Appellate Body Reports

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

Participants
Appellants/Appellees: Canada, Norway
Other Appellant/Appellee: EU
Third Participants: Argentina, China, Colombia,
Ecuador, Iceland, Japan, Mexico, Namibia (DS401),
Russia, U.S.

Timeline of Dispute
Panel Request (Canada): February 11, 2011
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Key Findings

- Reversed Panel's findings that EU Seal Regime lays down product characteristics; thus, also reversed
  findings that EU Seal Regime constitutes a "technical regulation" under TBT Agreement Annex 1.1;
  Appellate Body was unable to complete the analysis, and declared Panel's findings of violation of TBT
  Agreement moot and of no legal effect.

- Upheld Panel's finding that the legal standard for the non-discrimination obligation under TBT
  Agreement Article 2.1 does not apply equally to claims under GATT Articles I:1 and III:4; upheld
  Panel's conclusion that the measure at issue is inconsistent with Article I:1.

- Upheld Panel's finding that "the EU Seal Regime is provisionally deemed necessary" within the
  meaning of GATT Article XX(a); on the basis that the Panel applied the wrong legal test, reversed
  Panel's finding that EU failed to establish that the discriminatory impact found in the IC and MRM
  exceptions under the EU Seal Regime satisfies the Article XX chapeau; completing the analysis,
  Appellate Body concluded that EU "has not demonstrated that the EU Seal Regime is designed and
  applied in a manner that meets the requirements of the chapeau of Article XX of the GATT"; concluded,
  therefore, that EU has not justified the EU Seal Regime under GATT Article XX(a).
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 exception)"; (2) "seal products obtained from seals hunted for marine resource management (MRM exception)"; and (3) "[t]ravellers may be able to bring seal products into the European Union in limited circumstances (Travellers exception)."

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."

(Panel Reports, paras. 2.1-7, 7.1, 7.7-24, 7.28; Appellate Body Reports, paras. 1.1-4, 4.1-14)

Before the Panel, Canada and Norway claimed that the measures at issue violate TBT Agreement Articles 2.2, 5.1.2 and 5.2.1; and GATT Articles I:1, III:4, and XI:1. In addition, Canada raised a claim under TBT Agreement Article 2.1, and Norway raised an additional claim under Agriculture Agreement Article 4.2. Both parties asserted that the measures were not justified under GATT Article XX(a) or (b), and they also argued (conditionally for Canada), pursuant to GATT Article XXIII:1(b), that the measures nullify or impair benefits accruing to Canada and Norway under the GATT.

The Panel found that the EU Seal Regime, specifically, the IC and MRM exceptions, are inconsistent with TBT Agreement Article 2.1, but it rejected the claim under TBT Agreement Article 2.2. It further found a violation of TBT Agreement Article 5.1.2. It rejected Norway's claim under Agriculture Agreement Article 4.2. Finally, the Panel concluded that the IC and MRM exceptions violate GATT Articles I:1 and III:4, respectively, and also that, while the exceptions provisionally meet GATT Article XX(a), they do not satisfy the requirements of the Article XX chapeau.

On appeal, the complainants raised claims of error in respect of the Panel's findings under TBT Agreement Articles 2.1 and 2.2 and GATT Article XX. The EU raised issues under TBT Agreement Annex 1.1, TBT Agreement Article 2.1, GATT Articles I:1 and III:4 and conditionally under GATT Article XX. Claims were also raised that the Panel acted inconsistently with DSU Article 11 in its assessment of the matter.

**SUMMARY OF APPELLATE BODY'S FINDINGS**

**PROCEDURAL AND SYSTEMIC ISSUES**

**Separate Appellate Body Reports**

The Appellate Body issued its Reports in the form of a single document, constituting two separate Appellate Body Reports: one for the complaint brought by Canada (WT/DS400/AB/R), and one for the complaint brought by Norway (WT/DS401/AB/R). The cover page, preliminary pages, and the findings in sections 1 through 5 and the annexes are common to both Reports. By contrast, there are separate findings and conclusions for each report. (Cover note).

**Public Observation of Oral Hearing**

On 29 January 2014, the Appellate Boy received a joint communication from Canada and Norway requesting that the oral hearing be opened to public observation, and it also received a communication from the EU joining that request. On 5 February 2014, the Division hearing this appeal issued a Procedural Ruling authorizing opening of the hearing to public observation, and adopting additional procedures for the conduct of the hearing. Public observation took place via simultaneous closed-circuit television broadcast to a separate viewing room. (Paras. 1.11-13, 1.16, Annex 4)
Postponement of Oral Hearing

The oral hearing in these proceedings had originally been scheduled for 3-5 March 2014. On 30 January 2014, the Appellate Body received letters from the three participants requesting the postponement of the oral hearing "due to logistical difficulties faced by the parties." After inviting written comments from the third parties, the Division hearing this appeal, on 5 February 2014, issued a Procedural Ruling rescheduling the oral hearing for 17 to 19 March 2014. (Para. 1.14, Annex 5)

Amicus Curiae Submissions

The Appellate Body received three unsolicited amicus curiae briefs in this case. The participants and third participants were given an opportunity to express their views on the admissibility and substance of these briefs at the oral hearing. The Division hearing this appeal deemed one of the briefs, which was received on the first day of the oral hearing, inadmissible in light of its late filing and "mindful of the requirement to ensure that participants and third participants are given an adequate opportunity fully to consider any written submission filed with the Appellate Body." The Division did not find it necessary to rely on the other two briefs. (Para. 1.15)

Single Measure

The Appellate Body noted that the Panel considered it appropriate to treat the Basic Regulation and the Implementing Regulation as a single measure. It said that it would do the same in these Reports. (Para. 1.3)

DSU Article 17.5 - Extension of Deadline for Circulation of Appellate Body Reports

On 24 March 2014, the Chair of the Appellate Body informed the Chair of the DSB that, due to the requests made by the participants to postpone the date for the oral hearing and its subsequent rescheduling, and also "due to the size of these appeals and the other appeal by the European Union, including the number and complexity of the issues raised by the participants," it was expected that the Appellate Body Reports in these appeals would be circulated no later than 20 May 2014. Subsequently, by letter dated 16 May 2014, the Chair of the Appellate Body informed the Chair of the DSB that due to the time required for translation and the Appellate Body's caseload, the Reports would be circulated on 22 May 2014. (Para. 1.17)

DSU Article 17.6 - Scope of Appellate Review

In the context of examining claims related to the Panel's identification of the "objective" of the EU Seal Regime under GATT Article XX, the Appellate Body stated that "[a] panel's identification of the 'objective' of a measure is a matter of legal characterization subject to appellate review under Article 17.6 of the DSU." (Para. 5.144)

SUBSTANTIVE ISSUES

TBT Agreement Annex 1.1 - "Technical Regulation"

Before examining the substance of the complainants' claims under the TBT Agreement, the Panel had first addressed the threshold question of whether, as contended by Canada and Norway, the measure at issue constitutes a "technical regulation" under TBT Agreement Annex 1.1. This provisions 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.

In concluding that the EU Seal Regime is a "technical regulation," the Panel had referred to a "three-tier test" under this provision, finding that: (1) the EU seal regime applies to an "identifiable group of products"; (2) it "lays down characteristics for all products that might contain seal" as well as "applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition"; and (3) it imposes mandatory compliance. In reaching its conclusion, the Panel "determined that the prohibition on seal-containing products lays down a product characteristic in the negative form by requiring that products placed on the EU market not contain seal." The EU appealed the Panel's finding that the measure lays down product characteristics, including the applicable administrative provisions. In particular, the EU argued that the Panel "erred by construing the term 'applicable administrative provisions' as relating to 'products' rather than 'product characteristics or their related processes and production methods.'" ( Paras. 5.1-7

Interpretation of Annex 1.1

The Appellate Body began its analysis by examining the text of Annex 1.1. It noted that the first sentence "refers to 'product characteristics' or 'their related processes and production methods'" ("PPMs") and that, in past cases, the Appellate Body has "described these characteristics as 'features and qualities intrinsic to the product itself.'" In addition, in light of the disjunctive use of "or" between the references to product characteristics and PPMs, the Appellate Body considered that a "plain reading … suggests that a 'related' PPM is one that is 'connected' or 'has a relation' to the characteristics of a product," such that "the subject matter of a technical regulation may consist of a process or production method that is related to product characteristics." Thus, to determine whether a measure lays down related PPMs, "a panel … will have to examine whether the processes and production methods prescribed by the measure have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics." In addition, it understood "the appositive clause 'including the applicable administrative provisions' to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods." As for the second sentence, it considered that it further enumerates "specific elements that technical regulations 'may also include or deal exclusively with,'" and that it makes clear that it "includes elements that are additional to, and may be distinct from, those covered by the first sentence." ( Paras. 5.9-15

Characterization of the EU Seal Regime as a "technical regulation" under Annex 1.1

At the outset of its analysis of the EU's claims regarding the Panel's characterization of the measure under Annex 1.1, the Appellate Body made some preliminary remarks. First, it recalled that, in past cases, the Appellate Body "has emphasized that a determination of whether a measure constitutes a technical regulation 'must be made in the light of the characteristics of the measure at issue and the circumstances of the case,'" and "this analysis should give particular weight to the 'integral and essential' aspects of the measure," such that a panel must "carefully examine the design and operation of the measure." Second, it recognized the issue of how best to characterize a measure which comprises several different elements. Here, the Panel had noted that "(i) 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'; (ii) the permissive and the prohibitive elements of the measure are intertwined within the EU Seal Regime; and (iii) the parties agreed that the EU Seal Regime should be
treated as a single measure." Thus, it found it "appropriate to draw conclusions regarding the legal characterization of the EU Seal Regime as a whole on the basis of an integrated analysis of the constituent parts of the measure." Third, while the EU did not contest the Panel's finding that the measure applies to an "identifiable group of products," the Appellate Body found it nonetheless useful to confirm this finding, noting that the product scope of the EU Seal Regime is defined in Basic Regulation Article 2(2). In addition, it confirmed that the EU Seal Regime is "mandatory in the sense that it prescribes rules concerning the placing on the market of seal products 'in a binding or compulsory fashion.'" (Paras. 5.18-23)

Next, the Appellate Body reviewed the approach taken by the Panel in respect of whether the EU Seal Regime lays down product characteristics, including the applicable administrative provisions. In this regard, it observed that the Panel had: stated that it would examine the "prohibitive and permissive aspects of the EU Seal Regime"; and it recalled the Appellate Body's finding in EC - Asbestos that the prohibition on asbestos fibres "as such" did not lay down "product characteristics," because it simply "banned asbestos fibres in their natural state," but that the prohibition on asbestos-containing products did lay down a product characteristic in the negative form by requiring that all products must not contain asbestos. Here, the Panel had observed that the EU Seal Regime bans all seal products and also makes an exception in three situations, namely when the products "result from IC hunts, MRM hunts or in the case of Travellers imports." The Panel had then concluded that the prohibition on seal-containing products lays down a product characteristic in the negative form by requiring that all products not contain seal." (Para. 5.25)

On appeal, the EU asserted that the measure must be examined "as a whole." In particular, it argued that if the prohibition is examined in the light of the IC, MRM, and Travellers exceptions, then "the measure 'cannot be reduced to the simple negative intrinsic product characteristic that products may not contain seal.'" (Para. 5.26)

