WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

AB-2014-1
AB-2014-2

Reports of the Appellate Body

Note by the Secretariat:

The Appellate Body is issuing these Reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS400/AB/R; and WT/DS401/AB/R. The cover page, preliminary pages, sections 1 through 5, and the annexes are common to both Reports. The page header throughout the document bears the two document symbols WT/DS400/AB/R and WT/DS401/AB/R, with the following exceptions: section 6 on pages CAN-191 to CAN-192, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS400/AB/R; and section 6 on pages NOR-193 to NOR-194, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS401/AB/R.

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CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515

Short Title	Full Case Title and Citation
EC – Asbestos	Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III	Panel Reports, European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III), WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III,
EC – Export Subsidies on Sugar	Appellate Body Report, European Communities – Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Fasteners (China)	Appellate Body Report, European Communities – Definitive Anti-Dumping

Short Title	Full Case Title and Citation
Japan – Agricultural Products II	Appellate Body Report, Japan – Measures Affecting Agricultural Products , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Alcoholic Beverages II	Appellate Body Report, Japan – Taxes on Alcoholic Beverages , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Apples	Appellate Body Report, Japan – Measures Affecting the Importation of Apples , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Alcoholic Beverages	Appellate Body Report, Korea – Taxes on Alcoholic Beverages , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Dairy	Appellate Body Report, Korea – Definitive Safeguar d Measure on Imports of Certain Dairy Products , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Various Measures on Beef	Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef , WT/DS161/AB/R, WT/DS169/ AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Thailand – Cigarettes (Philippines)	Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines

PANEL EXHIBITS CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
CDA-12	Council Directive No. 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pu ps and products de rived therefrom, Official Journal of the European Communities , L Series, No. 91 (9 April 1983), pp. 30-31
CDA-29	J.C. Talling and I.R. Inglis, " Improvements to trapping standards" , DG ENV (2009) (a joint research report by Food and En vironment Research Agency (UK) , Federation of Associations for Hunting and Conservation of the EU, Ju lius Kühn-Institut (Germany), and Swedish Environmental Protection Agency)
CDA-34	P-Y. Daoust and C. Caraguel , "The Canadian harp seal hunt: observations on the effectiveness of procedures to avoi d poor animal welfare outcomes", Animal Welfare (2012), Vol. 21, pp. 445-455
CDA-47	EFSA, "Opinion of the Scientific Panel on Animal and Welfare on a request from the Commission related to welfare aspects of the main systems of stunning and killing the main commercial species of animals" , The EFSA Journal

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Measures
Prohibiting the Importation and Marketing
of Seal Products (DS400 / DS401)

Canada
    Appellant/Appellee
Norway
    Appellant/Appellee
European Union [1]
    Other Appellant/Appellee

Argentina,

1.2. The measure at issue in these disputes, as identified by the Panel [9], consists of the following legal instruments:

a. Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [10] (Basic Regulation); and

b. Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products [11] (Implementing Regulation).

1.3. The Panel considered it appropriate to treat the Basic Regulation and the Implementing Regulation as a single measure, which it referred to as the "EU Seal Regime". [12] We do the same in these Reports.

1.4. The EU Seal Regime prohibits the placing of seal products on the EU market unless they qualify under certain exceptions, consisting of the following: (i) seal products obtained from seals hunted by Inuit or other indigenous communities (IC exception); (ii) seal products obtained from seals hunted for purposes of marine resource management (MRM exception); and (iii) seal products brought by travellers into the European Union in limited circumstances (Travellers exception). [13] The EU Seal Regime lays down specific requirements in respect of each of these exceptions. [14]

1.5. Canada and Norway claimed before the Panel that the EU Seal Regime violates various obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement). The complainants alleged that the IC and MRM exceptions of the EU Seal Regime violate the non-discrimination obligations under Articles I:1 and III:4 of the GATT 1994 and, according to Canada, also under Article 2.1 of the TBT Agreement. Both complainants contended, in essence, that the IC and MRM exceptions accord seal products from Canada and Norway less favourable treatment than that accorded to like seal products of domestic origin, mainly from Sweden and Finland, and those of other foreign origin, particularly from Greenland. The complainants also asserted that the EU Seal Regime creates an unnecessary obstacle to trade, inconsistent with Article 2.2 of the TBT Agreement, because it is more trade restrictive than necessary to fulfil a legitimate objective. They further argued that certain procedural aspects of the measure violate the requirements for conformity assessment under Article 5 of the TBT Agreement. The complainants additionally claimed that the IC, MRM, and Travellers exceptions impose quantitative restrictions on trade, in a manner inconsistent with Article XI:1 of the GATT 1994. [15] Norway also argued that, if the EU Seal Regime was found to violate Article XI:1 of the GATT 1994, then it would also violate Article 4.2 of the Agreement on Agriculture. Finally, Canada and Norway both contended that the application of the EU Seal Regime nullifies or impairs benefits accruing to them under the covered agreements within the

TBT Agreement, and Articles I:1 and III:4 of the GATT 1994, it nullified or impaired benefits accruing to Canada and Norway under these agreements. [22]

1.10. On 24 January 2014, Canada and Norway each notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and each filed a Notice of Appeal [23] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Wo [illegible]

issued a Procedural Ruling rescheduling the oral hearing for 17 to 19 March 2014. The Procedural Ruling is attached as Annex 5 to these Reports.

1.15. On 19 February [30], 6 March [31], and 17 March 2014 [32], the Appellate Body received unsolicited amicus curiae briefs. 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, if they so wished. We note that the brief of 17 March 2014 was received on the first day of the oral hearing. In the 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 deemed this br

resulted in the detrimental impact was desi gned or applied in an even-handed manner."[35] Canada submits that the Panel erred in treating the first two elements of its test – i.e. whether the regulatory distinction was rationally connected to the objective and, if not, whether there was another cause or rationale that could justify the di stinction – as distinct from the third element – i.e. whether the regulatory distinction was designed and applied in an even-handed manner.[36] In support of its argument, Canada points to the Appellate Body's findings in US – Clove Cigarettes and US – COOL. Canada argues that, in both of these cases, "the absence of [a] rationale explaining or justifying the regulatory distinction played a central role in the Appellate Body finding that there had been a lack of even-handedness in how the distinction was designed and applied."[37]

designed in an arbitrary manner. [53] Canada submits that the Panel's analysis of the even-handedness of the regulatory distinction between commercial and IC hunts was misdirected and constitutes an error of law.

2.8. Canada further submits that the factual findings made by the Panel in its analysis of the even-handedness of the EU Seal Regime with respect to different IC hunts support the conclusion that the Greenlandic seal hunt is not primarily driven by subsistence considerations. [54] Therefore, Canada argues, the application of the regulatory distinction between Canada's commercial hunt and the Greenlandic hunt is arbitrary, even if the distinction between commercial hunts and Inuit hunts, generally, may not be.

2.9. Canada further argues that the Panel acted inconsistently with its duties under Article 11 of the DSU in failing to assess Canada's evidence demonstrating that the commercial hunts in Canada possess characteristics that are similar to the characteristics of subsistence hunts. According to Canada, this evidence was "highly material" to Canada's claims pertaining to the legitimacy of the regulatory distinction between commercial and IC hunts. [55] Canada asserts that, in its assessment of commercial hunts, the Panel selectively highlighted certain characteristics that are not similar to those of IC hunts, and did not respond to Canada's claims regarding the long-standing tradition of seal hunting on the east coast of Canada, the generation of income for small seal-hunting

2.16. In Canada's view, the Panel erred because it "failed to provide a clear and precise articulation of an actual contribution and the extent of the contribution or the capability of making a contribution to the proxy objective".[70] Canada adds that the Panel then "failed to undertake an examination of whether a reduction in demand for seal products in the EU or globally would consequently result in a reduction in the incidence of inhumane killing of seals".[71] Canada argues that findings made by the Panel in other parts of its Reports would not support such a showing since "the incidence of inhumane killing under the exceptions would be greater despite the possibility of fewer overall seals being killed."[72] Canada further alleges that the Panel compounded its error by referring to the "'incidence' of inhumane killing" without clarifying whether it was referring to the "proportion of seals being killed inhumanely or a total number of seals killed inhumanely".[73] Canada also contends that the Panel acted contrary to Article 11 of the DSU by failing to refer to any evidence that supports its finding that, by reducing global demand for seal products resulting from commercial hunts, fewer seals will be killed in an inhumane way.

2.17. Canada argues that the Panel erred because its findings with respect to the contribution that the EU Seal Regime makes to the identified objective "are insufficiently specific or detailed to provide an accurate assessment of the 'degree' of contribution and a benchmark for comparison with the alternative measure".[74] Relying on the Appellate Body reports in *US – COOL*, Canada contends that a panel needs to present "clear and precise" findings that enable identification of the degree of contribution made to the objective.[75] In Canada's view, however, the Panel failed to articulate what degree of contribution the EU Seal Regime as a whole makes to the identified objective "beyond vague references to 'some' contribution, 'a contribution' and 'contributes to a certain extent'".[76] Moreover, Canada considers that the Panel's finding that one part of the EU Seal Regime is capable of making and does make some contribution to the objective, while finding that the contribution is diminished and further negatively affected by other parts of the measure, provides an insufficient basis on which to identify the overall degree to which the EU Seal Regime makes a contribution to the objective. Canada argues that, without a finding of the overall degree of contribution of the measure to the objective, "it is not possible to compare the degree of contribution of the EU Seal Regime with that of the alternative measure."[77]

2.18. Canada further explains that its argument is not that imports from Greenland will replace imports from Canada, but rather that imports from Greenland can and do have access to the EU market despite the fact, as found by the Panel, that these products may be derived from seals killed inhumanely[78] Similarly, with respect to reducing the incidence of inhumanely killed seals, Canada notes that its contention is not that imports from Greenland will replace imports from Canada, but rather that they could, because there is no limit on the number of imports under the IC exception that can be placed on the EU market. Thus, Canada maintains, a reduction in demand for seal products in the European Union would not necessarily result in a decrease in the incidence of inhumanely killed seals since imports from Greenland are derived from hunting practices that have been recognized as creating poor animal welfare outcomes.

2.19. Finally, Canada claims that the Panel erred in two respects in its application of the legal standard under Article 2.2. First, the Panel failed properly to assess the risks non-fulfilment would create. According to Canada, although the Panel determined that the level of protection actually achieved by the measure is not as high as the European Union had claimed, the Panel then failed "to continue its analysis to assess the 'nature of the risks at issue' and the 'consequences of non-fulfilment' of the objective under the EU Seal Regime".[79] Second, Canada considers that the

trade-restrictive measure that does not make a significant contribution to the objective and has relatively low consequences of nonfulfillment of the objective is not 'provisionally' necessary pending confirmation by comparison with a less trade-restrictive alternative".[80]

2.1.2.2 The Panel's analysis of the alternative measure

the requirement that it meet this level of animal welfare".[90] Canada argues that the Panel also wrongly concluded that certification at the country or hunter level is insufficient because it would fail to convey accurate information in respect of seal welfare. Canada thus maintains that the Panel erred because its conclusion that the stringent version of the alternative measure imposes the sort of prohibitive costs and technical difficulties that can prevent an alternative measure from being considered to be reasonably available was "premised on the alternative measure being required to completely fulfil the objective".[91]

2.24. Canada submits that the Panel's error in evaluating the alternative measure against complete fulfilment of the objective led it to err in its reliance on certain jurisprudence and to disregard other relevant considerations. Canada argues, for instance, that the Panel's misconception about the standard against which to compare the alternative led it to err in its reliance on the Appellate Body report in *EC – Asbestos*.[92] According to Canada, it was not appropriate for the Panel to rely on the Appellate Body's analysis of whether the alternative measure led to a continuation of asbestos-related health risks because, in contrast to the measure

2.1.3 Article XX of the GATT 1994

2.1.3.1 Scope of Article XX(a)

2.28. Canada appeals the Panel's finding that the EU Seal Regime was designed to protect public morals and therefore falls within the scope of application of Article XX(a) of the GATT 1994. Relying on the Panel report in US – Gambling , Canada notes that the first element of the test under Article XX(a) is to determine whether a given measure is designed "to protect" public morals. [98] Canada highlights that the phrase "to protect" is also used in Article XX(b). In EC – Asbestos , the panel observed that "the use of the word 'protection' implies the existence of a risk." [99] In Canada's view, "[g]iven the close similarity between Articles XX(a) and XX(b), the interpretive reasoning of the panel in EC – Asbestos is highly relevant to this dispute". [100] For these reasons, Canada "extrapolate[s] that the test to be applied" in determining whether a measure falls within the scope of application of Article XX(a) includes three elements: (i) "identification of a public moral"; (ii) "identification of a risk to that public moral"; and (iii) "establishing that a nexus exists between the challenged measure and the protection of the public moral against that risk in the sense that the measure is capable of making a contribution to the protection of that public moral". [101]

2.29. With respect to the first element of its test, Canada argues that the Panel failed to "inquire what the content of the [relevant] moral norm is" by evaluating "the standard of right and wrong conduct in the European Union with respect to animal welfare". [102] According to Canada, "[s]uch an inquiry must focus on the content of animal welfare laws, policies and prac.4(l in)44.3(cies a th)-7.9focus.8(s)4.85ies ao the t fo

2.1.3.2 The Panel's analysis of "necessity"

2.34. Canada claims that the Panel also erred in its interpretation and application of the "necessity" test under Article XX(a) of the GATT 1994. To the extent that the Panel relied upon its analysis under Article 2.2 of the TBT Agreement, Canada puts forth the same claims of error with respect to the Panel's "necessity" analysis under Article XX(a) as Canada's claims of error with respect to Article 2.2 of the TBT Agreement. [122] Additionally, Canada presents a "specific claim of legal error" concerning the Panel's interpretation of the "material contribution" test established by the Appellate Body in Brazil – Retreaded Tyres .[123]

2.35. Canada takes issue with the Panel's conclusion that "for a preliminary finding that 'the measure as a whole is "necessary"' the contribution 'made by the "ban" to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness'." [124] According to Canada, in taking this approach, the Panel appears to have relied on the statement of the Appellate Body in

2.37. Canada also takes issue with the Panel's statement: "[w]e consider, and the parties do not

Article XX where there is no rational connection to the objective or if it goes against the objective." [146]

2.50. First, with regard to the Panel's analysis of the legislative history of the EU Seal Regime, Norway argues that the Panel erred in finding that addressing EU public moral concerns regarding seal welfare was the "principal" objective of the EU Seal Regime, when, according to Norway, the legislative history of the measure indicated that "the interests of indigenous communities and sustainable resource management were also priorities in the minds of legislators when developing the measure." [166] In support of its position, Norway refers to the legislative proposal by the European Commission for a regulation concerning trade in seal products [167] (Commission Proposal), which not only makes reference to public concerns regarding seal welfare, but also includes protecting IC interests as one of the "[g]rounds for and objectives of the proposal". [168] According to

described and provided for illustrate that the IC and [M]RM concerns were prominent in the minds of the legislators." [180]

2.53. Further, Norway claims that the Panel failed to consider and give appropriate weight to its own findings

Norway, "the Panel failed to attribute equal (or for that matter any) weight in its discussion to other objectives highlighted in that very same document" [191], namely that "[t]he fundamental economic and social interests of Inuit communities traditionally engaged in the hunting of seals should not be adversely affected." [192]

2.57. Second, Norway asserts that the Panel failed adequately to take into account the text of the EU Seal Regime, and in particular the Implementing Regulation for purposes of identifying the objective of the EU Seal Regime. Norway argues that, in its consideration of the text of the EU Seal Regime, the Panel erred because it failed to appreciate the import of its own finding that the preamble of the Basic Regulation sets out three main considerations with equal prominence, which included those relating to IC and MRM interests. According to Norway, the Panel's failure to explain why, in the light of that finding, "it still gave prominence singularly to the seal welfare concerns of the EU public, constitutes further error". [193]

2.58. Third, according to Norway, the Panel failed to account for the relevance of the measure's operation to discern the objective of the EU Seal Regime. More specifically, the Panel failed entirely to consider and give probative weight to its own findings in other sections of its Reports. According to Norway, these show that the EU Seal Regime will operate to allow into the EU market "all, or virtually all" seal products from Greenland under the IC exception, and that seal products from certain EU countries, including Sweden, would "likely qualify" under the MRM exception. [194] Norway posits that this evidence concerning the expected operation of the EU Seal Regime "confirms that the goals expressed in the legislative history, and reflected in the text and hierarchy of the measure, are implemented in the measure's operation to a considerable practical extent". [195] Thus, Norway contends that, together "with the remaining evidence, these findings should have revealed to the Panel that the EU Seal Regime pursues objectives relating to the protection of IC and [M]RM interests". [196]

2.59. Fourth, Norway alleges that the Panel's reasoning in paragraph 7.402 of its Reports lacks coherence to a degree that falls short of basic standards required under Article 11 of the DSU and is not supported by the evidence that was before the Panel. In this regard, Norway recalls its argument that the reasons given by the Panel for finding that protecting the IC and MRM interests were not objectives of the EU Seal Regime were: (i) that the three interests pursued in the measure "must be distinguished"; (ii) that the IC and MRM interests are not grounded "in the concerns of EU citizens"; (iii) that the IC and MRM "exceptions" were "included in the legislative process"; and (iv) that the exception in *Brazil – Retreaded Tyres* was not argued to constitute an "objective". [197] In Norway's view, "these reasons do not provide a coherent basis for the Panel's conclusion." [198] Moreover, according to Norway, the Panel's reasoning fails to address the "considerable evidence" on the Panel record showing that protection of the IC and MRM interests were objectives of the measure. [199]

2.2.1.2 The Panel's analysis of the contribution of the EU Seal Regime to its objective

2.60. Norway claims that the Panel erred in finding that the EU Seal Regime was more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. Norway first directs its challenge at the Panel's finding regarding the degree of contribution made by the EU Seal Regime to the protection of EU public morals. Norway asserts that the Panel's findings on contribution were insufficiently clear and precise, and were not properly substantiated.

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[191] Norway's appellant's submission, para. 188. (emphasis original)
[192] Norway's appellant's submission, para. 188 (quoting Commission Proposal, p. 5).
[193] Norway's appellant's submission, para. 198.
[194] Norway's appellant's submission, para. 204 (quoting Panel Reports, paras. 7.164 and 7.351, respectively).
[195] Norway's appellant's submission, para. 205.
[196] Norway's appellant's submission, para. 206.
[197] Norway's appellant's submission, para. 208 (quoting Panel Reports, para. 7.402).
[198] Norway's appellant's submission, para. 209.
[199] Norway's appellant's submission, para. 209.

