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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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EU-58	A summary of the results of various public opinion surveys compiled by IFAW
EU-59	Public opinion survey by IPSO-Mori for IFAW and HSI, June 2011 (Belgium, France, Germany, United Kingdom, Italy, Lithuania, Netherlands, Poland, Romania, Spain and Sweden)
EU-145	"European Commission representative visits Iqaluit on good-will trip", *Nunatsiaq Online*, 23 April 2013

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
AGRI	Committee on Agriculture and Rural Development of the European Parliament
Basic Regulation	Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L Series, No. 286 (31 October 2009) (Panel Exhibit JE-1)
Canada Panel Report (DS400)	Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/R)
Canadian Seal Harvest Overview	Canadian Department of Fisheries and Oceans, *Canadian Commercial Seal Harvest Overview 2011*, Statistical and economic analysis series (October 2012) (Panel Exhibit JE-27)
Commission 2008 Impact Assessment	European Commission, "Commission Staff Working Document accompanying document to the Proposal for a regulation of the European Parliament and of the council concerning trade in seal products – Impact Assessment on the potential impact of a ban of products derived from seal species" (23 July 2008), COM(2008) 469 final (Panel Exhibit JE-16)
Commission Proposal	European Commission, Proposal for a regulation of the European Parliament and the Council concerning trade in seal products (23 July 2008), COM(2008) 469 final (Panel Exhibit JE-9)
Complainants	Canada and Norway
COWI	Danish-based international consulting group
COWI 2008 Report	COWI, *Assessment of the potential impact of a ban of products derived from seal species* (April 2008) (Panel Exhibit JE-20)
COWI 2010 Report	COWI, *Study on implementing measures for trade in seal products*, Final Report (January 2010) (Panel Exhibit JE-21)
CSA poll	Opinion poll conducted by the Canadian Sealers Association (Research Dimensions, 1985) (results printed in Royal Commission Report, pp. 151-152)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC Seal Pups Directive	Council Directive No. 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, *Official Journal of the European Communities*, L Series, No. 91 (9 April 1983), pp. 30-31 (Panel Exhibit CDA-12)
EFSA	European Food Safety Authority
EFSA Scientific Opinion	European Food Safety Authority, "Scientific Opinion of the Panel on Animal Health and Welfare on a request from the Commission on the Animal Welfare aspects of the killing and skinning of seals", *The EFSA Journal* (2007), No. 610, pp. 1-122 (Panel Exhibit JE-22)
ENVI	Committee on the Environment, Public Health and Food Safety of the European Parliament
EPA	United States Environmental Protection Agency
EU Seal Regime	The Basic Regulation and the Implementing Regulation combined together
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Greenland 2012 Seal Management Report	Government of Greenland, Ministry of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised April 2012) (Panel Exhibit JE-26)
IC	Inuit or other indigenous communities
IC exception	An exception under the EU Seal Regime for seal products obtained from seals hunted by Inuit or other indigenous communities
IC hunts	Hunts undertaken by Inuit or other indigenous communities

Abbreviation	Description
Implementing Regulation	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, *Official Journal of the European Union*, L Series, No. 216 (17 August 2010), pp. 1-10 (Panel Exhibit JE-2)
ISO/IEC Guide	International Organization for Standardization/International Electrotechnical Commission, *Guide 2:1991 – General terms and their definitions concerning standardization and related activities*, 6th edn
MFN	Most favoured nation
MRM	Marine resource management
MRM exception	An exception under the EU Seal Regime for seal products obtained from seals hunted for purposes of marine resource management
MRM hunts	Hunts conducted for marine resource management purposes
Norway Panel Report (DS401)	Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS401/R)
Nunavut 2012 Report	Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut* (2012) (Panel Exhibit JE-30)
Panel Reports	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/R / WT/DS401/R)
Parliament Report	Committee on the Internal Market and Consumer Protection, *Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seals products* (5 March 2009), A-0118/2009 (Panel Exhibit JE-4)
PPMs	Processes and production methods
RC poll	Opinion poll conducted by the Canadian Royal Commission (Canadian Gallup Poll Limited, 1986a, 1986b) (results printed in Royal Commission Report, pp. 150-151)
Royal Commission Report	Report of the Royal Commission, *Seals and Sealing in Canada* (1986), Vol. I, Chapter 11, "Public Opinion on Sealing" (Panel Exhibit EU-48)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
Travellers exception	An exception under the EU Seal Regime for seal products brought by travellers into the European Union in limited circumstances
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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, *Third Participant*
China, *Third Participant*
Colombia, *Third Participant*
Ecuador, *Third Participant*
Iceland, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
Namibia, *Third Participant*[2]
Russian Federation, *Third Participant*
United States, *Third Participant*

AB-2014-1
AB-2014-2

Appellate Body Division:

Graham, Presiding Member
Chang, Member
Zhang, Member

1 INTRODUCTION

1.1. Canada, Norway, and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*[3] (Panel Reports).[4] The Panel was established[5] to consider complaints by Canada[6] and Norway[7] (the complainants) with respect to a European Union measure dealing with seal products.[8]

[1] These disputes began before the Treaty of Lisbon entered into force in December 2009, which led to the replacement, for WTO purposes, of the "European Communities" with the "European Union". For this reason, the case title in these disputes is *EC – Seal Products*, rather than *EU – Seal Products*. Apart from the case title, the Panel referred throughout its Reports to the responding party in these disputes as the European Union or the EU. We follow this practice in these Reports.

[2] In DS401 only.

[3] WT/DS400/R, 25 November 2013 (Canada Panel Report (DS400)); WT/DS401/R, 25 November 2013 (Norway Panel Report (DS401)).

[4] The Panel issued its findings in the form of a single document containing two separate reports, with a common cover page, table of contents, and sections 1 through 7 (including the Panel's findings), and with separate conclusions and recommendations in respect of the dispute initiated by Canada and in respect of the dispute initiated by Norway.

[5] At its meeting held on 25 March 2011, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS400/4, in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). At its meeting on 21 April 2011, the DSB established a panel pursuant to the request of Norway in WT/DS401/5, in accordance with Article 6 of the DSU, and agreed, as provided for in Article 9 of the DSU in respect of multiple complainants, that the panel established to examine the complaint by Canada would also examine the complaint by Norway. (Panel Reports, para. 1.6)

[6] Request for the Establishment of a Panel by Canada, WT/DS400/4.

[7] Request for the Establishment of a Panel by Norway, WT/DS401/5.

[8] These disputes concern products either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and tanned fur skins, as well as articles (such as clothing and accessories, and omega-3 capsules) made from fur skins and oil. (Panel Reports, para. 2.6 (referring to Article 2(2) of the Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L Series, No. 286 (31 October 2009); Canada's first written submission to the Panel, paras. 61-70; and Norway's first written submission to the Panel, paras. 86-102))

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 meaning of Article XXIII:1(b) of the GATT 1994.[16]

1.6. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 25 November 2013. In its Reports, the Panel found it appropriate first to address the claims under the TBT Agreement, followed by those made under the GATT 1994.[17]

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[9] Panel Reports, para. 7.7.

[10] *Official Journal of the European Union*, L Series, No. 286 (31 October 2009) (Panel Exhibit JE-1).

[11] *Official Journal of the European Union*, L Series, No. 216 (17 August 2010) (Panel Exhibit JE-2).

[12] Panel Reports, para. 7.8; see also para. 7.26 (referring to the parties' responses to Panel question No. 2).

[13] Panel Reports, para. 7.1. Apart from the reference to "conditions" in paragraphs 7.1 and 7.2, the Panel referred throughout its Reports to the IC, MRM, and Travellers "exceptions". (See e.g. ibid., para. 7.35)

[14] Panel Reports, para. 7.1.

[15] Panel Reports, para. 7.2.

[16] Panel Reports, para. 7.2.

[17] Panel Reports, para. 7.69.

1.7. With respect to Canada's and Norway's claims under the TBT Agreement, the Panel concluded that:

a. the EU Seal Regime is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;

b. with respect to Canada's claim under Article 2.1, the IC exception and MRM exception under the EU Seal Regime are inconsistent with Article 2.1 because the detrimental impact caused by these exceptions does not stem exclusively from legitimate regulatory distinctions and, consequently, the exceptions accord imported seal products treatment less favourable than that accorded to like domestic and other foreign seal products;

c. the EU Seal Regime is not inconsistent with Article 2.2 because it fulfils the objective of addressing EU public moral concerns regarding seal welfare to a certain extent, and no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective of the EU Seal Regime;

d. the European Union acted inconsistently with its obligations under Article 5.1.2 because the conformity assessment procedures under the EU Seal Regime were incapable of enabling trade in qualifying products to take place as from the date of entry into force of the EU Seal Regime; and

e. Canada and Norway did not demonstrate that the European Union had acted inconsistently with its obligations under Article 5.2.1.[18]

1.8. With respect to Canada's and Norway's claims under the GATT 1994, the Panel concluded that:

a. the IC exception under the EU Seal Regime is inconsistent with Article I:1 because an advantage granted by the European Union to seal products originating in Greenland is not accorded immediately and unconditionally to like seal products originating in Canada and Norway;

b. the MRM exception under the EU Seal Regime is inconsistent with Article III:4 because it accords imported seal products treatment less favourable than that accorded to like domestic seal products;

c. each of the IC, MRM, and Travellers exceptions under the EU Seal Regime is not inconsistent with Article XI:1;

d. the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(a) because they fail to meet the requirements under the chapeau of Article XX; and

e. the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(b) because the European Union failed to make a *prima facie* case for its claim.[19]

1.9. The Panel rejected Norway's claim under Article 4.2 of the Agreement on Agriculture[20], and refrained from examining Canada's and Norway's non-violation claim under Article XXIII:1 of the GATT 1994.[21] The Panel found that, pursuant to Article 3.8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), to the extent that the European Union had acted inconsistently with Article 2.1 (in the case of Canada) and Article 5.1.2 of the

[18] Canada Panel Report (DS400), para. 8.2; Norway Panel Report (DS401), para. 8.2.
[19] Canada Panel Report (DS400), para. 8.3; Norway Panel Report (DS401), para. 8.3.
[20] Norway Panel Report (DS401), para. 8.4.
[21] Canada Panel Report (DS400), para. 8.4; Norway Panel Report (DS401), para. 8.5.

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 Working Procedures for Appellate Review[24] (Working Procedures). On 29 January 2014, the European Union notified the 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 filed a Notice of Other Appeal[25] and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 11 February 2014, the European Union, Canada, and Norway each filed an appellee's submission.[26] On 14 February 2014, Iceland, Japan, Mexico, and the United States each filed a third participant's submission.[27] On the same day, Namibia notified its intention to appear at the oral hearing as a third participant[28] (in DS401 only), and Argentina, China, and Ecuador (on 17 February 2014), Colombia (on 19 February 2014), and Russia (on 21 February 2014) each notified its intention to appear at the oral hearing as a third participant.[29]

1.11. On 29 January 2014, the Appellate Body received a joint communication from Canada and Norway requesting that the oral hearing in these appellate proceedings be opened to public observation. Both complainants proposed 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 wished to keep its oral statement confidential. They further requested the adoption of additional procedures to ensure the security and orderly conduct of the proceedings. On the same date, the Appellate Body received a communication from the European Union, joining Canada and Norway's request for public observation of the hearing, and indicating that it had no objections to the proposed additional security arrangements.

1.12. On 30 January 2014, the Appellate Body Division in these appellate proceedings invited the third parties to comment in writing on the participants' request for an open oral hearing. Japan, Mexico, and the United States submitted their responses on 3 February 2014. In its communication, Japan indicated that it had no objection to the request for public observation or the proposed logistical arrangements. Mexico also did not object, but nevertheless stated that its position in these appeals was without prejudice to its systemic views on the public observation of oral hearings. The United States articulated its support for the request to open the hearing to the public, and suggested that the Division accommodate the participants' logistical requests to the extent possible.

1.13. On 5 February 2014, the Division issued a Procedural Ruling authorizing the request of Canada, Norway, and the European Union to open the hearing to public observation and adopting additional procedures for the conduct of the hearing. The Procedural Ruling is attached as Annex 4 to these Reports.

1.14. The oral hearing in these appeals was originally scheduled for 3-5 March 2014. On 30 January 2014, the Appellate Body received letters from Canada, Norway, and the European Union, requesting the postponement of the dates for the oral hearing due to logistical difficulties faced by the parties during the week of 3 March 2014. The participants requested that the oral hearing be postponed to no earlier than the week of 17 March 2014. On 31 January 2014, the Division invited the third parties to comment in writing on the request for postponement of the oral hearing. Japan, Mexico, and the United States submitted their comments on 4 February 2014, indicating that they had no objection to the participants' request. On 5 February 2014, the Division

[22] Canada Panel Report, para. 8.5 (DS400); Norway Panel Report (DS401), para. 8.6.

[23] WT/DS400/8 (Canada), WT/DS401/9 (Norway) (attached as Annexes 1 and 2 to these Reports, respectively).

[24] WT/AB/WP/6, 16 August 2010.

[25] WT/DS400/9, WT/DS401/10 (attached as Annex 3 to these Reports).

[26] Pursuant to Rules 22 and 23(4) of the Working Procedures.

[27] Pursuant to Rule 24(1) of the Working Procedures.

[28] Pursuant to Rule 24(2) of the Working Procedures.

[29] Pursuant to Rule 24(4) of the Working Procedures.

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 brief inadmissible. The Division did not find it necessary to rely on the other two *amicus curiae* briefs in rendering its decision.

1.16. The oral hearing in these appeals was held from 17 to 19 March 2014. Public observation took place via simultaneous closed-circuit television broadcast to a separate viewing room. The participants and Ecuador, Japan, Mexico, Namibia, and the United States made opening statements. The participants and third participants responded to questions posed by the Members of the Division hearing the appeals.

1.17. On 24 March 2014, the Chair of the Appellate Body informed the Chair of the DSB that, due to the requests made by the participants to postpone the date for the oral hearing and the subsequent rescheduling of the oral hearing from 3-5 March 2014 to 17-19 March 2014, and also due to the size of these appeals and the other appeal by the European Union, including the number and complexity of the issues raised by the participants, it was expected that the Appellate Body Reports in these appeals would be circulated to WTO Members no later than Tuesday, 20 May 2014.[33] Subsequently, by letter dated 16 May 2014, the Chair of the Appellate Body informed the Chair of the DSB that due to the time required for translation and the caseload of the Appellate Body, the Reports in these appeals would be circulated on Thursday, 22 May 2014 in all official languages.[34]

2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

2.1 Claims of error by Canada – Appellant

2.1.1 Article 2.1 of the TBT Agreement

2.1. Canada submits that the Panel erred by formulating and applying the wrong legal test under Article 2.1 of the TBT Agreement. Canada further challenges the Panel's intermediate conclusion, in the context of its analysis under Article 2.1, that the regulatory distinction between commercial hunts and hunts undertaken by Inuit or other indigenous communities (IC hunts) is justified. Canada requests the Appellate Body to complete the legal analysis under Article 2.1 by applying the correct "even-handedness" test; and to uphold the Panel's ultimate finding that the detrimental impact of the EU Seal Regime does not stem exclusively from a legitimate regulatory distinction under Article 2.1, but on the modified grounds that the distinction between commercial and IC hunts is arbitrary and unjustifiable.

2.2. Canada submits that the Panel committed a legal error by articulating the wrong test to determine whether the detrimental impact of the EU Seal Regime on the competitive opportunities of Canadian seal products stems exclusively from a legitimate regulatory distinction. Specifically, Canada takes issue with the Panel's framing of the test as consisting of three distinct elements. According to Canada, this is contrary to the Appellate Body's framing of the test, in three previous disputes under the TBT Agreement, as "a determination of whether the regulatory distinction that

[30] From a group of animal welfare organizations. These organizations include Anima, Animal Rights Action Network, Asociación Nacional para la Defensa de los Animales, Bont Voor Dieren, Compassion in World Farming, Djurens Rätt, Eurogroup for Animals, Fondation Brigitte Bardot, Fondation Franz Weber, Four Paws, GAIA, Humane Society of the United States/Humane Society International, International Fund for Animal Welfare, Lega Anti Vivisezione, Prijatelji živontinja, Respect for Animals, Royal Society for the Prevention of Cruelty to Animals, Svoboda zvířat, and World Society for the Protection of Animals.

[31] From the International Fur Federation.

[32] From Professor Robert Howse, Joanna Langille, and Professor Katie Sykes.

[33] This letter was circulated as document WT/DS400/10, WT/DS401/11.