The Appellate Body "disagreed with the approach adopted by the Panel." It noted the brevity with which the Panel stated its conclusion, and it also considered that in finding that "applicable administrative provisions" are set out through its exceptions, the Panel failed to "assess[] the weight that should be properly ascribed to those elements of the measure in identifying the essential and integral aspects of the measure." It considered that the Panel's conclusion "rests on its assessment of a single component of the measure," i.e., that the prohibition on seal-containing products laid down product characteristics in the negative form. In its view, the Panel then proceeded to find that other components of the measure, i.e., the exceptions, constitute "applicable administrative provisions" because they "define the scope of the prohibition," in that the "nature of the exceptions is to allow products containing seal" subject to "strict administrative requirements" based on a "set of criteria." The Appellate Body found that it was "not apparent" that the Panel "conducted a holistic assessment of the weight and relevance of each of the relevant components of the EU Seal Regime before reaching a conclusion as to the legal characterization of the measure 'as a whole.'" Recalling the Appellate Body's emphasis on the "integral and essential" aspects of the measure in EC - Asbestos, the Appellate Body stated that, here, "the Panel should … have examined the design and operation of the measure while seeking to identify its 'integral and essential' aspects before reaching a final conclusion as to the legal characterization of the measure in respect of, and having considered, the measure as a whole." (Paras. 5.27-29)

Having expressed its concern regarding the Panel's overall approach, the Appellate Body examined the participants' arguments as they relate to the three specific aspects of the EU Seal Regime: "(i) the prohibition on products consisting exclusively of seal (pure seal products); (ii) the prohibition on seal-containing products ('mixed' products); and (iii) the conditions under the IC/MRM/Travellers exceptions." (Para. 5.30)
Prohibitive and permissive elements

The EU argued that the Panel "erred by failing to take into account that ... a ban on pure seal products does not set out product characteristics." Based on the Appellate Body's conclusion in **EC - Asbestos**, the Appellate Body agreed with the EU that "a prohibition of pure seal products does not prescribe or impose any 'characteristics' on such products." It pointed out that, unlike in Asbestos, where it was undisputed that asbestos fibres had "no known use in their raw mineral form," products consisting exclusively of seal are used, consumed and traded to a considerable extent. It agreed with the EU, therefore, that the Panel should have "assessed the relevance of this aspect of the measure in order to determine whether it was a part of the integral and essential aspects of the measure and, if so, what weight it should ascribe to it in determining whether the EU Seal Regime, as a whole, lays down product characteristics." (Paras. 5.32-36)

Next, the EU argued that, with regard to "mixed" products, i.e., products containing seal as an input, the Panel should also have taken into account, together with the prohibition, the exceptions under the measure. In response, recalling the Appellate Body decision in Asbestos, the Appellate Body stated that, given that "the EU Seal regime 'consists of both prohibitive and permissive components," it would be "necessary further to examine the permissive elements of the measure before drawing, on the basis of all relevant components ..., an overall conclusion as to whether the measure prescribes product characteristics." (Paras. 5.37-39)

Before turning to examine the conditions under the exceptions, the Appellate Body first observed distinguishing features between the measures at issue in Asbestos as compared with the measures at issue here. First, it noted that asbestos-containing products "were regulated due to the carcinogenicity or toxicity of the physical properties of the subject products - i.e. the fact that those products contained asbestos fibres." By contrast, "the EU Seal Regime does not prohibit seal-containing products merely on the basis that such products contain seal as an input," but, rather, "such prohibition is imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived." In addition, while the prohibition in Asbestos was an "integral and essential aspect" of the measure at issue, here, the prohibition on the products containing seal "seems to be derivative of the three (IC/MRM/Travellers) market access conditions, that is, the permissive component of the measure." In this regard, the Appellate Body noted the "difficulty of verifying precisely whether a particular product contains seal as an input," something that "may suggest, albeit indirectly, that the regulation of the 'mixed products' is not an equally important feature of the EU Seal Regime as far as the operation of the measure is concerned." Finally, it noted that the exceptions under the measure in Asbestos applied "on 'an exceptional and temporary basis,'" which "is not the case for the exceptions under the EU Seal Regime." (Paras. 5.41-42)

The Appellate Body then examined "whether the conditions under the exceptions of the EU Seal Regime have features prescribing product characteristics." First, it noted that the complainants confirmed that they did not allege that the exceptions under the EU Seal Regime, when considered alone, lay down product characteristics. The EU, however, asserted that the Panel in fact reached such a finding. Examining the Panel's finding in paragraph 7.110, the Appellate Body agreed that the Panel's discussion of the criteria gave the impression that "the Panel treated the identity of the hunter, the type of hunt, and the purpose of the hunt as 'product characteristics' within the meaning of Annex 1.1," and it considered the Panel "to have erred in this regard." That is, the Appellate Body saw no basis in the text of Annex 1.1, or in prior Appellate Body reports, "to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics." In this regard, the Appellate Body noted that TBT Agreement Article 2.9 "envisages that technical regulations have 'technical content,'" and it considered it implausible "that a measure that purportedly distinguishes between seal products on the
basis of criteria relating to the identity of the hunter and the purpose of the hunt would be 'technical' in nature or have 'technical' content." (Paras. 5.43-45)

Applicable administrative provisions

The EU argued that the Panel "erred in considering that the word 'applicable' pertains to products rather than 'product characteristics or their related processes and production methods." Here, the EU contended that, "while the procedural requirements contained in the Implementing Regulation might be described as administrative provisions, they 'do not directly pertain to ... what the Panel considered as a product characteristic laid down in the negative form, namely that the products must not contain seal." Instead, it asserted, "they regulate trade in seal products," such that they cannot therefore be considered "as being 'applicable' to a product characteristic." (Para. 5.49)

The Appellate Body "read the clause 'including the applicable administrative provisions' in Annex 1.1 to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods." Here, it explained, "[t]o the extent that the essential and integral aspects of the EU Seal Regime that were identified above do not set out product characteristics, it follows that their related administrative provisions cannot be characterized as being applicable to product characteristics." The Appellate Body further noted that the EU Seal Regime differs from the measure in Asbestos in the sense that the exceptions in the latter measure were found to involve product characteristics and the scope of those measures were determined by an "exhaustive list" of products that were permitted to contain chrysotile asbestos fibres. Here, it considered, "the EU Seal Regime does not prohibit (or permit) the importation or placing on the EU market of products depending on whether or not they contain seal as an input," but, rather, it conditions market access "on the type and purpose of the seal hunt, and the identity of the hunter." It then reiterated its statement above that "such criteria do not constitute product characteristics in the sense of Annex 1.1." It continued, "[a]lthough the administrative provisions under the EU Seal Regime 'apply' to products containing seal, this does not, in our view, mean that the measure at issue amounts to a technical regulation for that reason alone." That is, "when viewed together with the exceptions under the EU Seal Regime," it considered that "this aspect of the measure is ancillary, and does not render the measure a 'technical regulation' within the meaning of Annex 1.1." (Paras. 5.53-57)

Conclusion

The Appellate Body summed up its findings as follows. Having reviewed the relevant aspects of the EU Seal Regime, the Appellate Body saw "only one feature" suggesting that the measure lays down product characteristics, "while all others suggest that this is not the case." To the extent that the measure regulates the placing on the EU market of pure seal products, it does not prescribe or impose any "characteristics." To the extent that it prohibits the placing on the market of seal-containing products, "it could be seen as imposing certain 'objective features, qualities or characteristics' on all products by providing that they may not contain seal." However, the Appellate Body was "not persuaded that this part of the Regulation constitutes the main feature of the measure." Moreover, the prohibition of "mixed" products "differs, to a considerable extent," from the prohibitive aspects of the French Decree under EC - Asbestos. More importantly, it quoted the Panel's statement that "the EU Seal Regime 'consists of both prohibitive and permissive components and should be examined as such." In its view, "when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such." Instead, "it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived." The Appellate Body viewed this "as the main feature of the measure." In this way, it did not consider that "the measure as a whole lays down product characteristics," and it explained that this
is "not changed by the fact that the administrative provisions under the EU Seal Regime may 'apply' to products containing seal." (Para. 5.58)

On this basis, the Appellate Body reversed the Panel's findings that the EU Seal Regime lays down product characteristics. In addition, given that the Panel's conclusion that the EU Seal Regime constitutes a "technical regulation" relied on its intermediate finding that the EU Seal Regime lays down product characteristics, the Appellate Body also reversed the Panel's findings that the EU Seal Regime constitutes a "technical regulation" within the meaning of TBT Agreement Annex 1.1. (Paras. 5.59, 5.70)

Completing the legal analysis

Canada and Norway requested that should the Appellate Body find that the Panel erred in determining that the EU Seal Regime lays down "product characteristics" and/or "applicable administrative provisions" under Annex 1.1, it should complete the analysis and find that the EU Seal Regime nevertheless constitutes a "technical regulation" under this provision. Thus, having reversed the Panel's finding that the measure lays down "product characteristics," the Appellate Body now considered whether it could complete the legal analysis as requested by the complainants. (Para. 5.61)

At the outset, the Appellate Body recalled past precedent as to when it is able to complete the legal analysis on appeal and when it declines such requests. Here, it recalled that Annex 1.1 indicates that the subject matter of a technical regulation may consist of either "product characteristics" or "their related processes and production methods [("PPMs")]." Thus, the Appellate Body considered that it might "in principle, be able to complete the analysis by ruling on whether the EU Seal Regime lays down 'their related processes and production methods' and therefore qualifies as a technical regulation even though it does not lay down product characteristics." In this regard, it was not convinced by the EU argument that it would not be in a position to reach such a determination absent sufficient factual findings by the Panel. In response to this point, the Appellate Body referred to the fact that the measure itself provides "some basis" on which to reach this determination and it also noted that the EU never explained why factual findings would have been required and which factual findings are missing. (Paras. 5.63-65)

Here, the Appellate Body recalled that, before the Panel, Norway raised an alternative argument under Annex 1.1 that the measure at issue "prescribes related PPMs." The Panel, however, had seen no reason to address this issue in light of its conclusion that the measure lays down product characteristics including the applicable administrative provisions. (Paras. 5.66-67)

On this issue, the Appellate Body considered that the complainants, in their written submissions, never developed argumentation on the issue of PPMs. It then recalled past precedent that it has "refrained from completing the legal analysis in view of the novel character of an issue which the panel 'had not examined at all' and on which the Panel had made no findings." That is, the Appellate Body "has not completed the analysis in the absence of a full exploration of issues before the panel that might have given rise to concerns about the parties' due process right," and it considered that "all these elements are present in this case." Moreover, it noted that "the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues," and it considered that more argumentation by the participants and exploration in questioning than what took place during the oral hearing would have been necessary in order to develop an interpretation of the Annex 1.1 phrase that relates to PPMs. On this basis, the Appellate Body "[did] not consider it appropriate to complete the legal analysis." (Paras. 5.68-69)
Conclusion

Having reversed the Panel's finding that the EU Seal Regime constitutes a technical regulation and having found that it was not in a position to complete the legal analysis, the Appellate Body declared "moot and of no legal effect" the Panel's findings under TBT Agreement Articles 2.1, 2.2, 5.1.2 and 5.2.1. (Para. 5.70)