2.2.1.2.1 Degree of contribution

2.61. Norway contends that the Panel was required "to state with sufficient clarity and precision the degree or extent of the net overall positive contribution it found to be made by the EU Seal Regime" to its objective. [200] Recognizing that a panel enjoys flexibility in conducting its analysis of the degree of the contribution, Norway observes that "the Panel opted for a methodology in which it considered the degree of positive, then negative, contribution made by the measure to each aspect of the EU public morals objective" before "reaching an overall conclusion that there is a net positive contribution to the objective of the measure". [201] Norway maintains that "the Panel was [thus] required to articulate sufficiently clearly and precisely the degree of the contribution made by the measure to each aspect of the objective, so that it could conclude with sufficient precision and clarity" that the measure made an overall net positive contribution to its objective. [202] Because the prohibitive and permissive aspects of the measure at issue "counteract each other" [203], Norway considered it particularly important that the Panel "articulate with clarity and precision the degree to which the positive contributions made by the prohibitive elements exceeded the negative contributions made by the permissive elements". [204] This, Norway adds, would provide an objective basis on which to conclude that the measure makes an overall net positive contribution to its objective, and provide a benchmark for purposes of comparison with the contribution of alternative measures.

2.62. Norway maintains that the Panel failed to establish the degree of contribution made by either of the two aspects of the public morals objective of the EU Seal Regime identified by the Panel, namely: (i) whether the measure ensures that EU citizens do not participate as consumers in products derived from seals killed inhumanely; and (ii) reducing the incidence of the inhumane killing of seals. Regarding the first aspect of the objective, Norway argues that, although the Panel concluded that the prohibitive element of the measure prevents the EU public from purchasing seal products to the "extent" that the banned products include products derived from seals killed inhumanely, the Panel never considered to what extent these hunts actually involved inhumane killing. [205] Moreover, Norway contends that the Panel failed in its assessment of the negative contribution of the IC and MRM hunts by not articulating with any clarity the extent of the risk of inhumane killing in these hunts, particularly in relation to the banned hunts. Norway concludes that the Panel, having failed to articulate the degree of the positive and negative contributions made, "had no basis to conclude that the measure actually makes a net positive contribution to that aspect of the objective". [206] Although the Panel concluded that the ban is capable of making a contribution to the measure's objective, Norway argues that it never determined "in what circumstances will the capability of contributing be converted into an actual contribution". [207]

2.63. With regard to the second aspect of the objective, Norway first criticizes the Panel for failing to explain the basis for treating a reduction in demand for seal products as a proxy for a reduction in inhumane killing. According to Norway, "[e]ven if demand were to fall, inhumane killing could increase if the measure favours supply from a hunt with poorer animal welfare outcomes." [208] Norway contends that, under these circumstances, the supply of seal products derived from inhumanely killed seals would increase, which is what occurs under the EU Seal Regime. Norway argues that the Panel failed to articulate the extent of the positive contribution made by the prohibitive elements of the measure to this aspect of the objective. In particular, Norway maintains that the EU Seal Regime is incapable of affecting consumer demand, and that the Panel itself acknowledged that it was unable to draw any concrete conclusions based on the available data. Moreover, Norway considers that the Panel's conclusion that the measure "may have contributed" to reducing EU demand is nothing more than a "possibility" that the measure did so. [209]

[200] Norway's appellant's submission, para. 262. (emphasis original)
[201] Norway's appellant's submission, para. 263.
[202] Norway's appellant's submission, para. 263.
[203] Norway's appellant's submission, para. 265.
[204] Norway's appellant's submission, para. 266. (emphasis original)
[205] Norway's appellant's submission, para. 273.
[206] Norway's appellant's submission, para. 281.
[207] Norway's appellant's submission, para. 284. (emphasis original)
[208] Norway's appellant's submission, para. 291.
[209] Norway's appellant's submission, para. 301 (quoting Panel Reports, para. 7.459).

Thus, Norway argues, "the moral standard found by the Panel applies to the IC and [M]RM hunts conducted in Greenland and the European Union as much as it does to other seal hunts."[218]

2.70. Third, Norway criticizes the Panel for failing to make an assessment of the animal welfare risks presented by the Greenlandic hunt in relation to the banned hunts. Norway points to the Panel's conclusions that "the use of rifles from boats in 'open water hunting' or trapping and netting appear to be the main hunting methods for Greenlandic Inuit", and that those hunting methods contribute to seal welfare concerns.[219] Norway also points to differences in compliance monitoring efforts as between Greenland, and Canada and Norway. Norway argues that the Panel, however, "failed to make any assessment of the animal welfare risks presented by the Greenlandic hunt in relation to the banned hunts".[220]

2.71. Fourth, Norway points to Panel findings and record evidence that, in its view, support the conclusion that the EU Seal Regime would lead to the substitution of Greenlandic seal products for imports previously derived from commercial hunts in Canada and Norway. Norway argues that these Panel findings and record evidence demonstrate that Greenlandic trade could by itself satisfy EU demand.[221] Norway further argues that the data relied on by the European Union to show levels of Canadian imports into the European Union were overstated because they also include transit goods that do not enter the EU market.[222]

2.72. Fifth, Norway argues 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. Norway asserts that the Panel's finding was "disingenuous"[223] because no Greenlandic imports were possible under the IC exception until a Greenlandic body to certify imports was recognized in April 2013, four days before the second Panel meeting.[224] Norway argues 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.

2.73. Sixth, Norway accuses the Panel of failing to assess the impact of the implicit exceptions under the EU Seal Regime. Norway contends that, despite the fact that the Panel's findings demonstrate that the implicit exceptions have commercial importance, and thus make an important negative contribution to countering the measure's objective, its significance "is nowhere properly taken into account or characterized by the Panel in arriving at its overall conclusion".[225]

2.74. In addition, Norway asserts two errors of the Panel that demonstrate its overvaluing of the positive contribution of the EU Seal Regime to the public morals objective. First, Norway considers

2.75. Second, Norway maintains that the Panel erroneously found that the ban reduces demand for seal products within the European Union and globally. With respect to the decline in demand within the European Union, Norway contends that "[t]he Panel did not identify any features of the measure, by design or otherwise", that affect the demand for seal products. [229] In Norway's view, the exceptions of the EU Seal Regime will ensure "sufficient quantities of seal products … in the EU market to meet the entirety of EU demand". [230] Norway also contends that the reasons given by the Panel for finding that the direct impact of the ban is a reduction of demand within the European Union "do not withstand scrutiny". [231] Norway further asserts that, in terms of Article 11 of the DSU, the Panel failed to substantiate its findings and engaged in selective treatment of the evidence demonstrating a lack of objectivity. Moreover, Norway argues that the Panel relied for its conclusion on trade data that do not pertain to EU or global demand, and that the Panel itself stated did not provide it with a basis to reach concrete conclusions. Accordingly, Norway argues, the Panel's findings lack objectivity.

2.2.1.2.3 Other issues regarding contribution

2.76. Norway further contends that the Panel acted inconsistently with Article 11 of the DSU when it failed to address Norway's claim that the so-called "non-profit", "non-systematic", and "sole purpose" conditi2(o)-.2", and "solee6wRMaaaaaaaaaurther contendit"ssaryrwlerstated di1ther as94on -2.3(67(wi(er(e)8.5(6e6.sh1

access were limited to seal products that meet animal welfare requirements, those seal products "would originate in hunts that may have caused poor animal welfare outcomes for some other number of seals". [237] Norway contends that the "logical implication" of this rationale is that "the current EU Seal Regime performs better than the alternative in this respect".

compliance could be borne by industry."[247] Moreover, Norway contends that the Panel "fundamentally misunderstood" the relevance of costs and technical difficulties addressed by the Appellate Body in *Brazil – Retreaded Tyres* and *US – Gambling* and, in doing so, "laid down an improper standard for less-restrictive alternatives to meet".[248] In Norway's view, it is clear from these decisions that the Appellate Body "was addressing the relevance of costs and technical difficulties that would be borne by the responding Member under a proposed alternative measure", and "was not addressing the cost to be borne by industry".[249]

restrictive than necessary by virtue of three contested conditions of the MRM exception: namely, the "not-for-profit", "non-systematic", and "sole purpose" conditions.[260]

2.2.2 Article XX of the GATT 1994

2.2.2.1 Aspects of the measure to be justified under Article XX(a)

2.86. Norway asserts that the Panel identified two precise aspects of the EU Seal Regime that violated the substantive provisions of the GATT 1994, namely, the IC exception and the MRM exception. According to Norway, although the Panel purported to agree with the parties and the relevant WTO jurisprudence that it is these "specific provisions"[261] – i.e. the IC and MRM exceptions found to be GATT-inconsistent – that have to be provisionally justified under Article XX(a), the Panel departed from this approach by expressly finding that "the EU Seal Regime can be provisionally deemed 'necessary' within the meaning of Article XX(a)."[262] Norway highlights that the Panel sought to draw a distinction between "justifying" the IC and MRM exceptions, on the one hand, and "considering" or "analysing" the EU Seal Regime as "a whole" in the process of "justifying" the IC and MRM exceptions, on the other hand.[263] Norway does not consider such distinction objectionable to the limited extent the Panel "consider[ed]" and "analy[sed]" the "ban" aspect of the EU Seal Regime to "better understand[]" the IC and MRM exceptions, all with the ultimate aim of assessing the provisional justification of these exceptions.[264] However, Norway

2.2.2.2 The Panel's analysis of "necessity"

2.90. In the event that the Appellate Body disa grees with Norway and finds that the Panel was correct in finding that it was the EU Seal Regime "as a whole" that should be provisionally justified as "necessary" under Article XX(a), Norway argues that the Panel erred in its finding that the EU Seal Regime contributes to the objective of protecting public morals regarding seal welfare.[285] The Panel considered that only "the 'contribution' made by the ' ban ' aspect of the measure needed to be ' material ', and that it was sufficient for the measure as a whole to contribute to ' a certain extent ' to its objective of addressing EU public moral concerns".[286] Norway highlights that, assuming that the Panel was correct in "considering the provisional justification of the measure as a whole (quod non), it was required to consider whether the contribution of the measure as a whole was 'material '".[287] A "material" contribution is a "signi ficant degree of contribution that exceeds the minimal level of contribution reflected in the Panel's finding that there is contribution 'to a certain extent '".[288] Although the Panel referred to "materiality" as regards the "ban" aspect of the measure, it did not consider that "its task was to determine whether the measure as a whole made a 'material' contribution to [the protection of] public morals."[289]

2.91. Norway asserts that the Panel's findings "reflect error in the application of the proper legal standard under Article XX(a) for two reasons".[290] First, the Panel's statement of the level of contribution of the EU Seal Regime lacks clarity and precision. The Panel's conclusion that the EU Seal Regime as a whole contributes to a "certain extent"[291] to the protection of EU public morals lacks -6.6(ght)5.6(-6-6.5(e)]TJ (N)66165")4.7(ah)4um004 T2-.0" ther th.

2.93. Norway notes that, having concluded that the EU Seal Regime contributed to "a certain extent" to its objective, the Panel recalled its "less trade-restrictive alternative" analysis under Article 2.2 of the TBT Agreement, wherein it concluded that the alternative measure proposed by the complainants was not reasonably available to the European Union.[298] For the same reasons set out in its appeal under Article 2.2 of the TBT Agreement, Norway asserts that the Panel erred: (i) in concluding that the less trade-restrictive alternatives proposed by Norway were not reasonably available; and (ii) in failing to make an objective assessment of the facts, as required by Article 11 of the DSU.

2.2.2.3 The Panel's analysis under the chapeau of Article XX

2.94. In the event that the Appellate Body disagrees with Norway that the Panel was incorrect in determining whether the EU Seal Regime as a whole was justified under Article XX(a) of the GATT 1994, Norway argues that, although it reached the correct conclusion, the Panel erred in the reasoning underpinning its finding that the EU Seal Regime is inconsistent with the requirements of the chapeau of Article XX. Specifically, Norway submits that the Panel erred in its analysis under the chapeau because it failed to: (i) articulate the relevant legal standards under the chapeau; and (ii) apply the proper standard to the IC and MRM exceptions. As to the Panel's failure to articulate the proper legal standard, Norway argues that the Panel erroneously applied the same test under the chapeau that it had adopted to address the "legitimate regulatory distinction" under Article 2.1 of the TBT Agreement. Although the Appellate Body has explained that the GATT 1994 and the TBT Agreement are "similar", Norway asserts that, "when seeking to understand how the legal standards under each Agreement are to be interpreted and applied, a panel must be faithful to the independence of the analysis to be conducted under each Agreement."[299]

2.95. Moreover, the legal standard developed by the Panel under Article 2.1 and applied by the Panel under the chapeau is contrary to the "well-accepted" jurisprudence on the requirements under the chapeau.[300] According to Norway, WTO jurisprudence is clear that, in considering whether WTO-inconsistent provisions of a measure comply with the chapeau, "a panel must assess whether there is any discrimination that runs counter to, or is otherwise rationally disconnected from,

"simply excused the European Union from that burden". [307] Such an approach, in Norway's view, undermines the "interpretive harmony" between the chapeau and the subparagraphs of Article XX, which requires that the discrimination be rationally connected "to the objective that provides the basis for provisional justification under a sub-paragraph", since, under the chapeau analysis, a panel must "verify" whether the provisional justification under a given subparagraph of Article XX is "not lost because the Member seeks … 'abuse or illegitimate use of the exceptions' to justify the WTO-inconsistent aspects". [308]

2.97. Turning to "step 3" of the Panel's analysis under Article 2.1, which sought to determine whether the discriminatory aspects of the measure are applied in an even-handed manner with regard to the additional cause or rationale used to "justify" it under "step 2", Norway submits that, although a panel may consider even-handedness with respect to the pursuit of the objective found to be provisionally justified under a subparagraph of Article XX, "there is simply no basis for the consequential third step of assessing whether this additional objective (cause or rationale) is pursued in an even-handed manner." [309] For these reasons, Norway asserts that the three-step test developed by the Panel under Article 2.1 of the TBT Agreement is "erroneous" in the context of the chapeau of Article XX of the GATT 1994. [310]

2.98. As a consequence of the erroneous legal standard adopted by the Panel for its Article XX analysis, Norway argues that the Panel erred in its reasoning as to why the IC and MRM exceptions do not meet the chapeau requirements. To the extent that Norway acknowledges the similarities between "step 1" of the Panel's analysis under Article 2.1 and the legal standard under the chapeau of Article XX, Norway asserts that the Panel should have found that the distinction between the IC and MRM hunts, on the one hand, and the commercial hunts subject to the ban, on the other hand, was not rationally connected to the objective of the EU Seal Regime. [311] For these reasons, Norway requests the Appellate Body to modify the Panel's reasoning and to find that the IC and MRM exceptions are not justified under the chapeau of Article XX of the GATT 1994 for the aforementioned reasons. [312]

2.3 Arguments of the European Union – Appellee

2.3.1 Article 2.1 of the TBT Agreement

2.99. In response to Canada's argument that the Panel articulated the wrong test under Article 2.1 of the TBT Agreement, the European Union argues that the Panel in fact conducted a proper two-step analysis. According to the European Union, the Panel first examined whether the regulatory distinction between commercial and IC hunts was "'justifiable' in the abstract", "without looking into the particular features of the IC exception as contained in the EU Seal Regime". [313] Having found this to be the case, the Panel then turned to examine whether that regulatory distinction between commercial and IC hunts "was 'indeed' designed and applied in an even-handed manner and did not reflect discrimination". [314] According to the European Union, the Panel thus sought to establish whether the objective or rationale pursued by the regulatory distinction was justifiable, and in that case, whether the measure at issue was designed and applied in an even-handed manner. The European Union emphasizes that the Panel did not

2.3.2 Article 2.2 of the TBT Agreement

2.3.2.1 The Panel's identification of the objective of the EU Seal Regime

2.107. The European Union maintains that the Panel correctly found that the main objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. [335] The European Union explains that, as found by the Panel, the te xt of the Basic Regulation, its drafting history, and its design and structure, establish that the EU Seal Regime was adopted in order to respond to EU public moral concerns regarding seal welfare.

