Paras. 7.410-411) (On appeal, the Appellate Body rejected several claims related to these issues in the context of its analysis under GATT Article XX. See DSC for EC - Seal Products (AB).)

Legitimacy of the identified objective

The Panel then examined the question of "whether the identified objective of the EU Seal Regime, i.e. 'addressing EU public moral concerns on seal welfare,' is legitimate within the meaning of Article 2.2." In particular, Canada and Norway argued that the European Union's defined objective is not legitimate because it is based on an arbitrary and unjustifiable distinction between "commercial" and "non-commercial" hunts. (Paras. 7.412-415)

The Panel first noted that this policy objective is not included in the non-exhaustive list of legitimate objectives in Article 2.2, such that its legitimacy must be assessed based on "several reference points." Citing past Appellate Body precedent, the Panel explained that the following are relevant factors in this assessment: (a) objectives provided in Article 2.2; (b) objectives listed in the sixth and seventh recitals of the TBT Agreement preamble; and (c) objectives recognized in other provisions of the covered agreements. (Paras. 7.415-416)

Here, the Panel noted that "public morals" is not included in the list provided in Article 2.2 or in the fifth and sixth recitals of the preamble. As for other covered agreements, the Panel observed the explicit inclusion of "public morals" as one of the general exceptions for a GATT- or GATS-inconsistent measure, demonstrating that WTO Members "considered this objective to be particularly significant." As a result, and considered together with recital two of the TBT Agreement Preamble, which states that an objective of the TBT Agreement is to further the objectives of the GATT, the Panel concluded that "public morals" falls within the scope of "legitimate" objectives under Article 2.2. (Paras. 7.417-418)
The Panel further explained that a subsequent question is "whether addressing public morals concerns on a specific type of issue," i.e., seal welfare, is a legitimate objective under Article 2.2. At the outset, the Panel said that "the concept of public morals is a relative term which needs to be defined based on the standard of right and wrong in a given society." Here, it noted, the EU "has established that the concerns of the EU public on animal welfare involved standards of right and wrong within the European Union as a community," and it considered that "addressing the public moral concerns on seal welfare … is 'legitimate' under Article 2.2." The Panel found support for its position in the fact that various international and national actions suggest that animal welfare is a globally recognized issue, and also in the fact that the complainants did not dispute that this objective is "legitimate." (Paras. 7.419-421)

Whether the EU Seal Regime is more trade-restrictive than necessary to fulfil the legitimate objective, taking account of the risks non-fulfilment would create

The Panel then examined whether the EU Seal Regime is more trade restrictive than necessary to fulfil the identified objective, taking account of the risks non-fulfilment would create. In doing so, it looked at the following elements: (a) trade-restrictiveness of the EU Seal Regime; (b) degree of the measure's contribution to the identified objective; and (c) availability of alternative measures. (Para. 7.422)

Whether the EU Seal Regime is "trade-restrictive"

The complainants asserted that "the EU Seal Regime is trade restrictive because it imposes limiting conditions or restrictions on imports into the European Union and placing on the EU market of seal products." In response, the Panel noted past WTO precedent, which establishes that "trade-restrictive' aspects of the measure mean the aspects of the measure that 'have[e] a limiting effect on trade,' or that constitute 'limiting condition[s]' on trade." Here, the Panel found that in light of the broad scope of the term, the EU Seal Regime, when "considered in its entirety," is trade restrictive "because it does 'have[e] a limiting effect on trade' by prohibiting certain seal products, including those imported from Canada and Norway, from accessing the EU market," and it noted that the EU itself "acknowledges that the measure 'aims at being very trade-restrictive.'" In this regard, it disagreed with the EU argument that the exceptions under the Regime do not need to be "justified" under Article 2.2 because they are not trade restrictive, and it explained, instead, that the trade-restrictiveness of the measure should be based on an examination of the Regime as a whole. (Paras. 7.425-427)

Degree of fulfilment of the objective

Next, the Panel considered the extent to which the measure fulfils the objective of addressing the EU public moral concerns on seal welfare. It recalled Appellate Body precedent that this question is "concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective," something that is "revealed through the measure itself and 'may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.'" Recalling that it was the EU Seal Regime as a whole that was found to constitute a technical regulation, the Panel said that it is therefore the EU Seal Regime in its entirety that must be assessed for its contribution to the objective, and not just a particular element of it. In this regard, the Panel said that it would first assess the degree of the measure's actual contribution to the two aspects of the measure's objective as discussed above, and it would then make an overall assessment of the measure's contribution to the objective as a whole. (Paras. 7.428, 7.441-443)

As to the first aspect of the objective (i.e., the EU public's participation as consumers and exposure to products derived from inhumanely killed seals), the EU argued that "the ban ensures that the
EU population does not render itself accomplice to the inhumane killing of seals in the commercial hunts and is not confronted with the products resulting from such immoral killing." Overall, the Panel concluded that, based on its design and expected operation, the ban under the EU Seal Regime "is capable of making a contribution to preventing the EU public from being exposed on the EU market to products that may have been derived from seals killed inhumanely in Canadian or Norwegian hunts." However, it noted, "the IC and MRM exceptions … diminish the degree of the actual contribution made by the ban, as consumers are exposed to seal products that are allowed on the EU market …, which may have been derived from seals killed inhumanely in IC or MRM hunts." (Paras. 7.444-448)

As to the second aspect (i.e., the number of seals killed inhumanely), the EU argued that the ban "makes material, but partial, contribution to addressing the animal welfare aspect of the concerns by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way." Reviewing the evidence, the Panel found that "while the measure prohibits certain seal products on the EU market based on their link to the potential incidence of inhumane killing of seals, the measure allows commercial activities within the European Union, which is directly connected to the processing of the same products." This "incoherency in the measure," it said, "further reduces the contribution of the measure to the reduction of the global demand for seal products derived from inhumane killing." In short, based on its design, structure, and expected operation, the Panel found that the ban "makes a contribution to reducing the demand for seal products within the European Union and, to a certain extent, to reducing global demand." Further, "based on the data showing the application of the ban," the Panel "observed a downward trend in seal products trade, which also suggests that the measure may have contributed to reducing the demand within the European Union." The "degree of the contribution made by the ban, however, appears to be diminished by the products imported under the IC and MRM exceptions." The Panel also found that "allowing commercial activities relating to the processing of the seal products that are otherwise prohibited under the ban further undermines the objective of the measure." (Paras. 7.449-459)

The Panel concluded that "the EU Seal Regime is capable of making and does make some contribution to its stated objective of addressing the public moral concerns." (Para. 7.460)

**Whether any less trade-restrictive alternative exists, taking into account risks of non-fulfilment**

The Panel continued its examination "by assessing whether any less trade-restrictive alternative measures exist that can make an equivalent or greater contribution to the objective of the EU Seal Regime, taking into account the risks non-fulfilment of the objective would create." In this regard, the EU asserted that "the 'risk of non-fulfilment of the objective of protecting public morals is that the EU public would experience the same moral feelings that prompted the adoption of the EU Seal Regime.'" (Paras. 7.461-462)