[34] This letter was circulated as document WT/DS400/11, WT/DS401/12.

resulted in the detrimental impact was designed 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 distinction – 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] Hence, in Canada's view, "the presence or absence of a rationale that explains or justifies the regulatory distinction is a critical aspect in determining whether a regulatory distinction is even-handed."[38]

2.3. Canada further submits that the Panel committed a number of legal errors in finding that the regulatory distinction between non-conforming Canadian seal products and Greenlandic Inuit seal products was justifiable. First, Canada asserts that the Panel erred in finding that the distinction was justifiable despite evidence demonstrating that the rationale for the distinction "goes against" the objective of the EU Seal Regime.[39] Canada highlights that, in its assessment of the EU Seal Regime's contribution to its objective, the Panel found that the IC exception actually "diminishes" the overall contribution of the EU Seal Regime to that objective.[40] Canada submits that a regulatory distinction that undermines the objective of a measure cannot be justified, as it would constitute arbitrary or unjustifiable discrimination. Canada argues that, in *Brazil – Retreaded Tyres*, the finding that the rationale for the discrimination undermined the objective of the measure at issue was determinative for the finding of arbitrary and unjustifiable discrimination.[41] Given the similarities between the test under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, Canada argues that the fact that the rationale for the discrimination completely undermines the objective of the measure must play a determinative role under both provisions. Canada further clarifies its view that the Panel committed an error in attempting to distinguish the Appellate Body's reasoning in *Brazil – Retreaded Tyres*.[42] Canada notes that, according to the Panel, the Appellate Body's conclusion of arbitrary and unjustifiable discrimination in that case was based on a finding that the rationale for the exception was not sufficient to justify the exception in the face of the rational disconnection to the objective of the measure. Canada submits that this is not correct. In Canada's view, the Appellate Body's conclusion was based solely on its determination that there was no rational connection between the exception and the objective of the ban, and did not involve a balancing of the objective of the exception with the rational disconnection.

2.4. Second, Canada alleges that the Panel committed a legal error "by relying on international instruments extraneous to the case" to justify the distinction between IC and commercial hunts.[43] Canada notes that the international agreements cited by the European Union before the Panel do not require the European Union to protect the interests of Inuit or other indigenous communities by discriminating against the products of non-indigenous peoples. Canada further argues that "the merits of according preferential treatment to indigenous peoples must still be balanced with how such treatment accords with the objective of the measure."[44] Canada recalls the Appellate Body's observation in *Brazil – Retreaded Tyres* that, even if a rationale is not capricious or random, it can still be found to be arbitrary or unjustifiable because it bears no relationship to the objective of the measure or goes against it.[45] Canada submits that the existence of international agreements that

[35] Canada's appellant's submission, para. 51 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 182 and 215; *US – Tuna II (Mexico)*, paras. 216 and 225; and *US – COOL*, paras. 271, 272, and 341).

[36] Canada's appellant's submission, para. 52 (referring to Panel Reports, para. 7.259).

[37] Canada's appellant's submission, para. 77.

[38] Canada's appellant's submission, para. 77.

[39] Canada's appellant's submission, para. 78 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).

[40] Canada's appellant's submission, para. 78 (referring to Panel Reports, para. 7.448).

[41] Canada's appellant's submission, paras. 80-82 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

[42] Canada's opening statement at the oral hearing.

[43] Canada's appellant's submission, heading B.a), at p. 27.

[44] Canada's appellant's submission, para. 89.

[45] Canada's appellant's submission, para. 89 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 232).

recognize, in general terms, the interests of indigenous people cannot be a determining factor in assessing whether the rationale for the regulatory distinction is justified.

2.5. The third legal error that Canada identifies is the Panel's failure to examine whether giving effect to the distinction will actually fulfil its rationale. Canada points to the Appellate Body's discussion of the rationales for the distinction between clove and menthol cigarettes that the United States put forward in the *US – Clove Cigarettes* case. According to Canada, the Appellate Body in that case dismissed the rationales on the basis that "it was not clear" that the alleged consequences of not making the distinction – namely, the impact on the US health care system associated with banning menthol and the risk of the development of a black market for menthol cigarettes – would materialize.[46] Canada argues that, in the present disputes, it is equally "not clear" that the IC exception will serve to protect Inuit or other indigenous communities' (IC) interests. Canada notes that Inuit communities were opposed to the EU Seal Regime as a whole despite the IC exception because they believe that it will have a negative impact on the market for all seal products.[47] Canada submits that the Panel's failure to consider the lack of fulfilment of the regulatory distinction's purpose constitutes legal error.[48]

2.6. Canada further alleges that the Panel erred by focusing on the wrong comparison in its assessment of whether the regulatory distinction is even-handed. According to Canada, the Panel erroneously applied the "even-handedness" test by analysing different Inuit hunts rather than the regulatory distinction between commercial and IC hunts, which it had found to be causing the detrimental impact. Canada notes that, in assessing the legitimacy of a regulatory distinction for the purposes of Article 2.1 of the TBT Agreement, the Appellate Body has focused only on the distinction that accounts for the detrimental impact on imported products as compared to domestic products.[49] Canada submits that, by not focusing on the proper regulatory distinction, the Panel failed to follow the guidance provided by the Appellate Body in previous TBT disputes. Canada argues that, had the Panel directed its attention towards the regulatory distinction between commercial and IC hunts, it would have had the correct basis to conclude that this regulatory distinction was designed and applied in an arbitrary manner because the IC hunt in Greenland exhibits the characteristics of a commercial hunt. As Canada sees it, the fact that the application of the IC exception results in differentiated benefits amongst the Inuit is not germane to the question of whether the regulatory distinction between commercial and IC hunts is even-handed. As a result, Canada argues, the Panel failed to determine whether the regulatory distinction between commercial and IC hunts is even-handed.

2.7. Canada further submits that the Panel erred by failing to examine the arbitrary aspects of the regulatory distinction between commercial and IC hunts.[50] In Canada's view, the Panel should have taken into account its finding that the Inuit hunt in Greenland has "characteristics that are closely related to that of commercial hunts" in examining whether the regulatory distinction between commercial and IC hunts was designed and applied in an arbitrary or unjustifiable manner.[51] For Canada, the Panel's findings regarding the similarities between the Inuit hunt in Greenland and commercial hunts are relevant to the application of the test under Article 2.1, not because they show that the IC exception was not designed or applied in an even-handed manner, but because they demonstrate that the distinction between Inuit and commercial hunts is "illusory in practice", and is thus designed in an arbitrary manner.[52] According to Canada, it is, therefore, the distinction between commercial and IC hunts, rather than the IC exception as such, that is

[46] Canada's appellant's submission, para. 90 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 225).

[47] Canada's appellant's submission, para. 91 (referring to Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut* (2012) (Panel Exhibit JE-30) (Nunavut 2012 Report), p. 3; Government of Greenland, Ministry of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised April 2012) (Panel Exhibit JE-26) (Greenland 2012 Seal Management Report), pp. 31-36; and Canada's first written submission to the Panel, paras. 526-532).

[48] Canada's appellant's submission, para. 92.

[49] Canada's appellant's submission, para. 94 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).

[50] Canada's appellant's submission, para. 99.

[51] Canada's appellant's submission, para. 99 (quoting Panel Reports, para. 7.313).

[52] Canada's appellant's submission, para. 102 (referring to Canada's second written submission to the Panel, paras. 280-284).

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 communities from the seal hunt, as well as the use of seal by-products in those communities.[56] Canada submits that, even if examining this evidence would not have changed the Panel's ultimate finding on the uniqueness of IC hunts, the Panel had a duty under Article 11 of the DSU to consider this evidence and explain why this information did not affect its finding.

2.10. Canada, therefore, requests the Appellate Body to complete the legal analysis under Article 2.1 by applying the correct "even-handedness" test; and to uphold the Panel's ultimate finding that the detrimental impact of the EU Seal Regime does not stem exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, but on the modified grounds that the distinction between commercial and IC hunts is arbitrary and unjustifiable.[57]

2.1.2 Article 2.2 of the TBT Agreement

2.11. Canada claims that the Panel erred in finding that the EU Seal Regime is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. Canada submits that the Panel erred in its analysis of the degree of contribution that the EU Seal Regime makes to the identified objective, in failing to assess the risk non-fulfilment would create and to conduct a "relational" analysis, and in its analysis of whether the alternative measure makes at least an equivalent or greater contribution to the objective. Canada requests that the Appellate Body reverse the Panel's finding and complete the legal analysis and find that the EU Seal Regime is inconsistent with Article 2.2.

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

2.12. Canada argues that the Appellate Body has stressed the importance of "clear and precise" panel findings in considering the three elements of the test under Article 2.2 of the TBT Agreement.[58] Without clear and precise findings regarding the degree of contribution of the measure to the objective, Canada argues, "a panel cannot complete the relational analysis or the comparison of the challenged measure with an alternative measure as it will not have a sufficiently accurate benchmark degree of contribution for comparison."[59]

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[53] Canada's appellant's submission, para. 102 (referring to Canada's second written submission to the Panel, paras. 280-284).

[54] Canada's opening statement at the oral hearing.

[55] Canada's appellant's submission, para. 111.

[56] Canada's appellant's submission, paras. 110 and 111 (referring to Canada's first written submission to the Panel, paras. 25-31).

[57] Canada's appellant's submission, para. 112.

[58] Canada's appellant's submission, para. 158 (quoting Appellate Body Reports, *US – COOL*, para. 479).

[59] Canada's appellant's submission, para. 158.

2.13. Canada claims that the Panel erred in its "contribution" analysis in several respects. Canada submits that the Panel erred in its analysis of the contribution of the EU Seal Regime to the first aspect of the identified objective, namely, preventing the EU public from being exposed to or purchasing products derived from seals killed inhumanely. Canada argues that the Panel's consideration of the prohibitive part of the measure is "immaterial" because its permissive aspect allows unlimited amounts of products from IC hunts and hunts conducted for marine resource management purposes (MRM hunts).[60] Because the Panel found that the EU public is exposed to and may be purchasing seal products derived from inhumanely killed seals under the EU Seal Regime, Canada states that the Panel "should have found that the EU Seal Regime, as a whole, fails to contribute to the first aspect of the objective because the EU public may still purchase seal products derived from seals killed inhumanely".[61]

2.14. Moreover, Canada argues that, even if the Panel correctly found that the ban contributes to the first aspect of the objective, it erred "by failing to make an overall conclusion that the EU Seal Regime as a whole makes a net positive contribution to preventing the EU public from being exposed to or purchasing seal products from inhumanely killed seals".[62] Canada maintains that the degree of contribution is a key factor in assessing the necessity of a measure under Article 2.2. In Canada's view, the Panel's failure to articulate a "clear or precise" finding of the extent of a positive or negative contribution to the first aspect of the objective of the EU Seal Regime and to provide an overall conclusion on the degree of contribution to that objective as a whole constitutes legal error.[63] Canada adds that, if the Panel had properly articulated the extent of the degree of contribution of the prohibitive and permissive aspects to the first aspect of the objective, there were factual findings in other sections of the Panel Reports "that [led] to the conclusion that products allowed access under the IC exception in particular, include a much higher risk of being derived from inhumanely killed seals".[64] Canada maintains that, based on the Panel's findings, "there is an increased likelihood of seal products being derived from inhumanely killed seals" in Greenlandic versus Canadian hunts, and "a high likelihood of an increase in supply of seal products from Greenland in the absence of seal products from Canada and Norway".[65] In Canada's view, not only are EU citizens being exposed to and possibly purchasing seal products derived from inhumanely killed seals under the EU Seal Regime, but the extent to which this occurs is higher under the EU Seal Regime and increases the negative contribution of the exceptions to the first aspect of the objective. If the Panel had applied the "degree of contribution" test correctly to the facts, Canada argues, it would have found that "the EU Seal Regime as a whole fails completely to make a contribution to the first aspect of the objective."[66]

2.15. Canada submits 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 incidence of the inhumane killing of seals. Canada argues that the Panel sought to determine whether the measure contributed to 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 incidence of the inhumane killing of seals.[67] Canada states that, in failing to assess this second step, the Panel failed to demonstrate that there was "a genuine relationship of ends and means between the objective pursued and the measure at issue".[68] Canada moreover states that this finding was made on the basis of its examination of trade data, despite finding that "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".[69]

[60] Canada's appellant's submission, para. 161.
[61] Canada's appellant's submission, para. 162.
[62] Canada's appellant's submission, para. 163.
[63] Canada's appellant's submission, para. 168.
[64] Canada's appellant's submission, para. 169.
[65] Canada's appellant's submission, para. 174.
[66] Canada's appellant's submission, para. 175.
[67] Canada's appellant's submission, para. 177.
[68] Canada's appellant's submission, para. 178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145).
[69] Canada's appellant's submission, para. 184 (quoting Panel Reports, para. 7.458).

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 Panel compounded this error by failing to undertake a "relational" analysis between the risks non-fulfilment would create under the EU Seal Regime, the trade-restrictiveness of the EU Seal Regime, and the contribution of the EU Seal Regime to the identified objective. Had the Panel completed this analysis, Canada asserts, the Panel would have concluded that "a very

[70] Canada's appellant's submission, para. 186.
[71] Canada's appellant's submission, para. 187.
[72] Canada's appellant's submission, para. 189 (referring to, *inter alia*, Panel Reports, paras. 7.164, 7.216, 7.220, 7.250, 7.268, 7.269, 7.310, 7.314, and 7.315).
[73] Canada's appellant's submission, para. 194.
[74] Canada's appellant's submission, para. 209.
[75] Canada's appellant's submission, para. 213 (quoting Appellate Body Reports, *US – COOL*, para. 479).
[76] Canada's appellant's submission, para. 215.
[77] Canada's appellant's submission, para. 215.
[78] Canada's opening statement at the oral hearing.
[79] Canada's appellant's submission, para. 309.

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

2.20. Canada claims that the Panel erred in several respects in its assessment of the alternative measure. Canada argues that the Panel erred by comparing the contribution of the alternative measure against only the prohibitive aspect of the EU Seal Regime. Canada notes that, unlike the Panel's analysis of the contribution of the EU Seal Regime, in which it assessed both positive and negative contributions to the objective, the Panel made no reference to the manner in which the exceptions, both implicit and explicit, diminish and undermine the contribution to the objective. Canada argues that the Panel erred by "ignoring its own findings" and establishing an improper benchmark for analysis of the alternative measure that considered the EU Seal Regime as "only a prohibition without the explicit or implicit exceptions".[81]

2.21. Canada maintains that, by failing to assess the alternative measure against the actual contribution of the EU Seal Regime, the Panel "assessed the alternative measure against the standard of complete fulfilment of the objective".[82] Canada considers that such an approach created an improper standard against which to compare the alternative measure. With regard to the first aspect of the objective, Canada argues that it appears the Panel was requiring that the alternative measure "would have to limit market access to only those seal products that were, in fact, derived from humanely killed seals"[83], and thus "prescribe adequate animal welfare standards and a certification and labelling scheme that would succeed in limiting access to the EU market exclusively to seal products derived from humanely killed seals".[84] And although the Panel also concluded that less stringent animal welfare standards and verification requirements would diminish the degree of contribution to the fulfilment of the objective, Canada argues that the Panel "fail[ed] to reconcile this with its finding that the IC and MRM exceptions 'diminish' the extent of the contribution that the 'ban' makes to both aspects of the objective and that the 'implicit exceptions' undermine the objective".[85]

2.22. With regard to the second aspect of the objective – namely, reducing the number of inhumanely killed seals – Canada observes that, on the one hand, the Panel found that the alternative measure may subject a greater number of seals to the risks of poor animal welfare by "restoring the potential market" in the European Union.[86] On the other hand, the Panel considered that the imposition of animal welfare requirements may also promote the humane killing practices in seal hunts that could reduce the number of inhumanely killed seals to some extent. Canada argues, however, that the Panel here also "failed to make an overall determination of the extent of contribution that the alternative measure makes to this aspect of the objective".[87] Canada considers that, by comparing the alternative measure to a standard of complete fulfilment of the objective and its two aspects, a standard that the EU Seal Regime itself failed to meet, the Panel erred in the application of the "necessity" test under Article 2.2.[88]

2.23. Canada also argues that the Panel erred by adopting the incorrect legal standard of complete fulfilment of the objective with respect to determining the degree of contribution the alternative measure would need to make and thus the reasonable availability of the alternative measure on that basis. In Canada's view, "[s]ince complete fulfilment of the objective is a higher degree of contribution than what was found under the EU Seal Regime, the Panel erred in finding that the alternative measure is not reasonably available."[89] Canada argues that, when the Panel considered whether the EU Seal Regime was reasonably available, it sought to determine whether the alternative measure reflected a high level of animal welfare. In doing so, Canada contends, the Panel erred "by basing its conclusion that the alternative measure was not reasonably available on

[80] Canada's appellant's submission, para. 322.
[81] Canada's appellant's submission, para. 244.
[82] Canada's appellant's submission, para. 246.
[83] Canada's appellant's submission, para. 250.
[84] Canada's appellant's submission, para. 251. (emphasis original)
[85] Canada's appellant's submission, para. 253.
[86] Canada's appellant's submission, para. 256 (quoting Panel Reports, para. 7.484).
[87] Canada's appellant's submission, para. 257 (referring to Panel Reports, para. 7.485).
[88] Canada's appellant's submission, para. 259.
[89] Canada's appellant's submission, para. 261.

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 in *EC – Asbestos*, the EU Seal Regime does not achieve the level of protection asserted by the European Union.