GATT Articles I:1 and III:4 - MFN and National Treatment

The EU appealed the Panel's findings under GATT Articles I:1 and III:4. First, the EU appealed the Panel's interpretation of both provisions, requesting that the Appellate Body "reverse the Panel's finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not 'equally apply' to claims under Articles I:1 and III:4." Second, on the basis of the alleged errors in interpretation, the EU requested the Appellate Body to reverse the Panel's finding that the measure at issue is inconsistent with Article I:1 because it does not "'immediately and unconditionally' extend the same market access advantage accorded to seal products of Greenlandic origin to like seal products of Canadian and Norwegian origin." (Paras. 5.71-72)

At the outset, the Appellate Body reviewed the Panel's findings in this regard. Because the complainants had raised non-discrimination claims under both the GATT and the TBT Agreement, the Panel had found it useful "to review the relationship" between the legal standards under the two agreements. In particular, the Panel had relied on Appellate Body guidance in paragraphs 180-182 of its report in U.S. - Clove Cigarettes that the GATT "treatment no less favourable" standard prohibits WTO Members from modifying the conditions of competition in the marketplace to the determinant of the group of imported products vis-à-vis the group of domestic like products, whereas the same standard in the TBT Agreement "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." Based on that guidance, the Panel had considered that, under the GATT, "the objective of trade liberalization -- including the obligation to respect the non-discrimination obligations under Articles I:1 and III:4 -- is balanced against the right of Members to regulate under Article XX of the GATT." The additional element in the analysis under Article 2.1, i.e., whether a measure's detrimental impact on imports stems exclusively from a legitimate regulatory distinction, "reflects the absence in the TBT Agreement of a general exceptions provision that resembles Article XX." (Paras. 5.75-77)

The Appellate Body then considered the legal standards of the obligations under GATT Articles I:1 and III:4. While the Panel had focused on the phrase "treatment no less favourable," the Appellate Body noted that this phrase appears in TBT Agreement Article 2.1 and GATT Article III:4, but not in Article I:1. The Appellate Body considered that "the Panel assimilated the legal standards under Articles I:1 and III:4." For this reason, the Appellate Body said that it found it useful to "make some general observations about the similarities and differences between these two provisions." (Para. 5.78)

First, it explained that the "points of comparison," for the purposes of determining whether a measure discriminates between like products, are not the same, in that Article I:1 proscribes discriminatory treatment between and among like products of different origins, while Article III:4 proscribes discriminatory treatment of imported products vis-à-vis like domestic products. Second, it noted that "Article I:1 incorporates 'all matters referred to in paragraphs 2 and 4 of Article III,'" such that "there is overlap in the scope of application of Articles I:1 and III:4, insofar as 'internal matters may be within the purview of the MFN obligation.'" Third, it observed textual differences between the two provisions, such as the "treatment no less favourable" standard in Article III:4, versus Article I:1's "obligation to extend any 'advantage granted by a Member to any product originating in or destined for any other country 'immediately and unconditionally' to the 'like product' originating in or destined for all
other Members." Finally, it recognized that notwithstanding these textual differences, both provisions are concerned, "fundamentally, with prohibiting discriminatory measures by requiring equality of competitive opportunities," and, for this reason, neither provision requires a demonstration of the actual trade effects of a specific measure. (Paras. 5.79-82)

**GATT Article I:1 - MFN Treatment**

The Appellate Body then examined the EU claim that the Panel erred in finding that the non-discrimination legal standard under TBT Agreement Article 2.1 does not apply equally to claims under Article I:1. It explained that it must "thus consider whether Article I:1 prohibits: (i) a detrimental impact on competitive opportunities for like imported products; or (ii) only a detrimental impact on competitive opportunities for like imported products that does not stem exclusively from a legitimate regulatory distinction." It understood the EU to be arguing on appeal that Article I:1 prohibits only the latter. (Para. 5.84)

GATT Article I:1, titled "General Most-Favoured-Nation Treatment," 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 like products originating in or destined for the territories of all other Members.

The Appellate Body explained that under this provision, "if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to like products originating from all other Members." In this regard, citing past WTO precedent, it noted that, in prohibiting discrimination among like imported products originating in, or destined for, different countries, Article I:1 "protects expectations of equal competitive opportunities for like imported products from all Members," and it said that an interpretation of the Article I:1 legal standard must take into account this fundamental purpose. Thus, the Appellate Body considered that the obligation to grant any advantage without conditions does not prohibit a Member from attaching any conditions to the granting of an "advantage," but, rather, "it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member." Conversely, it explained, "Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member." (Paras. 5.85-88)

In light of this interpretation, the Appellate Body found that, contrary to the EU argument, there is "no basis in the text of Article I:1 to find that, for the purposes of establishing an inconsistency with that provision, it must be demonstrated that the detrimental impact of a measure on competitive opportunities for like imported products does not stem exclusively from a legitimate regulatory distinction." Instead, it considered that, "where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1." (Paras. 5.90-93)
On this basis, the Appellate Body rejected the EU claim that the Panel erred in finding that "the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 of the GATT." (Para. 5.94)

Here, the Appellate Body noted that the Panel had concluded that the measure at issue was de facto inconsistent with Article I:1, given that, while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not. Thus, the Panel had found that, "in terms of its design, structure, and expected operation,' the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland." The Appellate Body considered that "based on these findings, the Panel considered, correctly …, that the measure at issue is inconsistent with Article I:1 because it does not, 'immediately and unconditionally,' extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland." In this regard, the Appellate Body considered the Panel's reliance on the "design, structure, and expected operation" of the measure to highlight that, "under Article I:1, the focus of the analysis is on the impact of a measure on competitive opportunities for like imported products, rather than the actual trade effects of a measure." Given that the EU's challenge under Article I:1 was based entirely on alleged interpretative errors, and given that the Appellate Body rejected the EU appeal in this regard, it said that it had no basis to disturb the Panel's finding under this provision. **Thus, the Appellate Body upheld the Panel's finding that the measure at issue is inconsistent with GATT Article I:1.** (Paras. 5.95-96)

**GATT Article III:4 - National Treatment**

Next, the Appellate Body addressed the EU claim that "the legal standard under Article III:4 entails an inquiry into whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction." GATT Article III:4, provides as follows:

National Treatment on Internal Taxation and Regulation

... 4. 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 all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The participants disputed whether, for the purposes of establishing a violation of this provision, a finding that a measure has a detrimental impact on competitive opportunities for imported products, compared to like domestic products, is dispositive. In this regard, the EU asserted that "a panel must conduct an additional inquiry into whether the detrimental impact on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction, like the one conducted under TBT Agreement Article 2.1." (Paras. 5.97-100)

Based on past panel and Appellate Body precedent, the Appellate Body noted that the following propositions regarding Article III:4's "treatment no less favourable" standard are "well established": (1) the phrase "requires effective equality of opportunities for imported products to compete with like
domestic products"; (2) "a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products"; (3) because this provision is concerned with ensuring effective equality of competitive opportunities, this determination "involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products"; and (4) "for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a 'genuine relationship' between the measure at issue and the adverse impact on competitive opportunities for imported products." (Para. 5.101)

The EU clarified that it was not suggesting that the legal standard under TBT Agreement Article 2.1 should be transposed onto GATT Article III:4. Rather, it argued that WTO jurisprudence establishes that the Article III:4 legal standard "goes beyond' a consideration of the detrimental effect of a measure on the competitive opportunities for like imported products." In particular, the EU contended that in Dominican Republic - Import and Sale of Cigarettes, the Appellate Body found that, under Article III:4, a detrimental effect on imports alone does not indicate that a measure accords de facto "less favourable treatment" to imports. (Paras. 5.102-103)

In response, Canada and Norway argued that the Appellate Body clarified that finding in U.S. - Clove Cigarettes. Specifically, they contended that the Appellate Body rejected the notion that its finding in the Dominican Republic case stands for the proposition that panels should conduct an inquiry into whether the detrimental impact of a measure on imports is unrelated to the foreign origin of the imported products. Moreover, in their view, the Appellate Body, in Clove Cigarettes, pointed out that in an earlier case it had clarified that, "for a finding of less favourable treatment under Article III:4, 'there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably.'" (Para. 5.104)

Examining this precedent, the Appellate Body recalled its finding in U.S. - COOL, which referred to the Appellate Body report in Korea - Beef, that "in determining whether the detrimental impact on competitive opportunities for the like imported products is attributable to, or has a genuine relationship with, the measure at issue, the relevant question is 'whether it is the governmental measure at issue that 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.'" The Appellate Body therefore disagreed with the EU position, and it found that, to the contrary, "an analysis of whether the detrimental impact on competitive opportunities for like imported products is attributable to the specific measure at issue does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction." (Para. 5.105)

The Appellate Body also rejected EU arguments based on the Appellate Body report in EC - Asbestos. In particular, the EU asserted that the Appellate Body's statement that "a Member may draw distinctions between products which have been found to be 'like,' without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products," supports the EU contention that "a finding that a measure has a detrimental impact on competitive opportunities for like imported products is not dispositive." In response, the Appellate Body considered that, in Asbestos, the Appellate Body had "merely highlighted that the term 'treatment no less favourable' in Article III:4 has a more unfavourable connotation than the drawing of distinctions between imported and domestic like products." Thus, "WTO Members are free to impose different regulatory regimes on imported and domestic products, provided that the treatment accorded to imported products is no less favourable than that accorded to like domestic products," such that "Article III:4 does not require
the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products." (Paras. 5.106-110)

Next, the Appellate Body addressed the EU argument that the Panel's interpretation fails to take into account the general principle expressed in Article III:1 that internal regulations should not be applied "so as to afford protection" to domestic production. In particular, the EU asserted that "the Appellate Body has found that the protective application of a measure, within the meaning of Article III:1, can most often be discerned from the design, the architecture, and the revealing structure of a measure," a standard, which, according to the EU, corresponds to the second step of the de facto discrimination analysis under TBT Agreement Article 2.1. (Para. 5.111) In response, the Appellate Body noted that while the general principle in Article III:1 informs the other Article III paragraphs, it does so in different ways, depending on their textual connections, such that any interpretive direction provided by Article III:1 "must respect, and in no way diminish, the meaning of the words actually used in those other paragraphs." Here, the Appellate Body considered that Article III:4 "is, itself, an expression of the principle set forth in Article III:1," such that, as it stated in paragraph 100 of EC - Asbestos, "[i]f there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products." (Paras. 5.114-115)

The Appellate Body then recalled that Article III:4 "requires effective equality of opportunities for imported products to compete with like domestic products." Thus, "a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products." (Para. 5.116)

On this basis, the Appellate Body found that the Article III:4 "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 like domestic products." Thus, it did not agree with the EU position that, under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for the like imported products stems exclusively from a legitimate regulatory distinction. (Para. 5.117)