2.108. The European Union agrees with the Panel's finding that the objectives of the IC exception and the MRM exception are not "independent" of the main objective of the EU Seal Regime. [336] Instead, they seek to accommodate other interests that the EU legislators deemed "morally superior to the welfare of seals in certain circumstances and under certain conditions" identified by the EU legislators. [337] By providing for such exceptions, the EU legislators were hence not undermining the public morals objective of the EU Seal Regime, "but instead giving effect to the basic moral standard that underlies the EU Seal Regime and, more generally, all EU legislation on animal welfare". [338] The European Union adds that the scope of the IC and Mr9 Mxcecc1.7(3ti)-6.3(o)-1.(n)2sas a

2.111. The European Union further notes that, un like the IC exception, the MRM exception was not envisaged in the Commission Proposal. Nor is a similar exception provided for in the EC Seal Pups Directive or in any of the measures taken by the EU member States or other WTO Members in .gs taken un

European Union asserts that Norway's own estimates show that "Greenland could not supply that volume on its own, even if it were to discontinue its exports to all other countries."[369]

2.119. The European Union also argues that the evidence before the Panel supports the finding that the Inuit have been adversely affected by the EU Seal Regime and have not always been able to benefit from the IC exception. According to the European Union, the EU Seal Regime has a depressing effect on global prices and demand, including on seal products from the IC hunts, and "this negative impact is one of the main reasons why the Complainants' speculative allegations that imports from Greenland will simply replace imports into the European Union from Canada and Norway are unfounded."[370] The European Union also challenges as "thoroughly misguided" Norway's assertion that the only reason the indigenous communities have not been able to benefit from the IC exception, as the Panel found, was because Greenland did not have an established recognized body at the time of the Panel proceedings.[371] Noting that the Panel was "well aware that Greenland had benefitted effectively from the IC exception since 2010", the European Union argues that the Panel must be understood as referring to difficulties faced by Inuit and other indigenous communities in Canada, not Greenland.[372]

2.120. The European Union submits that, contrary to the complainants' allegations, the evidence before the Panel supported the Panel's finding that the EU Seal Regime contributes to reducing EU demand for seal products, as well as global demand. The European Union asserts that "[i]t is beyond dispute that the EU Seal Regime has effectively limited imports of seal products resulting from the commercial hunts in Canada and Norway."[373] Although the Panel found that the statistics are incomplete because they do not track separately all categories of seal products, the European Union considers that "this does not mean that those statistics are unreliable."[374] The European Union thus considers that the Panel was correct in concluding that the statistics "show a general trend that seal product imports from the complainants into the EU Market have decreased significantly over the last few years".[375] The European Union again rejects the "speculative prediction" underlying the complainants' arguments that the EU Seal Regime does not contribute to reduce the demand for seal products within the EU market because imports from Canada and Norway will be replaced by imports from Greenland.[376]

2.121. The European Union further maintains that, because EU demand for seal products is a component of the global demand for such products, reducing EU demand also contributes to

seals killed would entail necessarily a reduction of the number of seals being killed inhumanely" on the basis of its factual findings regarding the welfare risks inherent in all seal hunts. [381]

2.123. The European Union also rebuts the complainants' claims under Article 11 of the DSU. The European Union does not separately address most of these claims, as it considers them "largely duplicative of those previously made" by the complainants in their claims of error in the legal application of Article 2.2 of the TBT Agreement. [382] With regard to Norway's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to examine the contribution of certain conditions of the MRM exception to meeting the EU public moral concerns regarding seal welfare, the European Union argues that "this claim is entirely dependent" on Norway's previous appeal of the Panel's finding that MRM interests are not an objective of the EU Seal Regime. The European Union adds that, by examining the contribution of the EU Seal Regime as a whole to the objective

2.3.2.3 The Panel's analysis of the alternative measure

2.126. The European Union argues that the comp

entitled to apply different measures with regard to seal products".[404] The European Union adds that the objective "pursued by the EU Seal Regime is to address public moral concerns with regard to the welfare of seals, rather than protecting the welfare of seals as such."[405]

2.130. The European Union also takes issue with the argument by the complainants that *Brazil – Retreaded Tyres* requires that consideration of any "prohibitive costs or substantial technical difficulties" must be those borne by the Member.[406] According to the European Union, that dispute simply identifies an example of a situation where the proposed less trade-restrictive alternative would not be reasonably available, and there "can be other circumstances where a measure would not be available because it would be 'merely theoretical in nature'".[407] The European Union refers to the Panel's various findings regarding the challenges presented by a "more stringent regime".[408] The European Union also notes that, despite the Panel's conclusion regarding the greater expenditure and practical challenges of implementation, the costs of such a regime was "just one of the obstacles mentioned by the Panel and, by no means, the most important".[409]

2.131. The European Union disagrees with Canada that the Panel failed to make an objective assessment under Article 11 of the DSU by finding that the less trade-restrictive alternative could result in an increase in the number of inhumanely killed seals. The European Union contends that the Panel's finding "can be reasonably inferred from the Panel's findings regarding the inevitability of certain risks of inhumane killing arising from the conditions and circumstances of the seal hunts".[410]

2.132. The European Union also rejects Norway's argument that the Panel committed a violation of Article 11 of the DSU by failing to address two other less trade-restrictive alternatives put forward by Norway. The European Union notes that one of these proposed less trade-restrictive alternatives consisted of removing all of the requirements of the EU Seal Regime, and "amounted effectively to repealing the EU Seal Regime".[411] Because[407] the European Union adds

2.3.3 Article XX of the GATT 1994

2.3.3.1 Aspects of the measure to be justified under Article XX(a)

2.134. The European Union requests the Appellate Body to reject Norway's appeal against the Panel's findings with respect to the aspect of the EU Seal Regime to be justified under Article XX(a) of the GATT 1994. According to the European Union, contrary to what Norway alleges, WTO

to which the measure contributes to the stated objective", which then affects the Article XX analysis. [424] Finally, the European Union contends that the Panel did not err in making a reference to its analysis under the TBT Agreement in its assessment of the measure with respect to Article XX. If at all, the Panel's "consistent and coherent analysis between the TBT Agreement and the GATT 1994 … further supports the correctness of [its] approach". [425]

2.139. In the event that the Appellate Body agrees with Norway that the Panel erred in

protection in different situations".[435] Such a limitation, the European Union maintains, cannot be easily presumed absent clear text, since, when the drafters intended to provide for a consistency obligation, they did so expressly, such as in Ar ticle 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[436]

2.142. The European Union also takes issue with Canada's argument that the EU Seal Regime

European Union considers that the interpretation advanced by the complainants would contradict the interpretation of the contribution requirement under Article 2.2 of the TBT Agreement as applied in *US – COOL*, in which "the Appellate Body rebuked the panel for having considered it necessary for the COOL measure to meet some minimum level of fulfilment".[446] The European Union also highlights that, unlike the measure at issue in *Brazil – Retreaded Tyres*, the EU Seal Regime does not provide for "a complete import ban", as the complainants themselves appear to have acknowledged.[447]

2.145. In any event, the European Union maintains that, in *Brazil – Retreaded Tyres*, the Appellate Body held that "a contribution should be deemed 'material' provided that it is not 'marginal or insignificant'."[448] In this case, the European Union claims that both the Panel's findings and the evidence on record "demonstrate that the contribution of the EU Seal Regime is clearly more than 'marginal or insignificant', even if it cannot be quantified precisely".[449] For these reasons, the European Union requests the Appellate Body to reject Canada's and Norway's claims and arguments on appeal with regard to the necessity of the EU Seal Regime under Article XX(a) of the GATT 1994.

2.3.3.4 The Panel's analysis under the chapeau of Article XX

2.146. The European Union submits that the Appellate Body should reject Canada's claims of legal error with respect to the Panel's reasoning under the chapeau of Article XX of the GATT 1994. According to the European Union, the Panel's approach of taking into account its "legitimate regulatory distinction" analysis under Article 2.1 of the TBT Agreement for the purposes of its assessment of "arbitrary or unjustifiable discrimination" under the chapeau is legally correct.[450] The European Union asserts that the complainants' "rigid interpretation" of the term "arbitrary or unjustifiable discrimination" as embodying a requirement that the reasons for discrimination be "rationally connected" to the policy objective of the measure is not reflected in the text of the chapeau or past Appellate Body jurisprudence.[451] While the European Union agrees that determining whether the discrimination at issue is "arbitrary or unjustifiable" usually involves an investigation of the reason underlying the discrimination, in its view, investigating the cause underlying the discrimination is not necessarily limited to determining whether such cause is "rationally connected" to the objective of the measure. Moreover, as reflected in prior Appellate Body jurisprudence, determining the cause of the discrimination may involve the consideration of other factors.[452]

2.147. The European Union considers that its position is supported by *Brazil – Retreaded Tyres*, where the Appellate Body found that, under the specific circumstances of that case, the MERCOSUR arbitral ruling was "not an acceptable rationale for the discrimination, because it [bore] no relationship to the legitimate objective pursued by the Import Ban that [fell] within the

2.148. The European Union further maintains th at the Panel based its conclusion about the justification of the regulatory distinction on its finding that, in the EU Seal Regime, "the interests underlying the IC exception are 'balanced agai nst the objective of the measure at issue.'" [455] The European Union adds that, by contrast, in Brazil – Retreaded Tyres , the Appellate Body did not find "any such balancing" in the measure at issue, since, in that case, there was a "complete dissociation of objectives". [456] Finally, the European Union notes that the nature of the exceptions

regulation" and to declare moot and of no legal effect the Panel's findings and conclusions under Article 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement. [466]

2.152. First, with respect to the Panel's interpretation of the term "applicable administrative provisions", the European Union submits that the Panel erred in considering that the word "applicable" pertains to "products" rather than "product characteristics or their related processes and production methods" (PPMs). [467] Pointing to the text of Annex 1.1, the European Union observes that "[t]he reference to 'applicable administrative provisions' immediately follows the mention of 'product characteristics or their related [PPMs]'", with the two categories being linked by "the conjunctive term 'including'". [468] Regarding the measure at issue, the European Union asserts 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". [469] Instead, they regulate trade in seal products. For the European Union, they cannot therefore be considered as being "applicable" to a product characteristic within the meaning of Annex 1.1.

2.153. Second, the European Union alleges that the Panel erred in its interpretation of the term "product characteristics" by relying only on "a fragment of the Appellate Body's analysis in EC – Asbestos " on the ordinary meaning of "product characteristics". [470] In particular, the Panel erred in relying on EC – Asbestos to find support for its finding that any "objectively definable features" of a product constitute product characteristics. [471] This led the Panel to find that the criteria established under the Implementing Regulation concerning the type of hunter and/or qualifying hunts amount to "product characteristics" within the meaning of Annex 1.1. Under the Panel's interpretation of Annex 1.1, "virtually anything" that bears a relation to a product could be construed as a product characteristic". [472] The European Union adds that the Panel's reading of Annex 1.1 renders redundant, at least in part, the inclusion of "related [PPMs]", as the two concepts overlap in scope. It also contradicts the object and purpose of the TBT Agreement, which "was designed to elaborate on the disciplines of Article III of the [GATT] for a very specific subset of measures" rather than to cover "all government regulatory actions affecting products" or "all internal measures covered by Article III:4 of the GATT 1994". [473] The European Union further argues that the negotiating history of the TBT Agreement reflects the intent to narrow the scope of the TBT Agreement, as negotiators only agreed to include PPMs " related to product characteristics". [474]

2.154. On this basis, the European Union submits that the conditions imposed under the EU Seal Regime – the IC, MRM, and Travellers exceptions – "do not concern the intrinsic characteristics or features that are related to the products". [475] Specifically, the IC exception deals with "the identity of the hunters, the traditions of their communities and the purpose of the hunt" [476]; the MRM exception relates to "the size, intensity and purpose of the hunt and the marketing conditions (i.e. non-profit and non-systematic) of the products" [477]; and the Travellers exception pertains to "the use of the products and the circumstances of their importation". [478] None of these conditions, argues the European Union, set out any intrinsic or related features of the products.

2.155. Finally, referring to the Appellate Body's findings in EC – Asbestos , the European Union recalls that the proper legal characterization of the measure at issue cannot be determined unless the measure is examined "as a whole". [479] The European Union adds, however, that the Appellate

[466] European Union's other appellant's submission, paras. 88-90 and 332.
[467] European Union's other appellant's submission, para. 53.
[468] European Union's other appellant's submission, para. 55.
[469] European Union's other appellant's submission, para. 58.
[470] European Union's other appellant's submission, para. 61.
[471] European Union's other appellant's submission, para. 65 (quoting Panel Reports, para. 7.110).
[472] European Union's other appellant's submission, para. 66.
[473] European Union's other appellant's submission, paras. 68 and 69, respectively (quoting Appellate Body Report, EC – Asbestos , para. 77).
[474] European Union's other appellant's submission, para. 70. (emphasis original)
[475] European Union's other appellant's submission, para. 71.
[476] European Union's other appellant's submission, para. 72.
[477] European Union's other appellant's submission, para. 73.
[478] European Union's other appellant's submission, para. 74.
[479] European Union's other appellant's submission, para. 76 (referring to Appellate Body Report, EC – Asbestos , para. 64).

Body did not suggest in that case that "it is sufficient for one component to meet the criteria for a technical regulation for a measure as a whole to be considered" as such. [480] Thus, it was incorrect

entity in Greenland has become a recognized body results from the decisions of the relevant authorities and operators in other countries, and cannot be attributed to the EU Seal Regime. The European Union argues that, contrary to what the Panel found, there is no "inherent flaw" or

the Canadian Sealers Association (CSA poll) – respondents were asked under which conditions the killing of animals would be acceptable. The European Union points out that 90% of respondents agreed with the statement that "the killing of wild animals is acceptable if a person's survival or livelihood depends on it". [510]

2.165. The European Union submits that the Panel did not claim that these polls support its finding, but rather characterized them as "unreliable". [511] The European Union argues that, in reaching this conclusion, the Panel "disregarded" or "distorted" the findings of the Royal Commission. [512] Although the Panel noted that the Royal Commission identified "two uncertainties" about the result of the polls, the European Union argues that these uncertainties did not lead the Royal Commission to question the "reliability" of the CSA poll. [513] Instead, the Royal Commission concluded that the CSA poll "at least, supports the view that there is strong public approval of taking seals for subsistence purposes". [514] In the European Union's view, it is "impossible to reconcile" this finding of the Royal Commission with the Panel's finding that EU public concerns regarding seal welfare do not vary depending on the purpose of the hunt. [515]

European Union submits that the Panel failed to provide reasoned and adequate explanations, lacked a sufficient evidentiary basis, and provided incoherent reasoning in arriving at this conclusion.

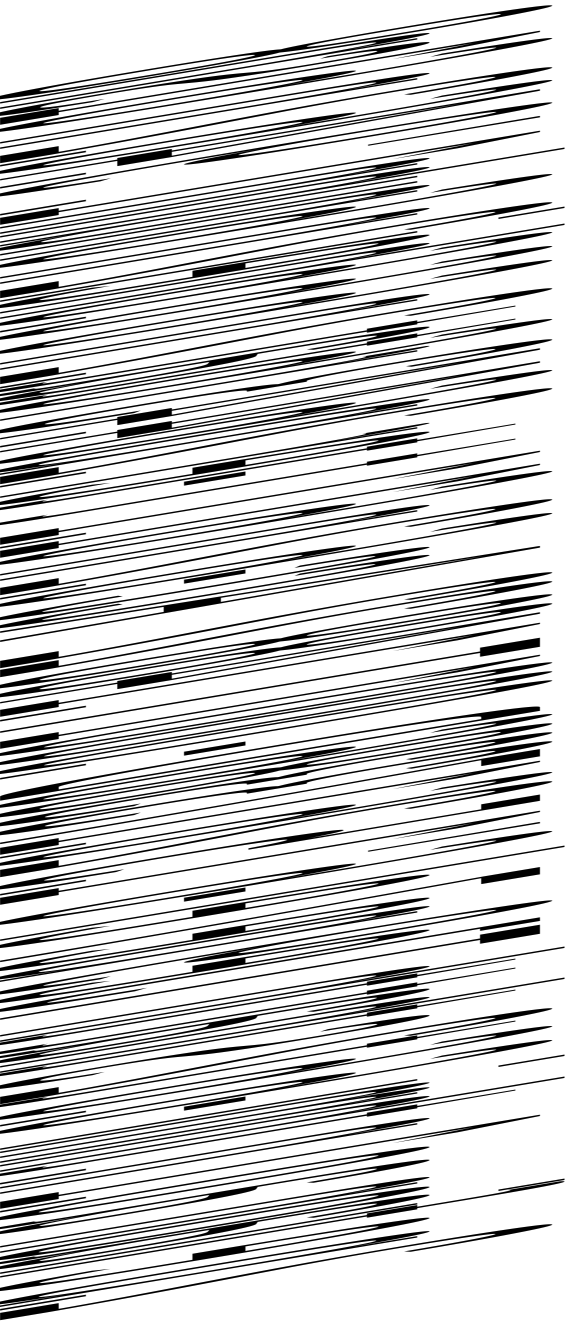
2.168. With respect to the text of the IC exception, the European Union notes the Panel's finding earlier in its analysis that, "[b]ased on the text, we consider that the requirements of the IC exception are generally linked to the characteristics of IC hunts".[523] For the European Union, this means that the Panel "did not find anything wrong with the requirements" attached to the IC exception.[524] The European Union, therefore, fails to understand how the Panel could have relied on the text of the IC exception as a basis for finding a lack of even-handedness. The European Union submits that, by doing so, the Panel provided incoherent reasoning and failed to provide an adequate explanation for its finding.

2.169. With respect to the legislative history of the IC exception, the European Union notes the Panel's observation that the COWI 2008 and 2010 Reports[525] "anticipated" that Greenland would be the only beneficiary of the IC exception, as well as the Panel's finding that the fact that Greenland is the only beneficiary of the IC exception is "not merely an incidental effect" of the application of the exception.[526] According to the European Union, the Panel based its conclusion that the IC exception was drafted with the knowledge that only Greenland could benefit from it on the two COWI Reports, as well as the Parliament Report on the proposal for a regulation concerning trade in seal products.[527] The European Union submits that the Panel's reliance on those documents was "unwarranted", and that the Panel lacked an evidentiary basis for its finding.[528] According to the European Union, neither the COWI Reports nor the Parliament Report

commercial considerations, but rather on an attempt to deal with a temporary crisis in a way that avoided laying off local workforce. [541]

2.176. Finally, the European Union submits that th e Panel's conclusion that "the purpose of seal hunts in Greenland has characteristics that are closely related to that of commercial hunts" contradicts its earlier conclusion that the primary purpose of seal hunts conducted by Inuit communities, including in Greenland, was the "subsi stence" of those communities in terms of their culture and tradition as well as their livelihood. [542] According to the European Union, the Panel's reasoning is therefore incoherent.

2.177. Consequently, the European Union requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter, co ntrary to Article 11 of the DSU, and to reverse the Panel's finding that the IC exception was



not be applied so as to afford protection to domestic production – informs the rest of Article III.[549] Further, in EC – Asbestos, the Appellate Body confirmed the relevance of Article III:1 for the interpretation of Article III:4.[550] The European Union notes that the Appellate Body has found that a determination of whether a measure is applied so as to afford protection to domestic production – within the meaning of Article III:1 – requires an inquiry into the design, architecture, and revealing structure of a measure. Moreover, panels should, in conducting this inquiry, give full consideration to all the relevant facts and circumstances of a given case.[551] The European Union submits that this test "corresponds to the second step of the de facto discrimination analysis" that the Appellate Body has found to be required under Article 2.1 of the TBT Agreement.[552] Thus, the Panel's suggestion that this analysis is unnecessary for a finding of de facto discrimination under Articles III:4 and I:1 "clearly fails to take account" of the context of Article III:1.[553]

2.182. The European Union also contends that the Panel's interpretation of Articles I:1 and III:4 fundamentally misunderstands the contextual relationship between the GATT 1994 and the TBT Agreement. Relying on the Appellate Body's finding in US – Clove Cigarettes that the GATT 1994 and the TBT Agreement should be interpreted in a coherent and consistent manner,

the scope of Article XX(a). [569] The European Union notes the Panel's recognition that a measure may pursue more than one objective, adding that there is not any reason why a measure cannot be justified "simultaneously under more than on e of the grounds listed in Article XX of the GATT". [570] According to the European Union, this reason, "[a]t most", could have justified exercising judicial economy with respect to its defence under Article XX(b). [571]

2.188. The European Union further submits that the Panel's observation on the "limited" extent of

about the design and application of the IC exception did not relate to whether Canadian Inuit seal products formally qualified for EU market access under the IC exception, but rather to the question of whether they could benefit from it in practice. As Canada sees it, the Panel concluded that they could not because the IC exception was designed and applied in such a way that only large-scale, commercially oriented seal-hunting operations possess the wherewithal to do so. Canada highlights the Panel's reference to a statement by the Canadian Inuit that their hunt is too small to "generate market interest alone on an international scale", and that "market realities are È major factors contributing to the ineffectiveness of the Inuit exemption to the EU seal ban È".[599] According to Canada, the Panel agreed that there is "little point" in Canadian Inuit applying for the IC exception if, due to its design and application, they are unable to take advantage of it.[600] Canada alleges that, more generally, the actions of a WTO Member or private actors should not form the basis for an assessment of whether the challenged measure discriminates against that WTO Member.