2.25. Canada maintains that the Panel further erred in its interpretation and application of the jurisprudence by dismissing the evidence regarding other wildlife hunts and abattoirs. Canada points to the Appellate Body's statements in *Korea – Various Measures on Beef* as support for examining measures applicable to other related product areas in assessing the reasonable availability of a proposed alternative measure.[93] Canada argues that, because the Panel found that the EU public's specific moral concern with respect to the inhumane killing of seals was rooted in animal welfare generally being an issue of public morals in the EU, "the same regulatory actions applied in the cases of other animals relied on by the EU to support its assertion of a public moral on seal welfare are relevant to the issue of which types of regulatory responses are reasonably available."[94] In Canada's view, if the Panel had correctly interpreted and applied the jurisprudence, it would have found that the types of measures applied with respect to the welfare of other animals – including setting animal welfare requirements, certification, labelling, monitoring, and enforcement – raise doubts with respect to the necessity of the more restrictive EU Seal Regime. Furthermore, Canada argues that, because the Panel misinterpreted and misapplied the jurisprudence to the facts of this case, it "erred in considering the costs and logistical demands on hunters and marketers of seal products if a strict certification scheme were to be adopted by the EU".[95] Canada also argues that it is the burdens and costs imposed by compliance with an alternative measure on the responding WTO Member, not on the industry, that are relevant for a finding that the alternative measure is reasonably available.

2.26. For these reasons, Canada requests the Appellate Body to reverse the Panel's finding, and to complete the legal analysis and find that the EU Seal Regime is inconsistent with Article 2.2 of the TBT Agreement.[96]

2.27. Canada also asserts a claim under Article 11 of the DSU regarding the Panel's finding that the alternative measure could result in an increase in the number of seals killed inhumanely. In particular, Canada argues that the Panel's finding was based on an assertion of the European Union, which is itself a restatement of an unsupported assertion made in an *amicus curiae* submission. According to Canada, the Panel thus found that "a stringent animal welfare standard would lead to more seals being killed inhumanely … without any evidentiary support."[97]

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[90] Canada's appellant's submission, para. 263.
[91] Canada's appellant's submission, para. 269.
[92] Canada's appellant's submission, paras. 270 and 271 (referring to Appellate Body Report, *EC – Asbestos*, para. 174).
[93] Canada's appellant's submission, paras. 281 and 282 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 170 and 168, respectively).
[94] Canada's appellant's submission, para. 284.
[95] Canada's appellant's submission, para. 291.
[96] Canada's appellant's submission, para. 335.
[97] Canada's appellant's submission, para. 334.

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 practices" in the European Union.[103] Instead, Canada argues, the Panel "merely pointed to the existence of EU animal welfare legislation while noting that the presence of animal welfare policies in a variety of EU and EU Member State legislation supports the idea that animal welfare is a moral matter".[104]

2.30. Turning to the second element of its test, Canada asserts that, in order to ascertain whether a "risk" to the public morals identified above exists, the Panel should have considered "whether there is evidence to show that the animal welfare practices with which the measure is concerned fall below that standard."[105] According to Canada, a "risk" to public morals in the European Union exists only if the evidence leads to the conclusion that "the commercial seal hunts targeted by the ban exhibit a degree or incidence of animal suffering that falls below the standard or norm of right and wrong conduct in the context of animal welfare shown to prevail within the [European Union]."[106] Canada recalls that it had presented evidence before the Panel to show that "EU policies and practices with respect to animal welfare included a tolerance for a certain degree of animal suffering, both for slaughterhouses and wildlife hunts", and that the welfare risks associated with commercial seal hunts are "'commonplace' in situations that involve the killing of animals, especially in the context of wild life hunts".[107] On this basis, Canada argues that the Panel failed to consider whether the risks associated with commercial seal hunts "exceeded the accepted level of risk of compromised animal welfare, as reflected in the EU's policies and practices in this field".[108]

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[98] Canada's appellant's submission, para. 386 and fn 470 thereto (quoting Panel Report, *US – Gambling*, para. 6.455).

[99] Canada's appellant's submission, para. 388 (quoting Panel Report, *EC – Asbestos*, para. 8.184).

[100] Canada's appellant's submission, para. 389.

[101] Canada's appellant's submission, para. 390.

[102] Canada's appellant's submission, para. 392.

[103] Canada's appellant's submission, para. 392.

[104] Canada's appellant's submission, para. 393 (referring to Panel Reports, para. 7.409).

[105] Canada's appellant's submission, para. 394.

[106] Canada's appellant's submission, para. 396.

[107] Canada's appellant's submission, para. 395 (referring to Canada's first written submission to the Panel, paras. 146-162 and 198-213; second written submission to the Panel, paras. 45-49; opening statement at the second Panel meeting, paras. 44-50; response to Panel question No. 60, paras. 248-250; and the following Exhibits submitted by Canada before the Panel: Panel Exhibits CDA-29; CDA-34, p. 453; CDA-47; CDA-98; CDA-122; CDA-123, p. 14; CDA-124; JE-8; JE-17; and JE-22, p. 88 (see list of Panel Exhibits, pp. 9-10).

[108] Canada's appellant's submission, para. 397.

2.31. Canada also challenges the Panel's findings under Article 11 of the DSU, specifically in respect of the Panel's finding "that the circumstances and conditions of seal hunts present certain specific challenges to the humane killing of seals".[109] Canada argues that, by characterizing seal hunts as "unique", and by disregarding the evidence relating to other situations involving the killing of animals, the Panel "failed to provide the comparative basis that would have allowed it to evaluate whether the commercial seal hunt failed to satisfy prevailing animal welfare standards in the European Union that provide the foundation for the alleged public moral concern".[110]

2.32. Canada asserts that "[t]he Panel did not provide any analysis based on the evidence before it to support its finding that the physical environment of seal hunts was distinguishable from wildlife hunts."[111] While the Panel did consider the European Food Safety Authority's Scientific Opinion on Animal Health and Welfare[112] (EFSA Scientific Opinion) that compared the conditions between seal hunts and abattoirs, it did not refer to any part of the EFSA Scientific Opinion that looked at other wildlife hunts.[113] Canada argues that much of the evidence regarding seal hunts, including the EFSA Scientific Opinion, provided comparison with other hunts "for the purpose of making qualified conclusions regarding the seal hunt", and such comparisons were necessary for the findings in the EFSA Scientific Opinion.[114] Because the Panel "felt that the other wildlife hunts were not comparable", Canada argues, the Panel "deviated from the proper scientific method employed by the experts to arrive at their conclusion on the seal hunt".[115] According to Canada, the Panel, "[a]t a minimum", should have provided "a thorough assessment of the findings in the EFSA Scientific Opinion regarding other wildlife hunts."[116] Canada argues that the Panel acted inconsistently with Article 11 of the DSU when it failed to provide reasons why environmental conditions between seal hunts and other wildlife hunts "are so different as to make the animal welfare aspects of the respective hunts incomparable", and when it did not objectively assess the evidence before it, "particularly evidence that goes to the heart of Canada's arguments".[117]

2.33. Canada also argues that the Panel did not properly compare the risks to animal welfare that arise from other terrestrial hunts. In particular, Canada points out that the Panel failed to take into account its evidence and arguments with respect to poor animal welfare outcomes in deer hunts, and, therefore, failed to recognize and compare the poor animal welfare outcomes in other terrestrial hunts.[118] According to Canada, the particular characteristics of seal hunts identified by the Panel "that pose 'various risks to the welfare of seals' including things such as ineffective stunning, delays in the killing process and struck and lost rates are all equally evident in wildlife hunts".[119] Canada recalls that it "had shown that the shooting of wildlife such as deer pose similar risks due to poor marksmanship, wounding as opposed to killing of deer as well as the inordinate delay between a shot and when a hunter checks the animal".[120] The Panel, however, "failed to disclose why this evidence that is of utmost relevance for Canada's arguments did not have a bearing on its determination regarding the particular risks to seal hunting".[121]

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[109] Canada's appellant's submission, para. 400 (quoting Panel Reports, para. 7.222).

[110] Canada's appellant's submission, para. 400.

[111] Canada's appellant's submission, para. 401.

[112] European Food Safety Authority, "Scientific Opinion of the Panel on Animal Health and Welfare on a request from the Commission on the Animal Welfare aspects of the killing and skinning of seals", *The EFSA Journal* (2007), No. 610, pp. 1-122 (Panel Exhibit JE-22).

[113] Canada's appellant's submission, para. 401 (referring to Panel Reports, fn 254 to para. 7.187).

[114] Canada's appellant's submission, para. 403 (referring to the following Exhibits submitted by Canada before the Panel: Panel Exhibits JE-20; JE-21; JE-22; JE-24; JE-31; and CDA-34 (see list of Panel Exhibits, pp. 9-10).

[115] Canada's appellant's submission, para. 403.

[116] Canada's appellant's submission, para. 403. (fn omitted)

[117] Canada's appellant's submission, para. 402.

[118] Canada's appellant's submission, para. 404 (referring to DEFRA, *Current and Future Deer Management Options*, Report on behalf of DEFRA European Wildlife Division, December 2003, pp. 14-15, available at: <http://www.naturalengland.org.uk/Images/managementoptions_tcm6-4637.pdf> (Panel Exhibit CDA-123)).

[119] Canada's appellant's submission, para. 406.

[120] Canada's appellant's submission, para. 406 (referring to Canada's oral statement at the second Panel meeting, paras. 42-49).

[121] Canada's appellant's submission, para. 406.

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 *Brazil – Retreaded Tyres*, that refers to "restrictive effects" "as severe as those resulting from an import ban".[125] Canada highlights, however, that in that dispute the panel analysed the import ban on retreaded tyres as a measure on its own and the MERCOSUR exception as a separate measure because of the structure of the complainant's request for the establishment of a panel in that case.[126] Relying on the Appellate Body's observations in *Brazil – Retreaded Tyres*, Canada argues that "the jurisprudence does not provide a basis upon which only the ban, which is not the aspect of the measure found inconsistent with the other provisions of the GATT 1994, is examined for the purposes of determining whether the measure makes a material contribution to the objective."[127] For these reasons, Canada contends that the Panel erred in its interpretation and application of the "contribution" test by only considering the "ban" aspect of the EU Seal Regime when considering whether the measure makes a "material" contribution to its identified objective.[128]

2.36. Next, Canada argues that, had the Panel applied the contribution element of the "necessity" test correctly, it would have found that the EU Seal Regime failed to make a material contribution to its objective. Canada recalls that, under its Article XX(a) analysis, the Panel referred to its findings in the context of Article 2.2 of the TBT Agreement to conclude that "[o]verall, with respect to the EU Seal Regime as a whole … we found that it contributed to a certain extent to its objective."[129] The Panel's conclusion that the EU Seal Regime makes "some contribution" or "contributes to a certain extent" does not provide a "sufficient or meaningful articulation" of the degree of contribution of the measure to the objective.[130] For a measure to be considered "necessary", "it should fall significantly closer to the pole of 'indispensable' rather than the opposite pole of 'simply making a contribution to'."[131] However, the EU Seal Regime's "degree of contribution" identified by the Panel, "fall[s] closer to the 'simply making a contribution to' end of the spectrum rather than the indispensable end".[132] For these reasons, Canada contends that the Panel erred in characterizing "some contribution" and "makes a contribution to" the identified objective as equivalent to making a "material contribution", as suggested by the Appellate Body in *Brazil – Retreaded Tyres*.[133]

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[122] Canada's appellant's submission, paras. 407 and 408 (referring to Panel Reports, paras. 7.634 and 7.637-7.639).

[123] Canada's appellant's submission, para. 409 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150).

[124] Canada's appellant's submission, para. 416 (quoting Panel Reports, para. 7.636).

[125] Canada's appellant's submission, para. 418 (quoting Panel Reports, para. 7.635).

[126] Canada's appellant's submission, para. 418 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 123).

[127] Canada's appellant's submission, paras. 419 and 420 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 126).

[128] Canada's appellant's submission, para. 421 (quoting Panel Reports, para. 7.637).

[129] Canada's appellant's submission, para. 428 (quoting Panel Reports, para. 7.638).

[130] Canada's appellant's submission, para. 429.

[131] Canada's appellant's submission, para. 423 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[132] Canada's appellant's submission, para. 429.

[133] Canada's appellant's submission, paras. 430 and 424, respectively (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150).

2.37. Canada also takes issue with the Panel's statement: "[w]e consider, and the parties do not dispute, that … such public moral concern [with regard to the protection of animals] is indeed an important value or interest."[134] Specifically, Canada refers to its second written submission to the Panel to assert that it "did not agree that the specific public moral concern[s] in issue [were] considered important or presented a serious risk".[135] For this reason, Canada asserts that the Panel erred in stating that Canada did not dispute the importance of the public moral concerns at issue in this case, and thus erred in making an objective assessment of the matter, contrary to Article 11 of the DSU.

2.38. Canada, therefore, requests the Appellate Body to reverse the Panel's intermediate findings under Article XX(a) of the GATT 1994 that: (i) the measure falls within the scope of application of Article XX(a); (ii) the EU Seal Regime as a whole makes a contribution to the identified objective; and (iii) the alternative measure advanced by Canada is not reasonably available.[136] Canada also requests the Appellate Body to complete the legal analysis and find that the EU Seal Regime cannot be provisionally justified under Article XX(a).[137]

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

2.39. Canada argues that, although the Panel came to the correct conclusion, it erred in its reasoning under the chapeau of Article XX of the GATT 1994 by finding that the discrimination against Canadian "non-Inuit" seal products is justifiable. Canada takes issue with the Panel's "exclusive" reliance on its legal analysis and findings under Article 2.1 of the TBT Agreement to determine whether the EU Seal Regime is applied in a manner that constitutes "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX.[138] Canada argues that, by "relying solely on the ['legitimate regulatory distinction'] test it had devised under TBT Article 2.1", the Panel committed an "error in law".[139] Canada maintains that the general overlap in scope and similarities in the objectives between the GATT 1994 and the TBT Agreement are not sufficient to "import the results of the ['legitimate regulatory distinction'] test directly into the analysis of the chapeau requirements", while "ignor[ing] crucial elements of the test for arbitrary or unjustifiable discrimination" under the chapeau.[140] According to Canada, although the text of the chapeau of Article XX is similar to the text of the sixth preambular recital of the TBT Agreement, there is no reason why "the wording of the sixth recital of the preamble of the TBT Agreement, created in 1994, should affect the interpretation of the chapeau requirements of Article XX, which dates back to 1947."[141] Canada asserts that the Panel "did not have a proper basis under the customary international law rules of treaty interpretation to read into the text of the chapeau requirements the ['legitimate regulatory distinction'] test applicable to another agreement".[142] Canada also argues that, by relying on its analysis under Article 2.1, the Panel erred by failing to apply the test laid down by the Appellate Body in *Brazil – Retreaded Tyres*. In that case, the Appellate Body ended its analysis under the chapeau of Article XX after finding that "there was no rational connection between the discrimination in the Brazilian measure and its objective".[143] Canada argues that, "[a]t a minimum", the Panel should have referred to the "rational connection" test that is directly applicable to the chapeau and provided an explanation why it did not apply the test in its chapeau analysis.[144]

2.40. Canada asserts that "[t]he ['legitimate regulatory distinction'] test developed by the Panel for TBT Article 2.1 did not properly assess the justifiability of the rationale for the regulatory distinction in the light of the identified objective of the measure."[145] According to the Appellate Body, Canada adds, "a rationale that purports to explain discrimination cannot be justified under

[134] Canada's appellant's submission, para. 431 (referring to Panel Reports, para. 7.632).
[135] Canada's appellant's submission, para. 434 (referring to Canada's second written submission to the Panel, paras. 176, 179, and 181-183; and Panel Report, *US – Gambling*, paras. 6.489-6.492).
[136] Canada's appellant's submission, para. 467.
[137] Canada's appellant's submission, para. 467.
[138] Canada's appellant's submission, paras. 447 and 450.
[139] Canada's appellant's submission, para. 449.
[140] Canada's appellant's submission, para. 450.
[141] Canada's appellant's submission, para. 452.
[142] Canada's appellant's submission, para. 453.
[143] Canada's appellant's submission, para. 456 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).
[144] Canada's appellant's submission, para. 457.
[145] Canada's appellant's submission, para. 460.