At the outset, the Panel recalled Appellate Body precedent that the "risks non-fulfilment would create" component "requires an ascertainment of 'the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.'" In this regard, it pointed out that the risks of non-fulfilment in this dispute are linked to the two aspects of the objective behind the EU measure, such that failure to achieve the two aspects would expose the EU public to their existing moral concerns on seal welfare and to the products derived from seals that may have been killed inhumanely. Here, recalling its findings above that the degree of the contribution of the measure to its identified objective is diminished by the scope of the exceptions, the Panel did "not consider that the level of protection actually achieved by the measure is as high as the European Union claims the measure initially aimed to achieve." The Panel said it would "bear this in mind in taking into account the risks non-fulfilment would create" in its subsequent analysis of the reasonable availability of a less trade-restrictive alternative measure. (Paras. 7.464-466)
Citing Appellate Body precedent, the Panel said that it would begin its analysis of this issue "by identifying the alternative measure advanced by the complainants and its trade-restrictiveness, assessing the degree of contribution by the alternative measure to the relevant objective, and then examining whether the alternative measure is reasonably available taking account of the risks non-fulfilment would create." Here, it noted that both Canada and Norway "propose an alternative measure whereby market access for seal products would be conditioned on compliance with animal welfare standards combined with certification and labelling requirements." The proposed alternative "consists of three related components: (1) the establishment of animal welfare requirements in the hunting of seals; (2) certification of conformity with the animal welfare requirements; and (3) labelling seal products to show the certified compliance with the animal welfare requirements." (Paras. 7.467-468)

First, the Panel examined the trade-restrictiveness of the alternative measure. In this regard, the Panel found that, in view of the "potentially large quantities of seal products derived from non-IC or MRM hunts, … their potential allowance under the proposed alternative measure makes such proposed measure less trade restrictive." (Para. 7.472)

Next, the Panel examined the degree of contribution of the alternative measure to the objective of the EU Seal Regime. It recalled that the EU Seal Regime "is capable of making and does actually make a contribution to the achievement of its stated objective of addressing the public moral concerns." That is, "through its prohibitive aspect, [it] prevents to a certain extent the EU public form being exposed to and participating as consumers in commercial activities related to the products derived from seals that may have been killed inhumanely," and it "also appears to have the effect of negatively impacting the global demand for seal products." Thus, the question for the alternative measure is "whether it would make an equivalent or greater contribution to that actually achieved by the EU Seal Regime in the two respects described above." Here, the Panel considered that "the degree of contribution achieved by the alternative measure to preventing participation of the EU public as consumers in the inhumane killing of seals depends on the reasonable availability of satisfying adequate animal welfare standards in seal hunts as well as the capability of accurately distinguishing the resulting products for placement on the EU market." As to the reduction of global demand for seal products and number of seals killed, the Panel considered that "the alternative measure would potentially afford market access to seal products from commercial hunts that are currently prohibited under the EU Seal Regime." On balance, it found that "the alternative measure may have the capacity of restoring the potential market in the European Union for seal products with the consequence of subjecting a greater number of seals to the risks of poor animal welfare." While this may be "contrary" to the EU's objective of reducing global demand for seal products and consequently reducing the number of inhumanely killed seals, the imposition of animal welfare requirements may also promote humane killing practices in seal hunts that could reduce the number of inhumanely killed seals to some extent. The "impacts" of the alternative measure, however, are "closely related to the type of animal welfare requirements to be imposed, the feasibility of enforcement of such requirements, and the attendant risks of inhuman killing in seal hunts." In light of this "inextricable link between the contribution of the alternative measure to the objective and the feasibility of its implementation," the Panel said that it would next address the parties' contentions regarding the "reasonable availability of the various components of the alternative measure." (Paras. 7.478-485)

Finally, as to the "reasonable availability" of the alternative measure, the Panel recalled the Appellate Body's statement in paragraph 156 of Brazil - Tyres that "[a]n alternative measure may be found not to be 'reasonably available' … where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on the Member, such as prohibitive costs or substantial technical difficulties." Here, the Panel said that the question of "reasonable availability presents a key factual disagreement between the parties as to the feasibility of measures that can be taken under the conditions in which seal hunting occurs to fulfil the
relevant policy objective." The Panel said it would address the parties' contentions regarding: "(1) the prescription of animal welfare criteria; (2) the application, monitoring, and enforcement of animal welfare criteria; and (3) certification and labelling of compliance with animal welfare criteria." (Para. 7.493)

After reviewing the evidence, the Panel found that "the alternative measure as proposed by the complainants appears to span a range of possible regimes of varying stringency and leniency with respect to animal welfare requirements and accuracy of certification." The more stringent regimes, it said, pose the type of "prohibitive costs or substantial technical difficulties" that can diminish an alternative's reasonable availability. And, on the other hand, the more lenient regimes "would call into question the degree to which the alternative measure can contribute to the welfare of seals," and it might give rise to an increase in the number of seals hunted, thereby possibly undermining the objective of reducing the overall number of seals killed inhumanely. In this regard, it recalled Appellate Body guidance from paragraph 174 of EC - Asbestos that "a responding Member cannot be reasonably expected to employ an alternative measure that involves a continuation of the very risk that the challenged measure seeks to halt." Moreover, the Panel stated that "the complainants' position rests on the premise that the alternative measure could calibrate the conditions of market access to the circumstances and risks existing in seal hunts." Here, the Panel considered that "[t]he complainants have not specified the substance of the exact regime (including the standard of animal welfare and method of certification) that would comprise their suggested alternative measure." Moreover, the alternative measure "would not be able to address the EU public's moral concerns with respect to their wish to not participate as consumers in products derived from seal hunts in general, and the reopening of the EU market could stimulate global demand so as to incentivize the killing of more seals." Thus, "[a]lthough the contribution of the EU Seal Regime to the fulfilment of its objective is lowered by the implicit and explicit exceptions of the measure, the complainants have not clearly defined an alternative measure in respect of its separate components and their cumulative capability to address the moral concerns of the EU public." (Paras. 7.494-503)

On this basis, the Panel concluded that "although the proposed alternative measure can be considered less restrictive of trade, the alternative measure is not reasonably available, taking account of the risks non-fulfilment would create." (Para. 7.504)

**Conclusion**

**On this basis, the Panel concluded that the EU Seal Regime is not more trade restrictive than necessary, within the meaning of TBT Agreement Article 2.2.** (Para. 7.505) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)

**TBT Agreement Annex 1.3 - "Conformity Assessment Procedure"**

The complainants raised claims under TBT Agreement Article 5, governing Procedures for Assessment of Conformity by Central Government Bodies. Before addressing these claims, the Panel considered whether the EU Seal Regime is a "conformity assessment procedure" ("CAP") within the meaning of TBT Agreement Annex 1. Annex 1.3 defines "conformity assessment procedures" as follows:

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

The explanatory note to the provision then provides:

Conformity assessment procedures include, inter alia, procedures for sampling, testing, and inspection; evaluation, verification and assurance
of conformity; registration, accreditation and approval as well as their combinations.