2.199. With respect to the European Union's argument that the Panel erred by relying on the degree of similarities of the seal hunt in Greenland with commercial hunts, Canada submits that the Panel conducted this examination as a means to assess what would be required for a given Inuit hunt to be able to take advantage of the IC exception. Canada faults the European Union for equating access with formal compliance with the criteria set out in the IC exception. Canada argues that, for the Panel, this was not sufficient, as even-handedness required equal access in practice. Canada submits that the factors examined by the Panel relate to the ability of Inuit communities to get their products to the EU market, and that these factors – in particular the

2.203. With respect to the Panel's reliance on the results of public surveys, Canada submits that the fact that 62% of the respondents stated that seals should not be hunted for any reason is consistent with the Panel's finding that the EU public's moral concerns about the hunt do not vary according to the type of seal hunt. At the same time, Canada argues that the Panel did not rely on the evidence from the public consultation to support its "basic" finding on whether the EU public's concerns on seal welfare varied with the type of hunt. [607] Canada further submits that the fact that the Panel did not explicitly address COWI's comment on the results of the consultation was "reasonable in the circumstances", and was within its discretion as the trier of fact. [608]

2.204. Canada responds that the European Union's claims that the Panel committed material inaccuracies that led to erroneous factual determinations and incoherent reasoning are without merit. First, Canada submits that the Panel did not say that each of the elements that it considered – the text, legislative history, and application of the IC exception – demonstrated a lack of even-handedness. Instead, according to Canada, the Panel only stated that it considered these three elements. With respect to the text of the IC exception, Canada notes that the European Union fails to mention the Panel's observation that the "scope and meaning of the 'subsistence' criterion under the requirements [of the IC exception] is not defined under the measure", as well as the Panel's reference to an observation in the COWI 2010 Report to the effect that, in order to fall into the "subsistence" category, a hunt must not be "organized on a large scale". [609] According to Canada, the Panel's scrutiny of the text of the IC exception established a

that, to the extent that commercial sealers retain the meat from seal carcasses, they have done so largely for personal consumption.

2.208. With respect to the volume of sealskins traded, Canada also alleges that the reasons why Greenland's seal product exports are limited to seal skins have less to do with the diversion of other products towards subsistence, and more to do with the fact that the Greenlandic seal industry faces logistical challenges in collecting fresh blubber quickly enough to refine it into oil.[614] Canada further asserts that commercialized seal products are not limited to skins, given that teeth and claws are used to make products for the tourist industry, and the meat, blubber, and offal are sold in local markets and restaurants, as well as in larger supermarkets.[615]

2.209. Canada further points out that the European Union neglects to address the many other considerations that led the Panel to describe the Greenlandic seal hunt as exhibiting characteristics that are closely related to those of commercial hunts. In this regard, Canada notes the Panel's finding that Greenland has 2,100 paid full-time hunters, who are licensed professionals and who kill roughly 80% of all seals hunted in Greenland.[616] Canada further points to the presence of the government-owned Great Greenland A/S, which operates a state-of-the-art processing facility, as well as manufacturing, design, and marketing facilities in Greenland.[617] In sum, Canada submits that the range of seal products sold by Greenland does not change the commercial characteristics of the Greenlandic hunt so that it no longer resembles a commercial hunt.

2.210. In response to the European Union's argument that the Panel wrongly assessed the relevance of the volume of seal skins traded in Greenland, Canada recalls the Panel's finding that the scale of a hunt is important in determining what a commercial hunt is.[618] Canada submits that the fact that Greenland subsidizes the seal hunt does not mean that there is a qualitative difference in the volume of seals killed in Greenland. Canada points to the Greenlandic

whether the detrimental impact on imported products stems from a legitimate regulatory distinction.

2.217. Turning to the European Union's argument that the Panel's interpretation of Articles I:1

respect to the objective, and "rejected the idea that the EU Seal Regime pursued any objectives other than EU public moral concerns on seal welfare". [645]

2.225. Finally, Canada considers that the European Union's claim that the Panel erred in finding that its arguments under Article XX(b) were "limited" is "equally ill-founded from the standpoint of the legal standard under Article 11". [646] Canada maintains that the European Union's first and second written submissions to the Panel dealt with Article XX(b) in one paragraph and two paragraphs, respectively. [647] Although the European Union made several cross-references to other parts of its submissions in these paragraphs, Canada notes that those cross-references "were general and made no attempt to situate the content of the cross-referenced sections in the specific context of the elements that together make up Article XX(b)". [648] For these reasons, Canada

2.230. Norway agrees with the Panel's finding that the EU Seal Regime "prescribes 'applicable administrative provisions' for products with certain objective characteristics".[654] The administrative

2.233. In concluding, Norway argues that the European Union "concedes that the measure lays down product characteristics by prohibiting products from containing seal inputs".[667] According to Norway, the European Union also concedes that the exceptions in the EU Seal Regime "define the scope of the prohibitions".[668] Norway submits that, rather than accepting the "consequences of these admissions", the European Union takes issue with "fragments of the Panel's analysis" and focusses "on a small minority of products consisting exclusively of seal".[669] According to Norway, the European Union's "objections to the Panel's reasoning do not alter the 'fundamental thrust and effect', and 'centre of gravity', of the measure as a whole."[670] Norway requests, on this basis, that the Appellate Body uphold the Panel's finding that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

2.234. In the event that the Appellate Body reverses the Panel's finding that the EU Seal Regime lays down product characteristics and/or applicable administrative provisions, Norway requests the Appellate Body to complete the legal analysis and to find that the measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[671]

2.6.2 Article I:1 and Article III:4 of the GATT 1994

2.235. Norway requests the Appellate Body to reject the European Union's appeal of the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994. With regard to the Panel's application of Article I:1 and its legal conclusion thereunder, Norway notes that the European Union "raises no additional argument" as to why the Panel's conclusion under Article I:1 should not be upheld by the Appellate Body, beyond its arguments concerning the alleged errors in the Panel's interpretation of that provision.[672] According to Norway, because the Panel did not err in its interpretation of Article I:1, the Appellate Body should reject the European Union's appeal regarding the Panel's conclusion under that provision.

2.236. Turning to the specific arguments raised by the European Union, Norway disagrees with the European Union's assertion that the Panel's interpretation of these provisions is not supported by the Appellate Body reports in Dominican Republic – Import and Sale of Cigarettes and EC – Asbestos. With respect to the European Union's reliance on Dominican Republic – Import and Sale of Cigarettes, Norway points out that, in US – Clove Cigarettes, the Appellate Body clarified that, in the former dispute, it had rejected the complainant's claim under Article III:4 for reasons other than any justification given for the detrimental impact caused by the measure on imported products. Thus, the Appellate Body confirmed that the focus of the analysis under Article III:4 is on whether the measure at issue "modif[ies] the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products".[673]

2.237. Norway contends that the European Union's reliance on EC – Asbestos is also misplaced. For Norway, the Appellate Body merely explained in that dispute that "Article III:4 is not violated

2.238. Norway further disagrees with the European Union's argument that, by failing to apply the same test developed under Article 2.1 of the TBT Agreement to Articles I:1 and III:4 of the GATT 1994, the Panel overlooked the context provided by Article III:1 of the GATT 1994. The Appellate Body has emphasized that the role of Article III:1 in interpreting the remaining paragraphs of Article III depends on whether Article III:1 is expressly invoked in the particular paragraph of Article III. [676] Norway notes in this regard that Article III:1 is not expressly invoked in Article III:4, and that the Appellate Body clarified that the legal requirements set out in Article III:4 are themselves an application of the general principle set forth in Article III:1. Thus, in assessing whether there is less favourable treatment of imports under Article III:4, a panel is required to examine whether the measure has a detrimental or "adverse impact on competitive opportunities for imported versus like domestic products". [677] Norway asserts that, if it does, the measure will not be in accordance with the "general principle" expressed in Article III:1, which is "to ensure equality of competitive conditions between imported and like domestic products". [678]

2.239. Noting the European Union's argument that the test under Article III:2, second sentence, of the GATT 1994 "'corresponds to the second step of the de facto discrimination analysis' under Article 2.1 of the TBT Agreement", Norway submits that the European Union misunderstands the legal standard under Article III:2, second sentence. [679] According to Norway, under Article III:2, second sentence, a panel is not required to ascertain "a justification for a tax measure that has been found to have a detrimental impact" on the equality of competitive conditions for imported products. [680]

address its other appeal, Norway submits that th e appeal should be dismissed because, when considered on its own terms, the Panel was correct in finding that the IC exception is not designed and applied in an even-handed manner. [697]

2.247. Norway submits that, in its arguments on appeal, "the European Union misses the rationale underpinning the Panel's finding." [698] According to Norway, the Panel's assessment of the even-handedness of the IC exception did not rely so lely on the formal written requirements of the exception, but also on the actual and expected operation of these requirements. As Norway sees it, the Panel viewed the fact that only the Greenlandic hunt, which "bears all the hallmarks of a large-scale commercial hunt", could benefit from the IC exception as an indication of a certain "inherent flaw" in the IC requirements. [699] Norway further submits that, while the Panel accepted that "a degree of commercialization could be accommodated under the subsistence hunts qualifying as IC hunts, this commercial aspect could not transform the hunt [in]to, in essence, a commercial hunt." [700]

Great Greenland A/S, which for Norway means that "the internationally traded seal skins are produced as part of a supply chain that is necessarily commercial in nature". [717]

2.254. Norway further submits that the fact that the Greenland hunt is subsidized does not render it non-commercial. According to Norway, producers benefiting from subsidies "still form part of the commercial marketplace". [718] Norway also points out that the European Union's position that the scale of a hunt is irrelevant for a qualitative assessment of the commercial aspect of a hunt is inconsistent with the European Union's argument before the Panel that scale had a fundamental importance in distinguishing hunts under the rules of morality asserted by the European Union. With respect to the European Union's argument that the Panel erred in finding a degree of integration between the seal industries in Greenland, Canada, and Norway, Norway asserts that the material presented by the European Union in its appeal itself supports the Panel's finding, as it documents various interactions between the sealing industries in the three countries. [719] Norway also does not see incoherent reasoning in the Panel's finding, on one hand, that "the purpose of seal hunts in Greenland has characteristics that are closely related to that of commercial hunts" and, on the other hand, what the European Union understands to be the Panel's finding that the Greenlandic hunt has a "subsistence" character. [720] Norway notes that the degree of the commercial aspect varies between indigenous hunts, and asserts that, in Greenland, the hunt is commercial to a significant degree, "reaching levels that more [closely] resemble commercial hunts". [721]

disposing of claims by the complainants in Thailand – Cigarettes (Philippines).[727]

2.7 Arguments of the third participants

2.7.1 Ecuador

2.259. Pursuant to Rule 24(4) of the Working Procedures, Ecuador chose not to submit a third participant's submission, but it did make an opening statement at the oral hearing. Due to its

commercial hunts and IC hunts that causes the detrimental impact, not the differences in application of the IC exception to seal products derived from different IC hunts. In Japan's view, the Panel should have examined instead whether th

2.270. Japan considers further that an argument in favour of the European Union's interpretation of Article III:4 of the GATT 1994 is that Article 2.1 of the TBT Agreement provides relevant context for the interpretation of Article III:4 when the measure at issue is a technical regulation.[764] Japan, however, expresses some concerns with this approach. First, Japan notes that this approach does not appear to be consistent with the existing case law of the Appellate Body under which "treatment no less favourable", within the meaning of Article III:4, is assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment

provisionally justified under one of the paragraphs of Article XX", it is contrary to the test under the chapeau as developed in WTO jurisprudence, namely that the rationale or cause of discrimination be rationally connected to the objective of the measure.[776]

2.7.4 Mexico

2.274. Mexico agrees with the participants and the Panel that, under Annex 1.1 to the TBT Agreement, "the proper legal character of the measure should be determined by examining the measure as a whole, in a holistic manner."[777] At the same time, Mexico disagrees with what it sees as a "mechanistic test" proposed by the European Union that would seem "to require a

product, rather than prescribing that the product possess or not possess a certain product characteristic, the measure is not a technical regulation."[793]

2.283. Moreover, the United States submits that the criteria under the exceptions provide that any seal inputs in a product "must result from certain processes or production methods"[794], which, in the United States' view, "are unrelated to the characteristics of the product".[795] The United States underscores that the PPMs referred to in the definition of a "technical regulation" are those that relate to product characteristics. The United States notes that, under Annex 1.1, the administrative provisions must apply to product characteristics or their related PPMs. For the United States, it is therefore important to ascertain whether the administrative provisions at issue apply to product characteristics or PPMs that are related to product characteristics, "or whether they instead apply to PPMs that are not related to product characteristics, such as the nature of the hunt involved".[796] The United States further argues that the EU Seal Regime bans seal products based not on the characteristics of the products, but on the type of hunt that resulted in the seal product.[797] Consequently, according to the United States, the EU Seal Regime would not appear to be a "technical regulation".

2.284. The United States submits that, because the "critical phrases" of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are "identically worded", the two provisions

3 ISSUES RAISED IN THESE APPEALS

3.1. The following issues are raised in these appeals:

a. whether the Panel erred in finding that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement (raised by the European Union);

b. with respect to the Panel's analysis under Article 2.1 of the TBT Agreement:

   i. whether the Panel erred in formulating and applying the legal test under Article 2.1 (raised by Canada);

   ii. whether the Panel erred in finding that the IC exception bears no "rational relationship" to the objective of the EU Seal Regime (raised by the European Union);

   iii. whether the Panel erred in finding that the regulatory distinction between commercial and IC hunts is justifiable (raised by Canada);

   iv. whether the Panel erred in finding that the EU Seal Regime is inconsistent with Article 2.1 because the IC exception is not designed and applied even-handedly (raised by the European Union); and

   v. whether the Panel acted inconsistently with Article 11 of the DSU in its analysis of:

      - whether the IC exception is designed and applied even-handedly (raised by the European Union);

      - the relationship between the IC except ion and the objective of the EU Seal Regime (raised by the European Union); and

      - whether commercial hunts and IC hunts can be distinguished on the basis that IC hunts are primarily for the purpose of subsistence (raised by Canada).

c. with respect to the Panel's identification of the objective of the EU Seal Regime, whether the Panel erred under Article 2.2 of the TBT Agreement, and acted inconsistently with Article 11 of the DSU, in finding that the obje ctive of the EU Seal Regime is to address EU public moral concerns regarding seal welfare (raised by Norway);

d. with respect to the Panel's analysis under Article 2.2 of the TBT Agreement:

   i. whether the Panel erred under Article 2.2, and acted inconsistently with Article 11 of the DSU, in its relational analysis, including with respect to the contribution of the EU Seal Regime to its objective, and the less trade-restrictive alternatives (raised by Canada and Norway), and the risks that non-fulfilment would create (raised by Canada); and

   ii. whether the Panel erred in failing to address "arbitrary or unjustifiable discrimination" in its analysis under Article 2.2 (raised by Norway);

e. with respect to the Panel's analysis under Article I:1 and Article III:4 of the GATT 1994, whether the Panel erred:

   i. in finding that the legal standard of the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 and Article III:4 (raised by the European Union); and

ii. in finding that the EU Seal Regime is inconsistent with Article I:1 because, through the IC exception, 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 (raised by the European Union);

f. with respect to the Panel's analysis under Article XX(a) of the GATT 1994, whether the Panel erred in:

i. concluding that the analysis under Article XX(a) of the GATT 1994 should examine the prohibitive and permissive aspects of the EU Seal Regime (raised by Norway);

ii. concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) (raised by Canada); and

iii. in finding that the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) (raised by Canada and Norway);

g. if the Appellate Body were to uphold the Panel's finding under Article I:1 of the GATT 1994, and were to reverse the Panel's finding under Article XX(a) of the GATT 1994, then whether the Panel acted inconsistently with Article 11 of the DSU in finding that the European Union has failed to establish a *prima facie* case in respect of its claim under Article XX(b) of the GATT 1994 (raised by the European Union); and

h. with respect to the Panel's analysis under the chapeau of Article XX, whether the Panel erred:

i. by applying the test developed under Article 2.1 of the TBT Agreement to determine the existence of arbitrary or unjustifiable discrimination (raised by Canada and Norway); and, if so, whether the Panel erred in finding that "the IC exception does not bear a rational relationship to the objective of addressing the moral concerns of the public on seal welfare" (raised by the European Union);

ii. in finding that the distinction between commercial aost078 -6.2(f)4.4(a)6.on betwe6.4(n)-5rodu6(o)-..3(ay)aTJ -1.8

4.2. Before the Panel, the parties agreed that the Basic Regulation and the Implementing Regulation should be treated as a single measure and the Panel, accordingly, examined the two instruments as an "integrated whole".[811] Following the terminology employed by the parties and the Panel, we refer to these legal instruments, together, as the "EU Seal Regime".[812] Pursuant to Article 8 of the Basic Regulation and Article 12 of the Implementing Regulation, the EU Seal Regime entered into force on 20 August 2010.

4.3. The EU Seal Regime does not have a specific section setting forth the objective of the EU Seal Regime. As noted by the Panel, the preamble of the Basic Regulation, comprising 21 recitals, refers to the EU public's concerns about seal welfare issues (recitals 1, 4, 5, 10, 11) and the need to preserve the economic and social interests of Inuit communities engaged in seal hunting and to define the conditions for the exceptions under the EU Seal Regime (recitals 14 and 17).[813]

4.4. The EU Seal Regime establishes rules concerning the placing on the market of seal products.[814]

4.6. As noted by the Panel, Article 3 of the Basic Regulation starts with a paragraph prescribing that the placing on the market [816] of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit [817] and other indigenous communities [818] (referred to by the Panel as "IC"), and contribute to their subsistence. [819] The word "subsistence" is not

4.9. The Implementing Regulation sets out detailed rules concerning the operation of the Basic Regulation. Article 3 of the Implementing Regulation provides that, for placing on the market of seal products pursuant to Article 3(1) of the Basic Regulation, the seal products must originate from seal hunts that satisfy three conditions:

a. the seal hunt was conducted by Inuit or other indigenous communities that have a tradition of seal hunting in the community and in the geographical region;

b. the products of the seal hunt are at least partly used, consumed or processed within the communities according to their traditions; and

c. the seal hunt contributes to the subsistence of the community.