Article XX where there is no rational connection to the objective or if it goes against the objective."[146] In Canada's view, the chapeau analysis "is not designed to assess whether a WTO Member has properly put forward a policy rationale that is not covered by one of the paragraphs of Article XX".[147] Canada argues that the Panel erred "by finding that discrimination arising from a regulatory distinction was justified despite the fact that the objective of that distinction had not been assessed to determine whether it fell within the scope of application of any of the paragraphs under Article XX".[148] Canada further argues that the Panel also erred "by failing to take into account the fact that, not only is there no rational connection between the discrimination and the policy objective of addressing the EU public moral concerns regarding seal welfare", but also that the exceptions in fact "go against that objective by enabling IC and MRM-sourced seal products to be sold on the EU market".[149]

2.41. In the event that the Appellate Body does not agree with Canada that the EU Seal Regime is not provisionally justified under Article XX(a) of the GATT 1994, Canada requests the Appellate Body to reverse the Panel's intermediate finding that the discrimination against Canadian commercial seal products arising from the IC exception is justifiable.[150] Canada requests the Appellate Body to complete the legal analysis on this specific point by applying the test set out in *Brazil – Retreaded Tyres* and to find that the discrimination between Canadian commercial seal products and IC seal products arising from the application of the EU Seal Regime is "arbitrary and unjustifiable".[151] Should the Appellate Body disagree with its requests, Canada clarifies that its challenge under the chapeau of Article XX of the GATT 1944 is restricted to the Panel's reasoning thereunder, and not its ultimate finding that the EU Seal Regime does not meet the requirements of the chapeau.[152]

2.2 Claims of error by Norway – Appellant

2.2.1 Article 2.2 of the TBT Agreement

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

2.42. Norway contends that the Panel erred in finding that the protection of the interests of indigenous communities, as reflected in the IC exception, and the promotion of the sustainable management of marine resources, as reflected in the MRM exception, do not amount to "objectives" of the EU Seal Regime for purposes of Article 2.2 of the TBT Agreement. Norway challenges the Panel's findings on several grounds.

2.2.1.1.1 Reasons provided by the Panel

2.43. Norway argues that the Panel gave erroneous reasons for finding that the protection of the IC and MRM interests do not amount to an objective of the EU Seal Regime within the meaning of Article 2.2 of the TBT Agreement. Norway submits that, even assuming that the Panel properly assessed the evidence before it, it nevertheless erred in its application of the law to the facts in finding that the IC and MRM interests do not amount to an objective of the EU Seal Regime within the meaning of Article 2.2. Specifically, Norway takes issue with four aspects of the Panel's reasoning that led the Panel to conclude that the interests accommodated in the IC and MRM exceptions do not amount to objectives of the EU Seal Regime.

2.44. First, Norway agrees that the public concerns regarding seal welfare must be distinguished from the policy interests targeted by the European Union in allowing the marketing of seal products derived from IC and MRM hunts. However, Norway emphasizes that "the mere fact that the three different policy interests pursued by the legislation (public concerns on seal welfare; protection of IC communities; and promoting sustainable marine resource management) must be distinguished is not a valid reason for considering that two of the three interests do not amount to

[146] Canada's appellant's submission, para. 461 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).
[147] Canada's appellant's submission, para. 464.
[148] Canada's appellant's submission, para. 463.
[149] Canada's appellant's submission, para. 466.
[150] Canada's appellant's submission, para. 468.
[151] Canada's appellant's submission, para. 468.
[152] Canada's appellant's submission, para. 468.

'objectives'."[153] According to Norway, "the need to distinguish the three legislative interests pursued by the measure was merely an *organizational issue* for the Panel in structuring its analysis and reasoning" and not a substantive reason to find that two of the interests are not objectives.[154]

2.45. Second, Norway suggests that the Panel erred in assuming that, for an interest to amount to a regulatory objective, it must be "grounded in the concerns of citizens".[155] Norway emphasizes that this need not necessarily be the case. For example, an interest "may be grounded in policy interests raised by legislators or regulators that enjoy limited or no public support and do not address citizens' concerns".[156]

2.46. Third, according to Norway, the Panel erred by assuming that the IC and MRM exceptions could not amount to objectives of the EU Seal Regime given that they were "included in the course of the legislative process".[157] Norway submits instead that "it is to be expected that the objectives of the legislative or regulating entity responsible for adopting the measure would arise 'in the course of the legislative process'."[158]

2.47. Fourth, Norway alleges that the Panel erred by relying on the Appellate Body report in *Brazil – Retreaded Tyres* to support its conclusion that the IC and MRM interests were not "objectives". Norway notes in particular that the exception at issue in *Brazil – Retreaded Tyres* "did not form part of the measure itself" but was "made effective through the application of the measure" and followed from a ruling of the MERCOSUR tribunal.[159] According to Norway, "[t]he factual circumstances surrounding the adoption of that exception were, therefore, very different from the circumstances surrounding the adoption of the IC and [M]RM 'exceptions', which were included by the legislator at the time it adopted the measure."[160] Norway adds that "[t]he mere fact that the respondent in a different dispute did not argue that an exception under a different measure, adopted in unusual circumstances in a different country, had distinct policy objectives, does not mean that exceptions cannot have distinct policy objectives."[161] Nor does it mean, according to Norway, that "the IC and MRM requirements – even if they were 'exceptions' – do not evidence distinct policy objectives."[162] Norway adds that, if a regulator adopts exceptions to general rules, there is usually a policy reason for doing so – "the exception will have some aim, target or goal, just as the IC and MRM requirements do".[163]

2.48. On this basis, Norway claims that the Panel erred under Article 2.2 of the TBT Agreement by providing "invalid reasons" for concluding that the interests accommodated by EU legislators in the IC and MRM exceptions do not amount to objectives of the EU Seal Regime, and therefore requests the Appellate Body to reverse the Panel's findings under Article 2.2 of the TBT Agreement.[164]

2.2.1.1.2 The Panel's legal characterization of the objective of the measure

2.49. In addition to challenging the reasoning provided by the Panel in paragraph 7.402 of the Panel Reports, Norway contends, as a separate matter, that the evidence before the Panel, as well as the Panel's own findings and the Panel's findings relating to the legislative history, text, and structure, design, and expected operation of the measure, do not support the Panel's overall conclusion that "the EU Seal Regime pursues a single objective, and does not pursue objectives relating to the IC and [M]RM requirements".[165] According to Norway, since the task of the Panel under Article 2.2 consisted of assessing the evidence before it for the purpose of identifying the objectives of the measure, the Panel's errors in this regard constitute errors in the legal characterization of the facts. Norway challenges several aspects of the Panel's analysis.

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[153] Norway's appellant's submission, para. 83.
[154] Norway's appellant's submission, para. 84. (emphasis original)
[155] Norway's appellant's submission, para. 85. (emphasis omitted)
[156] Norway's appellant's submission, para. 87.
[157] Norway's appellant's submission, para. 91 (quoting Panel Reports, para. 7.402).
[158] Norway's appellant's submission, para. 94.
[159] Norway's appellant's submission, para. 98 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 122 and fn 163 thereto; and quoting Panel Reports, fn 659 to para. 7.402).
[160] Norway's appellant's submission, para. 98.
[161] Norway's appellant's submission, para. 99.
[162] Norway's appellant's submission, para. 99.
[163] Norway's appellant's submission, para. 100.
[164] Norway's appellant's submission, paras. 108 and 109.
[165] Norway's appellant's submission, para. 114.

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 Norway, the Panel failed to take this into account in its analysis. Norway also refers to the report of the Committee on the Internal Market and Consumer Protection on the Commission Proposal[169] (Parliament Report) and an opinion provided therein by the Committee on Agriculture and Rural Development of the European Parliament (AGRI), which, in Norway's view "indicated the importance to EU legislators of the policy objectives underlying the IC and [M]RM objectives".[170] Norway further explains that the Committee on the Environment, Public Health and Food Safety of the European Parliament (ENVI) proposed, in the Parliament Report, "a full ban on trade in seal products with a limited exemption for Inuit communities"[171] and the Rapporteur of AGRI also supported restrictions that excluded Inuit communities from the scope of the regulation.[172] In addition, referring to remarks made by Finland and Sweden within the Council of the European Union, Norway argues that "the adoption of the EU Seal Regime in the precise form it took reflected a compromise attempt to incorporate a multitude of 'policy' aims and objectives proposed by the various stakeholders in the European Union's institutions: the Parliament, the Commission and the Council."[173] For Norway, these goals were animal welfare, protection of Inuit interests, and marine resource management.

2.51. Norway submits that, despite this evidence, "the vast majority of the Panel's reasoning on objectives examines whether the evidence supported the objective asserted by the European Union, namely that the measure addressed public concerns about seal welfare."[174] Moreover, when it came to the objectives asserted by the complainants, the Panel made only "selective" references to some of the above evidence.[175] For example, according to Norway, the Panel "did not … consider the role played by passages from the same Proposal on the need to 'ensur[e]' that the regulation protected the Inuit interests, in informing the objective of the EU measure" and did not mention the Parliament Report.[176]

2.52. Regarding the Panel's analysis of the text of the EU Seal Regime, Norway asserts that the Basic Regulation reflects the fact that the IC and MRM interests "are prominently reflected in the measure in a manner that gives rise to a hierarchy of interests established in favour of" the interests accommodated in those exceptions.[177] In Norway's view, the design and structure of those exceptions indicate that the legislator "prioritized market access for products from qualifying hunts".[178] Norway further alleges that the Panel "entirely overlooked" the Implementing Regulation, noting simply that, "while providing practical details necessary for the enforcement of the Basic Seal Regulation, the Implementing Regulation does not in itself assist us in identifying the objective of the measure."[179] Norway points out that the Implementing Regulation is an "integral part" of the EU Seal Regime, and that "detail with which the permissive elements are

[166] Norway's appellant's submission, para. 120.

[167] European Commission, Proposal for a regulation of the European Parliament and the Council concerning trade in seal products (23 July 2008), COM(2008) 469 final (Panel Exhibit JE-9).

[168] Norway's appellant's submission, para. 121 (quoting Commission Proposal, p. 5).

[169] Committee on the Internal Market and Consumer Protection, *Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seals products* (5 March 2009), A6-0118/2009 (Panel Exhibit JE-4).

[170] Norway's appellant's submission, para. 123.

[171] Norway's appellant's submission, para. 124 (quoting Parliament Report, Opinion of ENVI, Short Justification, p. 33).

[172] Norway's appellant's submission, para. 125 (referring to Parliament Report, Opinion of AGRI, Short Justification, pp. 56 and 62).

[173] Norway's appellant's submission, para. 129.

[174] Norway's appellant's submission, para. 130.

[175] Norway's appellant's submission, para. 130.

[176] Norway's appellant's submission, para. 131.

[177] Norway's appellant's submission, para. 149.

[178] Norway's appellant's submission, para. 153.

[179] Norway's appellant's submission, para. 157 (quoting Panel Reports, fn 633 to para. 7.388).

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 in other sections of the Panel Reports regarding the design, structure, and expected operation of the EU Seal Regime, which indicates that the IC and MRM exceptions amount to objectives of the EU Seal Regime. In particular, Norway recalls that the Panel noted earlier in its Reports that the EU Seal Regime is expected "to operate in such a way that most of the products from Greenland and Sweden qualify under the IC requirements and are therefore permitted into the EU market, whereas practically none of the seal products from Norway and Canada are permitted".[181] Norway adds that Greenland is expected to supply large quantities of the imported seal products and has the capacity to meet all of the European Union's demand. Thus, through the design and operation of the EU Seal Regime, seal products are not banned, but are instead allowed, through the IC and MRM exceptions. According to Norway, "[t]he expected operation of the measure therefore fulfills the *aim* of the regulators to ensure that products meeting the IC and [M]RM requirements have access to the EU market."[182] Norway further claims that the Panel "failed to draw the relevant legal conclusion, namely, that the operation of the measure reinforces its aim or goal of pursuing the IC, [M]RM, and personal use interests, and in fact *undermines* the degree to which the measure addresses public concerns about seal welfare".[183]

2.54. Norway further emphasizes that, in any event, the issue is not whether the IC and MRM interests are more or less important than seal welfare; the issue is simply whether the objectives of the measure include promoting IC and MRM interests.[184] To be an objective, a policy interest must form a regulatory goal or target, whether it is more, less, or equally important compared to other goals. Norway argues that a panel may have regard to the ways in which different interests are pursued and balanced, but it need not conclude that there is some absolute hierarchy among different objectives.

2.2.1.1.3 Claims under Article 11 of the DSU

2.55. Norway further claims that, through its treatment of the evidence relating to the design, structure, and legislative history of the EU Seal Regime, the Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the interests pursued by the IC and MRM exceptions do not amount to separate and independent objectives of the EU Seal Regime. Norway's claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU is based on four grounds.

2.56. Norway contends, first, that the Panel disregarded evidence provided by Norway showing that the legislative objectives of the EU Seal Regime included protecting the economic and social interests of indigenous communities, and separately promoting the sustainable management of marine resources.[185] Instead, the Panel undertook a "selective" and "unbalanced" review of the evidence of the legislative history, dedicating most of its analysis to addressing evidence that supported the public morals objective asserted by the European Union.[186] In contrast, the Panel's "discussion and consideration of the IC and [M]RM objectives asserted by Norway receive[d] a few cursory lines of commentary".[187] Norway emphasizes, however, that "[a]n objective assessment of the facts requires substantially more than 'notice' by a panel."[188] Norway further asserts that the Panel's "imbalanced treatment of the evidence is highlighted by its selective reliance" on the Commission Proposal.[189] In this regard, Norway notes that "[t]he 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."[190] Yet, according to

[180] Norway's appellant's submission, para. 158.
[181] Norway's appellant's submission, para. 164.
[182] Norway's appellant's submission, para. 164. (emphasis original)
[183] Norway's appellant's submission, para. 165. (emphasis original)
[184] Norway's opening statement at the oral hearing.
[185] Norway's appellant's submission, para. 180 (referring to Norway's first written submission to the Panel, paras. 591-630; and second written submission to the Panel, paras. 166-170).
[186] Norway's appellant's submission, para. 182.
[187] Norway's appellant's submission, para. 183.
[188] Norway's appellant's submission, para. 184.
[189] Norway's appellant's submission, para. 188 (referring to Commission Proposal, p. 5).
[190] Norway's appellant's submission, para. 188.

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.

[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).

2.64. Norway argues that the Panel's articulation of the negative contribution made to the second aspect of the measure is also inadequate. According to Norway, the Panel did not set out the extent of the negative contribution, or the extent to which that contribution is minimized by the inability of certain indigenous communities to benefit from the IC exception, or by commercial activity occurring under one of the implicit exceptions. As it did in respect of the contribution of the first aspect of the measure, Norway concludes that the Panel had no basis to conclude that the measure actually makes an overall net contribution to that aspect of the objective, and in fact never even stated that there was such a contribution.

2.65. With regard to the Panel's conclusion concerning the measure as a whole, Norway echoes the concerns it raises in respect of the Panel's intermediate findings. As Norway argues, the Panel's contribution findings "are so beset with equivocation, vagueness, and imprecision that it is impossible to form an understanding as to how the findings justify the overall conclusion that there is even '*some*' contribution, much less what the Panel itself considered to be the degree or extent of that contribution".[210] Norway adds that there is, therefore, no basis for the Panel's finding that the EU Seal Regime makes a contribution to its public morals objective, and requests that the Panel's finding be reversed.[211]

2.66. Norway further argues that the fact that a qualitative assessment is chosen does not mean that the specification of the extent of the contribution may be vague and imprecise, as suggested by the European Union.[212] Norway maintains that, despite the existence of qualitative assessments in *Brazil – Retreaded Tyres* and *US – Tuna II (Mexico)*, the panels in both of those cases nevertheless offered detailed qualitative explanations in support of their findings that a contribution existed.

2.2.1.2.2 Basis for a finding of contribution

2.67. Norway claims that the Panel also erred in applying Article 2.2 of the TBT Agreement "to arrive at the conclusion that the measure makes 'some' net overall contribution to that objective".[213] Norway focuses this aspect of its appeal on two features of the Panel's overall conclusion: (i) that the Panel undervalued the negative contribution of the permissive elements; and (ii) that it overvalued the positive contribution of the prohibitive elements. Norway considers that "neither the evidence before the Panel, nor its own findings, support the conclusion that the EU Seal regime makes a net overall positive contribution to the objective."[214] Norway considers that the Panel's errors constitute errors in the legal characterization of the facts, but also makes claims under Article 11 of the DSU with respect to limited aspects of the Panel's assessment of the issue.

2.68. Norway identifies six points that it considers the Panel undervalued in assessing the negative contribution of the EU Seal Regime to the public morals objective. First, Norway refers to the Panel's conclusions that virtually all seal products from Greenland and the European Union are likely to be introduced 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. Norway observes that these exceptions "impose no animal welfare conditions whatsoever"[215], and recalls the Panel's finding 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 without any quantitative limits.[216]

2.69. Second, Norway takes note of the Panel's conclusion that EU public moral concerns regarding seal welfare appear to be related to seal hunts in general, not to particular types of seal hunts. Although the European Union had argued that certain interests prevailed over concerns in respect of seal welfare, Norway claims that the Panel rejected this argument because it was unsupported by the evidence of record on the scope and content of the relevant public moral.[217]

[210] Norway's appellant's submission, para. 315. (emphasis original)
[211] Norway's appellant's submission, para. 315.
[212] Norway's opening statement at the oral hearing.
[213] Norway's appellant's submission, para. 316.
[214] Norway's appellant's submission, para. 317.
[215] Norway's appellant's submission, para. 325.
[216] Norway's appellant's submission, para. 325 (quoting Panel Reports, para. 7.447).
[217] Norway's appellant's submission, para. 333 (referring to Panel Reports, para. 7.442).