Canada asserted that "given that the Basic Regulation constitutes a technical regulation, the process of evaluating whether seal products satisfy the conditions specified in the Regulation, particularly Articles 3, 5 and 6 of the Implementing Regulation, amounts to a conformity assessment procedure." The EU responded that because the EU Seal Regime is not a technical regulation, the procedural provisions under the Implementing Regulation do not concern compliance with a technical regulation, such that they do not constitute "conformity assessment procedures." (Paras. 7.506-509)

The Panel recalled its finding above that the EU Seal Regime as a whole is a "technical regulation." In addition, it observed that Implementing Regulation Articles 3, 5, and 6 "establish the procedure for determining whether the specific requirements under the EU Seal Regime are fulfilled." On this basis, the Panel concluded that "these provisions under the EU Seal Regime constitute a CAP within the meaning of the TBT Agreement." (Para. 7.510) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)

**TBT Agreement Article 5.1.2 - Unnecessary Obstacle to Trade / More Strict Than Necessary**

TBT Agreement Article 5, titled "Procedures for Assessment of Conformity by Central Government Bodies," states, in relevant part:

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

...  

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking into account of the risks non-conformity would create.

The Panel considered that the text and structure of Article 5.1.2 indicate that it consists of general obligations set out in the first sentence, and then an example of the general obligations set out in the second sentence. In particular, "the general obligations under the first sentence are not to prepare, adopt, or apply conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade." The Panel said it would examine the complainants' claim, analyzing first contentions made based on the first sentence and, second, those arguments that have relevance under the second sentence. (Paras. 7.511-514)

*First sentence - whether the CAP creates an unnecessary obstacle to trade by failing to ensure the existence of a body to perform the CAP*

Canada submitted that "the failure by the European Union to ensure that a competent body exists to assess conformity with conditions that determine market access for qualifying seal products amounts to a violation of Article 5.1.2." In the absence of such a body, it asserted, "the CAP cannot function, thus
preventing any trade in seal products satisfying the relevant conditions," and it argued that "[c]onditioning market access on the uncertain prospect that a third party entity will apply for, and be recognized by the European Union, as a body authorized to ascertain conformity, and issue a certificate to that effect, creates precisely the kind of uncertainty that the trade rules are meant to reduce." (Para. 7.515) Similarly, Norway argued that "the Commission has prepared and adopted a CAP that lacks an essential element needed to enable trade to occur.” (Para. 7.516)

To assess the complainants' claim under the first sentence, the Panel said it "must examine the following points of contention between the parties": (1) "whether Article 5.1.2 permits a CAP that requires third-party accreditation and conformity assessment without creating or designating a default body independent of third-party approval"; and (2) "whether a CAP must be capable of allowing trade in conforming products to occur from the date of entry into force of a given measure." (Para. 7.521) As to the first question, the Panel noted that "the text [of Article 5.1.2] provides no direct prescription as to the permissibility of third-party accreditation, nor does it indicate whether such accreditation would require creation or designation of a default and/or back-up body." In addition, the Panel considered that context provided in other TBT Agreement provisions supports the view that "there is some flexibility as to permissible CAP regimes, particularly with respect to the possibility of third-party accreditation.” Thus, the Panel found that Article 5.1.2 "permits a system of third-party accreditation as part of a CAP,” such that it rejected the complainants' arguments that the third-party accreditation system under the EU Seal Regime violates Article 5.1.2 or that this provision creates an obligation on the part of a responding Member to create or designate a default body pending accreditation or recognition of third-party entities to perform a CAP. (Paras. 7.521-524)

The Panel described the second question as follows: "whether failure to have in place a mechanism through which trade in regulated products can occur from the date of entry into force of a CAP results in a violation of the obligation under Article 5.1.2." Here, it noted, the Implementing Regulation entered into force on 20 August 2010, the same day as the entry into force of the Basic Regulation imposing the IC and MRM exceptions. The requirements of the CAP stipulated in the Implementing Regulation were published in the EU Official Journal on 17 August 2010, three days prior to their entry into force. Recognizing that a system of third-party accreditation "logically requires some time in processing the applications from their review and until ultimate approval," and given that the CAP requirements were published only three days before their application, the Panel considered that "the earliest opportunity for potential applicants to initiate this process would have been just shortly before the day of entry into force." In addition, "based on the numerous requirements in Article 6 of the Implementing Regulation, it would not have been reasonable to expect that the CAP could be completed prior to the Regime's entry into force." On this basis, the Panel found that "as of the effective date of the EU Seal Regime, it was not possible for seal products to be examined or processed pursuant to the necessary CAP." While third-party bodies could apply to become a recognized body upon its entry into force, the CAP imposed the additional time necessary to examine and approve such a body, such that "trade in qualifying seal products was practically not possible for some period of time following the entry into force of the EU Seal Regime." (Paras. 7.525-527)

On this basis, the Panel concluded that the CAP had the effect of creating unnecessary obstacles to international trade, in violation of the first sentence of Article 5.1.2. (Para. 7.528) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)
Second sentence - whether the CAP creates an unnecessary obstacle because it is "more strict or ... applied more strictly than necessary"

The Panel then examined whether the CAP creates an unnecessary obstacle to trade because it is "more strict or ... applied more strictly than is necessary to give the importing Member adequate confidence" of conformity. Norway proposed that the EU could have adopted a less-trade restrictive alternative by designating a recognized body that would be competent, at all times (or at least in the absence of third-party recognized bodies), to assess and certify conformity. Canada asserted that "evaluation of the CAP would include consideration of reasonably available, less trade-restrictive alternative measures, 'such as supplier declaration of conformity, rather than a third party conformity assessment (3PCA) procedure.'" (Paras. 7.530-533)

The Panel considered that given the similarities between the text and structure of Article 5.1.2, second sentence and TBT Agreement Article 2.2, second sentence, this provision "calls for a relational analysis similar to that applied in Article 2.2, namely a weighing and balancing of a measure's trade- restrictiveness, degree of its contribution to an objective, and possible less trade-restrictive alternative measures." In the context of Article 5.1.2, however, "the analysis relates to the fulfilment of only one objective: giving positive assurance that the relevant requirements of the technical regulation are fulfilled." (Para. 7.539)

The Panel then examined the relevant factors. With respect to trade-restrictiveness, it stated that "it is undisputed that the CAP necessarily has some restrictive effect to the extent that it imposes additional conditions in order for the trade in seal products to be permitted," namely the obligation to obtain attesting documentation from a recognized body. As to the contribution of the CAP to the assurance of conformity, the Panel recalled that, in respect of seal products allowed on the EU market, for seal products potentially qualifying under these exceptions, "the CAP covers the assessment of products from activities that are conducted in locations outside and remote from the European Union." Moreover, in light of the "inherent nature of third-party accreditation," the Panel considered that "the degree of contribution to assurance of conformity is to be judged with regard for the capability and credibility of an authorized body in providing positive assurance of conformity with the substantive requirements of the EU Seal Regime." Here, noting that the primary function of recognized bodies under the CAP "pertains to inspection and certification of conformity with IC and MRM requirements," the Panel found that "the EU Seal Regime CAP contributes to the assurance of conformity with the relevant requirements of the EU Seal Regime through its provision for the capacity and impartiality of applicant entities." (Paras. 7.540-543)