4.10. Article 4 of the Implementing Regulation states that, in order to qualify under the Travellers exception in Article 3(2)(a) of the Basic Regulation, one of the following three requirements must be fulfilled:

a. the seal products are either worn by the travellers, or carried or contained in their personal luggage;

b. the seal products are contained in the personal property of a natural person transferring his normal place of residence from a third country to the European Union; or

c. the seal products are acquired on site in a third country by travellers and imported by those travellers at a later date, provided that, upon arrival in the EU territory, those travellers present to the customs authorities of the member State concerned the following documents:

   i. a written notification of import; and

   ii. a document giving evidence that the products were acquired in the third country concerned.

4.11. Finally, Article 5 of the Implementing Regulation provides that, in order to qualify under the derogation set out in Article 3(2)(b), the seal products at issue must originate from seal hunts that satisfy three conditions:

a. the seal hunt was conducted under a national or regional natural resources management plan that uses scientific population models of marine resources and applies the ecosystem-based approach;

b. the seal hunt did not exceed the total allowable catch (TAC) quota established in accordance with the national or regional natural resources management plan referred to; and

c. the by-products of the seal hunt can only be placed on the market in a non-systematic way on a non-profit basis.

4.12. Besides these specific requirements, Articles 3(2) and 5(2) of the Implementing Regulation stipulate that, in cases of seal products from IC and MRM hunts, the seal products must be accompanied by the attesting documents prescribed in Article 7(1) of the Implementing Regulation at the time of the placing on the market. Pursuant to Article 7(1), such attesting documents shall be issued by a "recognized body". Article 6 of the Implementing Regulation lays down the substantive and procedural requirements that must be fulfilled for an entity to be included in "a list of recognized bodies".

4.13. The Panel used the terms "IC hunts" and "MRM hunts" to refer to seal hunts conforming to the requirements of the IC and MRM exceptions, respectively, whereas it used the term "commercial hunts" to refer to hunts that do not conform to the IC and MRM requirements. [827]

[827] Panel Reports, paras. 7.13 and 7.14.

During the interim review stage, Norway asserted that use of the terms "commercial hunts" and "IC and MRM hunts" could be taken to reflect a "m oral judgement" with respect to the different hunts, and that the Panel's own findings demonstrate "the falseness of the distinction created by the Panel between 'commercial' and the other types of hunts".[828] Norway suggested that the Panel adopt instead "neutral language" to reflect the basis for its distinction, such as "non-conforming hunts", or the "Canadian East Coast hunt" and "Norwegian West Ice hunt".[829] Canada suggested that the phrase "non-conforming hunts" be used instead of "commercial hunts".[830] In rejecting the parties' requests, the Panel explained that the te rminology it employed was without prejudice to any findings on "the existence of a commercial element in IC and MRM hunts".[831]

4.14. The EU Seal Regime does not expressly distinguish between "commercial" and "non-commercial" seal hunts. Instead, it dist inguishes between IC hunts and MRM hunts, on the one hand, and all other hunts, on the other hand. Only seal products originating from the former two types of hunts can be placed on the EU market

regulation. [840] In reaching this 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. [841] The Panel also found that the EU Seal Regime sets out, through its exceptions, the applic able administrative provisions for products with "certain characteristics". [842] In the light of these findings, the Panel considered it unnecessary to examine whether the EU Seal Regime also lays down "related" processes and production methods. [843]

5.3. On appeal, the European Union argues 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". [844] The European Union underscores that the procedural requirements contained in the EU Seal Regime 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". [845] Consequently, they cannot be considered as being "applicable" to a product characteristic within the meaning of Annex 1.1. The European Union further argues that the Panel erred in finding that the criteria under the exceptions of the EU Seal Regime lay down "product characteristic[s]". [846] Instead, they impose requiremen ts relating to the identity of the hunter or the type or purpose of the hunt. A ccording to the European Union, the EU Seal Regime differs in this respect from the measure at issue in EC – Asbestos , where the exceptions themselves laid down product characteristics. [847] The European Union cautions that, under the Panel's reasoning, "virtually anything that [bears] any relation to a product" could be construed as a product characteristic, and be potentially cons idered a technical regulation subject to the disciplines of the TBT Agreement. [848] This, in the European Union's view, would "subsume [processes and production methods] into product characteristics" and mean that non-product related processes and production methods (P PMs) would fall within the ambit of the TBT Agreement. [849]

5.4. The European Union further claims that the Panel erred in limiting its analysis of whether the measure lays down product characteristics to it s finding that the EU Seal Regime lays down characteristics of a product in a negative form, by providing that all products may not contain seal. Referring to the Appellate Body's findings in EC – Asbestos , the European Union recalls that the proper legal characterization of the measure at i ssue requires that it be examined "as a whole". [850] Thus, it was incorrect for the Panel to assume that a measure can be deemed a technical regulation "simply because one of its components meets the criterion for a technical regulation". [851] The Panel should, instead, have based its determination on a consideration of all components of the measure and their respective role in the operation and purpose of the EU Seal Regime. [852] In this regard, the European Union highlights that, if the prohibition contained in the EU Seal Regime is examined in the light of the IC, MRM, and Travellers exceptions, the measure "cannot be reduced to the simple negative intrinsic product characteristic that o7e s24.4(rs24.oducts mu)25.6736a th.70oh.70 3(d)6.9(

satisfy the criteria under the exceptions. [855] In Canada's view, this is not different from the situation in EC – Asbestos , where the administrative provisions in question established a procedure to ensure that the criteria set ou t in the exception were satisfied. [856] For Canada, the European Union's concern that the Panel's approach will lead to an "over-inclusive" interpretation of "applicable administrative provisions" is unwarranted. [857] Canada further argues that the Panel properly examined and based its determination on the relevant elements of the EU Seal Regime, including the prohibitive and permissive aspects of the measure, and the administrative procedures. According to Canada, the Panel carefully considered the interplay among the various elements of the EU Seal Regime in reaching its conclusion. [858]

5.6. For its part, Norway argues that the criter ia set out in the exceptions under the EU Seal Regime lay down an "intrinsic" feature of the su bject products because they determine "when and under what conditions a product may contain a particular input". [859] Norway emphasizes that the legal situation in these disputes is very similar to the one confronted by the Appellate Body in EC – Asbestos , and that the Panel closely followed the Appellate Body's reasoning in that dispute. [860] Norway argues that the basis for the Panel's find ing that the EU Seal Regime lays down product

5.10. The first sentence of Annex 1.1 delineates the scope of measures that can be characterized as a technical regulation by referring to a document that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions".[867] The verb "lay down" is defined as "establish, formulate definitely (a principle, a rule); prescribe (a course of action, limits, etc.)".[868] Annex 1.1 further describes a technical regulation by reference to a "document" and makes clear that it is "compliance" with the content of the document laying down product characteristics or their related PPMs that must be found to be "mandatory". Accordingly, the scope of Annex 1.1 appears to be limited to those documents that establish or prescribe something and thus have a certain normative content.

5.11. The first sentence of Annex 1.1 refers to "product characteristics" or "their related processes and production methods". Looking first at the meaning of "product characteristics", in EC – Asbestos, the Appellate Body explained that the "characteristics" of a product include "objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product".[869] The Appellate Body added that such "product characteristics" might relate, *inter alia*, to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".[870] The Appellate Body described these characteristics as "features and qualities intrinsic to the product itself", adding that "product characteristics" within the meaning of Annex 1.1 may also include "related 'characteristics'".[871] As the Appellate Body has noted, a technical regulation may lay down "only one or a few 'product characteristics'".[872]

5.12. The definition of a technical regulation further provides that such a regulation may prescribe "product characteristics or their related [PPMs]". The use here of the disjunctive "or" indicates that

5.1.3.2 Preliminary remarks

5.18. We wish to make three preliminary remarks before we examine the European Union's claims regarding the Panel's characterization of the measure at issue under Annex 1.1 to the TBT Agreement.

5.26. On appeal, the European Union recalls that the proper legal character of the measure at issue cannot be determined unless the measure is examined "as a whole". [900] According to the European Union, if the prohibition contained in the EU Seal Regime is examined in the light of the IC, MRM, and Travellers exceptions, the measure "cannot be reduced to the simple negative intrinsic product characteristic that products may not contain seal". [901]

5.27. The Panel's reasoning on the issue of whether the EU Seal Regime lays down product characteristics is limited to the brief passage set out above. Moreover, the conclusion the Panel reached in paragraph 7.106 of the Panel Reports pertains to the "prohibition on seal-containing products". [902] The Panel then proceeded to find, in paragr aph 7.108, that the EU Seal Regime sets out, through its exceptions, "applicable administrative provisions" without assessing the weight that should properly be ascribed to those elemen ts of the measure in identifying the essential and integral aspects of the measure. Subsequently, in paragraph 7.111 of its Reports, the Panel stated, without further reasoning, that the EU Seal Regime "considered as a whole" lays down characteristics for all products that might contain seal.

5.28. We disagree with the approach adopted by the Panel. The Panel stated that the EU Seal Regime "consists of both prohibitive and permi ssive components and should be examined as such" [903], explaining that the "prohibitive" component of the EU Seal Regime "operates as a ban on seal products", while the "permissive" component consists of "an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation (3T(c)12(lo)4.67(i)-1.3(o)co" edgucts5(n)-1 ptiibtaine f21.3(r(a)6.m Repo cpergory)eal".)]TJ 6 0 05(t)8 520TD .1403 Tm .0043 Tc 0 Tw 4903

5.34. In EC – Asbestos, the Appellate Body observed that the measure at issue prohibited asbestos fibres in their raw form.[918] The Appellate Body found that if a measure consisted only of a prohibition on a product in its natural state, it might not constitute a technical regulation. Specifically, the Appellate Body stated:

> The first and second paragraphs of Article 1 of the Decree [96-1133] impose a prohibition on asbestos fibres, as such. This prohibition on these fibres does not, in itself, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted only of a prohibition on asbestos fibres, it might not constitute a "technical regulation".[919]

5.35. We agree with the European Union that a prohibition of pure seal products does not prescribe or impose any "characteristics" on such products. Unlike in EC – Asbestos, where it was undisputed that asbestos fibres had "no known use in their raw mineral form"[920], products consisting exclusively of seal are used, consumed and traded to a considerable extent even though trade in "mixed products" has surpassed trade in seal products in recent years.[921]

5.36. We agree with the European Union that the Panel should therefore 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. As noted, however, rather than conducting such an assessment, the Panel simply stated in footnote 153 of its Reports, that its conclusion that the measure lays down product characteristics is "not affected by the fact that the prohibition of seals 'in their natural state' might not, in itself, prescribe or impose any 'characteristics'".[922] This does not, in our view, show sufficient consideration of the integral and essential aspects of the measure as a whole.

5.37. We turn next to examine the EU Seal Regime as it applies to products containing seal as an input. With regard to products containing seal and other ingredients ("mixed" products), the European Union argues that the Panel should have also taken into account, together with the prohibition on seal-containing products, the exceptions under the measure, "because it is the permissive elements, together with the prohibition, that determine the situations where seal products may be placed on the European Union market".[923] In response, Canada argues that the Panel correctly found that the EU Seal Regime "[lays] down a product characteristic in the negative form by requiring that 'all products not contain seal'".[924]

5.38. For its part, Norway argues that the Panel took the exceptions under the EU Seal Regime "into account in finding that the measure as a whole lays down product characteristics".[925]

basis" [937] and the Appellate Body referred to these as "limited exceptions" [938], which is not the case for the exceptions under the EU Seal Regime.

5.43. We now turn to examine whether the conditions under the exceptions of the EU Seal Regime have features prescribing product characteristics.

5.44. The complainants confirmed at the oral hearing that they did not allege that the exceptions under the EU Seal Regime, when considered alone, lay down product characteristics. [939] The European Union asserts, however, that the Panel did make such a finding, and points to the following reasoning by the Panel:

> [O]nly seals obtained from the specific type of hunter and/or the qualifying hunts may be used in making final products. These criteria in our view constitute "objectively definable features" of the seal products that are allowed to be placed on the EU market and consequently lay down particular "characteristics" of the final products. Therefore, as was the case in EC – Asbestos, the exceptions under the EU Seal Regime identify a group of products with particular "characteristics" through a narrowly defined set of criteria. [940]

5.45. The Panel's discussion cited above gives 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. In particular, we note that the Panel referred to these as "objectively definable features" of seal products that "lay down particular 'characteristics' of the final products". [941] We consider the Panel to have erred in this regard. We see 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. [942] Nor do we see a basis to find that the market access conditions under the exceptions to the EU Seal Regime exhibit features setting out product characteristics.

5.46. We now turn to examine the participants' arguments regarding the "applicable administrative provisions".

5.1.3.3.3 Applicable administrative provisions

5.47. As noted by the Panel, Articles 6 through 10 of the Implementing Regulation prescribe procedural requirements that must be met to place seal products on the market. For example, under Article 7 of the Implementing Regulation, for a seal product to be placed on the market, it must be accompanied by an attesting document issued by a recognized body, and a reference to the attesting document number must be included in any further invoice. [943] Competent authorities designated by the EU member States may verify the certificates accompanying imported products, and monitor the issuing of certificates by recognized bodies established in their territory. [944] Similarly, with regard to the Travellers exception, the EU Seal Regime includes a requirement to present, for products imported to the European Union, a written notification of import to customs authorities. [945]

5.48. The Panel found that the EU Seal Regime sets out, through its exceptions, the "applicable administrative provisions" "for products with certain objective 'characteristics'". [946] The Panel explained in this regard that the exceptions under the EU Seal Regime constitute "applicable

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[937] Appellate Body Report, EC – Asbestos, para. 2 (quoting French Decree, Article 2).
[938] Appellate Body Report, EC – Asbestos, para. 73.
[939] Canada's and Norway's responses to questioning at the oral hearing.
[940] Panel Reports, para. 7.110.
[941] Panel Reports, para. 7.110.
[942] We note in this regard that Arti1r8A1s 0 0ndR(m38 155.0.au 0 (ge e)l(e TBT Ag0(Det.)- Tc .10292)-4i)-7.47(ng).8(ie)6.5ag or 'ch tcr

administrative provisions" because they "define the scope of the prohibition" of the EU Seal Regime. [947] The Panel further noted that the "nature of the exceptions is to allow products containing seal" subject to "strict administrative requirements" based on a "set of criteria". [948]

5.49. The European Union argues on appeal that the Panel erred in considering that the word "applicable" pertains to products rather than "product characteristics or their related processes and production methods". [949] Pointing to the text of Annex 1.1, the European Union observes that "[t]he reference to 'applicable administrative provisions' immediately follows the mention of 'product characteristics or their related processes and production methods'", with the two categories being linked by "the conjunctive term 'including'". [950] Regarding the measure at issue, the European Union contends 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". [951] Instead, they regulate trade in seal products. [952] For the European Union, they cannot therefore be considered as being "applicable" to a product characteristic within the meaning of Annex 1.1.

5.50. Canada counters that the administrative provisions in the EU Seal Regime "apply to product characteristics in the sense that the administrative provisions operate to ensure that products that exhibit the product characteristic of containing seal satisfy the criteria set out in the exceptions". [953] According to Canada, the European Union was therefore "misguided" in its concern that the Panel's reasoning leads to an "over-inclusive" characterization of "applicable administrative provisions". [954]

exceptions [was] determined by an 'exhaustive list' of products that are permitted to contain chrysotile asbestos fibres ".[960]

Annex 1.1. The European Union has not explained to us why factual findings in this regard would have been required and which factual findings are missing. [978]

5.66. Norway argued before the Panel, as an alte rnative to its argument that the EU Seal Regime lays down "product characteristics", that the measure at issue "prescribes related PPMs within the meaning of Annex 1.1". [979] Norway asserted that a PPM is laid down through the IC and MRM exceptions. With respect to the IC category , Norway argued that "the IC requirements prescribe a 'process' involving a particular course of action (a traditional hunt by specified persons) with a defined end (the production of se al products for community subsistence)." [980] Regarding the

IC and MRM requirements are "related" PPMs. [991] Norway similarly indicated that it did not consider that the conditions under exceptions of the EU Seal Regime, taken alone, amount to related PPMs.[992] Norway emphasized, however, that the conditions under the exceptions, when considered together with other elements of the measure, make the EU Seal Regime as a whole a technical regulation. [993]

5.69. As noted [994], the Appellate Body 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

challenge of the Panel's conclusion under Article I:1 is based entirely on the alleged errors in the

Article III:4 of the GATT 1994, but not found in Article I:1 of the GATT 1994. For example, referring to Articles I and III of the GATT 1994, the Panel stated that "under the GATT 1994 the 'treatment no less favourable' standard prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products".[1006] Thus, it seems to us that the Panel assimilated the legal standards under Articles I:1 and III:4, insofar as it found that, for the purposes of establishing an inconsistency with both provisions, a demonstration that a measure modifies the conditions of competition to the detriment of like imported products is dispositive. We consider it useful, therefore, to make some general observations about the similarities and differences between these two provisions, before turning to address the European Union's specific claims on appeal under Articles I:1 and III:4.

5.79. First, although the most favoured nation (MFN) and national treatment obligations under Articles I:1 and III:4 are both fundamental non-discrimination obligations under the GATT 1994, their points of comparison, for the purposes of determining whether a measure discriminates between like products, are not the same. On the one hand, the MFN obligation under Article I:1 proscribes, with respect to measures falling within its scope of application, discriminatory treatment between and among like products of different origins. On the other hand, the national treatment obligation under Article III:4 proscribes, with respect to measures falling within its scope of application, discriminatory treatment of imported products vis-à-vis like domestic products.

5.83. With these considerations in mind, we examine separately the Panel's interpretation of the legal standards under Article I:1 and Article III:4, respectively. We begin with the European Union's 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 equally apply to claims under Article I:1 of the GATT 1994.