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 that the Panel committed a "recurring error" by failing properly "to characterize the consequences of the explicit and implicit 'exceptions' for the capability of the 'ban' to make an overall net positive contribution".[226] Norway asserts that the Panel failed to reconcile the effects of the prohibitive and permissive aspects of the measure, and that it is impossible to understand on this basis how and why the Panel concluded that there is a net positive contribution to the measure's objective. Moreover, Norway asserts that, in terms of Article 11 of the DSU, "the imprecision of the Panel's analysis means that the Panel provide[d] an inadequate statement on how it *weighed*, *balanced*, and *reconciled* the competing evidence of positive and negative contributions".[227] Norway adds that, "[a]s the Panel failed to explain and reconcile the evidence in arriving at its conclusion, including in making its intermediate factual findings, there is no objective basis to comprehend how it arrived at its net overall conclusion".[228] This, Norway contends, demonstrates a lack of objectivity by the Panel, in violation of Article 11 of the DSU.

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[218] Norway's appellant's submission, para. 334.
[219] Norway's appellant's submission, para. 337 (quoting Panel Reports, para. 7.268).
[220] Norway's appellant's submission, para. 344.
[221] Norway's appellant's submission, para. 356 (referring to Panel Reports, para. 7.315, in turn referring to COWI, *Study on implementing measures for trade in seal products*, Final Report (January 2010) (Panel Exhibit JE-21) (COWI 2010 Report), p. 84).
[222] Norway's opening statement at the oral hearing.
[223] Norway's appellant's submission, para. 363.
[224] Norway's appellant's submission, para. 365 (referring to Panel Reports, fn 220 to para. 7.164).
[225] Norway's appellant's submission, para. 374.
[226] Norway's appellant's submission, para. 376.
[227] Norway's appellant's submission, para. 415. (emphasis original)
[228] Norway's appellant's submission, para. 418.

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" conditions of the MRM exception are unnecessary to the achievement of the seal welfare considerations underlying the public moral concerns found by the Panel, or to the achievement of sustainable resource management. As Norway argues, these three conditions "establish a barrier to trade in seal products from Norway"[232] and thus form a critical part of Norway's claim under Article 2.2 of the TBT Agreement. Norway maintains that, "[b]y *completely ignoring* this element of Norway's claim", the Panel failed in its duty under Article 11 of the DSU.[233]

2.77. Finally, Norway contends that the Panel failed to address "arbitrary or unjustifiable discrimination" in its analysis of whether the EU Seal Regime is more trade restrictive than necessary under Article 2.2. Norway contends that the sixth recital of the TBT Agreement reflects that WTO Members "have consciously carried over the qualifications in the chapeau to the disciplines that regulate technical regulations".[234] Norway adds that, because the Appellate Body previously found relevant contextual support in the sixth recital for its interpretation of Article 2.2, to "give effect to this context", a panel must assess whether there is "arbitrary or unjustifiable discrimination", in the pursuit of the justifying objective, in determining whether trade restrictions are necessary to fulfil an objective.[235] Norway claims that the Panel erred in its interpretation and application of the legal standard under Article 2.2 of the TBT Agreement, and, by failing to address Norway's arguments in this regard, acted inconsistently with its duty under Article 11 of the DSU.

2.2.1.3 The Panel's analysis of the alternative measure

2.78. Norway then addresses the Panel's analysis of the proposed alternative measure. Norway claims that, although the Panel identified the correct question in examining the contribution of a less trade-restrictive alternative measure, the Panel erred by "focus[ing] on whether the alternative could fulfil *completely* the identified objective, *as if the contested measure being compared against the alternative were a comprehensive ban*".[236] Norway contends that the Panel thus erred by holding the alternative measure up to a benchmark level of contribution that was higher than the contribution achieved by the EU Seal Regime. This error, Norway argues, compromised the Panel's analysis of whether the contribution of the alternative was equal to or greater than the level actually achieved by the EU Seal Regime, and of whether the alternative was reasonably available.

2.79. Norway considers that the Panel's assessment is erroneously premised on a requirement that the less-trade-restrictive alternative effectively prevents exposure to products from seals killed inhumanely. Norway finds evidence of the Panel's error in its conclusion that, even if market

[229] Norway's appellant's submission, para. 381.
[230] Norway's appellant's submission, para. 382.
[231] Norway's appellant's submission, para. 384.
[232] Norway's appellant's submission, para. 507.
[233] Norway's appellant's submission, para. 508. (emphasis original)
[234] Norway's appellant's submission, para. 534.
[235] Norway's appellant's submission, para. 542.
[236] Norway's appellant's submission, para. 583. (emphasis original)

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".[238] According to Norway, the IC and MRM exceptions allow the marketing of seal products irrespective of animal welfare considerations, and admit seal products from seal hunts, such as the Greenlandic hunt, that permit and commonly use inhumane killing methods, such as netting. Norway thus argues that "unlimited quantities of seal products are *already* admitted to the EU market" from hunts that have caused poor animal welfare outcomes.[239] In Norway's view, an alternative that conditions EU market access on a requirement that seal products be derived from seal hunts applying strict animal welfare requirements "can only be an improvement" on the EU Seal Regime, since it has exceptions that admit seal products regardless of animal welfare outcomes.

2.80. Norway also considers that the Panel similarly erred in its statement that the alternative may "have the consequence of subjecting a greater number of seals to the animal welfare risks incidental to seal hunting".[240] In doing so, the Panel relied on a report that rejected a proposed amendment during the legislative process on the grounds that it did not meet EU citizens' demands to end the trade in seal products.[241] As Norway argues, the Panel overlooked its own findings since the EU Seal Regime focused not on ending the trade in seal products, but rather on addressing concerns about the welfare of seals. Norway considers that the Panel's approach "holds the alternative measure up to a standard of contribution that is much higher than that actually achieved by the EU Seal Regime".[242]

2.81. With respect to the availability of the alternative measure, Norway argues that the Panel erred by considering the feasibility of an alternative measure that would completely fulfil the objective at issue. Norway points to the Panel's consideration of the level of stringency required from animal welfare standards "in order to *genuinely assuage* [animal welfare] concerns".[243] In Norway's view, the Panel's findings on the contribution of the EU Seal Regime show that the measure at issue does not genuinely assuage animal welfare concerns, because consumers are exposed to unlabelled seal products imported under the IC and MRM exceptions. By way of further example, Norway considers that the Panel's assertion that stringent animal welfare standards are not a reasonably available alternative because stringent standards might not be met relies on an inappropriate benchmark. In Norway's view, "animal welfare requirements are already *not* being met in the IC and [M]RM hunts".[244] According to Norway, "the proposed alternative actually imposes animal welfare requirements, whereas the measure imposes *none*."[245] Norway points to other errors it argues the Panel made in respect of certification, labelling, and costs. Norway, moreover, criticizes the Panel for its reliance on *EC – Asbestos* for the proposition that a responding Member cannot be expected to employ an alternative measure that involves a continuation of the risk that the challenged measure seeks to halt.[246] In Norway's view, this reliance by the Panel was misplaced, because the EU Seal Regime itself "does not even 'seek to halt' the animal welfare risks associated with seal hunting", given that it admits seal products under the IC and MRM exceptions.

2.82. Finally, Norway submits that the Panel misapplied WTO jurisprudence, in particular by indicating that the significance of costs and technical difficulties relates to those borne by WTO Members, not industry. Norway argues that efficient suppliers will have an incentive to meet any costs they bear, because they still are permitted to trade. In Norway's view, "compliance costs do not make the measure less 'reasonably available' *to the regulating Member*, since the cost of

[237] Norway's appellant's submission, para. 593 (quoting Panel Reports, para. 7.480).
[238] Norway's appellant's submission, para. 593. (emphasis original)
[239] Norway's appellant's submission, para. 594. (emphasis original)
[240] Norway's appellant's submission, para. 596 (quoting Panel Reports, para. 7.482).
[241] See Panel Reports, fn 772 to para. 7.482 (referring to Parliament Report, Justification for Amendment, p. 21).
[242] Norway's appellant's submission, para. 596.
[243] Norway's appellant's submission, para. 601 (quoting Panel Reports, para. 7.496). (emphasis added by Norway)
[244] Norway's appellant's submission, para. 602 (referring to Panel Reports, para. 7.496). (emphasis original)
[245] Norway's appellant's submission, para. 603. (emphasis original)
[246] Norway's appellant's submission, para. 611 (referring to Panel Report, *EC – Asbestos*, para. 7.502).

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]

2.83. Norway further submits that the Panel acted in violation of Article 11 of the DSU by ignoring two further alternative measures it had proposed during 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, [M]RM or Travellers 'exceptions'".[250] The second alternative was the removal of three contested 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.[251] In Norway's view, "this alternative could include animal welfare, certification, and labelling requirements on seal products that meet the two remaining [M]RM conditions".[252] According to Norway, "these alternatives were *completely ignored* by the Panel".[253] Norway contends that the Panel's failure to address the second alternative was "egregious" since the three conditions were found to restrict access to the EU market.[254] Norway asserts that "the Panel's failure to assess whether Norway's proposed alternative – which excludes these three restrictive conditions, but adds animal welfare requirements and labelling – could make an equivalent contribution to the public morals objective is manifestly inadequate."[255]

2.2.1.4 Request for completion of the analysis

2.84. Finally, Norway requests, if the Appellate Body reverses the Panel's finding that the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement, that the Appellate Body complete the legal analysis. Norway explains that "there may not be a sufficient basis in the Panel findings and record to complete the analysis on *all* aspects of Norway's claim".[256] Norway thus requests that the Appellate Body make "limited findings" in relation to the objectives of the EU Seal Regime and the legitimacy of the objectives, as well as a "narrow finding" of inconsistency in relation to certain conditions for market access under the MRM exception.[257]

2.85. Norway requests the Appellate Body to complete the legal analysis in relation to three specific points. First, Norway requests the Appellate Body to find that, in addition to addressing EU public moral concerns regarding seal welfare, the EU Seal Regime also includes two additional objectives: protecting IC interests, and promoting marine resource management.[258] Second, Norway requests the Appellate Body to find that the MRM objective is legitimate, although it does not request completion as to whether the objective of protecting IC interests is legitimate.[259] Third, Norway requests the Appellate Body to find that the EU Seal Regime is more trade

[247] Norway's appellant's submission, para. 614. (emphasis original)
[248] Norway's appellant's submission, para. 614.
[249] Norway's appellant's submission, para. 616. (emphasis original)
[250] Norway's appellant's submission, para. 621 (referring to Norway's first written submission to the Panel, paras. 776-778).
[251] Norway's appellant's submission, para. 622 (referring to Norway's first written submission to the Panel, paras. 782 and 912-917; opening statement at the first Panel meeting, para. 138; second written submission to the Panel, paras. 313-315; opening statement at the second Panel meeting, paras. 70-77; and response to Panel question No. 114, para. 81).
[252] Norway's appellant's submission, para. 622 (referring to Norway's opening statement at the second Panel meeting, para. 77; and responses to Panel question No. 114, para. 81, and Panel question No. 145, fn 204 to para. 214).
[253] Norway's appellant's submission, para. 623. (emphasis original)
[254] Norway's appellant's submission, para. 624.
[255] Norway's appellant's submission, para. 625.
[256] Norway's appellant's submission, para. 632. (emphasis original)
[257] Norway's appellant's submission, para. 632.
[258] Norway's appellant's submission, paras. 641-671.
[259] Norway's appellant's submission, paras. 672-680.

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 points out that the Panel instead assessed and found the EU Seal Regime "as a whole" to be provisionally justified on the basis of the positive contribution of the ban, which allowed the Panel to "mask" and "overcome" the negative contribution of the exceptions.[265] In this way, the Panel's consideration of the ban went well beyond "better understanding"[266] the exceptions, as it allowed aspects of the EU Seal Regime found to be WTO-consistent (i.e. the ban) to "shield from scrutiny" under Article XX(a) those aspects of the measure found to be WTO-inconsistent (i.e. the exceptions).[267]

2.87. Norway makes three arguments in support of its position. First, Norway refers to the GATT Panel report in *US – Section 337 Tariff Act* and the Appellate Body reports in *Thailand – Cigarettes (Philippines)* and *US – Gasoline* to show "consistent" GATT and WTO jurisprudence that it is the "particular aspect of the measure found to be inconsistent that must be justified under Article XX".[268] With respect to *US – Section 337 Tariff Act*, Norway recalls that the GATT panel found that "the part of the measure found to be inconsistent with GATT obligations is the part that must be justified".[269] The panel noted that, otherwise, contracting parties could introduce GATT-inconsistent provisions that are not "necessary", simply by making them part of a measure that contained other elements that are "necessary".[270] Norway considers that this approach was affirmed by the Appellate Body in *Thailand – Cigarettes (Philippines)* when it observed that, "when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to discrimination".[271] Finally, with respect to *US – Gasoline*, Norway notes that only the WTO-inconsistent part of the measure at issue in that case – i.e. the "baseline establishment rules" – were found by the Appellate Body to be provisionally justified under Article XX(g).[272] Norway maintains that, in that dispute, "[t]he WTO-consistent non-degradation requirements were treated merely as 'context' for understanding whether the WTO-inconsistent baseline establishment rules were 'related to' conservation" within

[260] Norway's appellant's submission, paras. 681-746.
[261] Norway's appellant's submission, para. 787.
[262] Norway's appellant's submission, para. 788 (quoting Panel Reports, para. 7.639). (emphasis added by Norway)
[263] Norway's appellant's submission, para. 792 (referring to Panel Reports, paras. 7.618 and 7.624).
[264] Norway's appellant's submission, paras. 793 and 794.
[265] Norway's appellant's submission, para. 795.
[266] Norway's appellant's submission, para. 794.
[267] Norway's appellant's submission, para. 795.
[268] Norway's appellant's submission, para. 823.
[269] Norway's appellant's submission, para. 806 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27).
[270] Norway's appellant's submission, para. 806 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27).
[271] Norway's appellant's submission, para. 809 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177).
[272] Norway's appellant's submission, para. 818.

the meaning of Article XX(g).[273] In Norway's view, "although the Appellate Body considered the non-degradation requirements as context, it assessed, and found, that the baseline establishment rules were themselves provisionally justified."[274] Norway submits that these cases establish that the WTO-consistent parts of a measure play a "limited role", and can do no more than "shed light" on understanding whether the WTO-inconsistent parts are justified under Article XX.

2.88. Second, Norway takes issue with the Panel's finding that "an exception to a general rule, by definition, would hardly be considered as 'necessary', when considered on its own, to achieve a policy objective of the general rule".[275] Norway sees no reason why a properly characterized exception, even if found to be WTO-inconsistent, cannot be justified as "necessary" to achieve a policy objective as set out in one of these subparagraphs of Article XX, even if it is different from the objective of the measure as a whole. For example, Norway suggests that the European Union could have sought to justify the MRM exception on the ground that they relate to the conservation of exhaustible natural resources. According to Norway, "an unnecessary WTO-*inconsistent* provision does not become necessary to achieve an objective, simply because the WTO-*consistent* provisions are necessary to achieve that objective."[276] If such a "flawed approach" were permitted, it would remove multilateral scrutiny of WTO-inconsistent provisions under Article XX only because they are formally characterized as "exceptions".[277]

2.89. Norway argues that the Panel's reliance on its findings under the TBT Agreement to justify its approach under Article XX of the GATT 1994 was misplaced, because the Panel did not explain the precise relevance of these findings to the "distinct analysis" under Article XX.[278] Specifically, Norway challenges the Panel's reliance on its findings under Article 2.2 of the TBT Agreement, because the subject matter of the examinations under Article 2.2 and Article XX(a) are different. Under Article 2.2, the Panel considered whether the technical regulation "as a whole" is more trade restrictive than necessary.[279] In so doing, the Panel weighed the positive contribution made by the ban against the negative contribution made by the explicit and implicit exceptions of the measure. By contrast, Norway submits that, under Article XX(a), the Panel was required to assess whether the "discriminatory IC and [M]RM 'exceptions' are 'necessary' to protect EU public morals", and therefore the necessity of the prohibitive ban element and the contribution it makes are "irrelevant" to the analysis under Article XX(a).[280] Since the Panel found that the IC and MRM exceptions are "rationally disconnected" from the public moral concerns, and undermine its achievement, the exceptions cannot be found to be necessary to protect public morals.[281] Norway requests the Appellate Body to reverse the Panel's finding that the EU Seal Regime, as a whole, should be provisionally justified under Article XX(a), and to complete the legal analysis to find that the IC and MRM exceptions cannot be provisionally justified under Article XX(a) of the GATT 1994. Specifically, Norway argues that, since the Panel found that the IC and MRM exceptions are not "rationally connected" to the objective of addressing the EU public moral concerns regarding seal welfare[282], and since the requirements under the two exceptions "counteract and prejudice" the achievement of the EU Seal Regime's objective[283], the IC and MRM exceptions "*could never* contribute, much less be 'necessary', to protect the public moral at issue".[284]