With respect to the "reasonable availability of less-trade restrictive alternative measures," the Panel explained that "[t]he comparison of a possible alternative CAP under Article 5.1.2 should examine whether the alternative CAP is less trade restrictive than the CAP in question and would provide an equivalent assurance of conformity." Here, it recalled, Canada proposed a supplier declaration of conformity and Norway proposed the designation of a recognized body in the absence of third-party recognized bodies. (Para. 7.544) As to Canada's alternative, the Panel considered that Canada failed to provide specific arguments as to how such an alternative would provide an equivalent assurance of conformity as the current CAP and it never indicated whether such suppliers would be subject to some form of approval. As to Norway's alternative, the Panel considered that its proposal does not differ fundamentally from the EU Seal Regime CAP, but would rather supplement it with a designated entity. In response to the EU argument that an entity based in the EU would have to manage added difficulties of assessing conformity of products that are potentially derived from hunts occurring at considerable distances outside the EU, the Panel considered that "this may have implications for the level of contribution to fulfilment of the relevant objective by Norway's alternative CAP," and it noted that it had not been provided any evidence or arguments in this regard. (Paras. 7.544-546)
On this basis, the Panel concluded that Canada and Norway failed to establish that an alternative CAP would make a contribution to confidence of conformity at the same level as the current CAP. It therefore rejected the complainants' claim that the EU Seal Regime CAP is more strict or applied more strictly than is necessary to give adequate confidence of conformity with the applicable technical regulations within the meaning of the second sentence of Article 5.1.2. (Para. 7.547) (On appeal, the Appellate Body declared this finding moot and of no legal effect. See DSC for EC - Seal Products (AB).)

**TBT Agreement Article 5.2.1 - "Undertaken and Completed as Expeditiously as Possible"**

TBT Agreement Article 5.2.1 provides:

5.2 When implementing the provisions of paragraph [5.1], Members shall ensure that:

5.2.1 conformity assessment procedures are undertaken and completed *as expeditiously as possible* and in a no less favourable order for products originating in the territories of other Members than for like domestic products; (emphasis added by Panel)

The complainants raised a challenge as to "whether the EU Seal Regime CAP [(conformity assessment procedure)] is 'undertaken and completed as expeditiously as possible' within the meaning of the first clause of Article 5.2.1." (Paras. 7.555-556)

At the outset, the Panel said that it would "examine the meaning of the phrase 'undertaken and completed as expeditiously as possible.'" In this regard, the Panel noted the parties' disagreement as to the point in time when the obligation to "undertake and complete" a CAP is triggered, namely whether it predates the receipt of an application for recognition under the CAP. (Paras. 7.557-558)

In response, the Panel observed that Article 5.1.2 covers "the entire process in which a CAP is prepared, adopted or applied," while Article 5.2.1 "applies only to the implementation stage of the process." It also noted that the SPS Agreement contains a similar obligation in Annex C(1)(a), which requires Members to "ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that … such procedures are undertaken and completed *without undue delay.*" (Emphasis added by Panel) Given the textual similarities, the Panel agreed with the parties that there are "certain parallels in the terms and scope" of the two provisions. Based on the text of Article 5.2.1 and the panel report in EC - Biotech Products interpreting SPS Agreement Annex C(1)(a) (as well as references to the French and Spanish versions of Annex C(1)(a), first clause), the Panel considered that "undertaken and completed" applies to the implementation of a CAP from the moment when an application for recognition has been received and through the completion of the process." The Panel said that its understanding of the temporal scope of this obligation is unaltered by the fact that "the application is for accreditation to perform conformity assessment, rather than a direct application for certification of conformity." (Paras. 7.559-563) Similarly, examining the meaning of "expeditiously" along with the Biotech panel's interpretation of "without undue delay," the Panel considered that "Article 5.2.1 permits the time that is reasonably required to assess conformity with technical requirements." (Paras. 7.564-566)

Turning to the question of whether the Seal Regime CAP in question has been undertaken "as expeditiously as possible," the Panel noted that the parties' arguments "mainly concern the issue of the justifiability and attribution of delay caused under the CAP." First, they criticized the design of the CAP as creating an absence of any body competent to "undertake and complete" the required CAP. In
response, the Panel recalled its finding above that Article 5.1.2 does not impose an obligation to create or designate a default body pending accreditation or recognition of third-party entities to perform a CAP. As a result, the Panel was not persuaded that similar circumstances would lead to a violation of Article 5.2.1. (Paras. 7.567-568)

Next, the Panel said that it would assess the evidence relating to the application of the CAP with respect to those applications that were submitted to the Commission. Examining the timetables that transpired, the Panel found it "clear that there were some delays of varying length in the exchanges between the Commission and the respective applicant bodies in Sweden and Greenland." With respect to the Greenlandic application, the Panel considered that the evidence submitted did not enable it to make a precise assessment of the cause or attribution of the overall length of the proceedings and nor did the complainants provide a sufficient basis for the Panel to conclude that the procedures under the CAP were not undertaken and completed as expeditiously as possible under Article 5.2.1. With respect to the Swedish application, the Panel observed a delay greater than one year from receipt of the applicants' responses to the Commission's deficiency letter until final approval. According to the Panel, "[t]he amount of time taken in this specific instance, without sufficient justification, would not therefore seem 'expeditious' within the meaning of Article 5.2.1." (Paras. 7.569-577)

As to the length of time taken to approve a recognized body under the CAP, the Panel noted that the complainants referred simply to the lapse of time from the effective date of the EU Seal Regime until the approval of applications from Greenland and Sweden, without otherwise explaining how specifically the CAP was not as expeditious as possible. Recalling its finding above that the Article 5.2.1 obligations apply upon receipt of an application, the Panel did not consider the complainants' use of the effective date of the EU Seal Regime to be the correct benchmark. In addition, the Panel opined that a violation of Article 5.2.1 "must be examined in light of the specific circumstances relating to a given CAP," including the specific time taken for each procedural step. However, here, the complainants failed to provide this type of specific argument. (Paras. 7.578-579)

On this basis, despite its concern about the time taken with respect to the Swedish applications, the Panel found that it had not been provided a sufficient basis to conclude that the CAP was not undertaken and completed as expeditiously as possible within the meaning of TBT Agreement Article 5.2.1. (Para. 7.580) (On appeal, the Appellate Body declared this conclusion moot and of no legal effect. See DSC for EC - Seal Products (AB).)