Finally, the Appellate Body noted the EU argument that, under the Panel's interpretation, "a technical regulation could be considered non-discriminatory under the TBT Agreement, but still violate the GATT." That is, while the list of possible legitimate objectives that may factor into an analysis under TBT Agreement Article 2.1 is "open," there is only a "closed list of objectives" enumerated under GATT Article XX. Thus, according to the EU, the Panel's interpretation would render Article 2.1 "irrelevant ... as complainants would have a strong incentive not to invoke Article 2.1 ..., and, instead, would bring claims under the GATT ..., even if the measure at issue qualified as a technical regulation." (Para. 5.118) In response, the Appellate Body observed that the GATT 1994, the TBT Agreement and the other covered agreements are integral parts of the WTO Agreement. Thus, it said, "the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously." It did not consider, however, that this principle means that legal standards for similar obligations, such as GATT Articles I:1 and III:4 and TBT Agreement Article 2.1, must be given identical meanings. It recalled that while the TBT Agreement does not contain a general exceptions clause like GATT Article XX, this does not mean that Members do not have a right to regulate under the TBT Agreement. Instead, it explained, "the sixth recital of the preamble of the TBT Agreement suggests that a Member's right to regulate should not be constrained if the measures taken are necessary to fulfill certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement." By contrast, it noted that the obligations assumed by Members to respect the non-discrimination principles under GATT Articles
I:1 and III:4 "are balanced by a Member's right to regulate in a manner consistent with the requirements of the separate general exceptions clause of Article XX and its chapeau." It considered that the fact that a Member's right to regulate is accommodated under Article XX "weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction." In light of the "immediate contextual differences" between the TBT Agreement and the GATT, the Appellate Body did not consider that the legal standard for the non-discrimination obligation under Article 2.1 applies equally to claims under Articles I:1 and III:4. It was also "not persuaded" by the EU argument that this interpretation results in divergent outcomes under the two agreements in respect of the same measure, thereby rendering Article 2.1 irrelevant. In this regard, recalling its finding above that the measure at issue does not constitute a "technical regulation," it noted that the asymmetrical outcomes pointed to by the EU do not arise in this case. Moreover, it considered that the EU argument "is predicated on a perceived imbalance between, on the one hand, the scope of a Member's right to regulate under Article XX ..., and, on the other hand, the scope of that right under Article 2.1." Yet, it explained, "under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT." In this regard, it opined that beyond stating that the TBT Agreement contains an "open" list of legitimate objectives as compared to the "closed list" of the GATT, the EU "has not pointed to any concrete examples of a legitimate objective" that could factor into an analysis under Article 2.1 but "would not fall within the scope of the GATT." Finally, the Appellate Body stated that its interpretation is based on the text and context of the provisions, in the light of their object and purpose, as is its mandate. Thus, "[i]f there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance." (Paras. 5.123-129)

**Conclusion**

On this basis, the Appellate Body upheld the Panel's finding that the legal standard for the non-discrimination obligations under TBT Agreement Article 2.1 does not apply equally to claims under GATT Articles I:1 and III:4. Consequently, it upheld the Panel's conclusion that the measure at issue is inconsistent with Article I:1 because it does not, "'immediately and unconditionally,' extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland." (Para. 5.130)

**GATT Article XX / DSU Article 11 - Article XX(a) (Public Morals) and Chapeau**

The Appellate Body addressed three sections of claims relating to the Panel's analysis under GATT Article XX: (1) the Panel's identification of the objective of the EU Seal Regime; (2) claims of Canada and Norway relating to the Panel's analysis of whether the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a); and (3) claims of Canada, Norway, and the EU concerning the Panel's analysis under the Article XX chapeau. (Para. 5.131)

**The objective of the EU Seal Regime**

The participants raised several challenges concerning the Panel's identification of the objective of the EU Seal Regime. The Panel first had sought to identify this "objective" in the context of its analysis under TBT Agreement Article 2.2. It then relied on that assessment in its analyses under TBT Agreement Article 2.1 and GATT Article XX. (Para. 5.133) In short, the Panel had concluded, "on the basis of its examination of the text and legislative history of the EU Seal Regime, as well as other evidence pertaining to its design, structure, and operation, 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.'” The Panel elaborated that these
concerns have two specific aspects: (i) "the incidence of inhumane killing of seals"; and (ii) "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." It further concluded that "the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts," which explains why 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." The Panel then had found this objective to be "legitimate," pointing in particular to the inclusion of "public morals" in the GATT and GATS general exceptions provisions as well as the second recital of the TBT Agreement, which states that one of the objectives of that Agreement is to further the objectives of the GATT. (Paras. 5.139-140)

Norway challenged the Panel's finding that the "sole objective" of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. In particular, it asserted that the Panel "committed a number of legal and factual errors in reaching the conclusion that the EU Seal Regime does not pursue objectives relating to the protection of IC interests and the promotion of MRM interests." (Para. 5.141) The EU separately appealed the Panel's finding that "the IC distinction does not bear a rational relationship to the objective of addressing the moral concerns of the public on seal welfare." According to the EU, "legislators considered that the subsistence of Inuit and other indigenous communities and the preservation of their cultural identity 'provide benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.'" (Para. 5.143)

At the outset, citing past precedent, the Appellate Body explained that "[a] panel should take into account the Member's articulation of the objective or the objectives it pursues through its measure, but it is not bound by that Member's characterizations of such objective(s)." It added, "the panel must take account of all evidence put before it in this regard, including 'the texts of statutes, legislative history, and other evidence regarding the structure and operation' of the measure at issue." A panel's identification of the "objective" of a measure, it said, "is a matter of legal characterization subject to appellate review under Article 17.6 of the DSU." (Para. 5.144)

Here, the Appellate Body said that "[c]ontrary to what Norway suggests, the Panel did not find that addressing EU public moral concerns regarding seal welfare was the 'sole objective' of the EU Seal Regime." Rather, it concluded that "the principal objective of adopting a regulation on trade in seal products was to address public concerns on seal welfare." It then proceeded to find that "the IC and other interests had been 'accommodated' in the measure," and it suggested that the IC and other interests were not manifest in the objective of the measure in the same manner as concerns regarding seal welfare. Thus, while the Panel had rejected the contention that IC and other interests reflected independent objectives of the EU Seal Regime, the Appellate Body did not understand the Panel to have excluded the role of IC and other interests in the design and implementation of the measure. In addition, it noted that, although the Panel did not determine the moral content of the IC and MRM interests, "the Panel also did not accept the European Union's contention that the benefits to Inuit communities 'outweighed' concerns in respect of seal welfare." (Paras. 5.145-147)

Before reaching a conclusion regarding the objective of the EU Seal Regime, however, the Appellate Body addressed Norway's argument that the Panel acted inconsistently with DSU Article 11 in its identification of the objective of the EU Seal Regime. Article 11 "requires a panel to make 'an objective assessment of the matter,' which includes an objective assessment of the facts of the case." (Paras. 5.149-150)

First, Norway asserted that the Panel disregarded evidence provided by Norway allegedly showing that the legislative objectives of the EU Seal Regime included protecting the economic and
social interests of indigenous communities, and separately promoting the sustainable management of marine resources. In this regard, it argued that the Panel's "imbalanced treatment of the evidence is highlighted by its selective reliance" on a Commission Proposal. Examining this Proposal, the Appellate Body first rejected an argument that the Panel's failure to address a particular statement in it would have a bearing on the objectivity of the Panel's factual assessment. In addition, recalling that the Panel concluded that the EU public concerns were what principally motivated the adoption of the Regime, but that other interests were also accommodated, the Appellate Body was "not persuaded that the Panel undertook a 'selective' and 'unbalanced' review of the evidence of the legislative history." Rather, it said, the Panel "declined to attribute to certain aspects of the legislative history of the EU Seal Regime the weight and significance that Norway considers it should have." (Paras. 5.151-158)

Second, Norway argued that in respect of the text of the measure, the Panel erred "by failing to take into account its own findings." For example, Norway asserted that, while the Panel found that the preamble of the Basic Regulation sets out three main considerations with equal prominence, including those related to IC and MRM interests, the Panel failed to explain why, in light of that finding, it still gave prominence singularly to the EU seal welfare concerns. Examining the Panel's findings in this regard, the Appellate Body disagreed with Norway's characterization, concluding that the Panel did not find that these considerations were of "equal prominence." Thus, the Appellate Body did not agree with Norway that the Panel ignored its own findings in regard to the text of the measure. While Norway contended that the Panel failed to take into account how the text catered to the goals of EU Member States, such as Sweden and Finland, to protect MRM interests and Inuit communities, the Appellate Body "[did] not consider that the Panel committed legal error in failing to attribute to evidence of these interests the meaning and significance Norway considers it should be given." (Paras. 5.159-162)

Next, the Appellate Body addressed Norway's argument that the Panel's reasoning for finding that the IC and MRM interests are not objectives of the EU Seal Regime "fails to reconcile its finding with 'the considerable evidence showing that protection of the IC and MRM interests were objectives of the measure.'" In response, the Appellate Body said that it already rejected these arguments above when considering how the Panel discerned the objective, and it therefore saw no grounds separately to consider these issues under DSU Article 11. (Paras. 5.163-164)

Finally, the Appellate Body turned to Norway's argument that, in respect of the expected operation of the measure, the Panel failed to consider and give probative weight to its own findings in other sections of its Reports, such as the fact that the EU Seal Regime will operate to allow into the EU market virtually all seal products from Greenland and Sweden. In response, the Appellate Body recalled that it has consistently recognized that "panels enjoy a margin of discretion in their assessment of the facts." Here, while it considered that the Panel "could have provided more reasoning to support its findings," it did "not think that any shortcomings in the Panel's analysis of the expected operation of the EU Seal Regime are so serious as to amount to a failure to make an objective assessment of the matter before it." Nor did the Appellate Body see why the facts regarding seal products from Greenland and Sweden "would necessarily mean that the protection of IC and MRM interests amount to separate objectives of the EU Seal Regime." (Paras. 5.165-166)

On this basis, the Appellate Body rejected Norway's contentions that the Panel erred in its characterization of the objective of the EU Seal Regime, and that the Panel failed to comply with its duties under DSU Article 11 in its assessment of the evidence regarding the objective of the EU Seal Regime. In addition, having reviewed the Panel's findings and the participants' arguments on appeal, the Appellate Body concluded that "the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests." (Para. 5.167)
**GATT Article XX(a) - Necessary to Protect Public Morals**

GATT Article XX(a) states:

*General Exceptions*

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

(a) necessary to protect public morals; …

The Appellate Body recalled that based on WTO jurisprudence, "the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX." In turn, "provisional justification under one of the subparagraphs requires that a challenged measure 'address the particular interest specified in that paragraph' and that 'there be a sufficient nexus between the measure and the interest protected.'" In the context of Article XX(a), "this means that a Member … must demonstrate that it has adopted or enforced a measure 'to protect public morals,' and that the measure is 'necessary' to protect such public morals." (Paras. 5.168-169)

Canada and Norway appealed the Panel's conclusion that the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a) on three grounds. First, Norway argued that the Panel erred by seeking to justify under Article XX(a) the EU Seal Regime as a whole, instead of the aspects of the measure giving rise to WTO-inconsistency. Second, Canada asserted that the Panel failed to establish that there was a risk to the public morals of the EU regarding animal welfare that is unique to seals. Third, Canada and Norway contended that the Panel failed to establish that the EU Seal Regime makes a material contribution to the objective of addressing EU public morals concerns regarding seal welfare. (Paras. 5.170-172)

As a side note, the Appellate Body recognized that in *U.S. - Shrimp*, the Appellate Body stated that it would not "pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation." Here, while the Basic Regulation sets out that the EU Seal Regime is designed to address seal hunting activities occurring "within and outside the Community" and the seal welfare concerns of "citizens and consumers" in EU member States, the participants did not address this issue in their appellate submissions. Thus, while "recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation," the Appellate Body decided not to examine this question further. (Para. 5.173)