5.2.3 Article I:1 of the GATT 1994

5.84. The issue before us is whether the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement applies equally to claims under Article I:1 of the GATT 1994. We 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. We understand the European Union to argue on appeal that Article I:1 prohibits only the latter. Thus, in the European Union's view, an analysis of a claim under Article I:1 entails an assessment of whether the detrimental impact on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. [1010]

5.85. Article I:1 of the GATT 1994 provides:

> General Most-Favoured-Nation Treatment
>
> 1. 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

5.88. Under Article I:1, a Member is proscribed from granting an "advantage" to imported products that is not "immediately" and "unconditionally" extended to like imported products from all Members. This means, in our view, that any advantage granted by a Member to imported products must be made available "unconditionally", or without conditions, to like imported products from all Members. [1014] However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching any conditions to the granting of an "advantage" within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member. Cotv2.38er.s5.3(ed6.7(rly,)6.7(mA)4.4(.)5.i)-1.9(c)412led6.7(r l)1.9(k:5.31(16.7(r p7.3(e)6.7(r)4.4(

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5.95. 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. [1018] 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. [1019]

5.96. Given that the European Union's challenge of the Panel's conclusion under Article I:1 is based entirely on the alleged errors in the Panel's interpretation of that provision [1020], and given that we have rejected the European Union's appeal in this regard, we have no basis to disturb the Panel's finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994. We therefore uphold the Panel's finding, in paragraph 7.600 of the Panel Reports, that the measure at issue is inconsistent with the European Union's obligation under Article I:1 of the GATT 1994.

5.2.4 Article III:4 of the GATT 1994

5.97. We turn now to consider whether, as argued by the European Union, 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.

5.98. Article III:4 of the GATT 1994 provides:

> National Treatment on Internal Taxation and Regulation
>
> …
>
> 4. The products of the territory of any Memb

dispositive. The European Union submits that a panel must conduct an additional inquiry into whether the detrimental impact on competitive opportunities for like imported products stems

treatment accorded to imported products is no less favourable than that accorded to like domestic products. Thus, 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. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products. For this reason, the Appellate Body has considered that:

> A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not

expresses the general principle in Article III:1, so that "[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."[1043]

5.113. Norway, for its part, notes that Article III:1 is not expressly invoked in Article III:4, and that the legal requirements set out in Article III:4 are an application of the general principle set forth in Article III:1. Thus, in assessing whether there is less favourable treatment of imports under Article III:4, a panel is required to examine whether a measure has a detrimental or "adverse impact on competitive opportunities for imported versus like domestic products".[1044] Norway asserts that, if it does, the measure will not be in accordance with the "general principle" expressed in Article III:1.[1045]

5.114. It is well established that the general principle expressed in Article III:1 – that internal measures should not be applied to afford protection to domestic production – informs the rest of Article III, including Article III:4.[1046] This general principle, however, informs the other paragraphs of Article III in different ways, depending on the textual connection between Article III:1 and the other paragraphs of Article III.[1047] Thus, the interpretative direction that Article III:1 provides to the other paragraphs of Article III must respect, and in no way diminish, the meaning of the words actually used in those other paragraphs.

5.118. We note the European Union's argument that, under the Panel's interpretation of Articles I:1 and III:4, a technical regulation could be considered non-discriminatory under the TBT Agreement, but still violate the GATT 1994. [1051] Expounding on this argument, the European Union explains that the list of possible legitimate objectives that may factor into an analysis under Article 2.1 of the TBT Agreement is open, in contrast to the closed list of objectives enumerated under Article XX of the GATT 1994. Thus, the Panel's "divergent approach to de facto discrimination" could lead to a situation where, under Article 2.1, a technical regulation that has a detrimental impact on imports would be permitted if such detrimental impact stems from a legitimate regulatory distinction, while, under Articles I:1 and III:4 of the GATT 1994, the same technical regulation would be prohibited if the objective that it pursues does not fall within the

GATT disciplines and emphasized that the two agreements should be interpreted in a coherent and consistent manner. [1061]

standard for the non-discrimination obligation under Article 2.1 of the TBT Agreement applies equally to claims under Articles I:1 and III:4 of the GATT 1994.

5.126. We are also not persuaded by the Europe an Union's argument that accepting the Panel's interpretation of Articles I:1 and III:4 would result in divergent outcomes under the TBT Agreement and the GATT 1994 in respect of th e same measure, and would therefore render Article 2.1 of the TBT Agreement irrelevant. At the outset, we recall that we have reversed the Panel's finding that the EU Seal Regime constitu tes a technical regulation under Annex 1.1 to the TBT Agreement. Therefore, the asymmetrical ou tcomes that the European Union alleges could result from the Panel's interpretation of Articles I:1 and III:4 do not arise in this case.

5.127. In any event, it seems to us that the European Union's argument is predicated on a perceived imbalance between, on the one hand, the scope of a Member's right to regulate under Article XX of the GATT 1994, and, on the other hand , the scope of that right under Article 2.1 of the TBT Agreement. Yet, under the TBT Agreemen t, 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 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX. [1068]

5.128. We further note that, beyond stating that the list of legitimate objectives that may factor into an analysis under Article 2.1 of the TBT Agreement is open, in contrast to the closed list of objectives enumerated under Article XX of the GATT 1994, the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall wi thin the scope of Article XX of the GATT 1994. [1069]

5.129. Finally, we note that our interpretation of the legal standards under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreemen t, is based on the text of those provisions, as understood in their context, and in the light of the object and purpose of the agreements in which they appear, as is our mandate. If 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. [1070]

5.130. In the light of the foregoing considerations, we uphold the Panel's finding, at paragraph 7.586 of its Reports, that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. Consequently, we upho ld the Panel's conclusion, in paragraphs 7.600 and 8.3(a) of its Reports, 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. [1071]

5.3 Article XX of the GATT 1994

5.131. We address in the following three sections the claims and arguments of the participants relating to the Panel's analysis under Article XX of the GATT 1994. First, we address the Panel's identification of the objective of the EU Seal Re gime. Second, we address the claims of Canada and Norway that relate to the Panel's analysis of wh ether the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994. Third, we address the claims

[1068] Appellate Body Report, US – Clove Cigarettes , para. 96.
[1069] the WTO tTUporf Aa(e)1.2le ti

of Canada, Norway, and the European Union concerning the Panel's analysis under the chapeau of Article XX of the GATT 1994.

5.132. We recall that we have declared moot and of no legal effect the Panel's conclusions under Articles 2.1 and 2.2 of the TBT Agreement. The Panel, however, relied on certain of its findings and reasoning in the context of its analysis under the TBT Agreement when addressing claims and arguments under Article XX of the GATT 1994. Where relevant, we refer to those findings and reasoning below.

5.3.1 The objective of the EU Seal Regime

5.133. The Panel sought first to identti5tive"of the E lRegim-6.52(e)m-6.52()-1.31 the contt-6.6(W)-6.53

5.136. The Panel further concluded that, "in drawing up the measure, the European Union accommodated other interests or considerations" related to Inuit communities, marine management, and the personal use of seal products by travellers.[1079] Although the Panel recognized that a measure may have several objectives, it was not convinced – after reviewing the text, legislative history, and structure and design of the measure – that the "aim", "target", or "goal" was to protect the interests reflected in the exceptions to the EU Seal Regime.[1080] Rather, the Panel found that "the principal objective of adopting a regulation on trade in seal products was to address public concerns on seal welfare."[1081] In the Panel's view, "the interests that were accommodated in the measure through the [IC, MRM, and Travellers] exceptions must be distinguished from the main objective of the measure as a whole."[1082] The Panel considered that the interests reflected in these exceptions were not "grounded in the concerns of EU citizens", but rather "appear to have been included in the course of the legislative process".[1083] For all of these reasons, the Panel stated that it did not consider that such interests "form independent policy objectives of the EU Seal Regime as a whole".[1084]

5.137. Having concluded that the text and legislative history of the measure established the existence of the EU public's concerns on seal welfare, the Panel then turned to examine whether these concerns fall within the scope of "public morals" in the European Union.[1085] The Panel explained that, because it had found that IC and MRM interests do not constitute objectives of the EU Seal Regime, it was "unnecessary to determine whether such interests are 'articulations of the same standard of morality' governing the public concerns on seal welfare as claimed by the European Union".[1086] The Panel thus defined its task as "confined to assessing whether the public concerns on seal welfare are anchored in the morality of European societies".[1087]

5.138. The Panel considered the legislative history of the EU Seal Regime, as well as a range of other evidence, including various actions taken by the European Union as well as EU member States concerning animal welfare protection in general; various pieces of legislation and conventions on animal welfare within the European Union and other countries, including Norway and Canada; and various international instruments. The Panel found that the evidence of the European Union illustrates standards of right and wrong conduct maintained by or on behalf of the European Union concerning seal welfare.[1088] Although the Panel did not consider that all evidence makes an explicit link between seal or animal welfare and the morals of the EU public, it nevertheless was persuaded that the evidence "as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union".[1089]

5.139. The Panel 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".[1090] The Panel elaborated that these concerns have two specific aspects: (i) "the incidence of inhumane killing of seals"; and (ii) "EU citizens' 'individual and

seal products derived from inhumane hunts rather than "commercially-hunted seal products" as submitted by the European Union. [1093]

5.140. Turning to the legitimacy of the objective pursued, the Panel noted that the protection of "public morals" is expressly included as a general exception to the GATT 1994 and the General Agreement on Trade in Services (GATS), which, in the Panel's view, demonstrated that "WTO Members considered this objective to be particularly significant." [1094] The Panel considered that, in the light of this, together with the second recital of the TBT Agreement, which states that one of the objectives of the TBT Agreement is to further the objectives of the GATT 1994, the protection of "public morals" falls within the scope of legitimate objectives under Article 2.2 of the TBT Agreement. [1095] Given its finding that the concerns of the EU public on animal welfare involved standards of right and wrong within the Europe an Union as a community, the Panel found that addressing public moral concerns on seal welfare is a "legitimate" objective within the meaning of Article 2.2 of the TBT Agreement. [1096]

5.3.1.2 Identification of the object ive pursued by the EU Seal Regime

5.141. Norway challenges the Panel's finding that the "sole objective" of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. [1097] In Norway's view, 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. Norway explains that it does not "c ontest the existence of public concerns on seal welfare", but rather maintains that the measure "also pursued other objectives". [1098] In particular, Norway is critical of the Panel's analysis set out in paragraph 7.402 of its Reports, in which the Panel rejected the inclusion of IC and other interests as part of the objective of the measure because they were not "grounded in the concerns of EU citizens", but rather were "included in the course of the legislative process", and therefore di d not "form independent policy objectives of the EU Seal Regime as a whole". [1099]

5.142. The European Union maintains that the Pane l correctly found that the "principal" or "main" objective of the EU Seal Regime is to address pub lic moral concerns with regard to the welfare of seals. [1100] The European Union explains that, as found by the Panel, the text of the Basic Regulation, its drafting history, and its st ructure and design establish that the EU Seal Regime was adopted in order to respond to EU public moral concerns with regard to the welfare of seals. The European Union adds that, if the EU legislators' main objective had been "to protect the interests of the Inuit and other indigenous communities or the objective that Norway ascribes to the MRM exception, they would have refrained fr om adopting the EU Seal Regime in the first place." [1101] The European Union further emphasizes that "[t]he IC exception does not seek to promote exports of seal products by the Inuit and other indigenous communities, but rather to mitigate the necessary adverse effects of the EU Seal Regime on those communities to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals." [1102]

5.143. The European Union separately apimuniees t41.9eq]TJ T*162 Tat "[td (es t4st (es t41.9eq]Ti)-6.7t)-6.31.6(Uni)-6.7(o)-.2(n d

welfare as claimed by the European Union".[1104] In the European Union's view, the EU Seal Regime reflects a moral standard of "animal welfarism"[1105], pursuant to which "humans ought not to inflict suffering upon animals without a sufficient justification".[1106] With regard to the IC exception, the European Union states that 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".[1107]

5.144. As noted above, the Panel sought first to identify the objective of the EU Seal Regime when assessing the claims under Article 2.2 of the TBT Agreement. The Panel subsequently relied on that assessment in its analysis under Article XX of the GATT 1994. In seeking to identify the objective of a measure, a panel may be faced with conflicting arguments by the parties as to the nature of the objective or the objectives pursued by a responding party through its measure. 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 of the measure as a whole", it was commenting on how the relative significance of the policy interests played out in the measure, suggesting that the IC and other interests were not manifest in the objective of the measure in the same manner as concerns regarding seal welfare. [1118] This is confirmed by the subsequent statement of the Panel that, "unlike the issue of seal welfare", it saw no evidence that the IC and other interests were "grounded in the concerns of EU citizens" and that these interests appear instead "to have been included in the course of the legislative process". [1119] This was not a statement by the Panel that policy concerns only have validity if they are grounded in the concerns of citizens, as opposed to being advanced by legislators. Rather, we understand this to have been considered by the Panel as further evidence supporting its conclusion that concerns regarding seal welfare were what principally motivated adoption of the measure, and that the IC and other interests were also reflected in the design and implementation of the measure in that they were accommodated so as to mitigate the impact of the measure on those interests.

5.147. In addition, the Panel's statement that IC and other interests "do not … form independent policy objectives of the EU Seal Regime as a whole" [1120] must be read together with the various statements of the Panel confirming that the interests protected or promoted in the IC, MRM, and Travellers exceptions are reflected in the measure itself. The Panel thus acknowledged the role of these interests when it stated that, in designing the EU Seal Regime, the European Union sought to address concerns on seal welfare while "also [taking] into account" IC, MRM, and Travellers interests. [1121] The Panel also stated that, "in drawing up the measure, the European Union accommodated other interests or considerations, such as the Inuit communities engaged in seal hunting, seals hunted for marine management purposes, and seal products brought into the European Union for personal use". [1122] The Panel noted, in particular, references in the legislative history that "the interests of Inuit and indigenous communities engaged in seal hunting should be protected from possible trade regulations on seal products." [1123] Thus, although the Panel rejected the contention that IC and other interests reflected independent objectives of the EU Seal Regime,

regulations on seal products".[1137] Norway emphasizes that an objective assessment of the facts "requires substantially more than 'notice' by a panel."[1138]

5.152. Norway further asserts that the Panel's "imbalanced treatment of the evidence is highlighted by its selective reliance"[1139] on a proposal by the European Commission for a regulation concerning trade in seal products[1140] (Commission Proposal). In this regard, Norway notes that the Panel "referred to the Commission's Proposal to support the view that public concerns regarding seal welfare were to be addressed in the measure, quoting two full paragraphs of that Proposal".[1141]

5.154. The Panel concluded, therefore, that the Commission Proposal "provide[d] evidence that the public concerns about seal welfare constitute a moral issue for EU citizens". [1150]

5.155. The Commission Proposal also notes that the "fundamental economic and social interests of Inuit communities traditionally engaged in the hunting of seals should not be adversely affected." [1151] Norway's complaint appears to relate to the fact that the Panel did not attribute this statement any weight in its discussion of other objectives highlighted in that same document. We do not see, however, why the Panel's failure explicitly to address and rely upon this statement in the Commission Proposal would have "a bearing on the objectivity of the panel's factual assessment". [1152]

5.156. We further note that this statement from the Commission Proposal cited by Norway is immediately preceded by the following statements regarding seal welfare concerns, which also fall under the heading "Grounds for and objectives of the proposal":

welfare concerns of the EU public, constitutes further error."[1156] Norway also maintains that, despite the Panel's finding that the Implementing Regulation was necessary to the enforcement of the EU Seal Regime, the Panel overlooked the relevance of the Implementing Regulation and its enforcement provisions relating to the IC and MRM requirements.[1157]

5.160. Based on its analysis of the preamble of the Basic Regulation, the Panel found that:

> [T]he Basic Regulation appears to address three main considerations: first, the need to harmonize the regulations on seal products within the EU internal market (recitals 5, 6, 7, 8, 10, 15, 21); second, concerns about seal welfare issues (recitals 1, 4, 5, 10, 11); and, third, the need to preserve the economic and social interests of Inuit communities engaged in seal hunting and to define the conditions for IC, MRM, and Travellers exceptions (recitals 16 and 17).[1158]

5.161. Contrary to what Norway suggests, we do not understand the Panel to have concluded that these considerations were of "equal prominence".[1159] Nor are we persuaded that the Panel gave "prominence singularly to the seal welfare concerns of the EU public".[1160] Rather, as we have said, the EU Seal Regime pursued EU public moral concerns regarding seal welfare while at the same time accommodating other interests so as to mitigate the impact of the measure on those interests. Thus, in examining the text of the EU Seal Regime, the Panel found that "in designing

5.165. Regarding the expected operation of the measure, Norway argues that the Panel failed to

5.169. As established in 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. [1177] As the Appellate Body has stated, 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". [1178] In the context of Article XX(a), this means that a Member wishing to justify its measure 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. [1179] As the Appellate Body has explained, a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. [1180] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. [1181] The burden of proving that a measure is "necessary to protect public morals" within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken. [1182]

5.170. Canada and Norway each appeal the Panel's conclusion that the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994. [1183] The complainants present several challenges to the Panel's analysis in respect of Article XX(a). First, Norway submits 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 under Articles I:1 and III:4 of the GATT 1994. Thus, in section 5.3.2.2 below, we address the question of what aspects of the EU Seal Regime must be justified under Article XX(a).

5.171. Second, Canada maintains that the Panel failed to establish that there was a risk to the public morals of the European Union regarding animal welfare that is unique to seals. Canada's appeal goes to the question of whether the Panel properly found that the EU Seal Regime is a measure taken "to protect public morals", and is addressed in section 5.3.2.3 below.

5.172. Third, Canada and Norway contend that the Panel failed to establish that the EU Seal Regime makes a material contribution to the objective of addressing EU public moral concerns regarding seal welfare. This claim implicates the Panel's assessment of whether the EU Seal Regime is "necessary" to protect public morals. In addition, because the Panel's analysis under Article XX(a) relies on findings it made in the context of Article 2.2 of the TBT Agreement [1184], Canada and Norway also incorporate by reference various arguments from their appeals of the Panel's findings and analysis under Article 2.2 regarding the contribution of the EU Seal Regime to the objective of the measure, as well as the alternative measure proposed by the

complainants. [1185] We address these claims concerning the Panel's "necessity" analysis in sections 5.3.2.4 and 5.3.2.5 below. [1186]

5.173. Finally, we note that, in US – 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". [1187] The Appellate Body explained that, in the specific circumstances of that case, there was "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)". [1188] As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring "within and outside the Community" [1189] and the seal welfare concerns of "citizens and consumers" in EU member States. [1190]

5.180. Next, the Panel turned to assess the measure's contribution to the objective pursued under Article XX of the GATT 1994 in the light of the Appellate Body's jurisprudence that such a

5.3.2.2 The Panel's analysis of the aspects of the EU Seal Regime to be justified under Article XX(a)

5.184. We first consider Norway's claim that the Panel erred in seeking to justify the EU Seal Regime as a whole under Article XX(a). [1216] According to Norway, it is the "particular aspect" of a measure that is inconsistent with the GATT 1994 that must be justified under Article XX. [1217] In the

5.192. Norway appears to contend that the baseline establishment rules, which the Appellate Body found needed to be justified in *US – Gasoline*, were like the IC and MRM exceptions of the EU Seal Regime in that they constituted the WTO-inconsistent aspect of the measure.[1233] We do not agree with the analogy drawn by Norway between the baseline establishment rules and the IC and MRM exceptions. Rather, we see the baseline establishment rules as comparable to the prohibitive and permissive aspects of the EU Seal Regime, which, taken together, resulted in the differential treatment found to be inconsistent with the GATT 1994. The Appellate Body confirmed this when it stated, in *US – Gasoline*, that it had to consider whether the "baseline establishment

failing to explain why it found the physical environmental conditions for seal hunts different from other types of terrestrial wildlife hunts. [1241]

5.195. The European Union takes issue with Canada's assertion that a panel must first ascertain

For example, the concepts of "risk" and "protectio n" are expressly reflected in the SPS Agreement, which elaborates rules for the application of Article XX(b). [1250]

5.198. However, the notion of risk in the context of Article XX(b) is difficult to reconcile with the subject matter of protection under Article XX(a), namely, public morals. While the focus on the dangers or risks to human, animal, or plant life or health 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. We therefore do not consider that the term "to protect", when used in relation to "public morals" under Article XX(a), required the Panel, as Canada contends, to identi fy the existence of a risk to EU public moral concerns regarding seal welfare.