GATT Articles I:1, III:4 and XX - Non-Discrimination and Exceptions (Including "Public Morals")

Relationship between TBT Agreement and the GATT

Before turning to the complainants' non-discrimination claims under the GATT, given that it had already addressed Canada's non-discrimination claim under TBT Agreement Article 2.1, the Panel found it "useful to review the relationship between, and the legal standards under, the GATT 1994 and the TBT Agreement." First, it noted Appellate Body guidance provided in recent disputes under the TBT Agreement, namely that "the TBT Agreement expands on the pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner." In particular, the Panel considered that the Appellate Body clarified the legal standards for the non-discrimination provisions, such that, under the GATT, the "'treatment no less favourable' standard prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products," whereas under the TBT Agreement, the same standard "does not prohibit detrimental impact on imports that stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products." The Panel considered that the "additional element (i.e. legitimate regulatory
distinction)" that the Appellate Body considered as necessary under Article 2.1 "reflects the Appellate Body's earlier observation regarding the absence in the TBT Agreement of a general exceptions clause equivalent to Article XX in the GATT." Thus, the Panel did not consider that the Article 2.1 legal standard "equally applies" to claims under GATT Articles I:1 and III:4, as argued by the European Union. (Paras. 7.581-586) (On appeal, the Appellate Body upheld this interpretation. See DSC for EC - Seal Products (AB).)

With this in mind, the Panel said it would examine whether certain aspects of the EU Seal Regime modify the conditions of competition for Canadian and Norwegian imports of seal products on the EU market vis-à-vis Greenlandic and EU domestic seal products under Articles I:1 and III:4 respectively. If it were to find in the affirmative, the Panel said it would then examine whether the EU has demonstrated why such aspects of the EU Seal Regime are nevertheless justified under GATT Article XX. (Para. 7.587)

GATT Article I:1

Canada and Norway both argued that the EU Seal Regime violates GATT Article I:1 because, through the Inuit or indigenous communities ("IC") exception, it "grants a market access advantage to certain seal products from Greenland without extending such advantage 'immediately and unconditionally' to 'like' seal products from Canada and Norway." (Paras. 7.588-589) Norway also argued that "the conditions of the IC exception discriminate on grounds of origin by establishing explicit links between importation and the territory of production." (Para. 7.590)

GATT Article I:1 provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

The Panel explained that "three elements must be satisfied in order to demonstrate an inconsistency": "(i) there must be an 'advantage, favour, privilege or immunity' of the type covered by Article I:1; (ii) the advantage is not granted 'immediately and unconditionally'; (iii) to like products originating in or destined for all other WTO Members." (Paras. 7.592-593)

At the outset, the Panel recalled its finding under TBT Agreement Article 2.1 above that Canadian seal products are "like" seal products of other origin (Greenland), irrespective of whether they conform or not to the requirements under the EU Seal Regime, and it noted that the parties did not dispute this issue. It also considered that the term "advantage" is "broad," applying to all matters referred to in Articles III:2 and III:4, namely all "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use [of a product]." Here, it said, "[t]he EU Seal regime is undoubtedly a 'law or regulation' under Article III:4, such that it also falls within the scope of Article I:1. Moreover, the "advantage granted" is in the form of market access, such that the EU Seal Regime "affects the placing on the market of seal products and therefore the 'internal sale,' 'offering for sale,' 'distribution' and 'purchase' of seal products." As to "immediately and unconditionally," the Panel
considered the evidence to show that this "has not been the case because the vast majority of seal products from Canada and Norway do not meet the IC requirements for placing on the market under the EU Seal Regime." By contrast, "virtually all of Greenlandic seal products are likely to qualify under the IC exception for placing on the market." Thus, "in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affects the conditions of competition on the market of Canadian and Norwegian origin as compared to seal products of Greenlandic origin." (Paras. 7.594-597)

With this finding in mind, the Panel then addressed Norway's argument that the IC requirements give rise to "origin-based discrimination," in that to qualify under the IC exception, "seal products must originate in one of a limited number of countries inhabited by an indigenous community that meets the specific terms of the conditions." The Panel found it unclear whether Norway's arguments in this regard indicate that it is pursuing a de jure claim with respect to the IC exception, and it found that, in any event, Norway never fully developed such a claim as a separate and additional claim from its de facto claim considered above. Thus, to the extent that it already found a de facto violation, the Panel found it unnecessary to make a finding on a de jure claim. The Panel then noted that several countries have Inuit or indigenous communities living in their territory and that IC requirements "permit the placing on the market based on conditions relating to the characteristics of seal hunts as opposed to a 'closed list' of countries." In light of these considerations, the Panel did "not believe that the EU Seal Regime gives rise to discrimination based on origin per se." (Paras. 7.598-599)

Based on its findings above under Article 2.1, the Panel concluded that "the measure at issue does not 'immediately and unconditionally' extend the same market access advantage on the EU market to the complainants' imports as they do to seal products originating from Greenland" and thus is inconsistent with GATT Article I:1. (Para. 7.600) (On appeal, the Appellate Body upheld this conclusion. See DSC for EC - Seal Products (AB).)

**GATT Article III:4**

Canada and Norway argued that the EU Seal Regime violates GATT Article III:4 because "through the requirements of the MRM exception, the Regime accords to imported seal products from Norway (and Canada) a treatment that is less favourable to that accorded to like domestic seal products." (Para. 7.602) Article III:4 provides that:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The Panel explained that there are three elements that must be examined to assess a measure's consistency with Article III:4: "(i) whether the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase or use of goods; (ii) whether the products at issue are like; and (iii) whether imported products are accorded less favourable treatment than that accorded to like domestic products." (Paras. 7.602-605)

The Panel examined the three elements in turn. As to the first element, the Panel stated, "the EU Seal Regime is undoubtedly a 'law' or 'regulation' affecting the internal sale, offering for sale, purchase, distribution and use of seal products within the meaning of Article III:4." In respect of the second element, the Panel recalled its finding in the context of TBT Agreement Article 2.1 that seal products are "like" irrespective of whether they conform or not to the requirements under the EU Seal Regime, and also that the parties did not dispute that conforming and non-conforming seal products are "like." Finally,
with respect to the third element, the Panel found that, based on the evidence, "it appears that the vast majority of seal products from Canada and Norway are excluded from the EU market by the terms of the MRM exception," and, by contrast, "evidence shows that virtually all domestic seal products are likely to qualify for placing on the market." (Paras. 7.606-608)

**On this basis, the Panel concluded that "the measure at issue grants Canadian and Norwegian seal products a treatment less favourable than that accorded to EU seal products" in violation of GATT Article III:4.** (Para. 7.609)

**EU Justification of the Seal Regime under GATT Article XX**

GATT Article XX provides, in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

...