[273] Norway's appellant's submission, para. 818 (referring to Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, pp. 17-18).
[274] Norway's appellant's submission, para. 818.
[275] Norway's appellant's submission, para. 826 (quoting Panel Reports, para. 7.624).
[276] Norway's appellant's submission, para. 831. (emphasis original)
[277] Norway's appellant's submission, para. 833.
[278] Norway's appellant's submission, para. 835.
[279] Norway's appellant's submission, para. 857. (emphasis omitted)
[280] Norway's appellant's submission, para. 838. (emphasis omitted)
[281] Norway's appellant's submission, para. 839 (referring to Panel Reports, paras. 7.275 (IC exception) and 7.340 (MRM exception).
[282] Norway's appellant's submission, para. 845 (quoting Panel Reports, para. 7.340, and referring to para. 7.298).
[283] Norway's appellant's submission, para. 845 (referring to Panel Reports, paras. 7.447, 7.448, 7.451, 7.452, 7.459, 7.460, and 7.638).
[284] Norway's appellant's submission, para. 848. (emphasis original)

2.2.2.2 The Panel's analysis of "necessity"

2.90. In the event that the Appellate Body disagrees 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 "significant 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 the "clarity and precision that is indispensable to a finding of contribution under the 'necessity' analysis in Article XX".[292] According to Norway, as with the analysis under Article 2.2 of the TBT Agreement, a "clear and precise" articulation of the degree of contribution of the EU Seal Regime was required in order to establish whether the contribution meets the "required legal standard of contribution", reflected in the notion of "materiality", and to provide an "operable and objective benchmark" against which the contribution of Norway's less trade-restrictive alternative measures could be assessed.[293]

2.92. Norway also contends that the factual findings of the Panel do not support the conclusion that the EU Seal Regime "contributes either 'to a certain extent' – as the Panel found – or 'materially' – as it was required to find under the proper legal standard".[294] For the same reasons as its appeal with respect to the Panel's analysis under Article 2.2 of the TBT Agreement, Norway asserts that the Panel both overvalued the positive contribution of the ban aspect of measure and undervalued the negative contribution made by the permissive aspects of the measure. For the same reasons as provided in its Article 2.2 appeal, Norway submits that the Panel's conclusion that the EU Seal Regime contributes "to a certain extent" to its objective "cannot be sustained".[295] Moreover, as with its appeal under Article 2.2, Norway submits that the Panel's intermediate findings with respect to the contributions of the prohibitive and permissive aspects, as well as the overall contribution of the EU Seal Regime, are "not grounded in an objective assessment of the facts" and, therefore, are inconsistent with Article 11 of the DSU.[296] For these reasons, Norway contends that "there is simply no basis for a finding that the EU Seal Regime makes a 'material' contribution to [the protection of] EU public morals."[297]

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[285] Norway's appellant's submission, para. 851.
[286] Norway's appellant's submission, para. 854 (referring to Panel Reports, paras. 7.635-7.638). (emphasis original)
[287] Norway's appellant's submission, para. 855 (referring to Panel Reports, para. 7.636). (emphasis original)
[288] Norway's appellant's submission, para. 856 (quoting Panel Reports, para. 7.638). (emphasis added by Norway)
[289] Norway's appellant's submission, para. 856.
[290] Norway's appellant's submission, para. 857.
[291] Norway's appellant's submission, para. 857 (quoting Panel Reports, para. 7.638).
[292] Norway's appellant's submission, para. 859.
[293] Norway's appellant's submission, para. 859. (emphasis omitted)
[294] Norway's appellant's submission, para. 857.
[295] Norway's appellant's submission, para. 863.
[296] Norway's appellant's submission, para. 864.
[297] Norway's appellant's submission, para. 865.

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, *the objective that the measure pursues under one of the sub-paragraphs of Article XX*."[301] Norway adds that, if the rationale or reason for discrimination "*goes against*, or otherwise bears *no rational relationship to, even to a small extent, the objective assessed under one of the sub-paragraphs*, it is arbitrary and unjustifiable."[302] Norway argues that, instead of applying this legal standard, the Panel erroneously applied its "three-step test" developed in the context of its "legitimate regulatory distinction" analysis under Article 2.1 of the TBT Agreement.[303] Norway notes that "step 1" of the Panel's analysis under Article 2.1 – namely, that the regulatory distinctions drawn between commercial and IC/MRM hunts must be rationally connected to the objective of the EU Seal Regime – "bears some resemblance" to the legal test developed by the Appellate Body under the chapeau.[304]

2.96. By contrast, Norway argues that "step 2" of the Panel's analysis under Article 2.1 – "which serve[d] for the Panel to *justify* a regulatory distinction in a measure that is rationally disconnected to the objective of the measure" – "represents a subversion of the structure of Article XX".[305] Norway highlights that the Appellate Body has "never allowed the discrimination under the chapeau to be justified by reference to an objective (cause or rationale) that had not provided the basis for provisional justification under one of the sub-paragraphs of Article XX".[306] Norway notes that, although the Panel rejected the European Union's argument that the IC and MRM exceptions were also provisionally justified under Article XX(a), rather than drawing the "obvious consequence" from the European Union's failure to secure provisional justification of the IC and MRM exceptions under one of the subparagraphs of Article XX, the Panel's "step 2" analysis

[298] Norway's appellant's submission, para. 866 (quoting Panel Reports, para. 7.638).
[299] Norway's appellant's submission, para. 897 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 405).
[300] Norway's appellant's submission, para. 898.
[301] Norway's appellant's submission, para. 891. (emphasis original)
[302] Norway's appellant's submission, para. 891. (emphasis original)
[303] Norway's appellant's submission, para. 876 (referring to Panel Reports, paras. 7.649 and 7.650).
[304] Norway's appellant's submission, para. 904 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).
[305] Norway's appellant's submission, para. 906. (emphasis original)
[306] Norway's appellant's submission, para. 911

"*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 consider these two elements in isolation, but instead conducted an overall analysis as to whether the detrimental impact stemmed from a legitimate regulatory distinction. The European Union argues that the Panel did not err in structuring its analysis in this way. The European Union submits that the analysis of the rationale of a regulatory distinction "could be made in the abstract … or in the context of examining the design and application of the particular measure at issue".[315] For the European Union, "[t]he key point is that such an analysis of the alleged rationale

[307] Norway's appellant's submission, para. 913. (emphasis original)
[308] Norway's appellant's submission, paras. 917-922 (referring to Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:I, p. 23; and Panel Report, *Brazil – Retreaded Tyres*, para. 7.221). (emphasis original)
[309] Norway's appellant's submission, para. 926. (emphasis original)
[310] Norway's appellant's submission, para. 927.
[311] See Norway's appellant's submission, paras. 929-932 (referring to Panel Reports, paras. 7.274, 7.275, and 7.337-7.339).
[312] Norway's appellant's submission, para. 934.
[313] European Union's appellee's submission, para. 56.
[314] European Union's appellee's submission, para. 57.
[315] European Union's appellee's submission, para. 61.

or justification must be conducted as part of the analysis."[316] Thus, the European Union characterizes Canada's arguments as "formalistic and rigid".[317]

2.100. The European Union responds to Canada's appeal of the Panel's finding that the distinction between commercial and IC hunts is justifiable even though the rationale of the distinction "goes against" the objective of the EU Seal Regime[318] by highlighting the case-specific nature of the Panel's finding.[319] The European Union submits that the Panel's conclusion is both legally correct and reasonable on substantive terms, given that "exceptions are precisely 'exceptions' because they go against the general rule".[320] The European Union acknowledges that an exception "may pursue an objective that detracts from the main objective of the general rule in view of other legitimate regulatory concerns or rational explanations/justifications".[321] The European Union considers that, where a measure "clearly shows the weighing of opposing interests with the main objective", the regulatory distinction embodied in the measure could be found to be non-arbitrary and justifiable "even if the exception undermines the main objective of the measure".[322] The European Union notes that this view finds support in the Appellate Body report in *US – Clove Cigarettes,* where the Appellate Body examined the justifications provided by the defending Member, even though it had already found that there was no rational connection between the objective of the measure at issue and the exception.[323]

2.101. In response to Canada's argument that the Panel improperly relied on "international instruments extraneous to the case"[324] to justify the distinction between IC and commercial hunts, the European Union recalls that the Panel did not rely *only* on the existence of international instruments recognizing the interests of indigenous peoples, but also found such recognition in the legislative history of the EU Seal Regime and in measures adopted by other WTO Members, including Canada.[325] Moreover, the European Union submits that the Panel was referring to international instruments as "evidence" – in line with the practice of the Appellate Body – and not as instruments setting out legal obligations that would conflict with the WTO agreements.[326] The European Union further argues that, in finding that the distinction between commercial and IC hunts was justifiable, the Panel took into account the balance between the protection of IC interests and the principal objective of the measure as reflected in the EU Seal Regime. According to the European Union, it was only logical for the Panel to assess the merits of protecting the interests of indigenous peoples by reference to international instruments. Finally, the European Union notes that the Appellate Body has recognized that a technical regulation may pursue several purposes, including purposes which are not listed in the sixth recital of the TBT Agreement.[327]

2.102. With respect to Canada's allegation that the Panel failed to examine whether giving effect to the IC exception will actually fulfil the rationale of protecting Inuit interests, the European Union notes that, while the Panel found evidence that Inuit communities have been adversely affected by the EU Seal Regime as a whole, the Panel also found that Greenland was currently benefiting from the IC exception. According to the European Union, this shows that the IC exception does serve to protect the interests of the Inuit communities engaged in seal hunting. The European Union further argues that, in any event, the opposition of some Inuit communities to the EU Seal Regime does not demonstrate that the purpose of the IC exception, i.e. to protect IC interests, is not fulfilled by the regulatory distinction, given that, without the IC exception, seal products derived from IC hunts would fall under the general ban and would thus not be permitted to be placed on the EU market. The European Union acknowledges that Inuit sealing communities would be better off

[316] European Union's appellee's submission, para. 61.
[317] European Union's appellee's submission, para. 66.
[318] European Union's appellee's submission, para. 176 (referring to Canada's appellant's submission, paras. 78 and 79).
[319] European Union's appellee's submission, para. 76.
[320] European Union's appellee's submission, para. 79.
[321] European Union's appellee's submission, para. 79.
[322] European Union's appellee's submission, para. 80.
[323] European Union's appellee's submission, para. 82 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 225 and 236).
[324] Canada's appellant's submission, heading B.a), at p. 27.
[325] European Union's appellee's submission, para. 88 (referring to Panel Reports, paras. 7.292-7.298).
[326] European Union's appellee's submission, para. 90 (referring, as examples, to Appellate Body Reports, *US – Shrimp*, para. 168; and *US – Shrimp (Article 21.5 – Malaysia)*, paras. 127 and 128).
[327] European Union's appellee's submission, para. 92 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 213).

absent any regulation of the placing on the EU market of seal products; however, the IC exception seeks to mitigate the necessarily adverse impact of the EU Seal Regime on the Inuit and other indigenous communities.

2.103. The European Union submits that Canada's argument that the Panel focused its analysis of even-handedness on the wrong comparison and failed to examine the arbitrary aspects of the distinction between commercial and IC hunts is based on a misreading of how the Panel conducted the analysis of whether the detrimental impact that it had found to exist stemmed from a legitimate regulatory distinction. As the European Union sees it, the Panel had already examined the arguments raised by Canada in the context of its analysis of whether the regulatory distinction is justified.[328] To the European Union, it appears logical that the Panel did not need to repeat the same analysis in the context of its assessment of the even-handedness of the distinction. At the same time, the European Union recalls that, in its other appellant's submission, it expresses the view that the Panel misinterpreted and misapplied Article 2.1 of the TBT Agreement when examining the even-handedness in the design and application of the IC exception.[329] According to the European Union, the Panel should have examined whether the IC exception under the EU Seal Regime was designed and applied in a reasonable, impartial, and harmonious manner, having regard to the objective it pursues.

2.104. With respect to Canada's argument that the distinction between commercial and Inuit hunts is "illusory" in the light of the strong commercial dimension of the Inuit hunt in Greenland, the European Union maintains that the extent of development of the commercial aspect in the marketing of by-products from Inuit communities in Greenland is irrelevant for assessing the even-handedness of the IC exception. The European Union submits that, as long as the relevant criteria to qualify as a legitimate indigenous subsistence activity are met and subsistence thus remains the primary objective of the hunts, the extent to which some of the by-products of these hunts are sold through commercial channels is irrelevant for assessing even-handedness. Hence, this does not show any arbitrariness in the design and application of the IC exception. The European Union also argues that the Panel did not find Greenland's hunt to be commercial in nature. Rather, the Panel found that, while the commercial aspect of seal hunting in Greenland has been developed to a degree that is comparable to that of commercial hunts, Greenland's hunts remain "subsistence"/IC hunts. The European Union underscores that seal hunts in Greenland are primarily conducted for subsistence purposes, "even if they may have a commercial aspect".[330]

2.105. For the aforementioned reasons, the European Union requests the Appellate Body to reject Canada's allegations that the Panel erred in its findings relating to Canada's claim under Article 2.1 of the TBT Agreement.[331]

2.106. The European Union further submits that Canada's allegations of error under Article 11 of the DSU should be dismissed for several reasons. First, the European Union argues that Canada has failed to explain how the Panel's alleged failure to consider the evidence put forward by Canada affected the objectivity of the Panel's assessment. Second, the European Union notes that the Panel summarized the arguments raised by Canada in the Panel Reports[332], and that the Panel distinguished commercial and IC hunts on the basis of their "primary purpose".[333] Third, the European Union submits that the alleged similarities between Canada's east coast hunt and IC hunts are irrelevant. The European Union notes that Canada never contested that the majority of seal hunts conducted in Canada are commercial hunts with the sole or primary purpose of making a profit. Finally, the European Union recalls the Panel's finding that the type of the hunter (Inuit versus non-Inuit) is also relevant for the regulatory distinction at issue. According to the European Union, the similarities between commercial and IC hunts mentioned by Canada "are irrelevant insofar as the hunter in question does not belong to the Inuit or other indigenous communities".[334]

[328] European Union's appellee's submission, para. 101 (referring to Panel Reports, paras. 7.256-7.300).
[329] European Union's appellee's submission, para. 102 (referring to European Union's other appellant's submission, section 4).
[330] European Union's appellee's submission, para. 104; see also fn 92 thereto.
[331] European Union's appellee's submission, para. 121.
[332] European Union's appellee's submission, para. 113 (referring to Panel Reports, paras. 7.226-7248).
[333] European Union's appellee's submission, para. 114.
[334] European Union's appellee's submission, para. 118.

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 text 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 MRM exceptions was, nevertheless, "carefully circumscribed, so as to preserve, to the extent possible, the contribution of the EU Seal Regime to the objective of improving the welfare of seals".[339]

2.109. The European Union submits that, if the EU legislators' 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 from adopting the EU Seal Regime in the first place".[340] According to the European Union, "[t]hose objectives would be best served by removing all restrictions to the marketing of seal products."[341]

2.110. 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."[342] According to the European Union, there is evidence of such adverse effects.[343] The European Union further recalls that the IC exception was part of the Commission Proposal for a regulation concerning trade in seal products, and a similar exception is found in the European Council Directive concerning imports of certain seal pup skins and products[344] (EC Seal Pups Directive), in the national bans enacted by some EU member States prior to the EU Seal Regime, and in the measures banning trade in seal products adopted by other Members, both before and after the adoption of the EU Seal Regime.[345] According to the European Union, this shows the existence of a "broad consensus" regarding the duty to take into account the special needs of the Inuit and other indigenous communities.[346] In all those legal instruments, however, the provisions in favour of the Inuit and other indigenous communities operate as "exceptions from the restrictions generally applied with regard to the marketing of seal products".[347]

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[335] European Union's appellee's submission, para. 138.
[336] European Union's appellee's submission, para. 140 (referring to Panel Reports, para. 7.402).
[337] European Union's appellee's submission, para. 140.
[338] European Union's appellee's submission, para. 140.
[339] European Union's appellee's submission, para. 140.
[340] European Union's appellee's submission, para. 141.
[341] European Union's appellee's submission, para. 141 (referring to Norway's appellant's submission, para. 621).
[342] European Union's appellee's submission, para. 142.
[343] European Union's appellee's submission, para. 142 (referring to Canadian Department of Fisheries and Oceans, *Canadian Commercial Seal Harvest Overview 2011*, Statistical and economic analysis series (October 2012) (Panel Exhibit JE-27) (Canadian Seal Harvest Overview), Table 14; Greenland 2012 Seal Management Report, pp. 31-36, and Table 4, at p. 33; and Nunavut 2012 Report, p. 3).
[344] Council Directive No. 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, *Official Journal of the European Communities*, L Series, No. 91 (9 April 1983), pp. 30-31 (Panel Exhibit CDA-12).
[345] European Union's appellee's submission, para. 142.
[346] European Union's appellee's submission, para. 142.
[347] European Union's appellee's submission, para. 142.