**Measure as a whole versus aspect of the measure to be justified**

The Appellate Body first considered Norway's claim that the Panel erred in seeking to justify the EU Seal Regime "as a whole" under Article XX(a), instead of the "particular aspect" of the measure (i.e., the IC and MRM exceptions) that was found to be inconsistent with the GATT. Specifically, Norway asserted that the Panel found that the EU Seal Regime was provisionally justified on the basis of the positive contribution of the "ban" to the EU objective, but this approach "allowed aspects of the EU Seal
Regime not found to be WTO-inconsistent, to shield from scrutiny under Article XX(a) those aspects of the measure found to be WTO-inconsistent." (Para. 5.184)

The Appellate Body began by noting that "the general exceptions of Article XX apply to 'measures' that are to be analysed under the subparagraphs and the chapeau, not to any inconsistency with the GATT … that might arise from such measures." It elaborated, citing paragraph 1223 of the Appellate Body report in *Thailand - Cigarettes*, that the focus should be on "the 'differences in the regulation of imports and like domestic products' giving rise to the finding of less favourable treatment under Article III:4." Thus, "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994." (Para. 5.185)

Here, examining the Panel's findings, the Appellate Body disagreed with Norway that "the 'precise aspects' of the EU Seal Regime that violate the provisions of the GATT 1994 are the IC exception and the MRM exception.” It cautioned, however, that "[a]t the same time, it may not be accurate to state that the analysis under Article XX(a) must focus on the EU Seal Regime 'as a whole' insofar as the measure consists of elements other than the prohibitive and permissive components of the EU Seal Regimes." In any event, it made clear that, while the Panel had stated that its analysis should focus on the EU Seal Regime "as a whole," the Panel had "then made clear that it was referring to the components of the measure embodying the 'ban' and the 'exceptions.'" The Appellate Body also disagreed with Norway's argument analogizing the IC and MRM exceptions to the baseline establishment rules in *U.S. - Gasoline*. On the other hand, the Appellate Body did not consider the Panel to be correct "to the extent that it suggested that what it considered must be 'justified' in this case was limited to the permissive aspects flowing from the IC and MRM exceptions." Rather, "what must be justified is … both the prohibitive and permissive components of the EU Seal Regime, taken together." Because the Panel ultimately considered whether both of these aspects taken together were "necessary to protect public morals" the Appellate Body found no error in the Panel's approach. **Accordingly, it rejected Norway's claim and found that the Panel did not err in concluding that the analysis under GATT Article XX(a) should examine "the prohibitive and permissive aspects of the EU Seal Regime."

*Protection of public morals*

Next, the Appellate Body addressed Canada's claim that "the Panel failed to establish that there was a risk to EU public morals consisting of concerns regarding animal welfare that are particular to seals." In particular, Canada contended that the Panel "erred in finding that the EU Seal Regime falls within the scope of application of Article XX(a) without identifying a 'risk' against which the measure seeks to 'protect.'" According to Canada, "the Panel failed to determine the content of the relevant public moral, consisting of the exact standard of right and wrong conduct, in the European Union." (Para. 5.194)

The Appellate Body understood Canada's arguments to be "built around the notion of an identifiable 'risk' that it finds implicit in the phrase 'to protect' in Article XX(a)," raising the question of whether this provision "requires a panel to identify a risk against which the measure that is to be justified seeks to protect." The Appellate Body examined dictionary definitions of "protect," and it also examined its meaning as used in the context of other Article XX subparagraphs, particularly Article XX(b) which focuses on the protection of "human, animal or plant life or health." In this regard, the Appellate Body found it difficult to reconcile the notion of risk in that context with "public morals." That is, while the focus on the dangers or risks in the context of Article XX(b) "may lend itself to scientific or other methods of inquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals." Thus, it did not consider that the term "to protect," under Article XX(a), required the Panel to identify the existence of risk to EU public morals concerns regarding seal welfare. (Paras. 5.196-198)
The Appellate Body also had difficulty accepting Canada's argument that, under Article XX(a), "a panel is required to identify the exact content of the public morals standard at issue." In this regard, it noted that Canada never directly challenged the Panel's finding that there are in fact public morals concerns in the EU in relation to seal welfare. Moreover, the Appellate Body considered that by suggesting that the EU must recognize the same level of animal welfare risk in seal hunts as it does in slaughterhouses and terrestrial wildlife hunts, Canada appeared to argue that a responding Member must regulate similar public morals concerns in similar ways. In response, the Appellate Body recalled paragraph 6.461 of the panel report in U.S. - Gambling, which "underscored that Members have the right to determine the level of protection that they consider appropriate," thereby "suggest[ing] that Members may set different levels of protection even when responding to similar interests of moral concern." In any event, the Appellate Body stated that even if it were correct that the EU has the same moral concerns regarding seal welfare and other animal welfare and that it must recognize the same level of animal welfare risk in the different contexts, the Appellate Body did not consider that, under Article XX(a), the EU was required "to address such public moral concerns in the same way." (Paras. 5.199-200)

On this basis, the Appellate Body rejected Canada's argument that the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations, such as terrestrial wildlife hunts. It therefore also did not consider it necessary to address Canada's claim under DSU Article 11 regarding the same issue. Thus, it found that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of GATT Article XX(a). (Para. 5.201)

Canada also claimed that the Panel "misinterpreted" Canada's argument and therefore erred under DSU Article 11 in finding that Canada did not dispute the importance of public morals concerns regarding the protection of animal welfare. In response, examining the Panel's findings in this regard, while it considered that the Panel did not provide much elaboration of its assessment of the importance of the objective in the context of its Article XX(a) analysis, the Appellate Body did not consider that the general statement pointed to by Canada shows that Canada's position was somehow misinterpreted by the Panel. Rather, Canada's views about the scope and content of EU public morals concerns were "amply reviewed" by the Panel. Thus, the Appellate Body rejected Canada's claim under DSU Article 11. (Paras. 5.202-203)

Contribution of the EU Seal Regime to the objective

The complainants challenged on appeal the Panel's analysis and findings in respect of the contribution that the EU Seal Regime makes to its objective, and in respect of the comparison of the EU Seal Regime with a less trade-restrictive alternative measure. (Para. 5.206)

"Material Contribution"

Canada and Norway argued that the Panel "erred by focusing only on the prohibitive aspect of the measure, i.e. the 'ban,' when determining whether the EU Seal Regime made a 'material' contribution to its objective of addressing EU public moral concerns regarding seal welfare." Instead, they argued that "because the Panel sought to determine whether the EU Seal Regime 'as a whole' was provisionally justified under Article XX(a), it was required to consider whether the contribution of the measure 'as a whole,' and not just the 'ban,' was 'material.'" In addition, they contended that the Panel "erred in finding that the EU Seal Regime made a 'material' contribution." In response, the EU argued that Canada's and Norway's arguments were based on a misreading of the Appellate Body report in Brazil - Retreaded Tyres, asserting instead that, in that case, the Appellate Body "left open 'the possibility that, exceptionally, an import ban may be considered necessary even when the contribution is not 'material.'" (Paras. 5.207-208)
The Appellate Body first addressed the question of whether the Panel was required to determine whether the contribution of the measure was "material." Drawing on the Appellate Body's report in Brazil - Retreaded Tyres, the Panel had stated that "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." Examining the particular circumstances in Tyres, however, the Appellate Body did not consider that the approach in that case "sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analyzing the necessity of a measure under Article XX." It found support for this approach in the "other dimensions of a necessity analysis," noting that a measure's contribution is only one component. It elaborated that the flexibility of a "necessity" exercise "does not allow for the setting of pre-determined thresholds in respect of any particular factor." (Paras. 5.209-215) On this basis, the Appellate Body rejected Canada's and Norway's contention that the Panel was required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis. It also considered that the Panel "erred to the extent that it relied on such a standard in these portions of its analysis." (Para. 5.216)

On the other hand, because the Panel then proceeded to examine the contribution of the EU Seal Regime by examining the contribution of both the prohibitive and permissive aspects, the Appellate Body considered that it need not rule on Canada's and Norway's claims that the Panel also erred in focusing exclusively on the ban, and not the ban together with the exceptions, in this part of its analysis. (Para. 5.217)

Panel's articulation of its findings on contribution

In the context of its analysis under Article XX(a), the Panel had recalled its finding under TBT Agreement Article 2.2 that the EU Seal Regime contributed to a certain extent to its objective of addressing the EU public morals concerns on seal welfare. The complainants did not take issue with the Panel's characterization of the legal standard for determining contribution, but rather, they challenged the Panel's application of that legal standard to the facts of this case. In particular, they argued that "the Panel failed to articulate the 'degree' or 'extent' of the contribution made by the prohibitive and permissive parts of the EU Seal Regime." In this regard, they asserted that "the Panel reached indeterminate conclusions regarding the positive and negative contributions made by different elements of the measure, and … the Panel therefore had no basis to reach, and in fact did not reach, an overall conclusion on the net contribution of the measure," and, also, they "fault[ed] the panel for reaching findings indicating a capability or possibility of a contribution, rather than the actual contribution." Moreover, they argued that the Panel "failed to make 'clear and precise' findings regarding the contribution of the EU Seal Regime to the identified objective." Norway also challenged aspects of the Panel's analysis under DSU Article 11. (Paras. 5.218-219)

At the outset, the Appellate Body referred to its findings in paragraphs 145 and 146 of Brazil - Retreaded Tyres that "a panel enjoys certain latitude in setting out its approach to determine contribution; that such an approach may be performed in qualitative or quantitative terms; and that it ultimately depends on the nature, quantity, and quality of evidence existing at the time the analysis is made." Here, it noted, the Panel "opted for a qualitative analysis that focused mainly on the design and expected operation of the measure," and it also noted that the Panel had only limited information on how certain aspects of the measure would operate in practice, particularly since the permissive aspects "were still in a relatively nascent stage of implementation." Moreover, it observed that "although the parties had submitted substantial evidence regarding the EU market for seal products, that information appears to have been incomplete and subject to a number of limitations." Thus, the Appellate Body did "not consider that the Panel's decision to focus largely on a qualitative assessment of the measure was improper." (Paras. 5.221-222)
In addition, the Appellate Body recognized that in analyzing the contribution made to the first aspect of the objective (addressing public morals concerns relating to the EU public's participation as consumers in the market for products derived from inhumanely killed seals), the Panel focused exclusively on an assessment of the measure itself. In this regard, the complainants asserted that by concluding that the ban was "capable of making a contribution," the Panel had identified "a possible, instead of an actual, contribution." The Appellate Body disagreed, explaining that, "because the Panel made it clear that it was focusing on the design and expected operation of the measure," it understood the Panel "to have been projecting what the impact of the prohibitive aspect of the measure would be." It considered that this approach bears similarities with the analysis in paragraph 136 of Brazil - Retreaded Tyres. (Paras. 5.223-224)

With regard to the second aspect of the objective (addressing public morals concerns relating to the number of inhumanely killed seals), the Panel had concluded that the prohibitive aspect "makes a contribution" to reducing the demand for seal products within the EU and also contributes "to a certain extent" to reducing global demand. The Appellate Body considered it "not surprising" that the Panel conveyed a qualified conclusion in light of the limitations in the evidence as noted above. (Para. 5.225)