The EU asserted that the IC and MRM exceptions are "based on 'regulatory differences' that are 'necessary' to achieve the objectives invoked by the EU under Article XX(a) and XX(b)." The Panel said that it would "examine whether the European Union has established its case under Article XX by demonstrating two elements": (1) that the measure "falls within the scope of, and meets the requirements under paragraph (a) and/or paragraph (b)"; and (2) that the measure "satisfies the requirements of the chapeau of Article XX." (Paras. 7.610-612)

The Panel began its analysis "by examining the specific aspects of the measure that must be considered in our analysis of Article XX." Based on their submissions, the Panel considered that the parties were in agreement that "it is the aspect of the measure that infringes the GATT that must then be justified under Article XX." However, it pointed out that this "does not mean that a panel can consider only that aspect of the measure to determine the measure's justifiability under Article XX." That is, "the question concerning the specific aspects of a measure that must be considered for a claim under Article XX should be dealt with in light of the specific circumstances of a given dispute," including "the nature and characteristics of a measure at issue, the manner in which the complainants present their claims with respect to the measure, and the relationship between the GATT 1994 and other WTO covered agreements that were also examined with respect to the measure concerned." (Paras. 7.618-619)

Here, regarding the nature and characteristics of the measure at issue, the Panel considered that the two components (i.e. a ban and exceptions) "are closely connected to each other." Similar to the measure in *U.S. - Gasoline*, the Panel considered that, here, "the IC and MRM exceptions have a 'substantial' relationship with the ban given that the exceptions cannot exist without the ban and that the exceptions inform the scope of the ban." It also recalled that the EU Seal Regime in its entirety was found to constitute a technical regulation under Annex 1.1. On this basis, the Panel considered that "although it is the aspects of the EU Seal Regime infringing the GATT 1994 (i.e. the IC and MRM
exceptions) that must be justified under Article XX, [the Panel's] analysis under paragraphs (a) and (b) should first focus on the EU Seal Regime as a whole; it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban." (On appeal, the Appellate Body upheld this finding. See DSC for EC - Seal Products (AB).) The Panel said it would "then examine whether the EU Seal Regime, in particular the distinctions drawn in the form of the IC and MRM exceptions, are applied in a manner consistent with the requirements under the chapeau of Article XX." (Paras. 7.620-624)

**GATT Article XX(a)**

Turning first to GATT Article XX(a), the Panel stated that the "necessity" of a measure under this provision "is determined through 'a process of weighing and balancing' of 'all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake.'" The more "vital or important the values or interests furthered by a measure are, the easier it will be to accept that measure as necessary." Quoting paragraph 156 of the Appellate Body report in Brazil - Tyres, the Panel recognized that "if this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued." With this guidance in mind, the Panel began by considering whether the EU policy objective "falls within the range of policies designed to protect public morals as prescribed in Article XX(a)." In this regard, it recalled its finding above that the EU "seeks to address the public moral concerns on seal welfare through the EU Seal Regime" and that it relied on guidance from panel reports concerning GATT Article XX(a) and GATS Article XIV(a) in reaching this conclusion. The Panel said that in light of these considerations, it found that "the policy objective pursued by the European Union ('addressing the EU public moral concerns on seal welfare') falls within the scope of Article XX(a) ('to protect public morals')." (Paras. 7.630-631) (On appeal, the Appellate Body upheld this finding. See DSC for EC - Seal Products (AB).)

Turning to the measure, the Panel considered, and the parties did not dispute, that the protection of public moral concerns regarding the protection of animals "is indeed an important value or interest." As to the contribution of the measure to meeting this objective, given the close relationship between the GATT and TBT Agreement "and the need to interpret relevant provisions under both Agreements in a consistent and harmonious manner," the Panel considered that an analysis of the measure's contribution to an objective under TBT Agreement Article 2.2 is also relevant to such analysis under GATT Article XX. Thus, the Panel said it would refer back to its analysis under Article 2.2 above. In addition, based on Appellate Body precedent, the Panel noted that "the trade-restrictiveness of a measure is closely linked to the extent of the measure's contribution to the objective." Thus, in the circumstances of this dispute, the Panel considered that, for a preliminary finding that the measure is "necessary," "the contribution made by the 'ban' to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness." (Paras. 7.632-636) (On appeal, the Appellate Body rejected the argument that the Panel was required to apply a "material" contribution standard; said that Panel erred to the extent it did so. See DSC for EC - Seal Products (AB).)

Here, the Panel recalled its earlier finding that, while the degree of contribution made by the measure is diminished by both the explicit and implicit exceptions under the measure, overall, it contributes "to a certain extent to its objective of addressing the EU public moral concerns on seal welfare." On this basis, the Panel found that "the EU Seal Regime can be provisionally deemed 'necessary' within the meaning of Article XX(a)," unless it is demonstrated that the EU could have adopted a GATT-consistent or less trade-restrictive measure as an alternative. The Panel then recalled its finding above that under Article 2.2 the alternative measure proposed by the complainants was not reasonably available to the EU given inter alia the animal welfare risks and challenges found to exist in
seal hunting in general. Thus, the Panel concluded that "the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a)." (Paras. 7.637-639) (On appeal, the Appellate Body upheld this finding. See DSC for EC - Seal Products (AB).)

**GATT Article XX(b)**

The Panel took note of the EU argument that the EU Seal Regime also falls within the scope of Article XX(b) because it contributes to protecting the health of seals (in particular, by reducing the number of seals that are killed). However, the Panel found that the EU "never submitted in this dispute that the protection of seal welfare as such was the objective of the EU Seal Regime." In these circumstances and given the limited extent of the EU arguments in this regard, the Panel considered that the EU failed to establish a *prima facie* case for its claim under Article XX(b). (Para. 7.640)

**Chapeau of GATT Article XX**

The EU argued that "the EU Seal Regime is not applied in a manner that constitutes 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' because it applies indistinctly irrespective of the country of origin of the products." (Para. 7.641)

At the outset, the Panel noted Appellate Body precedent explaining that the focus of the chapeau is on the application of a measure already found inconsistent with an obligation of the GATT but falling within one of the paragraphs of Article XX. In addition, the Panel said it was mindful of Appellate Body guidance that "the fundamental theme -- when interpreting the chapeau -- is to be found in the purpose of the object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX." Thus, the Panel said the focus of its analysis would be "whether the EU Seal Regime, in particular the distinctions drawn in the form of the IC and MRM exceptions, are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination." (Paras. 7.645-646)

As to the existence of "discrimination," citing paragraph 7.229 of the panel report in Brazil - Tyres, the Panel considered that "discrimination alleged to exist in the application of the EU Seal Regime within the meaning of the chapeau results from the discriminatory impact found in the IC and MRM exceptions under Article I:1 and III:4." Accordingly, the Panel examined "whether such discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX and arises between countries where the same conditions prevail." The Panel considered that this question leads it to recall its analysis of the legitimacy, under TBT Agreement Article 2.1, of the regulatory distinctions drawn in the exceptions, along with the Appellate Body's clarification of that legal standard based on its observation regarding the relationship between the TBT Agreement and the GATT and the absence in the TBT Agreement of a general exceptions clause equivalent to Article XX. According to the Panel, "[t]his means ... that our analyses under Article 2.1 of the TBT Agreement regarding the legitimacy of the IC and MRM exceptions are relevant and applicable to the assessment of the exceptions for its consistency with the requirements under the chapeau." (Paras. 7.647-649)

Recalling its findings under Article 2.1, the Panel found that for the same reasons, "due to the lack of even-handedness in the design and application of the IC exception, the IC exception does not meet the requirements under the chapeau of Article XX." In addition, as it found above that the MRM exception is not rationally connected to the objective nor based on any justifiable grounds, similarly, it is also inconsistent with the requirements of the chapeau of Article XX, and it is not designed and applied in an even-handed manner. (Para. 7.650) (On appeal, the Appellate Body reversed this conclusion based on the Panel's application of an "incorrect legal test"; Appellate Body completed the analysis and found that the requirements of the Article XX chapeau are not met. See DSC for EC - Seal Products (AB).)
Conclusion

On this basis, the Panel concluded that the EU has "failed to establish that the discriminatory impact found in the IC and MRM exceptions under the EU Seal Regime is justified under Article XX(a) of the GATT," because they do not meet the requirements of the chapeau. (Paras. 7.651, 8.3) (On appeal, the Appellate Body reversed this conclusion based on the Panel's application of an "incorrect legal test"; Appellate Body completed the analysis and found that the requirements of the Article XX chapeau are not met. See DSC for EC - Seal Products (AB).)