2.111. The European Union further notes that, unlike 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 order to restrict trade in seal products. Instead, the MRM exception was introduced in the EU Seal Regime towards the end of the legislative process in response to the concerns raised by some EU member States with regard to small-scale hunts conducted exclusively for MRM purposes. The European Union further explained that "the MRM exception was subjected to strict conditions that define very narrowly its scope" in order to avoid creating a loophole allowing the marketing of products from large-scale commercial hunts.[348] The European Union adds that, in 2011, only 96 seals qualified for the MRM exception. On this basis, the European Union does not agree with Norway that the objective pursued by the MRM exception would be more "prominent" than the objective of addressing EU public moral concerns regarding seal welfare.[349]

2.112. For the European Union, although "it is in the nature of all exceptions to derogate from the general rule", this does not mean that, "for that reason, the objective of the exception should be regarded as being equally important, or even more important, than the objective of the general rule."[350]

2.113. As a separate matter, the European Union argues that, having found that the objectives of the IC and MRM exceptions are not "independent" of the main objective of the EU Seal Regime, the Panel should have proceeded to find that both objectives are "rationally connected" because they stem from the same standard of morality.[351] In the European Union's view, it was "contradictory" for the Panel to maintain that the objective pursued by the IC exception is not "independent" of the public morals objective pursued by the EU Seal Regime and, at the same time, that the IC exception does not bear any "rational relationship" to that objective.[352] Thus, in the event that the Appellate Body were to reject the European Union's other appeal concerning this aspect of the Panel's findings[353], the European Union submits that the Appellate Body should uphold Norway's claim that the Panel erred by failing to identify the objective pursued by the IC exception as one of the objectives of the EU Seal Regime to be examined under Article 2.2 of the TBT Agreement.[354] The European Union explains in this regard that "the mere fact that the public morals objective is the 'main' objective of a measure does not have the implication that other, less important, but 'rationally disconnected' objectives of the same measure become irrelevant under Article 2.2 of the TBT Agreement."[355] Thus, on the assumption that the objective of the IC exception was not "rationally connected" to the public morals objective of the EU Seal Regime, it should, according to the European Union, have been identified by the Panel as a separate objective of the EU Seal Regime, albeit one of lesser importance than the public morals objective.

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

2.114. The European Union submits that Canada's and Norway's arguments are "unfounded"[356], because the TBT Agreement does not prescribe the manner in which the contribution to the fulfilment of the measure's legitimate objective should be assessed, nor how specific that assessment should be.[357] The European Union argues that the Appellate Body in *Brazil – Retreaded Tyres* clarified that there is no requirement to quantify the contribution to the achievement of the measure's objective, and that panels may rely on a qualitative analysis.[358] The European Union maintains that the Panel's analysis is in line with this guidance, and that, because the quantitative

[348] European Union's appellee's submission, para. 143.
[349] European Union's appellee's submission, para. 143.
[350] European Union's appellee's submission, para. 144.
[351] European Union's appellee's submission, para. 145.
[352] European Union's appellee's submission, para. 145.
[353] European Union's appellee's submission, para. 146 (referring to European Union's Notice of Other Appeal, paras. 5-8).
[354] European Union's appellee's submission, para. 147.
[355] European Union's appellee's submission, para. 148.
[356] European Union's appellee's submission, para. 165.
[357] European Union's appellee's submission, para. 166.
[358] European Union's appellee's submission, paras. 167 and 168 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-147).

evidence available did not permit a precise quantification of the contribution, "the Panel had no alternative but to resort to qualitative reasoning."[359]

2.115. The European Union contends that the Panel's findings were no less specific than those reached by other panels conducting a "necessity" test.[360] The European Union further contends that the analysis by the Appellate Body in *US – COOL* contradicts the position of the complainants in these disputes. In particular, the European Union refers to the Appellate Body's reliance on the fact that the measure in those disputes contributed to the objective "at least to *some* degree".[361] The European Union adds that, although the Appellate Body alluded to the panel's failure to specify the degree of contribution among the reasons that prevented it from completing the legal analysis, this was not the only obstacle cited by the Appellate Body. According to the European Union, the Appellate Body's analysis in *US – COOL* "shows that it is not possible to determine, in the abstract, whether a finding of contribution is sufficiently *specific*", and that such a determination "can only be made taking into account the circumstances of each dispute".[362]

2.116. The European Union argues that the complainants' claim that the Panel's contribution finding was unsubstantiated is premised entirely on the contention that imports from Norway and Canada will be replaced by imports from Greenland under the IC exception. As a preliminary matter, the European Union submits that the errors alleged by the complainants raise factual issues and should have been submitted under Article 11 of the DSU, and requests the Appellate Body to consider whether these claims should be examined as a legal characterization of the facts or under Article 11.[363]

2.117. The European Union argues that the complainants' main piece of evidence – a statement by the Danish-based international consulting group COWI that "[t]he Greenlandic trade is more than enough to cover EU demand[364] – "is not supported by any evidence or reasoning and it is not possible to know on what basis COWI came to that view".[365] The European Union identifies other facts that, in its view, contradict the complainants' position: (i) the number of seals hunted in Canada and Norway has traditionally exceeded the number of catches in Greenland; (ii) unlike in Canada and Norway, a large part of the seal skins in Greenland are consumed domestically rather than traded internationally; (iii) a large part of the seal skins are exported from Greenland to markets outside the European Union; (iv) Greenland can also export seal skins under Inuit exceptions to seal product bans in other countries; (v) the assumption that global demand for seal products will remain unchanged at currently depressed levels; (vi) the IC exception is subject to conditions that constrain Greenland's ability to expand supply more than traditional levels; (vii) Greenland's supply capacity is declining; and (viii) Greenlandic export data show declining exports to the European Union.[366]

2.118. The European Union contends that this evidence demonstrates that, due to depressed global demand and prices produced in part by the EU Seal Regime, imports from Greenland "have not even returned to their usual level" before seal product bans were first introduced in the European Union in 2007.[367] The European Union also maintains that Norway's assertion that Greenland's supply of 80,000 seal skins per year can easily supply the European Union's average imports of 20,000 skins "is deeply flawed".[368] These data, the European Union argues, only cover tanned skins, whereas Canada's principal exports to the European Union consisted of raw skins. Noting that Canada exported more than 100,000 raw skins to the European Union in 2006, the

[359] European Union's appellee's submission, para. 170.

[360] European Union's appellee's submission, paras. 171-173 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 136 and 137; *US – Tuna II (Mexico)*, para. 327; and *US – Gambling*, para. 301; each referring in turn to the respective Panel Reports, *Brazil – Retreaded Tyres*, para. 7.148; *US – Tuna II (Mexico)*, para. 7.563; and *US – Gambling*, para. 6.494).

[361] European Union's appellee's submission, para. 174 (quoting Appellate Body Reports, *US – COOL*, para. 473). (emphasis added by the European Union)

[362] European Union's appellee's submission, para. 175. (emphasis original)

[363] European Union's appellee's submission, para. 180.

[364] European Union's appellee's submission, para. 184 (quoting COWI 2010 Report, p. 84).

[365] European Union's appellee's submission, para. 184.

[366] European Union's appellee's submission, paras. 186-195.

[367] European Union's appellee's submission, para. 196.

[368] European Union's appellee's submission, para. 199.

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 reducing global demand. Accordingly, while other factors may contribute to reducing global demand, "the reduction in EU demand would still entail a reduction in *potential* global demand."[377] According to the European Union, this is supported by trade statistics that showed a decline in Canada's exports and a "precipitous reduction in the number of seals hunted".[378] The European Union moreover observes that Canada acknowledged the "negative impacts" and "depressing effects" of the EU Seal Regime on the EU seal product market, and that the Panel found that a connection exists, even if it could not be precisely quantified, between the EU Seal Regime and the number of seals hunted.[379]

2.122. The European Union considers wrong on two counts the complainants' allegations that the Panel failed to establish any link between a reduction in global demand and the number of inhumanely killed seals. First, the European Union maintains that neither it nor the Panel ever sought, in referring to the "incidence of inhumane killing" of seals, to ascribe any meaning to that term other than that relating to the number of such inhumanely killed seals.[380] Second, the European Union argues that "the Panel was entitled to assume that a reduction in the number of

[369] European Union's appellee's submission, para. 199.
[370] European Union's appellee's submission, para. 205.
[371] European Union's appellee's submission, para. 206.
[372] European Union's appellee's submission, para. 206 (referring to Panel Reports, para. 7.452).
[373] European Union's appellee's submission, para. 208.
[374] European Union's appellee's submission, para. 209 (referring to Norway's appellant's submission, para. 442).
[375] European Union's appellee's submission, para. 209 (quoting Panel Reports, para. 7.456).
[376] European Union's appellee's submission, para. 212.
[377] European Union's appellee's submission, para. 214. (emphasis original)
[378] European Union's appellee's submission, para. 219.
[379] European Union's appellee's submission, paras. 220 and 221, respectively.
[380] European Union's appellee's submission, para. 224 (referring to Canada's appellant's submission, para. 193).

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 of addressing EU public moral concerns with regard to seal welfare, the Panel "examined the contribution of the conditions attached to the MRM exception to that objective".[383]

2.124. The European Union rejects Canada's contention that the Panel failed to assess the risks of non-fulfilment and to conduct a "relational" analysis before considering the proposed less trade-restrictive alternative. The European Union maintains that the Panel conducted its assessment of the risks of non-fulfilment at paragraphs 7.465 and 7.466 of its Reports before proceeding to assess the less trade-restrictive alternative. The European Union contends that the comparison with a proposed less trade-restrictive alternative "is a more sophisticated and reliable conceptual tool for assessing the necessity of a measure in the light of the relevant weighing factors than the type of relational analysis" suggested by Canada.[384] Given that the Appellate Body stated in *US – Tuna II (Mexico)* that a comparison with the proposed less trade-restrictive alternative is required in most cases, the European Union argues that panels are not required to make an explicit and motivated finding justifying why they proceed to such a comparison.[385] The European Union adds that such a justification "is required only in the exceptional cases where a panel decides <u>not</u> to perform a comparison with the proposed [less trade-restrictive alternative]".[386]

2.125. The European Union also rejects Norway's argument that the Panel erred by failing to consider "arbitrary or unjustifiable discrimination" under Article 2.2. According to the European Union, Norway's interpretation has no basis in the text of Article 2.2 or in recent Appellate Body reports concerning Article 2.2.[387] The European Union further contends that the proviso in the last part of the sixth recital alludes to Article 2.1, but "does not justify reading the same requirement into Article 2.2".[388] The European Union considers that Norway's interpretation would be "superfluous because it would prohibit what is already prohibited by Article 2.1".[389] The European Union goes on to reject the distinction Norway draws between origin-based discrimination under Article 2.1 versus other types of discrimination captured under Article 2.2. As the European Union explains, Article 2.2 is designed to address measures "that are not discriminatory, but nevertheless create unnecessary obstacles to trade".[390] Moreover, the European Union explains, "if a measure found justified under Article 2.2 is applied in a discriminatory manner, such discriminatory application can be challenged under Article 2.1."[391]

[381] European Union's appellee's submission, para. 226.
[382] European Union's appellee's submission, para. 232.
[383] European Union's appellee's submission, para. 235.
[384] European Union's appellee's submission, para. 300.
[385] European Union's appellee's submission, paras. 300 and 302 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).
[386] European Union's appellee's submission, para. 302. (emphasis original)
[387] European Union's appellee's submission, para. 315 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*; *US – COOL*; and *US – Clove Cigarettes*).
[388] European Union's appellee's submission, para. 317.
[389] European Union's appellee's submission, para. 318.
[390] European Union's appellee's submission, para. 321.
[391] European Union's appellee's submission, para. 321.

2.3.2.3 The Panel's analysis of the alternative measure

2.126. The European Union argues that the complainants' allegations that the Panel assessed the contribution made by the proposed less trade-restrictive alternative against the wrong benchmark "misrepresent the analysis conducted by the Panel and are unfounded".[392] The European Union contends that the Panel did not ignore its findings regarding the exceptions, and that, even if it did not expressly repeat its findings with regard to the exceptions, "those findings are reflected in the Panel's overall assessment of the contribution".[393] The European Union maintains that, because the complainants failed to articulate a sufficiently precise less trade-restrictive alternative, the Panel "had to assess instead the degree of contribution and the reasonable availability of two distinct hypothetical regimes within the scope of the broad [less trade-restrictive alternative] proposed by the Complainants".[394] The European Union recalls the Panel's conclusions that, while "more stringent regimes" would make a positive contribution to the objective, they were not "reasonably available"; by contrast, "more lenient regimes" were "reasonably available", but would "call into question the degree to which the alternative measure can contribute to the welfare of seals".[395]

2.127. The European Union maintains that, although the complainants sought to establish that a more lenient regime was possible, they "failed to specify the content of such a 'more lenient regime' before the Panel, let alone provide any meaningful assessment of its contribution to the measure's objective".[396] The European Union adds that, although the Panel could have dismissed the claim on that basis alone, it "made considerable efforts to examine the degree of contribution and reasonable availability of different hypothetical regimes spanned by the broad [less trade-restrictive alternative] proposed".[397] The European Union rejects as "unsupported speculation" the complainants' claims that the negative impact described by the Panel would be offset by the fact that seal products currently covered by the IC exception would be excluded from the EU market by virtue of a more lenient regime.[398] The European Union adds that much would depend on the specific welfare requirements and certification methods of the more lenient regime, but that the complainants failed to specify any such requirements and methods before the Panel.

2.128. The European Union also addresses the complainants' claim that the Panel improperly relied on dictum from *EC – Asbestos*. The European Union argues that the quoted language "reflects the basic and undisputed principle that, both under Article XX of the GATT and under Article 2.2 of the TBT Agreement, the proposed [less trade-restrictive alternative] must achieve at least the same degree of contribution as the challenged measure".[399] The European Union further argues that "[t]he mere fact that the measure at issue in *EC – Asbestos* provided for a more comprehensive ban on trade in the product concerned than the EU Seal Regime is wholly immaterial."[400] What matters, the European Union adds, "is that in both cases the defending Member cannot be forced to adopt alternative measures that would fail to achieve the same degree of contribution to its objective".[401]

2.129. The European Union rejects Canada's claim that the Panel failed to take into account certain measures applied by the European Union in other areas in its analysis. The European Union argues that *Korea – Various Measures of Beef* does not support such a comparison if it does not address behaviour of the same kind for like or at least similar products.[402] According to the European Union, the Panel recognized that "seal hunting gives rise to specific welfare risks".[403] The European Union also maintains that, "even if the Panel had found that the welfare risks of seal hunting were sufficiently similar" to other situations, "the European Union would still have been

[392] European Union's appellee's submission, para. 245.
[393] European Union's appellee's submission, para. 249.
[394] European Union's appellee's submission, para. 260.
[395] European Union's appellee's submission, para. 260.
[396] European Union's appellee's submission, para. 261.
[397] European Union's appellee's submission, para. 261.
[398] European Union's appellee's submission, para. 265.
[399] European Union's appellee's submission, para. 269 (referring to Appellate Body Report, *EC – Asbestos*, para. 174).
[400] European Union's appellee's submission, para. 269.
[401] European Union's appellee's submission, para. 269.
[402] European Union's appellee's submission, paras. 270-272 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 172; and Canada's appellant's submission, paras. 278-290).
[403] European Union's appellee's submission, para. 273.

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 Norway's proposal was premised on the assumption that the EU Seal Regime made no contribution to its objective, the European Union argues that the Panel implicitly rejected this claim. The European Union notes that the other less trade-restrictive alternative put forward by Norway was the removal of three conditions attached to the MRM exception (the "not-for-profit", "non-systematic", and "sole purpose" conditions). The European Union argues that, although the Panel did not expressly address this proposal, it is clearly implicit in the Panel's reasoning and findings that this less trade-restrictive alternative would also fail to make an equivalent contribution to the measure's objective.

2.133. For the above reasons, the European Union requests the Appellate Body to reject the claims raised by Canada and Norway under Article 2.2 of the TBT Agreement with regard to the contribution made by the EU Seal Regime to it objective and the Panel's analysis of the proposed less trade-restrictive alternatives.[412] The European Union further requests the Appellate Body to uphold the Panel's finding that the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement.[413]

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[404] European Union's appellee's submission, para. 276.

[405] European Union's appellee's submission, para. 277 (referring to, as examples, European Union's responses to Panel question Nos. 9, 10, 11, and 104; and second written submission to the Panel, paras. 271-276).

[406] European Union's appellee's submission, paras. 278 and 279 (referring to Panel Reports, para. 7.502; and quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156).

[407] European Union's appellee's submission, para. 279 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156).

[408] European Union's appellee's submission, para. 281 (referring to Panel Reports, para. 7.496 and fn 801 to para. 7.497).

[409] European Union's appellee's submission, para. 281.

[410] European Union's appellee's submission, para. 291.

[411] European Union's appellee's submission, para. 306.

[412] European Union's appellee's submission, paras. 236 and 308.

[413] European Union's appellee's submission, para. 474.