The complainants also criticized the Panel's overall conclusion that "the EU Seal Regime is capable of making and does make some contribution to its stated objective of addressing the public moral concerns," asserting that this findings is not sufficiently clear and precise. In response, the Appellate Body explained that it understood this sentence "to reflect the combination of the Panel's assessment of the contribution in respect of both aspects of the measure." In this regard, while taking note of the fact that, in its Article XX analysis, the Panel had recalled its Article 2.2 analysis and then stated that the EU Seal Regime "contributed to a certain extent," the Appellate Body "did not see any appreciable difference between a finding that a measure 'makes a contribution' and a finding that it 'contributes to a certain extent.'" (Paras. 5.226-227)

Finally, the complainants asserted that the Panel "failed to identify how the positive and negative contributions of the different elements of the measure resulted in a net overall contribution to the identified objective." They also contended that the Panel's failure to identify the degree of contribution meant that the Panel was not able to reach a sufficiently clear and precise conclusion. While the Appellate Body agreed that the Panel's finding is not very detailed, it said that, at the same time, "it is not clear what greater clarity or precision the Panel could have achieved in the circumstances of this case." Recalling the limitations faced by the Panel in examining aspects of the measure other than through its design, structure and expected operation, the Appellate Body found it unclear that the Panel could have done more. Thus, it "[did] not consider that the Panel erred in concluding that the EU Seal Regime 'is capable of making and does make some contribution' to its objective, or that it makes a contribution 'to a certain extent.'" (Para. 5.228)

Norway also asserted a claim under DSU Article 11 that mirrored aspects of its claim that the Panel erred in the application of the legal standard. In response, the Appellate Body stated that "[t]o the extent that [it has] reviewed the Panel's reasoning, and the clarity and precision of its findings, in [its] assessment of Norway's claim that the Panel erred in its contribution analysis," it considered that it had "also addressed the substance of Norway's criticism that the nature and quality of the Panel's reasoning was inconsistent with an objective assessment under Article 11 of the DSU." Thus, it saw "no grounds separately to consider these issues under Article 11." (Paras. 5.229-230)
Whether Panel's findings were properly substantiated

The complainants also asserted claims that various aspects of the Panel's findings were unsubstantiated. In particular, Norway identified various points that it considered were undervalued or overvalued by the Panel in assessing the contribution of the EU Seal Regime to the public morals objective. Separately, Canada and Norway both maintained that the Panel failed to substantiate its conclusion that the EU Seal Regime contributes to reducing EU and global demand for seal products and the incidence of inhumanely killed seals. (Para. 5.231)

At the outset, the Appellate Body noted that certain of the claims present "overlapping challenges" concerning the Panel's application of the law to the facts, as well as the Panel's assessment of the facts under DSU Article 11. In this regard, it explained that the Appellate Body "has recognized the difficulty of distinguishing "clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact," and has stated that "[i]n most cases … an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both." Allegations "implicating a panel's assessment of the facts and evidence" fall under DSU Article 11, while "'[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue' and therefore a legal question." The Appellate Body said that it would examine, where relevant, "whether certain of the complainants' claims are properly considered as claims of legal application under Article XX(a) of the GATT 1994, or as claims relating to the Panel's objective assessment of the facts within the meaning of Article 11 of the DSU." (Para. 5.232)

Turning to the claims here, the Appellate Body noted that several of the complainants' arguments were premised on the view that the EU Seal Regime could or does lead to greater numbers of imports of seal products derived from seal hunts with poor seal welfare outcomes. In particular, they asserted: "(i) that the EU Seal Regime will have the effect of replacing imports from commercial hunts with those from IC and MRM hunts; and (ii) that IC and MRM hunts lead to higher rates of inhumanely killed seals as compared to commercial hunts." In response, the Appellate Body noted that "other findings in the Panel Reports either highlight the particular seal welfare risks associated with both Inuit and commercial hunts, or indicate that such risks are equivalent." Moreover, it observed that this assertion about worse welfare outcomes due to a replacement effect "appears to have been highly contested by the parties in these disputes." In this regard, it observed that the Panel "did not reach the findings sought by Canada and Norway, and, in the light of the contested nature of these facts between the parties, appears to have had reasonable grounds for not doing so." Thus, the Appellate Body considered that, even if there were particular findings that, when viewed in isolation, could be viewed as possibly supporting a differentiation between welfare outcomes in different types of hunts, "the Panel was not of the view that such differentiation was clearly supported by the record." In addition, the Panel identified difficulties that it had in examining data related to the replacement effect. (Paras. 5.234-242)

On this basis, the Appellate Body concluded that the premise offered by the complainants "is primarily factual in nature." Thus, it "relates to the Panel's weighing and appreciation of the evidence," and it therefore considered that these claims would be more properly addressed under DSU Article 11 as challenges to the Panel's objective assessment of the facts. Here, it recalled its view that the Panel's record provided it with reasonable grounds for its conclusions regarding seal welfare outcomes and an alleged replacement effect. Even where specific Article 11 allegations were made, it considered that its above analysis was dispositive. Thus, the Appellate Body saw "no grounds" under DSU Article 11 to disturb the Panel's findings, and it therefore rejected the claims of Canada and Norway as they relate to this aspect of the Panel's contribution analysis. (Para. 5.243)

Canada and Norway further claimed that the Panel "erred in its analysis of the contribution of the EU Seal Regime to the second aspect of the identified objective, namely, reducing the number of
inhumanely killed seals.” In particular, the complainants asserted that: "(i) the evidence does not support the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products; and (ii) the Panel never demonstrated that reducing demand leads to fewer inhumanely killed seals.” (Paras. 5.244-246) As to the second point, the Appellate Body considered that "it was not unreasonable for the Panel to assume that a decrease in demand, and hence a contraction of the seal product market, would have the effect of reducing the number of seals killed, and thus the number of inhumanely killed seals.” As to the complainants’ argument that seal products derived from Greenlandic hunts could fully satisfy EU demand, such that the ban could or does lead to an increase in the number of seals killed inhumanely, the Appellate Body recalled its discussion above that this argument rests on a factual premise that was highly contested by the parties, was not uniformly supported by the record, and, in any event, was not found to exist by the Panel. It also recalled its finding above that this premise is primarily factual in nature, such that it properly relates to a challenge under DSU Article 11 regarding the Panel's objective assessment of the facts. In response, the Appellate Body stated that, in light of uncertainty about the Panel record, it did not see sufficient grounds on which to sustain arguments that the Panel erred in assuming that reducing demand leads to fewer inhumanely killed seals. Accordingly, it rejected Canada's and Norway's claims that the basis for such an assumption lacked a proper evidentiary foundation, in violation of the Panel's duties under DSU Article 11. (Paras. 5.247-248)

The Appellate Body also rejected the complainants' remaining claims regarding whether the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products was properly substantiated. In particular, the Appellate Body found that "references to market uncertainty and decreases in trade numbers and market prices are all elements of a market dynamic that is at least partly informed by demand-side considerations, and that the Panel therefore had a reasonable basis to conclude that the evidence that it cited provided at least some support for the view that the measure reduced EU demand for seal products." Similarly, the Appellate Body considered that "the presence of these demand-side considerations in the evidence relied upon by the Panel" also addresses specific allegations of error under DSU Article 11. (Paras. 5.249-250)

The Appellate Body reached similar conclusions in respect of Norway's arguments that the Panel's findings regarding global demand were even more untenable. In response, while agreeing that the basis for the Panel's findings "appears quite tenuous," the Appellate Body recalled the analytical difficulties faced by the Panel and the appropriately qualified nature in which the Panel asserted its conclusions (i.e., that the EU Seal Regime "appears to be negatively affecting" global demand). Moreover, as with the claims above, the Appellate Body considered that the question of whether the Panel properly reasoned and substantiated its finding relates principally to the Panel's weighing and appreciation of the evidence and thus is more properly entertained under DSU Article 11. Here, having examined the alleged shortcomings in the Panel's reasoning and evidentiary support, the Appellate Body found that the Panel merely declined to attribute to certain arguments and evidence that weight and significance that the complainants would have liked, but this does not amount to a violation of DSU Article 11. Thus, the Appellate Body "[did] not consider that any alleged limitations identified by the complainants in respect of the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products amount to a violation of Article 11," and it therefore rejected Canada's and Norway's claims as they relate to this aspect of the Panel's contribution analysis. (Paras. 5.251-254)

Other aspects of the contribution analysis

Finally, the Appellate Body rejected Norway's claims that the Panel "undervalued two additional aspects in assessing the contribution of the EU Seal Regime to the public morals objective.” First, Norway argued that "the Panel failed to take proper account of the negative contribution made by the implicit exceptions in its contribution analysis.” The Appellate Body, however, disagreed with Norway's characterization of the Panel's examination of the evidence, and, in any event, even in the absence of a
finding in this regard by the Panel, the Appellate Body did not see how this would necessarily have a bearing on the extent to which the prohibitive aspect of the measure contributes to the objective. (Paras. 5.255-256) Second, Norway argued that "the Panel wrongly concluded that indigenous communities have not been able to benefit from the IC exception, a factor that the Panel considered to limit the negative impact of the exceptions," and that "the Panel's conclusion demonstrates a selective treatment of the evidence, and a failure to refer to or reconcile its findings, in violation of Article 11 of the DSU." Examining the evidence cited by the Panel, the Appellate Body did not consider that the Panel placed undue emphasis on factors concerning the eligibility of Greenlandic imports in reaching its conclusion. In addition, it considered that Norway's claim relates to a factual question and the Panel's assessment of the evidence, such that it is more properly considered under DSU Article 11. For similar reasons, then, it rejected Norway's claim that the Panel failed to conduct an objective assessment under DSU Article 11. (Paras. 5.257-259)

Reasonable availability of the alternative measure

The Appellate Body then examined Canada's and Norway's claims relating to the Panel's finding that the alternative measure was not reasonably available. At the outset, the Appellate Body recalled past precedent holding that "the weighing and balancing exercise under the necessity analysis contemplates a determination as to 'whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'" Here, it noted, "the proposed alternative measure consisted of market access for seal products that would be conditioned on compliance with animal welfare standards, and certification and labelling requirements." The Panel found that the alternative measure was less trade restrictive than the EU Seal Regime, but that it was not reasonably available. Canada and Norway requested the Appellate Body to reverse that latter finding, arguing that "the Panel failed to assess the alternative measure against the actual contribution of the EU Seal Regime, but rather did so against a standard of complete fulfilment of the objective." That is, "since complete fulfilment of the objective is a higher degree of contribution than what was found under the EU Seal Regime, the Panel erred in finding that the alternative measure is not reasonably available." The complainants also raised claims in this regard under DSU Article 11. (Paras. 5.260-264)

Finding that the proposed alternative measure was not reasonably available

Canada and Norway pointed to key passages of the Panel's analysis that, in their view, evidenced its use of an inappropriately high benchmark of contribution for the EU Seal Regime. The Appellate Body understood the essence of the complainants' contention to be "that it was improper for the Panel to have entertained scenarios in which an alternative measure would limit market access only to humanely killed seals, or would increase overall market access, since that is not reflective of the level of contribution actually achieved by the EU Seal Regime." In response, the Appellate Body "agree[d] that several of the hypothetical outcomes considered by the Panel … contemplate the consequences of a certification system that would operate to exclude all inhumanely killed seals from, and include all humanely killed seals into, the EU market, or that would potentially lead to increased EU market access for seal products." However, it considered that, at this stage of its assessment, the Panel's analysis was "inconclusive," in that the Panel was "simply assessing what possible scenarios might result from adoption of a certification system." Thus, it did not agree that these statements demonstrate that the Panel erroneously considered the EU Seal Regime to have achieved complete fulfilment of the objective, and then to have measured the alternative measure against such an inflated benchmark. (Paras. 5.265-267)