GATT Article XI:1, Agriculture Agreement Article 4.2 - Import Restrictions

GATT Article XI:1

The complainants claimed that the EU Seal Regime is inconsistent with GATT Article XI:1, which requires that WTO Members not institute or maintain any "prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures … on the importation of any product of the territory of any other Member." In particular, the complainants asserted that each of the three exceptions to the ban, considered individually, "imposes quantitative limitations on imported seal products." The Panel understood that the complainants were not claiming that the Regime as a whole has a restrictive impact, but rather, that each exception results in a limiting effect. (Paras. 7.657-658)

At the outset, the Panel recalled its finding above regarding the characterization of the EU Seal Regime, that it is a measure containing both prohibitive and permissive aspects. Here, it is the "implicit prohibitive aspect of the measure, the scope of which is informed by the exceptions, that restricts imported seal products rather than the exceptions considered individually." That is, the restriction is imposed in the form of an implicit ban, based on the Regime as a whole, that results in a restrictive impact on imports. (Paras. 7.660-661)

Here, it noted, "the complainants focused on the discriminatory aspects of the Regime, particularly with respect to the IC and MRM exceptions …, rather than the measure in its entirety." That is, they considered that "each individual exception is an independent source of restrictiveness for imports." However, the Panel disagreed with this view. Thus, the Panel was "not persuaded by the complainants' argument," and it therefore rejected the claims under GATT Article XI:1 with respect to all three exceptions under the EU Seal Regime. (Paras. 7.662-663)

Agriculture Agreement Article 4.2

Norway asserted that the EU Seal Regime violates Agriculture Agreement Article 4.2, because a quantitative restriction on importation for purposes of GATT Article XI:1 would also constitute a "quantitative import restriction" on agricultural products prohibited under Article 4.2. (Para. 7.664)

In light of Norway's reliance on its claim under GATT Article XI:1, and given the Panel's rejection of that claim above, the Panel also rejected Norway's claim under Agriculture Agreement Article 4.2. (Paras. 7.664-665)
COMMENTARY

Discrimination and Necessity in the GATT and the TBT Agreement

Overlapping WTO obligations on discrimination and necessity within and across agreements can make the legal analysis of these provisions challenging. Should a national treatment provision in the GATT be interpreted the same way as a national treatment provision in the TBT Agreement? Should a necessity defense under GATT Article XX look the same as a necessity obligation in the TBT Agreement? In this case, the Panel examined the concepts of discrimination and necessity across a number of GATT and TBT Agreement provisions. In doing so, it offered a useful look at how the different, but related, obligations might be applied. As set out below, some aspects of the Panel's analysis may be called into question, and in the event of an appeal, the Appellate Body may revisit these issues. Until then, though, the Panel's approach offers some perspective on these issues.

Discrimination

With regard to the discrimination issues in this case, there were four provisions at issue. Under the GATT, claims were based on the national treatment obligation of Article III and the MFN obligation of Article I; in addition, the introductory clause (chapeau) of Article XX was a key part of the analysis of the Article XX defense. Under the TBT Agreement, there were claims under the national treatment/MFN obligations that are both found in Article 2.1.

The Panel began its analysis with issues under the TBT Agreement, and it carried over some of that analysis to the GATT provisions. Thus, it makes sense to focus on Article 2.1 at the outset.

Under Article 2.1, the Panel referred to recent Appellate Body case law on this provision, which sets forth a two-part test. In this regard, the Panel first considered whether the EU seal products measure, including both the general ban on seal products and the exceptions for indigenous communities and marine resource management, causes a detrimental impact on competitive opportunities for imported products in relation to domestic products (national treatment), or for some imported products in relation to other imported products (MFN). If a detrimental impact were found, the Panel would look at whether such impact "stems exclusively from a legitimate regulatory distinction" rather than "reflecting discrimination."

With regard to the issue of detrimental impact, the Panel took into account the effect the measure had on Canadian products in two ways. First, on the MFN issues, the Panel compared -- based on products eligible for sale through the indigenous communities exception -- the amount of Canadian products eligible for sale in the EU to the amount of Greenlandic products eligible for sale. And second, for national treatment, it compared -- based on products eligible for sale through the marine resource management exception -- the amount of Canadian products eligible for sale to the amount of Swedish (and other European) products eligible for sale. In addition, the Panel referred to the design, structure, and expected operation of the measure. In this regard, it seemed to go beyond a pure disparate impact analysis, tied to the breakdown of products sold by country, and looked a little further at the structure of the measure. On this basis, it concluded that the EU measure had a detrimental impact on Canadian products. (See paras. 7.149-170)

Next, the Panel examined whether this detrimental impact "stems exclusively from legitimate regulatory distinctions." Here, its focus was on the differences between commercial and non-commercial seal hunting, and in particular whether the distinction between these hunts under the EU measure is "legitimate." In this regard, the measure distinguished between normal commercial hunts, on the one
hand, and hunts by indigenous communities or for marine resource management that were "non-commercial," on the other.

To address this issue, the Panel considered whether the distinctions are connected to the objective of the EU measure, and, if they are not, whether the EU rationale for the distinction is justifiable. Finally, it examined whether the distinction is designed and applied in an even-handed manner.

For the commercial versus non-commercial distinctions as related to indigenous communities, the Panel found that the rationale for the measure was justifiable, but that it was not designed and applied in an even-handed manner. (See paras. 7.290-319) For the distinction related to marine resource management, the Panel found that the measure was not justifiable and also was not designed and applied in an even-handed manner. (See paras. 7.341-353)

In contrast to the detailed analysis of Article 2.1, the Panel's examination of the discrimination issues under the GATT was relatively brief. The simplest treatment of these issues came under Article III:4 and Article I:1. In that context, the Panel set out very brief reasoning that relied exclusively on the disparate impact of measure, that is, its disproportionate impact on Canadian and Norwegian products. For example, under Article III:4, the Panel said:

7.608. With respect to the third element under Article III:4, the national treatment obligation contained therein requires that imported products from Canada and Norway receive a treatment no less favourable than that accorded to domestic seal products. Based on the evidence before the Panel, it appears that the vast majority of seal products from Canada and Norway are excluded from the EU market by the terms of the MRM exception. In contrast, evidence shows that virtually all domestic seal products are likely to qualify for placing on the market.

Thus, due to this disparate impact, the Panel found a violation (and for similar reasons, of Article I:1 as well).

By contrast, when it examined discrimination issues in the context of the GATT Article XX chapeau, the Panel looked first at the disparate impact, but it then went further. In this regard, it recalled its analysis under TBT agreement Article 2.1 related to the even-handedness, design, and application of the measure. On this basis, the Panel found that while the measure fell within Article XX(a) as a "public morals" measure, it did not satisfy the terms of the chapeau.