5.199. For this reason, we also have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX(a), a panel is requ ired to identify the exact content of the public morals standard at issue. The Panel accepted the definition of "public morals" developed by the panel in US – Gambling , according to which "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation'". [1251] The Panel also referred to the reasoning developed by the panel in US – Gambling that the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values. [1252] Canada does not challenge these propositions on appeal. In addition, we note that, although Canada indirectly questions the existence of EU public moral concerns regarding seal welfare by contending that the Panel ought to have considered the similarity of animal welfare risks in both terrestrial wildlife hunts and seal hunts, Canada does not directly challenge the Panel's finding that there are public moral concerns in relation to seal welfare in the European Union.

5.200. Finally, by suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requiremen t "to protect" public morals under Article XX(a). In this regard, we note that the panel in US – Gambling underscored that Members have the right to determine the level of protection that they consider appropriate [1253], which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, and must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, we

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content of EU public moral concerns at issue in th is case have been amply reviewed by the Panel in these disputes and now on appeal. We therefore reject this claim under Article 11 of the DSU.

5.3.2.4 The Panel's analysis of the contributi on of the EU Seal Regime to the objective

5.204. Next, we address Canada's and Norway's claims that the Panel erred in finding that the EU Seal Regime is "necessary" within the meanin g of Article XX(a) of the GATT 1994. In analysing "necessity" under Article XX(a), the Panel considered that "an analysis of a measure's contribution to an objective under Article 2.2 of the TBT Agreement is also relevant to such analysis under Article XX of the GATT 1994." [1264] The Panel thus decided that it would "refer back to [its] relevant analysis under Article 2.2 of the TBT Agreement to the extent necessary for the analysis of the measure's contribution under Article XX(a) of the GATT 1994". [1265] The Panel then recalled its earlier findings in the context of its analysis und er Article 2.2 of the TBT Agreement in addressing the elements of the legal standard of "nec essity" under Article XX(a) of the GATT 1994. [1266] The Panel ultimately concluded that the EU Seal Regime is "necessary" within the meaning of Article XX(a). [1267]

5.205. We note that, in assessing the appeals by Canada and Norway, there are aspects of the Panel's necessity analysis that have not bee(e(e(e(e5(94)-4.2( )1o c)-6)1o c)].3(43629s(94)-4.(onwhti)-6.2(s).4h(w),)-3.5(there rul4

Canada and Norway contend that the Panel erred in finding that the EU Seal Regime made a

by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU. [1286]

5.211. The Appellate Body thus confirmed that a panel's approach is appropriately guided by the particular circumstances of the case and the evidence at issue, and that a panel will have certain, but not unbounded, discretion is designing that approach. The Appellate Body further confirmed that a panel's contribution analysis "can be done either in quantitative or in qualitative terms". [1287]

5.212. The measure at issue in *Brazil – Retreaded Tyres*, namely, a ban on imports of retreaded tyres, was particular in at least two respects. First, the import ban formed part of a comprehensive policy designed and implemented by Brazil to deal with the public health and environmental consequences of waste tyres. As the Appellate Body recognized, "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures". [1288] Consequently, the Appellate Body noted, it may prove difficult in the short term "to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive

WTO-consistent measure is 'reasonably available'".

conclusions under Article XX(a) on the basis of their contentions that the Panel erred in the contribution analysis it conducted in the co ntext of Article 2.2 of the TBT Agreement.

5.3.2.4.2 Whether the Panel properly ar ticulated its findings on contribution

5.218. In the context of its analysis under Arti cle XX(a), the Panel recalled its finding that the EU Seal Regime "contributed to a certain extent to its objective of addressing the EU public moral concerns on seal welfare". [1304]

held its second substantive meeting in April 2013, Greenlandic and Swedish recognized bodies had only recently been approved for the issuance of attesting documentation under the exceptions.[1314]

5.222. Moreover, 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. As the Panel remarked, the "data provided by the parties are incomplete in terms of product types and import/export countries".[1315] For example, EU trade data was available only for those categories of seal products for which the tariff classification consisted exclusively of seal or seal-containing products.[1316] The EU trade data therefore did not reflect imports of seal products other than seal skins, and did not reflect imports of raw seal skins after 2006, when the European Union no longer maintained a separate tariff classification covering only raw seal skins.[1317] These limitations were particularly significant given that the Panel recognized that seal skins have historically constituted the majority of traded seal products.[1318] In the light of these factors, the Panel stated that it was "not in a position to draw any concrete conclusions" based on the data before it.[1319] Additionally, the Panel stated that, although the data "show a general trend that seal product imports from the complainants into the EU market have decreased significantly over the last few years"[1320], "the extent of the connection between the ban aspect of the measure and the reduction in the number of seals killed is not clearly discernible".[1321] Therefore, we do not consider that the Panel's decision to focus largely on a qualitative assessment of the measure was improper.

5.223. In analysing the contribution made by the EU Seal Regime to the first aspect of the objective – i.e. addressing public moral 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. Indeed, in its intermediate finding, the Panel expressly stated that its conclusion was based on the "design and expected operation" of the measure.[1322] This approach would also seem to have implications for the way in which the Panel framed its findings. The complainants argue that, by concluding that the ban was "capable of making a contribution"[1323], the Panel was identifying a possible, instead of an actual, contribution. We recognize that the Panel's language could be read to suggest that the Panel found only a possibility that the ban contributed to the objective. On the other hand, because the Panel made clear that it was focusing on the design and expected operation of the measure, we understand the Panel to have been projecting what the impact of the prohibitive aspect of the measure would be.

5.224. This approach bears similarities with the analysis in *Brazil – Retreaded Tyres*, where the panel concluded that the measure at issue was "capable of making a contribution to the objective".[1324] The European Communities argued on appeal that this represented an erroneous legal standard, and that the panel should instead have assessed the actual contribution of the measure to its stated objective, and measured the importance of the contribution to the objective achieved by the measure.[1325] The Appellate Body ultimately dismissed this ground of appeal.[1326] As we noted, the Appellate Body further found that the impact of the measure was not yet

uneven information relating to the actual operation of the measure on the Panel record, in particular relating to the actual operation of the exceptions, and the actual impact the measure

evidence fall under Article 11 of the DSU.[1343] By contrast, "[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.[1344] We examine, where relevant below, 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.

5.233. We have structured our analysis to address the issues raised by the complainants in the following three subsections. First, we examine Canada's and Norway's contention that the EU Seal Regime fails to contribute to the objective in various respects because it leads to worse seal welfare outcomes. Next, we assess the complainants' claims in respect of the Panel's finding that the EU Seal Regime contributes to reducing EU and global demand for seal products and the incidence of inhumanely killed seals. Finally, we consider several remaining claims as they relate to the Panel's analysis.

5.3.2.4.3.1 Whether the EU Seal Regime leads to worse seal welfare outcomes

5.234. Several of the arguments advanced by the complainants in respect of the Panel's contribution analysis are 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. Norway specifically addresses this matter in relation to several issues that it considers the Panel undervalued in assessing the contribution of the EU Seal Regime[1345], as well as in challenging the Panel's analysis under Article 11 of the DSU.[1346] Canada does so to a more limited extent in its criticism of the Panel for failing to assess whether the EU Seal Regime makes a net positive contribution.[1347]

5.235. The complainants' premise that the EU Seal Regime leads to worse seal welfare outcomes consists of two elements: (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. Both elements are required to sustain the premise upon which the complainants rely. Only if seal products derived from IC and MRM hunts replace seal products from commercial hunts would any alleged effect of worse seal welfare outcomes in the former hunts lead to an increase of seal product imports derived from inhumanely killed seals.

5.236. Canada and Norway identify factors that, in their view, cumulatively confirm the existence of a replacement effect. Norway refers to the Panel's finding that virtually all seal products from Greenland and the European Union are likely to be placed on the EU market by virtue of the IC and MRM exceptions, whereas the vast majority of Canadian and Norwegian seal products do not meet the requirements of either of these exceptions.[1348] Norway considers that the Panel's findings also demonstrate that seal products may be sold on the EU market under the IC and MRM exceptions regardless of whether they derive from seals killed humanely, and that these exceptions do not impose any quantitative limits on the number of qualifying seal products that may be admitted to the EU market.[1349] Canada makes similar arguments when it refers to the Panel's findings that the

[1343] This includes claims that a panel: exceeded its authority as a trier of facts (Appellate Body Report, US – Wheat Gluten, para. 151); disregarded evidence or did not have a sufficient evidentiary basis on the record for its finding (Appellate Body Report, US – Continued Zeroing, para. 338); lacked even-handedness in the treatment of evidence (Appellate Body Report, US – Upland Cotton (Article 21.5 – Brazil), para. 292); failed to provide reasoned and adequate explanations for its findings (Appellate Body Report, US – Softwood Lumber VI (Article 21.5 – Canada), para. 97); or failed to provide coherent reasoning (Appellate Body Report, US – Upland Cotton (Article 21.5 – Brazil), para. 293 and fn 618 thereto, and para. 294).

[1344] Appellate Body Report, EC – Hormones

only beneficiary under the IC exception is Greenland, and that all or virtually all seal products from Greenland are eligible to access the EU market under the IC exception. [1350]

that the European Union's own data show that the level of imports from Canada in 2006 comprised less than 11,000 skins. [1362]

5.240. Canada and Norway also identify factors that, in their view, support the existence of worse seal welfare outcomes in Greenlandic as opposed to commercial hunts. As a preliminary matter, Norway refers to the Panel's conclusion that EU public concerns on seal welfare appear to be related to seal hunts in general, not to particular types of seal hunts. [1363] Norway maintains that this shows that the moral standard applies equally to IC and MRM hunts as it does to hunts conducted in Greenland and the European Union. [1364] The complainants both assert that the Panel failed to take proper account of findings made elsewhere in its Reports that establish that IC and MRM hunts lead to poorer seal welfare outcomes than commercial hunts. Specifically, they refer to several of the Panel's findings that, when taken together, in their view support a finding that Greenlandic Inuit rely mainly on open-water hunting and trapping and netting, and that these

were particular findings of the Panel that, when read 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 Panel record. Likewise, with respect to the replacement effect, the Panel identified the difficulties it had in examining data due to significant gaps and limitations with the trade data concerning the EU seal product market, particularly given that the data was incomplete with regard to product types and import and export countries. If the Panel was "not in a position to draw any concrete conclusions"[1375] concerning the data for purposes of determining seal product demand, it does not seem unwarranted for the Panel to have refrained from relying on that same data to reach a finding that the EU Seal Regime could or does have the effect of replacing imports from commercial hunts with those from IC and MRM hunts.

5.243. On the basis of the foregoing, we consider that the premise that the complainants believe is supported by the Panel record is primarily factual in nature, and therefore relates to the Panel's weighing and appreciation of the evidence. We therefore consider that these claims of Canada and Norway are more properly addressed under Article 11 of the DSU as challenges to the Panel's objective assessment of the facts. Even in respect of aspects of the Panel's analysis where Canada and Norway have presented solely claims of error in the Panel's application of law to fact, we consider that their arguments would have been more properly characterized as ones concerning the Panel's failure properly to evaluate the evidence on the Panel record, or to rely on other Panel findings, to reach a factual determination as to whether the EU Seal Regime could or does lead to worse seal welfare outcomes. We recall, in this regard, our view that the record before the Panel provided it with reasonable grounds for not concluding that: (i) IC and MRM hunts lead to poorer seal welfare outcomes than commercial hunts; and (ii) the EU Seal Regime resulted in the replacement of seal product imports from commercial hunts with such products from IC and MRM hunts. Moreover, even where specific allegations of error were raised under Article 11 of the DSU, we consider that our analysis is dispositive of those arguments as well.[1376] Accordingly, we see no grounds under Article 11 of the DSU to disturb the Panel's findings, and we therefore reject the claims of Canada and Norway as they relate to this aspect of the Panel's contribution analysis.

5.3.2.4.3.2 Whether the EU Seal Regime contributed to reducing EU and global demand for seal products and the incidence of inhumanely killed seals.

5.244. Canada and Norway further claim 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.[1377] Canada contends that the Panel relied on a proxy objective of reducing demand for seal products in the EU and globally without assessing whether this then contributed to a reduction in the number of inhumanely killed seals.[1378] Canada and Norway also maintain that there is no support for the Panel's conclusion that a reduction in EU or global demand for seal products would result in a reduction in the number of inhumanely killed seals.[1379] Norway further argues that the rationale and evidence relied on by the Panel do not substantiate

[1375] Panel Reports, para. 7.456.

[1376] For instance, Norway notes that, despite numerous occasions on which the Panel relied on the COWI 2010 Report, the Panel nevertheless overlooked the statement in that report that "Greenlandic trade is more than enough to cover EU demand by itself". (Norway's appellant's submission, para. 470 (quoting COWI 2010 Report, p. xi) Norway refers to this as "a particularly revealing example of the Panel's selective

its conclusion that the measure affected the demand for seal products. [1380] Finally, Canada and

this premise is primarily factual in nature, and therefore relates to the Panel's weighing and appreciation of the supporting evidence. We therefore view this issue as properly relating to a challenge under Article 11 of the DSU regarding the Panel's objective assessment of the facts. In the light of uncertainty about whether the Panel record ever evinced a more definite depiction of this aspect of the EU seal product market, much less the depiction sought by the complainants, we do 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, because we consider that it was reasonable for the Panel to rely on this assumption, we also reject 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 Article 11 of the DSU.

5.249. We next turn to the remaining questions as to whether the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products was properly substantiated. We note the Panel's reference to statements in the COWI 2010 Report indicating that the EU Seal Regime has created uncertainty in the EU market, and that, as a result, trade numbers have decreased substantially and the market price of raw skin has been cut in half.[1393] The Panel also pointed to evidence that the EU Seal Regime has "halted" European markets for seal oil and had a generally negative influence on the EU seal product market.[1394] Canada and Norway contend that this evidence is unavailing because the prohibitive aspect of the EU Seal Regime affects the supply, not the demand, for seal products.[1395]

5.250. The evidence cited by the Panel does not refer to demand *per se* but rather to observations about trade impacts experienced by the EU seal product market as a whole. Such observations, however, are descriptive of a market dynamic that necessarily reflects both supply-side and demand-side considerations. Taking the statement about market price, for example, we observe that, generally speaking, a decrease in supply without a change in demand would lead to higher prices. Consequently, it would seem reasonable to infer from an observation about decreases in the market price that demand for seal products had also been adversely affected. Likewise, it does not seem unreasonable for the Panel to have considered that the "halting" of the seal oil market in certain EU countries was due at least in part to an impact on demand occasioned by the impact of the EU Seal Regime.[1396] We therefore consider that the 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. In our view, the presence of these demand-side considerations in the evidence relied upon by the Panel also addresses specific allegations of error that the Panel acted inconsistently with its duties under Article 11 of the DSU in its treatment of the evidence.[1397]

[1393] Panel Reports, para. 7.450.

[1394] Panel Reports, para. 7.450.

[1395] Canada's appellant's submission, para. 183; Norway's appellant's submission, paras. 386, 423, and 424.

[1396] The Panel referred to Norway's recognition that "the mere expectation of the adoption of the EU Seal Regime hampered trade", which could be understood as reflecting at least in part downward shifts in demand. (Panel Reports, para. 7.450 (quoting Norway's first written submission to the Panel, paras. 673 and 674, in turn referring to COWI 2010 Report, Annex 5, Briefing note of 2009)) Canada also stated before the Panel that the EU Seal Regime adversely affected market demand. (Canada's first written submission to the Panel, para. 81 ("The 2007 Belgian and the Dutch prohibitions and the 2009 EU Seal Regime have had significant negative impacts on the Canadian industry's ability to export seal products by decreasing the demand for such products."))

[1397] For instance, Norway directs a specific allegation of error at the Panel for citing the COWI 2008 Report for a statement that restrictions on market access will have trade impacts, yet neglecting to include a statement from the same passage of the Report that highlights supply-side impacts on various groups involved in the seal product trade. (Norway's appellant's submission, paras. 428-430 (referring to COWI 2008 Report)) Norway asserts that "this selective treatment of th

of the DSU for a panel "to fail to accord the weight should be accorded to it". [1409] to the evidence that one of the parties believes

5.258. The European Union responds that the Panel record supports the Panel's finding that the Inuit have been adversely affected by the EU Seal Regime and have not always been able to benefit from the IC exception. In the European Union's view, the EU Seal Regime has a depressing effect on global prices and demand, including on seal products from IC hunts.[1420] The European Union also rejects as "thoroughly misguided"[1421] Norway's assertion that the only reason the indigenous communities have not been able to benefit from the IC exception is because Greenland did not have an established recognized body at the time of the Panel proceedings. The European Union maintains that the Panel was "well aware that Greenland had benefitted effectively from the IC exception since 2010", and must be understood as referring to the difficulties faced by indigenous communities in Canada, not Greenland.[1422]

5.259. We do not consider that the Panel was, as Norway argues, referring exclusively to the fact that Greenlandic imports were not legally permitted before 25 April 2013 as the basis for its

pursued."[1428] The complaining Member bears the burden of identifying possible alternatives to the measure at issue that the responding Member could have taken.[1429]

5.262. In these disputes, 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.[1430] The Panel found that the alternative measure is less trade restrictive than the EU Seal Regime.[1431] This finding is not challenged on appeal. Instead, Canada

feasibility of its implementation".[1446] Thus, having identified certain conceptual limitations of any certification system in fulfilling the objective of addressing EU public moral concerns regarding seal welfare, the Panel expressly refrained from making a finding regarding the contribution of the alternative measure until it could also evaluate the reasonable availability of the alternative measure. We therefore do not agree with Canada and Norway that these statements of the Panel demonstrate that it 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.