In addition, Canada and Norway asserted that the Panel compared the alternative measure against a higher degree of contribution than what was found in respect of the Seal Regime. Again, the Appellate Body disagreed, explaining that the Panel was merely "exploring the hypothetical implications" for the
EU's ability to achieve its objective of addressing seal welfare concerns. In this regard, it found that the Panel "appeared quite sceptical that a certification system, even if it were to adopt the most stringent animal welfare requirements, would be able effectively to address EU public moral concerns regarding seal welfare." The Panel "also expressed the concern that a certification system that sought to impose stringent welfare requirements would have consequences that would effectively undercut any potential contribution to EU public moral concerns." In this regard, the Appellate Body "[did] not consider the Panel's reference to more stringent hypothesized regimes as somehow suggesting that it was comparing the alternative measure against a benchmark of complete fulfilment of the objective." Rather, it "understood the Panel to have suggested that even the more stringent certification systems presented significant difficulties in terms of both their reasonable availability and their contribution to the objective." Moreover, the Appellate Body rejected the complainants' contention that the Panel erred in relying on Appellate Body guidance that the prospect of imposing an alternative measure faces significant, even prohibitive obstacles, it may be that such a measure cannot be considered 'reasonably available.'" That is, it could "not exclude a priori the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure." Thus, it considered that "an assessment of the reasonable availability of an alternative measure could potentially include the burden on the industries concerned." (Paras. 5.268-273)

In addition, relying on the Appellate Body report in Brazil - Retreaded Tyres, Canada and Norway submitted that "the Panel erred in considering the costs and logistical demands on hunters and marketers of seal products if a strict certification scheme were to be adopted by the European Union." The Appellate Body rejected this argument, finding that, "if there are reasons why the prospect of imposing an alternative measure faces significant, even prohibitive obstacles, it may be that such a measure cannot be considered 'reasonably available.'" That is, it could "not exclude a priori the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure." Thus, it considered that "an assessment of the reasonable availability of an alternative measure could potentially include the burden on the industries concerned." (Paras. 5.274-277)

Finally, the Appellate Body rejected an argument that the Panel erred in concluding that the situations in which other measures are applied are not sufficiently similar to the circumstances of the seal hunt to assist in determining the availability of alternative measures. In particular, it found that the Panel provided "a reasonable explanation as to why it did not consider regimes applicable in other situations helpful in determining the reasonable availability of the alternative measure." (Para. 5.728)

In sum, the Appellate Body concluded that the Panel did not err in finding that "the alternative measure is not reasonably available." (Para. 5.279)

DSU Article 11

The Appellate Body then rejected two claims brought respectively by Canada and Norway under DSU Article 11 relating to the reasonable availability of the alternative measure. First, Canada argued that the Panel's finding that the alternative measure could result in an increase in the number of seals killed inhumanely was based on an EU assertion that was itself a restatement of an unsupported assertion made in an amicus curiae submission. Upon review of the record, however, the Appellate Body found that the Panel had been presented with more information relating to this argument. While the Panel failed to cite all of the arguments and evidence that supported its finding, the Appellate Body did not consider that a panel errs under DSU Article 11 for such an omission, and, in any event, the Appellate Body considered that the Panel had implicitly referred to the extensive information on the record in this regard when it stated that it "assessed" the argument at hand against the "backdrop" of the risks of seal hunting.
Thus, the Appellate Body did not consider that this statement by the Panel evidenced a failure to conduct an objective assessment under DSU Article 11. (Paras. 5.281-284)

Second, Norway submitted that the Panel violated Article 11 "by ignoring two further alternative measures it had proposed during the course of the Panel proceedings." The Appellate Body understood the first additional alternative measure to amount to the removal of the restrictive conditions of the EU Seal Regime, an alternative which rested on the factual premise that the EU Seal Regime could or does lead to worse seal welfare outcomes than those existing prior to adoption of the measure, a factual premise that the Appellate Body had already found above to be highly contested by the parties, not uniformly supported by the Panel record, and ultimately found by the Panel not to exist. Similarly, in respect of the second additional alternative (removal of three restrictive conditions of the MRM exception to be replaced by welfare, certification and labelling requirements), the Appellate Body considered that, as acknowledged by Norway, what Norway was proposing consisted in part of a set of requirements similar to what the Panel actually analyzed in its Reports, such that the same conclusions that it reached regarding the certification system would apply to this additional alternative as well. The Appellate Body concluded that the additional alternatives to which Norway refers "were in fact implicitly addressed by the Panel." Thus, it did not consider that the Panel's failure to mention these two alternatives undermined the objectivity of the Panel's assessment under DSU Article 11. (Paras. 5.285-288)

Conclusion

Overall, the Appellate Body said that "in light of the specific circumstances of this case, and the particular nature of the measure at issue, [it] endorsed the Panel's analysis of the EU Seal Regime under Article XX(a)." On this basis, the Appellate Body upheld the Panel's finding that "the EU Seal Regime is provisionally deemed necessary" within the meaning of GATT Article XX(a). (Paras. 5.289-290)

GATT Article XX Chapeau

Having upheld the Panel's finding that the EU Seal Regime is "necessary to protect public morals" under GATT Article XX(a), the Appellate Body turned to review the Panel's analysis under the Article XX chapeau. The Panel had determined that discrimination 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 Articles I:1 and III:4." In light of its earlier findings under TBT Agreement Article 2.1 that these exceptions are not designed and applied in an even-handed manner, the Panel had then found that they also constitute "arbitrary" or "unjustifiable" discrimination within the meaning of the chapeau. (Para. 5.293)

While Canada and Norway agreed with the Panel's conclusion that the EU Seal Regime does not meet the requirements of the Article XX chapeau, they appealed the Panel's reasoning in reaching that conclusion. In particular, they alleged that "the Panel erred in applying the same test to determine the existence of arbitrary or unjustifiable discrimination under the chapeau of Article XX as it had applied in determining whether the measure was inconsistent with Article 2.1 of the TBT Agreement." (Para. 5.294) At the outset, the Appellate Body reviewed past precedent regarding the interpretation of the Article XX chapeau. In this regard, it explained that "[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX." (Paras. 5.296-306)

Canada and Norway submitted that "the scope, content, and the text of the chapeau of Article XX … and Article 2.1 of the TBT Agreement (read together with the sixth preambular recital thereto) are not
the same." In addition, they asserted that "the Panel's 'three-step test' in the context of its 'legitimate regulatory distinction' analysis under Article 2.1 is at odds with the text of the chapeau of Article XX, as well as with well-accepted jurisprudence regarding the proper analysis of 'arbitrary or unjustifiable discrimination' under the chapeau." Specifically, they both took issue with the Panel's substitution of its three-step "legitimate regulatory distinction" test for "the proper test under the chapeau of Article XX developed by the Appellate Body in Brazil - Retreaded Tyres, which, the complainants assert[ed], requires an assessment of whether the discrimination at issue is 'rationally connected' to the objective of the measure." (Para. 5.308)

On this issue, the Appellate Body opined that "the Panel should have provided more explanation as to why and how its analysis under Article 2.1 of the TBT Agreement was 'relevant and applicable' to the analysis under the chapeau." While it recognized that "there are important parallels" between the two analyses (e.g., the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade"), it stated that there are also "significant differences" between the two, such as the applicable legal standards and their main function and scope. On this basis, the Appellate Body found that "the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau."

It therefore reversed the Panel's finding that the EU 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. It also reversed "the intermediate legal findings that the Panel made in the context of the chapeau … on the basis of its analysis under Article 2.1 of the TBT Agreement, given that the Panel reached these intermediate findings on the basis of a legal test that it should not have applied under the chapeau of Article XX." (Paras. 5.310-313)

**Completion of the Analysis as to Whether the EU Seal Regime Meets the Requirements of the Chapeau**

In completing the analysis under the Article XX chapeau, at the outset, the Appellate Body observed that the discrimination found by the Panel under GATT Article I:1 "arises from the different regulatory treatment that the measure accords to seal products derived from 'commercial' hunts, on the one hand, as compared to seal products derived from IC hunts, on the other hand, in combination with the fact that seal hunts in Canada and Norway are primarily 'commercial' hunts, whereas seal hunts in Greenland are predominantly IC hunts." In turn, the Appellate Body said that in completing the analysis it would "first examine whether the different regulatory treatment that the EU Seal Regime accords to seal products derived from IC hunts as compared to 'commercial' hunts constitutes 'arbitrary or unjustifiable discrimination.'" In addition, it would "analyse whether the measure has any discriminatory effects on different indigenous communities and whether any such effects amount to arbitrary or unjustifiable discrimination." (Para. 5.316)

Here, the Appellate Body did not consider that the EU showed that "the 'conditions' prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, are relevantly different." In particular, the EU "[did] not appear to contest Norway's claim that 'the same animal welfare conditions prevail in all countries where seals are hunted,' nor has the European Union appealed the Panel's finding that 'the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts.'" It also did not understand the EU to have argued that "the differences in the identity of the hunter or in the purpose of the seal hunts that the Panel found to exist between 'commercial' and IC hunts would render the conditions in Canada and Norway, on the one hand, and Greenland, on the other hand, relevantly different." Finally, while the EU pointed to "the different level of development in the organization of the marketing structures achieved by the Inuit communities in Greenland as compared to the Canadian Inuit communities," according to the Appellate Body, it "has not … sufficiently explained how these differences would render the conditions prevailing in Canada and Greenland different in a
respect that would be relevant under the chapeau." Given that the EU "has not shown" that the prevailing conditions are relevantly different, the Appellate Body said that it would "proceed on the basis that the conditions prevailing in these countries are 'the same' for the purposes of the chapeau." (Para. 5.317)

Next, the Appellate Body stated that, "in the present case, the causes of the 'discrimination' found to exist under Article I:1 … are the same as those to be examined under the chapeau," and it noted that the participants did not dispute this. Thus, it turned to examine "whether such discrimination is 'arbitrary or unjustifiable' within the meaning of the chapeau." It recalled that one of the most important factors in this assessment "is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX." It therefore began its analysis with Canada's and Norway's claim that the EU Seal Regime results in arbitrary or unjustifiable discrimination "because it discriminates on a basis that does not have a 'rational relationship' with the objective of the measure or goes against that objective." (Para. 5.318)

The Appellate Body said that the first relevant question before it was whether the EU "has sufficiently explained how the manner in which the EU Seal Regime treats IC hunts as compared to 'commercial' hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare." It noted that "the different regulatory treatment of IC hunts, as compared to 'commercial' hunts, takes the form of a significant carve-out of the former from the measure's ban on seal products." While it considered that the EU sought to explain why it decided not to impose the ban on seal products derived from IC hunts, it also found that the EU "failed to demonstrate … how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to 'commercial' hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare." In this regard, it noted that the EU did not establish, "for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that IC hunts can cause the very pain and suffering for seals that the EU public is concerned about." (Para. 5.320)