The terms of all of these discrimination provisions vary, as does their nature as part of an obligation or an exception (and if they are an obligation, whether an exception exists). Article III:4 and Article I:1 are obligations with an exception; the Article XX chapeau is a check on an exception; and Article 2.1 is an obligation without exceptions. As a result, perhaps it is not appropriate to assign them identical interpretations. Nevertheless, the coherence of all of these provisions is important, and the choice of which elements to consider under each affects their substantive scope. The following questions arise from the Panel's findings: Disparate impact played a role under each provision, but should it be enough to find a violation by itself? Is the design and application analysis part of the "detrimental impact" element, or is it exclusively part of the subsequent "legitimate regulatory distinction" element? And is there a need to separate out, in Article 2.1, the issue of whether the rationale for the measure was "justified" from the "even-handedness" issue? All of these questions, and others, are likely to be considered by the Appellate Body in the event of an appeal.

Necessity
Turning to the necessity obligation, various WTO obligations are based on the concept that measures should be "necessary" to meet their objectives. Here, the provisions at issue were the GATT Article XX(a) exception for measures necessary to protect "public morals" (and, to a lesser extent, Article XX(b)); and the TBT Agreement Article 2.2 obligation that measures not be more trade-restrictive than necessary. Article XX(a) is an exception to other GATT obligations; Article 2.2 is an obligation in its own right.

As with the discrimination issues, the Panel began its analysis with the TBT Agreement, and it then referred to parts of this analysis when it later turned to the GATT. In the context of Article 2.2, the Panel referred to past Appellate Body explanations of this provision. In this regard, it first looked at the trade-restrictiveness of the measure. On this issue, the Panel said that the EU seal products measure has a "limiting effect on trade." (See paras. 7.425-427)

It then considered the degree to which the measure fulfills its public morals objectives. It noted that the ban on seal products contributes to the objective (although the exceptions undermine this contribution). The Panel then looked at the design, structure, and operation of the measure, finding that it is "capable of making and does make some contribution" to addressing "public morals" concerns: It prevents EU citizens from being exposed to and participating in commercial activities related to seal products from seals killed inhumanely. (See paras. 7.441-460)

It also examined the risk of non-fulfillment of the objectives of the measure. In this regard, it said that not fulfilling the objective would expose EU citizens to moral concerns on seal welfare. (See paras. 462-466)

Finally, the Panel looked at whether there are less trade-restrictive alternative measures. In particular, it considered a labelling measure that certifies seal products as complying with animal welfare standards. Here, the Panel found that Canada and Norway did not show that this measure clearly was available as an alternative way to achieve these goals. (See paras. 7.467-504)

Therefore, the Panel found, the EU measure is not more trade-restrictive than necessary under 2.2. In other words, there is no violation of this provision.

Later, the Panel revisited all of this in Article XX(a), which was invoked by the EU as a defense to the violations of Article III:4 and Article I:1. Under Article XX(a), the Panel reached similar conclusions as it had under Article 2.2 and found that the measure is "necessary." (Paras. 7.630-639) In this context, the Panel emphasized the "important value or interest" in protecting moral concerns, something which was not mentioned under Article 2.2; it then looked at the contribution to its objective, and at alternative measures. It mentioned trade-restrictiveness, but it did not assess it as a separate element.

As with the discrimination provisions, there are differences in the nature of TBT Agreement Article 2.2 and GATT Article XX(a). Article XX(a) is subject to a general non-discrimination clause; Article 2.2 is not. Article 2.2 is an obligation, whereas article XX(a) is an exception. These differences will affect the interpretation to some extent, but just how they should do so is unclear. The Appellate Body has interpreted Article 2.2, but it has not been able to apply it in past cases, having found that it had insufficient facts to do so. In the event of an appeal in this case, it may have a good opportunity to shape the contours of this provision. In addition, the Appellate Body may apply both provisions in the same case, which will help clarify their relationship.
Necessity of the Measure: A Seal Products Ban and Possible Alternatives

Although the Panel found several violations in this case, news reports and government press releases have portrayed this ruling as a victory for the EU, stating that the "ban" on seal products was "upheld." (See, e.g., Suzanne Goldenberg, "World Trade Organisation upholds EU ban on imported seal products," The Guardian, November 25, 2013; European Commission, "Report of the WTO Panel upholds EU’s ban on seal products," November 25, 2013). Along the same lines, in its press release on the case, Canada has indicated a possible appeal, whereas the EU did not, suggesting that Canada believed it had lost on key issues. (Foreign Affairs, Trade and Development Canada, "Harper Government to Appeal WTO Decision on EU Ban on Seal Products," November 25, 2013).

The explanation for this disconnect is that the violations found by the Panel were all based on the discriminatory nature of the measure, such that they may be correctable without repealing the underlying ban. For example, the EU could simply remove the exceptions that led to the findings of discrimination; or it could tweak the measure so that it applies equally and fairly to Canadian and Norwegian products. Thus, while this report represents a "win" for the complainants, it may not have been the win they were hoping for, i.e., one that would have condemned the seal products ban more generally.

In terms of the ban itself, the claims under TBT Agreement Article 2.2 were most relevant. This was the claim that went beyond simply criticizing the design and application of the exceptions in the measure as discriminatory. In the context of Article 2.2, the complainants offered up an alternative measure that they believed would contribute to the EU public morals goal in a less trade restrictive manner. The alternative measure involved conditioning access to the EU market for seal products on a labelling and certification requirement designed to ensure that animal welfare requirements were met during the hunting of seals. Because this alternative measure was available, the complainants argued, the ban was more trade-restrictive than necessary, in violation of Article 2.2. (See para. 7.468)

The Panel was skeptical that the alternative measure would make an equivalent contribution to the public morals goal put forward by the EU. In this regard, it noted that the humanely killed seals sold in the EU might be part of a hunt that killed other seals inhumely, and it might increase global demand for seal products. (See paras. 7.478-485)

To some extent, the Panel's doubts can be seen as tied to the Canadian/Norwegian arguments in this case, as it emphasized the complainants’ failure to show clearly how such an alternative would be preferable. Thus, the Panel's rejection of the Article 2.2 claim here does not preclude another alternative being suggested at some later time in a future case. It should also be noted that the measure at issue was not a pure seal products ban, but rather a partial ban with exceptions. It is that measure which the Panel found to be consistent with TBT Agreement Article 2.2, not a pure ban. While one could speculate that a pure ban would also be found consistent, it is difficult to say for sure until such a measure is considered. The analysis would be somewhat altered for such a measure, as a pure ban would be more trade restrictive, but may contribute more to the objective, which changes the balance.

Thus, it cannot be said with certainty that all seal product bans will always be consistent with Article 2.2. Nevertheless, this Panel's review of the measure probably provides a good indication of how other adjudicators might see it. Of course, there is still the issue of how the Appellate Body will address these issues (and, as noted, Canada has suggested it will appeal), which may provide a different take on the status of a seal products ban under WTO law.

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