5.268. Canada and Norway also consider that the Panel, in assessing the reasonable availability of the alternative measure, compared that measure against a higher degree of contribution than what was found in respect of the EU Seal Regime.[1447] The complainants refer, for instance, to the Panel's statement that "in order to genuinely assuage [animal welfare] concerns there would need to be a mechanism to verify that the requirements were actually satisfied for seals used to generate products".[1448] This statement, they contend, demonstrates that the Panel compared the alternative measure against stringent animal welfare requirements including seal-by-seal certification, a standard that the EU Seal Regime does not meet.[1449] The complainants further argue that the Panel also wrongly concluded that certification at the country or hunter level is insufficient because it would fail to convey accurate information in respect of seal welfare, a standard that the EU Seal Regime also does not meet.[1450]

5.269. As we see it, in addressing whether the alternative measure was reasonably available, the Panel was exploring the hypothetical implications for the European Union's ability to achieve its objective of addressing seal welfare concerns.

5.274. Canada and Norway further submit that the Panel erred in considering the costs and logistical demands on hunters and marketers of seal products if a strict certification scheme were

the arguments and evidence supporting a particul ar proposition. Even if the Panel made the reference it did to identify the source of the argument, this does not mean that there were no further arguments and evidence on the Panel record that informed the Panel's statement. Moreover, the Panel implicitly referred to the exte nsive information on the Panel record regarding the "welfare risks of seal hunting" in stating that it "assessed" the argument against the "backdrop" of those risks. This further indicates that the Panel's statement was substantiated. We therefore do not consider that this statemen t by the Panel evidences a failure to conduct an objective assessment under Article 11 of the DSU.

5.285. Norway submits that the Panel acted in violation of Article 11 of the DSU by ignoring two further alternative measures it had proposed duri ng the course of the Panel proceedings. First, Norway proposed an alternative that consisted of the removal of the restrictive conditions of the EU Seal Regime. Under this alternative, trade would be permitted from hunts that, under the measure at issue, could not meet the conditions for market access under the IC, MRM, or Travellers exceptions. [1476] The second alternative was the removal of three of the conditions for access to the MRM exception, namely, the not-for-profit, non-systematic, and sole purpose conditions, leaving all the other elements of the EU Seal Regime undisturbed. Norway maintains that this alternative could include animal welf

it analysed would equally apply to a version of that system that would apply only in respect of seal products from MRM hunts.

5.288. We emphasize that a panel must consider the claims and arguments of parties in a dispute so as to conform with the obligation under Article 11 of the DSU to make an objective assessment of the matter before it. At the same time, the Appellate Body has clarified that a panel need not "refer explicitly to every argument made by the parties" [1484] or "consider each and every argument put forward by the parties in support of their respec tive cases, so long as it completes an objective assessment". [1485] We consider that, in the circumstances of this case, the additional alternatives to

5.3.3 The chapeau of Article XX of the GATT 1994

5.291. Having upheld the Panel's finding that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, we now turn to review the Panel's analysis as it pertains to the chapeau of Article XX of the GATT 1994.

5.292. Article XX of the GATT 1994 reads in relevant part:

> 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; …

5.293. The Panel 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".[1489] In its assessment of whether this discrimination is "arbitrary" or "unjustifiable" within the meaning of the chapeau of Article XX, the Panel recalled its analysis of the EU Seal Regime, in particular the distinctions drawn in the IC and MRM exceptions, under Article 2.1 of the TB-3.7(t)4.9(h)3.7(e)6.6( )6.clc i8 4.6(.0032 Tw 9 0 0 9 297.9 52907404 Tm .00434(e)4 2

enforcement with respect to foreign refiners were "doubtless real to some degree"[1514], it noted that the United States "had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate".[1515] Second, the United States explained that imposing the statutory baseline requirement on domestic refiners was not an option either, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The Appellate Body observed that, while the United States counted the costs for its domestic refiners, there was

5.3.3.2 Canada's and Norway's claims on appeal regarding the Panel's reasoning under the chapeau of Article XX of the GATT 1994

5.307. We recall that, in determining whether the discrimination under the EU Seal Regime is "arbitrary" or "unjustifiable" within the meaning of the chapeau of Article XX, the Panel relied on its findings under Article 2.1 of the TBT Agreement. [1525] Based on its findings under Article 2.1 of the TBT Agreement that the IC and MRM exceptions under the EU Seal Regime are not designed and applied in an even-handed manner, the Panel found that they also do not meet the requirements of the chapeau of Article XX of the GATT 1994. [1526]

5.308. Neither Canada nor Norway appeal the Panel's ultimate conclusion under the chapeau of Article XX that the "IC exception and the MRM exception … fail to meet the requirements under the chapeau". [1527] Instead, Canada and Norway take issue wi

that, under the specific circumstances of that individual case, the MERCOSUR arbitral ruling was "not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban th at falls within the purview of Article XX(b), and even goes against this objective".[1537]

5.310. We consider 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 of Article XX of the GATT 1994.[1538] We recognize that there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX. In particular, we note that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade" are found both in the chapeau of Article XX of the GA TT 1994 and in the sixth recital of the preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1 of the TBT Agreement.[1539] Moreover, both Article 2.1 and the chapeau of Article XX do not "operate to prohibit a priori any obstacle to international trade".[1540] Instead, as interpreted by the Appellate Body, Article 2.1 "permit[s] detrim ental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions"[1541], while under the chapeau of Article XX, discrimination is permitted if it is not arbitrary or unjustifiable.

5.311. However, there are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994. First, the legal standards applicable under the two provisions differ. Under Article 2.1 of the TBT Agreement, a panel has to examine whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[1542] Under the chapeau of Article XX, by contrast, the question is whether a measure is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[1543]

5.312. Another important difference between Article 2.1 and the chapeau of Article XX relates to their main function and scope. Article 2.1 is a non-discrimination provision in respect of technical regulations. Consequently, in the context of Article 2.1, it is only the regulatory distinction that accounts for the detrimental impact on imported products that is to be examined to determine whether it is "a legitimate regulatory distinction".[1544] By contrast, the function of the chapeau of

discriminatory impact found in the IC and MRM exceptions under the EU Seal Regime is justified under Article XX(a) of the GATT 1994. We also reverse the intermediate legal findings that the Panel made in the context of the chapeau of Article XX of the GATT 1994 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. [1548]

5.314. It follows that we do not need to address the arguments on appeal as far as they relate to these findings. In particular, we do not need to address the European Union's appeal of 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" [1549], nor the related claim under Article 11 of the DSU, given that the Panel made this finding in the context of its analysis under Article 2.1 of the TBT Agreement. For the same reasons, we do not need to address Canada's appeal of the Panel's finding that the distinction between commercial and IC hunts is nevertheless justified, nor Canada's related claim under Article 11 of the DSU. [1550]

5.315. In the following, we complete the analysis under the chapeau of Article XX of the GATT 1994 to the extent that we are able to do so on the basis of factual findings by the Panel and uncontested facts on the Panel record.

level of development in the organisation of th

IC hunts, given that "IC hunts can cause the very pain and suffering for seals that the EU public is concerned about."[1559]

5.321. As noted above, the relationship of the discrimination to the objective of a measure is one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary or unjustifiable discrimination.[1560] In other words, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment. In this connection, we note that the European Union argues that only seal products derived from hunts conducted by Inuit communities for subsistence purposes can benefit from the exception.[1561] We therefore now turn 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.

5.322. We recall that the IC exception is set out in Article 3(1) of the Basic Regulation, which provides that "[t]he 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". This provision is implemented by Article 3(1) of the Implementing Regulation, which requires that, in order to qualify for the IC hunts category, seal products must originate from seal hunts that satisfy the following three conditions:

a. seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;

b. seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; and

c. seal hunts which contribute to the subsistence of the community.

5.323. With respect to these criteria, we note the Panel's finding that:

> [T]he requirements of the IC exception are generally linked to the characteristics of IC hunts as discussed above, particularly in terms of the identity of the hunter with a tradition of seal hunting, the use of by-products from the hunted seals, and the contribution of the hunts to the subsistence of the community.[1562]

5.324. The Panel also noted, however, that the "scope and meaning of the 'subsistence' criterion" of the IC requirements "is not defined under the measure".[1563] The Panel had earlier found that "the subsistence purpose of IC hunts encompasses not only direct use and consumpnel8a, r TcBbrliT]TJeo30he use4.8(

by selling by-products of the hunted seals". [1566] The Panel thus identified a degree of overlap between the purposes of "commercial" and IC hunts, while at the same time maintaining that "[t]he commercial aspect of IC hunts is … not the same in its extent as that associated with commercial hunts". [1567] The European Union has not contested that IC hunts also have a commercial aspect. As we see it, the lack of a precise definition of the subsistence criterion introduces a degree of ambiguity into the requir ements for the IC exception under the EU Seal Regime.

5.325. We see similar ambiguities with respect to the "partial use" criterion, pursuant to which seal products must be "at least partly used, consumed or processed within the communities according to their traditions". The assessment of whether this criterion is fulfilled may be straightforward when it comes to the products of a single hunt, or where there are relatively stable patterns in the use of seal products, as appears to be the case in Greenland, where skins are the only parts of the seal that are currently traded on a significant scale. However, the ambiguity in

criterion is assessed at a sufficiently disaggregated level.[1571] Moreover, while the recognized body is subject to "independent third party audit" pursuant to Article 6(1)(g) of the Implementing Regulation, it is not clear how the auditor would be able reliably to assess whether the recognized body has diligently applied the criteria of the IC exception, especially given the ambiguities that

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS400/AB/R

6.1. In the appeal of the Panel Report, European Communities – Measures Prohibiting the

iii. finds that the European Union has not justified the EU Seal Regime under Article XX(a) of the GATT 1994; and

e. with respect to the European Union's conditional other appeal under Article XX(b) of the GATT 1994, finds that the conditions upon which this appeal is premised are not met and, consequently, makes no finding with respect to the European Union's claim that the Panel erred in finding that the European Union failed to make a *prima facie* case for its claim under Article XX(b).

6.2. The Appellate Body recommends that the DSB requestthe

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS401/AB/R

6.1. In the appeal of the Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (WT/DS401/R) (Norway Panel Report), for the reasons set out in this Report, the Appellate Body:

a. reverses the Panel's finding, in paragraphs 7.125 and 8.2(a) of the Norway Panel Report, that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement; and consequently, declares moot and of no legal effect the Panel's conclusions under:

   i. Article 2.2 of the TBT Agreement, in paragraphs 7.505 and 8.2(b) of the Norway Panel Report;

   ii. Article 5.1.2 of the TBT Agreement, in paragraphs 7.528, 7.547, and 8.2(c) of the Norway Panel Report; and

   iii. Article 5.2.1 of the TBT Agreement, in paragraphs 7.580 and 8.2(d) of the Norway Panel Report;

b. with respect to the Panel's analysis under Article I:1 and Article III:4 of the GATT 1994:

   i. upholds the Panel's finding, in paragraph 7.586 of the Norway Panel Report, that the legal standard of the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994; and

   ii. upholds the Panel's finding, in paragraphs 7.600 and 8.3(a) of the Norway Panel Report, that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994 because it does not "immediately and unconditionally" extend the same advantage accorded to seal products of Greenlandic origin to like seal products of Norwegian origin;

c. with respect to the Panel's analysis under Article XX(a) of the GATT 1994:

   i. finds that the Panel did not err in concluding, in paragraph 7.624 of the Norway Panel Report, that the analysis under Article XX(a) of the GATT 1994 should examine the prohibitive and permissive aspects of the EU Seal Regime;

   ii. finds that the Panel did not err in concluding, in paragraph 7.631 of the Norway Panel Report, that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994;

   iii. upholds the Panel's finding, in paragraph 7.639 of the Norway Panel Report, that "the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994";

d. with respect to the Panel's analysis under the chapeau of Article XX of the GATT 1994:

   i. reverses the Panel's findings under the chapeau of Article XX of the GATT 1994, in paragraphs 7.649, 7.650, 7.651, and 8.3(d) of the Norway Panel Report, on the basis that the Panel applied an incorrect legal test;

   ii. completes the analysis and finds that the European Union 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 1994; and, therefore,

   iii. finds that the European Union has not justified the EU Seal Regime under Article XX(a) of the GATT 1994; and

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS400/8

29 January 2014

EU Seal Regime contributes to the identified objective, [5] the relational analysis under the "weighing and balancing" exercise, and its reasoning and findings as to whether the alternative measure proposed by Canada is reasonably available. [6]

ANNEX 2

- the Panel also failed to make an objective assessment of the matter under Article 11 of the DSU by failing to address Norway's claim and argument that three contested conditions under the SRM requirement – that is, the "s ole purpose", "not-for-profit", and "non-systematic" requirements [12] (the "three contested conditions") – make no contribution to the measure's objectives.

8. The Panel erred in interpreting and applying Article 2.2 of the TBT Agreement , and failed to make an objective assessment of the matter, as re quired under Article 11 of the DSU, by failing to establish whether the EU Seal Regime gives rise to "arbitrary and unjustifiable discrimination", as required by Article 2.2, read in light of the sixth recital of the preamble of the TBT Agreement ;

9. The Panel erred in interpreting and applying Article 2.2 of the TBT Agreement , and failed to make an objective assessment of the matter as re quired under Article 11 of the DSU, in finding that one of the less trade-restrictive alternative measures pro.9(terpreti)-7(s)4.5(heti)-4 re fetit

III. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE ("GATT 1994") AND REQUEST FOR COMPLETION OF THE ANALYSIS UNDER ARTICLE XX OF THE GATT 1994

1. With respect to the Panel's finding that the EU Seal Regime is provisionally justified under sub-paragraph (a) of Article XX of the GATT 1994:[16]

12. The Panel erred in interpreting and applying sub-paragraph (a) of Article XX because it

or unjustifiable discrimination", it failed to end its analysis upon finding that the IC and SRM requirements are not "rationally connected" to the EU public moral concerns. [22]

17. If the Appellate Body disagrees with Norway's requests under paragraphs 12 and 13 above, Norway requests that the Appellate Body modify the reasoning underpinning the Panel's finding at paragraphs 7.651 and 8.3(d) that the measure is not consistent with the requirements of the chapeau to Article XX, and uphold that finding, albeit for reasons different than those given by the Panel.

[22] Panel Report, paras. 7.644-7.651.

ANNEX 3

WORLD TRADE ORGANIZATION

WT/DS400/9
WT/DS401/10

31 January 2014

4. Reversal of the Panel's conclusion that the EU Seal Regime is a technical regulation would dispose of Canada's and Norway's claims under the TBT Agreement. Accordingly, the European Union requests the Appellate Body to find that the Panel's findings and conclusions with regards to Articles 2.1, 2.2, 5.1.2 and 5.2.1 of the TBT Agreement are moot and of no legal effect.

2. THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION BEARS NO "RATIONAL RELATIONSHIP" TO THE PRIMARY OBJECTIVE OF THE EU SEAL REGIME

5. The European Union also appeals the Panel's finding, as part of its analysis under Articles 2.1 and 2.2 of the TBT Agreement and under Article XX(a) of the GATT 1994, that "the IC exception does not bear a rational relationship to the objective of addressing the moral concerns of the public on seal welfare". [6]

6. This finding is in error because it is based on an incorrect interpretation of the notion of "public morals", according to which a Member invoking that a measure pursues a public morals objective would have to show that such measure is supported by a majority of its population.

7. Furthermore, the European Union submits in the alternative that, in reaching its conclusion that the EU public does not support the IC exception the Panel failed to make an objective assessment of the evidence before it, as required by Article 11 DSU. Specifically, the Panel relied upon the following factual evidence: 1) the results of two opinion polls analysed in Canada's Royal Commission Report on Sealing7; and 2) the results of a public consultation conducted by the EU Commission as part of the preparation of its proposal to the EU legislators. [8] Yet this evidence lends no support to the Panel's appealed finding.

8. In view of these errors, the European Union requests the Appellate Body to reverse this

reasoning, contrary to the Panel's duties under

ANNEX 4

ORGANISATION MONDIALE DU COMMERCE

ORGANIZACIÓN MUNDIAL DEL COMERCIO

WORLD TRADE ORGANIZATION

APPELLATE BODY

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products

AB-2014-1
AB-2014-2

Procedural Ruling

1. On 29 January 2014, we received a joint communication from Canada and Norway in the above proceedings. In that letter, Canada and Norway request that the oral hearing in this appeal be opened to public observation. Specifically, Canada and Norway request that the Division allow public observation of the statements and answers to questions of the participants, as well as those of third participants who agree to make their statements and responses to questions public. They propose that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off should a third participant indicate that it wishes to keep its oral statement confidential. Canada and Norway further request and that the Division adopt additional procedures to ensure the security and orderly conduct of the proceedings. On that same date, we also received an email communication from the European Union, the Other Appellant in these proceedings, stating that it joins Canada's and Norway's request for observation by the public of the hearing, and has no objections to the proposed additional security arrangements.

2. On 30 January 2014, we invited the third parties to comment in writing on the request by noon, on 3 February 2014. By that deadline, we received responses from Japan, Mexico, and the

has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair

ANNEX 5

ORGANISATION MONDIALE DU COMMERCE

ORGANIZACIÓN MUNDIAL DEL COMERCIO

WORLD TRADE ORGANIZATION

APPELLATE BODY

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products

AB-2014-1
AB-2014-2

Procedural Ruling

1. On 30 January 2014, we received letters from Canada, Norway, and the European Union requesting that we postpone the date for the oral hearing in the above appellate proceedings due to certain logistical difficulties faced by the parties in securing reasonable hotel accommodation in Geneva during the week of 3 March 2014. Norway and the European Union confirmed that they would be available for a hearing as of the week of 17 March. Canada requested that the hearing be postponed until 19 March to allow its legal team to arrive a few days prior.

2. On 31 January 2014, we invited the third parties to comment in writing on the request by 12 noon on 4 February 2014. By that deadline, we received responses from Japan, Mexico, and the United States. Japan and Mexico indicated that they have no objections to the participants' requests. The United States supported the participants' requests, and considered that their requests to change the date of the oral hearing would also satisfy Rule 16(2) of the Working Procedures for Appellate Review.

3. The Division has carefully considered the participants' requests and the comments provided