Next, noting that other factors may be relevant to this assessment, the Appellate Body turned to "examine whether the specific criteria of the IC exception are designed and applied in a manner that would render arbitrary or unjustifiable the different regulatory treatment of seal products derived from IC hunts as compared to seal products derived from 'commercial' hunts." Examining the IC exception, the Appellate Body found ambiguities and overall vagueness in the requirements. Given these "significant ambiguities and the broad discretion in the application of the IC requirements," the Appellate Body said that it was troubled by the EU position that, once a seal hunt has been classified as an IC hunt, "the degree of commercialization is 'irrelevant.'" Given that evaluation of whether a seal product complies with the requirements of the IC exception is left entirely to "recognized bodies," and in light of the ambiguities in the requirements meaning that the recognized bodies enjoy broad discretion in applying the IC requirements, the Appellate Body cautioned that this could allow for instances of abuse of the IC exception, and it considered that the EU did not sufficiently explain how such instances can be prevented in the application of the IC exception. In this regard, the Appellate Body said that it had "similar concerns" to those it had in paragraph 181 of U.S. - Shrimp, where it cautioned that there appeared to be no way that exporting Members could be certain whether the measures were being applied in a fair and just manner. Thus, the Appellate Body concluded that, pursuant to its design, the EU Seal Regime could be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. (Paras. 5.321-328)

The Appellate Body then turned to the question of "whether the manner in which the IC exception affects Inuit communities in different countries amounts to 'arbitrary or unjustifiable
discrimination." The Panel had found that "the IC exception is available de facto exclusively to Greenland,' and that this outcome is 'directly attributable to the regime itself and not to the actions of the operators in countries like Canada.'" The EU challenged these findings on appeal both as an error of law, and, in the alternative, as a failure of the Panel to make an objective assessment of the facts as required by DSU Article 11. (Para. 5.329)

The Appellate Body considered that, "to the extent that the IC exception is designed and applied so as to be de facto only available to Greenland, the EU Seal Regime would treat seal products derived from IC hunts in Greenland and Canada differently and, in this respect, result in discrimination between countries where the same conditions prevail." While it was undisputed that the Inuit in Greenland are currently the only beneficiaries of the IC exception, the EU contested that this outcome can be attributed to the EU Seal Regime, suggesting that there is no "genuine relationship" between the de facto exclusivity and the design and application of the IC exception. (Para. 5.333) In response, the Appellate Body explained that while the Panel found that only Greenland had benefited from the exception, it had not pointed to any aspect of the IC exception that prevents indigenous communities in Canada from taking advantage of it. In this regard, it noted Canada's own explanation that Canadian Inuit communities do not have an incentive to take advantage of the IC exception because of "incidental effects of the ban on seal products derived from commercial hunts." It also observed that, while the Panel cited Canada's explanation and other statements, it "never made an affirmative finding that the ban on seal products derived from commercial hunts prevents the Canadian Inuit from taking advantage of the IC exception." Moreover, the EU submitted that the Panel ignored the fact that the relevant Canadian authorities and entities have not shown any interest in benefiting from the IC exception, and it asserted that the Canadian Inuit could benefit from the IC exception "at any time in the future if and when they so wish." (Paras. 5.334-335)

The Appellate Body explained that if the current de facto exclusivity could be attributed "entirely to private choice," then there would be "no 'genuine relationship' between this exclusivity and the EU Seal Regime." Nonetheless, the Appellate Body was "not persuaded that the European Union has made 'comparable efforts' to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit." For example, it stated that "the Danish customs authorities processed imports based on certificates by the Greenlandic authorities prior to the Greenlandic entity obtaining recognized body status." While the EU argued that it had engaged in multiple efforts to assist the Canadian Inuit, the Appellate Body considered that the EU failed to "pursue[] cooperative arrangements to facilitate the access of Canadian Inuit to the IC exception." In this regard, citing paragraph 165 of U.S. - Shrimp, the Appellate Body recalled that "a measure may result in arbitrary or unjustifiable discrimination 'when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.'" Thus, it was "not persuaded" that the EU has established that it has designed and implemented the EU Seal Regime in a manner that is not arbitrary or unjustifiable. (Paras. 5.336-337)

On this basis, the Appellate Body concluded that the EU "has not demonstrated that the EU Seal Regime, in particular with respect to the IC exception, is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT." It follows, it said, that the EU has not justified the EU Seal Regime under GATT Article XX(a). (Para. 5.339)

In the Panel Reports in this case, the focus of the analysis was under the TBT Agreement, including the non-discrimination obligations of Article 2.1. The Panel addressed these claims first, and went into much greater detail on them than on the parallel GATT non-discrimination claims, where its analysis was much briefer. However, with its conclusion that the measure was not, in fact, a technical regulation, the Appellate Body threw out all of the Panel's TBT findings, and the GATT non-discrimination issues became perhaps the most important aspect of the case.

The GATT-related appeals on these issues focused to some extent on the GATT/TBT relationship, but the Appellate Body also directly examined the GATT obligations. In this regard, it provided new elaborations on the legal standards under GATT Article I:1, Article III:4 and the Article XX chapeau. Despite its clarifications, however, a good deal of uncertainty remains.

One point of certainty in the ruling is that, under each of the GATT provisions, the "legitimate regulatory distinction" element of TBT Article 2.1 is not to be applied. In several recent TBT cases, the Appellate Body explained that "treatment no less favorable" exists where the measure has a "detrimental impact" on imported goods as compared to like domestic goods, and that impact does not "stem exclusively from a legitimate regulatory distinction." In other words, and loosely speaking, if the impact is caused by a valid public policy, there is no violation. Here, the Appellate Body clarified that the TBT standard cannot simply be transposed to the GATT provisions; it also made clear that Articles I:1 and III:4 are about detrimental impact alone.

Beyond that, however, the nuances of the standard are unclear. While the "detrimental impact" of the measure on "conditions of competition" will be considered, the precise scope of that element is uncertain. We consider the Appellate Body's explanations of each provision in turn.

Article I:1

With regard to Article I:1, the Panel's analysis of the issue was quite brief, seeming to focus solely on the disparate impact of the measure -- under the Seal Products measure, more foreign goods than like domestic goods faced the less favorable regulatory treatment. In this regard, the Panel stated:

With respect to the third element of Article I:1, the MFN obligation contained therein requires that once seal products from Greenland are granted the advantage of access to the European Union market, such advantage be extended "immediately and unconditionally" to Canadian and Norwegian seal products that are found to be "like". As explained above, the evidence suggests 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. In 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.
(Para. 7.597) On appeal, the Appellate Body cited to this statement, and upheld the finding of violation. It stated:

We note that, in these disputes, the Panel concluded that the measure at issue, although origin-neutral on its face, is de facto inconsistent with Article I:1. The Panel found that, while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market. Thus, the Panel found that, "in terms of its design, structure, and expected operation", the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, "immediately and unconditionally," extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.

(Para. 5.95)

Left unexplained, however, is how such an analysis should be carried out. Is it enough that there is a disparate impact on the products of certain countries (here, Canada and Norway) resulting from the measure? Or must there be a deeper and more thorough analysis of the measure, through an examination of the "design, structure and expected operation"? Here, to the extent that such an analysis can be seen in para. 7.597, it was fairly cursory, and does not engage with the measure much at all. Future cases will be needed to refine the scope of the standard.

**Article III:4**

As with Article I:1, the Appellate Body's reasoning on Article III:4 in this case has important implications for the future of the obligation. However, due to the nature of the way the issue was appealed, and gaps in the Appellate Body's reasoning, some questions remain unanswered, even more so than under Article I:1.

In *Seal Products*, the issue on appeal under Article III:4 was "whether, for the purposes of establishing a violation of Article III:4, a finding that a measure has a detrimental impact on competitive opportunities for imported products, compared to like domestic products, is dispositive." As it did under Article I:1, the EU argued that the Appellate Body's TBT Agreement Article 2.1 reasoning should apply to Article III:4, and thus a panel must conduct an additional inquiry into "whether the detrimental impact on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction."

The Appellate Body clearly rejected the view that the "stem exclusively from a legitimate regulatory distinction" is part of the legal standard under Article III:4. What remains unclear, however, is how exactly the "detrimental impact" element should be applied. The issue is even more confusing than under Article I:1, because for Article III:4, the Appellate Body did not even mention "design, structure and expected operation." Based on what it did say about the measure in para. 5.116, there are a number of possibilities, including the following:
-- If a measure has a disparate impact on competitive opportunities for foreign goods as compared to like domestic goods, there will be a violation.

-- The impact on competitive opportunities is one part of the standard, but in addition, the "design, structure, and expected operation" of the measure must also be considered. ("Design, structure" and various other factors have been a standard part of Article III:4 analysis in the past, and they were explicitly referenced in Appellate Body's Article I:1 analysis. The Appellate Body, however, did not mention these factors in the context of its discussion of the Article III:4 standard.)

-- Impact is one part of the standard, but in addition (or as part of that analysis), the "genuine relationship" of the measure to its impact plays an important role in the analysis. While one might think of this relationship test as a mere formality, it could also involve a detailed look at the measure and its impact, along the lines of the "design, structure, and expected operation" test.

The Appellate Body's reasoning on these issues leaves a lot of uncertainty as to which approach should be followed. Its initial explanation of the standard is in para. 5.101. There, the Appellate Body made clear that "detrimental impact" on "conditions of competition" is a part of the standard, and it also referenced the "genuine relationship" test. But it did not elaborate on the content of either element.

In the past, the Appellate Body has said that an Article III:4 analysis should take into account "design, structure, and expected operation." In Thailand - Cigarettes (Philippines), it stated: "an analysis under Article III:4 must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue." (Para. 134) Does the omission in Seal Products of a reference this language have any significance? It is possible, even likely, that the Appellate Body did not mention it because it was not raised by the parties or was not crucial to the issues it was addressing. At the same time, though, the lack of reference would certainly be invoked in future cases by parties wishing to keep it out. In addition, the Panel in this case seemed to rely solely on disparate impact in its brief findings on the issue. (Para. 7.608) The Appellate Body must have been aware of this, and could have taken the opportunity to correct this view, if it had wanted to.

As a final point, the precise scope of each approach is itself uncertain. How should the "detrimental impact" of a measure be examined? What kind of analysis of the measure itself should be conducted, as part of the "design, structure and expected operation" or otherwise? There is flexibility on how to do this, and the various approaches could accommodate different methods. What is not clear at this point is both the general legal standard, and the specific application of that standard. It will be up to future cases to clarify this.

Article XX chapeau

Under the discrimination element of the Article XX chapeau, the Appellate Body engaged in more detailed analysis than it did under Articles I:1 and III:4. It referred to how the measure is "designed and applied," and set out several factors that it looked at in this case:

In sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception. First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be
reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the "subsistence" and "partial use" criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a "recognized body" that fulfils all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.

(Para. 5.338) The Appellate Body seemed to indicate that these were not the only factors that could ever be looked at, but rather were simply the relevant factors in this case.

The analysis here was a broader and more nuanced look at the issue of discrimination than was conducted under Articles I:1 and III:4. Under Article XX, of course, the standard refers to "arbitrary" and "unjustifiable" discrimination, which requires something more. In this context, the Appellate Body talked about how the measure was "designed and applied." The focus, then, is on the application of the measure, as distinguished from the more abstract "expected operation" in the context of Article I:1.