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 jurisprudence on the issue "is not as clear cut and rather suggests that an artificial separation of certain provisions from the remainder of the measure at issue … is not conducive to a proper understanding of the measure and can affect the correctness of the analysis under Article XX".[414]

2.135. Responding to Norway's criticism of the Panel's reliance on *US – Gasoline*, the European Union points out that the Appellate Body in *US – Gasoline* was of the view that "not only the provisions relating to importers and blenders, but also those related to domestic refiners had to be considered in determining whether the measure [– i.e. the Gasoline Rule –] [could] be justified".[415] This is because, in that case, the less favourable treatment found to be in violation of Article III:4 of the GATT 1994 "resulted from the interplay between the provisions relating to baselines for domestic refiners and the provisions relating to baselines for blenders and importers of gasoline".[416] The Panel's approach in the present case is similar to the approach adopted by the Appellate Body in *US – Gasoline* since, under the EU Seal Regime, "the less favourable treatment alleged by the Complainants results from the interplay between the General Ban and the IC and MRM exceptions and not from the exceptions alone."[417] The Panel was, therefore, correct in concluding that the ban and the exceptions under the EU Seal Regime are "closely connected to each other and could not operate in isolation".[418] The European Union adds that the approach of the Appellate Body in *US – Gasoline* was "echoed subsequently" in the Panel report in *Argentina – Hides and Leather*.[419]

2.136. With respect to Norway's reliance on the Appellate Body report in *Thailand – Cigarettes (Philippines)*, the European Union submits that, contrary to what Norway alleges, the Appellate Body's observations in that dispute indicate that, when less favourable treatment results from certain regulatory treatment of imports, "the analysis under the exceptions of Article XX should focus on whether such 'regulatory differences' are 'necessary' in order to achieve the objectives set out in either of those two provisions at the level of protection chosen by the responding Member."[420]

2.137. Based on these cases, the European Union asserts that the aspect of the measure to be justified should not be defined so narrowly as to make it impossible correctly to understand the measure, and that the focus of the analysis under Article XX should be on "regulatory differences".[421] In the present case, the Panel was correct in not limiting its analysis to the IC and MRM exceptions, since the discrimination found to be inconsistent with the GATT 1994 resulted from the "interplay" between the ban and the exceptions.[422]

2.138. In response to Norway's criticism of the Panel's reasoning that an "exception", when considered alone, could never be "necessary" to achieve the objective of a ban, the European Union posits that "the mere fact that the exception is considered together with the general rule in the context of the analysis of the design and structure of the measure under a paragraph of Article XX in no way means that the exception is altogether 'removed from scrutiny'".[423] Instead, the exception "critically informs the design and structure" of the measure, particularly "the extent

[414] European Union's appellee's submission, para. 389.
[415] European Union's appellee's submission, para. 393 (referring to Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, p. 15).
[416] European Union's appellee's submission, para. 393.
[417] European Union's appellee's submission, para. 395.
[418] European Union's appellee's submission, para. 395 (referring to Panel Reports, para. 7.620).
[419] European Union's appellee's submission, para. 396 (referring to Panel Report, *Argentina – Hides and Leather*, paras. 11.303-11.305).
[420] European Union's appellee's submission, para. 404 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177).
[421] European Union's appellee's submission, para. 404.
[422] European Union's appellee's submission, para. 407.
[423] European Union's appellee's submission, para. 412 (referring to Panel Reports, para. 7.638).

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 considering whether the EU Seal Regime as a whole was provisionally justified under Article XX(a), the European Union notes its other appeal of the Panel's finding that the objective of the IC exception is rationally disconnected from the EU Seal Regime objective.[426] If the Appellate Body agrees with the European Union and reverses the Panel's finding that the IC exception does not bear a rational relationship to the objective of addressing EU public moral concerns regarding seal welfare, "in completing the analysis following Norway's appeal, the Appellate Body would need to base its analysis on the finding that there is a rational connection between the IC exception and the objective of the EU Seal Regime."[427] If the Appellate Body upholds the Panel's finding that the IC exceptions does not bear a rational relationship with the objective of the EU Seal Regime, the European Union submits that the Appellate Body "should uphold Norway's claim that the Panel erred by failing to identify the objective pursued by the IC exception as an independent objective of the EU Seal Regime".[428] In completing the analysis under Article XX(a) in such circumstances, the European Union requests the Appellate Body to take into account "the modified Panel's analysis as to the objective of the IC exception and its contribution to its fulfilment and find that the IC exception is justified" under Article XX(a) of the GATT 1994.[429]

2.3.3.2 Scope of Article XX(a)

2.140. The European Union disagrees with Canada's claim that the Panel erred in finding that the EU Seal Regime falls within the scope of application of Article XX(a) of the GATT 1994. Contrary to Canada's arguments, the European Union submits that there is no requirement to assess the "risk" to public morals in order to determine whether a measure falls within the scope of Article XX(a). Instead, such examination must be undertaken as part of the "necessity" analysis because, where the risks that a measure purports to address are shown to be "inexistent or negligible", the measure will be found "unnecessary".[430] Relying on a statement by the Appellate Body in *Korea – Various Measures on Beef*, the European Union argues that "all that must be shown in order to establish that a measure falls within the scope of Article XX(a) is that the measure is *designed* to protect public morals."[431] The European Union points out that Canada has not appealed the Panel's finding that the EU Seal Regime pursued a "public morals objective". On the basis of this finding, the European Union considers that "the Panel was entitled to conclude that the EU Seal Regime was *designed* to protect public morals and, therefore, fell within the scope of Article XX(a) of the GATT 1994."[432]

2.141. The European Union submits that Canada's interpretation of Article XX(a) would "effectively introduce … a strict consistency test", which would impose on Members the burden of proving "that the relevant standard of morality is consistently applied by them in each and every situation involving similar risks."[433] According to the European Union, WTO jurisprudence shows that the application of a measure in one area is "only of a limited relevance" to an Article XX analysis.[434] The European Union adds that introducing a "consistency" test into Article XX would limit Members' "regulatory autonomy and, in particular, their right to select an appropriate level of

[424] European Union's appellee's submission, para. 412.
[425] European Union's appellee's submission, para. 414 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 90 and 91).
[426] European Union's appellee's submission, para. 415 (referring to European Union's other appellant's submission, paras. 91-123).
[427] European Union's appellee's submission, para. 416.
[428] European Union's appellee's submission, para. 417.
[429] European Union's appellee's submission, para. 417.
[430] European Union's appellee's submission, para. 342.
[431] European Union's appellee's submission, para. 344 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 157). (emphasis original)
[432] European Union's appellee's submission, para. 346. (emphasis original)
[433] European Union's appellee's submission, para. 347.
[434] European Union's appellee's submission, para. 349.

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 Article 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 does not address genuine risks to public morals on animal welfare on the ground that the European Union "tolerates" a similar degree of animal suffering in slaughterhouses and terrestrial wildlife hunts.[437] The European Union highlights that the Panel gave detailed reasons for its findings on the uniqueness and distinctiveness of the welfare risks associated with seal hunts, and that these findings have not been challenged by Canada. The European Union reiterates that comparing seal hunts with those activities would be "of limited value" given the differences in the animals involved, the killing methods, and the physical environment.[438] Owing to these differences, and the "limited value" accorded to comparisons with terrestrial hunts, the European Union argues that the Panel was not bound to address Canada's evidence concerning the poor welfare outcomes in terrestrial wildlife hunts.

2.143. Finally, with respect to Canada's claim that the Panel failed to make an objective assessment of the matter, contrary to Article 11 of the DSU, by failing to take into account evidence relating to environmental conditions and risks in other situations, such as wildlife hunts, the European Union notes that Canada misstates the Panel's finding. According to the European Union, the Panel did not simply distinguish the physical environmental conditions of seal hunts from the conditions in wildlife hunts, but rather distinguished between "hunts occurring within or near Arctic and sub-Arctic regions, on the one hand, and *terrestrial* wild life hunts, on the other hand".[439] The European Union submits that the differences between Arctic and semi-Arctic marine habitats and the terrestrial habitats of animals are "self-evident".[440] As to Canada's argument that the Panel failed thoroughly to assess the EFSA Scientific Opinion, the European Union submits that, contrary to Canada's arguments, the EFSA Scientific Opinion "stressed that the methods for killing wild animals and their efficacy vary considerably" and "cautioned that 'care should be taken when comparing their efficacy because of the great variation in environmental conditions concerned'".[441] With respect to the Panel's alleged failure to consider the risks to animal welfare in terrestrial wildlife hunts in determining whether such risks exist for seal hunts, the European Union points out that the Panel found comparisons with terrestrial hunts to be "of limited value" and, therefore, it was not necessary for the Panel to address the evidence cited by Canada.[442]

2.3.3.3 The Panel's analysis of "necessity"

2.144. The European Union asserts that the complainants' arguments with respect to the Panel's "contribution" analysis are based on a misreading of the Appellate Body's observations in *Brazil – Retreaded Tyres*. The European Union clarifies that the Appellate Body in that case left open "the possibility that, exceptionally, an import ban may be considered necessary even when the contribution is not 'material'".[443] Moreover, the European Union adds, in using the phrase "material contribution", the Appellate Body "did not purport to define a minimum legal requirement to be enforced by panels as a mandatory component of the necessity test".[444] Instead, the Appellate Body simply made a "prediction about the likely legal characterization of a certain factual scenario", which provides useful guidance, but should not be taken as a legal requirement.[445] The

[435] European Union's appellee's submission, para. 352.
[436] European Union's appellee's submission, para. 352.
[437] European Union's appellee's submission, para. 353 (quoting Canada's appellant's submission, para. 395).
[438] European Union's appellee's submission, paras. 354 and 378 (quoting Panel Reports, fn 300 to para. 7.206).
[439] European Union's appellee's submission, para. 370 (referring to Panel Reports, para. 7.187). (emphasis original)
[440] European Union's appellee's submission, para. 371.
[441] European Union's appellee's submission, para. 376 (quoting EFSA Scientific Opinion, p. 36).
[442] European Union's appellee's submission, para. 378 (quoting Panel Reports, fn 300 to para. 7.206).
[443] European Union's appellee's submission, para. 423 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 510).
[444] European Union's appellee's submission, para. 423.
[445] European Union's appellee's submission, para. 423.

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 purview of Article XX(b), and even [went] against this objective".[453] The European Union emphasizes that, unlike the EU Seal Regime, the measure in *Brazil – Retreaded Tyres* was a health measure, which was provisionally justified under Article XX(b). According to the European Union, the "line of equilibrium" that the Appellate Body found with respect to the health measure in *Brazil – Retreaded Tyres* under the specific circumstances of that case does not apply to the EU Seal Regime, which requires a different "balancing exercise" between public moral concerns and other interests.[454] The European Union contends that the Panel, therefore, correctly based its conclusion on the justification of the regulatory distinction on the specific circumstances of these disputes.

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[446] European Union's appellee's submission, para. 424.
[447] European Union's appellee's submission, para. 427.
[448] European Union's appellee's submission, para. 429.
[449] European Union's appellee's submission, para. 429.
[450] European Union's appellee's submission, para. 442.
[451] European Union's appellee's submission, paras. 443-447 (referring to Appellate Body Reports, *US – Gasoline*, p. 23, DSR 1996:I, p. 21; and *US – Shrimp*, paras. 158 and 159).
[452] European Union's appellee's submission, paras. 448-456 (referring to Appellate Body Reports, *US – Gasoline*, pp. 28-29, DSR 1996:I, p. 27; and *US – Shrimp*, paras. 161, 165, 166, 173, 175, and 180-184).
[453] European Union's appellee's submission, para. 451 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).
[454] European Union's appellee's submission, para. 453 (quoting Appellate Body Report, *US – Shrimp*, para. 159).

2.148. The European Union further maintains that 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 against 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 in the two cases differ significantly. In the present case, the IC exception is "based on a broad recognition of the unique interests of Inuit and other indigenous communities", whereas in *Brazil – Retreaded Tyres,* the exception at stake had "a mere economic objective, i.e. implementing the market access concessions contained in the MERCOSUR free trade agreement".[457] Given the "relevant differences" between the present case and *Brazil – Retreaded Tyres*, the European Union submits that the Panel's approach to not "exclusively focus" on the rational connection between the cause of the exceptions and the main objective of the measure "appears correct".[458]

2.149. The European Union also submits that the approach proposed by the complainants also conflicts with the purpose of Article XX, which is "to balance the substantive obligations established in the GATT 1994 with certain important and legitimate policy objectives".[459] The European Union underscores that the "[e]xceptions are often not 'rationally connected' to the main purpose of a measure", and when they are "inserted to achieve a balance between the main objective … and conflicting other legitimate objectives, there will typically be a 'disconnect' between their rationale and the main objective pursued".[460] The approach proposed by the complainants would preclude Members from carrying out such a balancing exercise, when there is nothing "arbitrary or unjustifiable" in "striking a balance between animal welfare and these other objectives".[461] Finally, the European Union contends that the "rigid interpretation" proposed by the complainants also disregards the context provided by the TBT Agreement to the chapeau of Article XX of the GATT 1994, and that the Panel rightly attempted to achieve a "coherent and consistent interpretation" by taking into account its analysis under Article 2.1 of the TBT Agreement.[462] For these reasons, the European Union requests the Appellate Body to reject Canada's and Norway's allegations of errors concerning the Panel's findings under the chapeau of Article XX of the GATT 1994.[463]

2.150. In the event that the Appellate Body accepts Canada's and Norway's appeals, the European Union notes its other appeal of the Panel's 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."[464] According to the European Union, if the Appellate Body modifies the Panel's reasoning following successful appeals by Canada and Norway as regards the interpretation of the chapeau, the Appellate Body "should not base its analysis on a finding of a lack of rational connection between the IC exception and the objective of the EU Seal Regime".[465]

2.4 Claims of error by the European Union – Other appellant

2.4.1 Annex 1.1 to the TBT Agreement

2.151. The European Union contends that the Panel erred in its interpretation and application of the terms "product characteristics" and "applicable administrative provisions" in the definition of a "technical regulation" under Annex 1.1 to the TBT Agreement, and consequently requests the Appellate Body to reverse the Panel's conclusion that the EU Seal Regime constitutes a "technical

[455] European Union's appellee's submission, para. 454 (quoting Panel Reports, para. 7.296).
[456] European Union's appellee's submission, para. 454 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 228 and 234).
[457] European Union's appellee's submission, para. 455 (referring to Panel Reports, para. 7.298).
[458] European Union's appellee's submission, para. 456.
[459] European Union's appellee's submission, para. 457 (referring to Appellate Body Report, *US – Shrimp*, para. 121).
[460] European Union's appellee's submission, para. 457.
[461] European Union's appellee's submission, para. 458.
[462] European Union's appellee's submission, para. 458 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 91; and Panel Reports, para. 7.613).
[463] European Union's appellee's submission, para. 461.
[464] European Union's appellee's submission, para. 459 (referring to European Union's other appellant's submission, paras. 91-123).
[465] European Union's appellee's submission, para. 460.

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 for the Panel to conclude that a measure as a whole can be deemed a technical regulation "simply because one of its components meets the criterion for a technical regulation".[481] In the European Union's view, since not all of the components of the EU Seal Regime meet the criteria for a technical regulation, the Panel should have instead based its determination on consideration of "all components of the measure and their respective role in [its] operation and object and purpose".[482] In this regard, the European Union argues that the Panel failed to address how the ban on products consisting exclusively of seal impacts on the legal characterization of the measure as a whole.[483] The European Union further highlights that, while the exceptions in the measure at issue in *EC – Asbestos* "permitted certain products which were identified according to their intrinsic characteristics"[484], none of the conditions under which seal-containing products may enter the European Union market "relate to intrinsic or related product characteristics".[485] Thus, 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".[486] Nor does the EU Seal Regime, when considered as a whole, lay down "product characteristics" within the meaning of Annex 1.1 to the TBT Agreement.

2.4.2 Article 2.1 of the TBT Agreement

2.156. The European Union appeals the Panel's 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".[487] The European Union submits that this finding was "based on an incorrect interpretation of the notion of 'public morals'", according to which a Member claiming that a measure pursues a public morals objective has to show that the measure is supported by a majority of its population.[488] Alternatively, the European Union submits 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 of the DSU.

2.157. The European Union observes that the Panel cited with approval the interpretation of the notion of "public morals" made by the panels in *US – Gambling* and *China – Publications and Audiovisual Products*, but argues that, in its reasoning, the Panel disregarded the interpretation developed in these previous disputes.[489] According to the European Union, the Panel held that the IC exception was not related to the public morals objective of the EU Seal Regime because it was not "grounded in the concerns of EU citizens", a finding that it had in turn inferred from evidence "consisting exclusively of opinion polls and a public consultation".[490] The European Union takes issue with the Panel's finding on the basis that the "standards of right and wrong" that make up a Member's public morals "do not necessarily have to be held by a majority of members of a community".[491] Instead, the European Union argues that these standards "can be set by a Member's authorities *on behalf of* a community, in accordance with that Member's *own system* of government".[492] The European Union submits that "[i]t is … the task of legislators and regulators to translate the broader moral concerns of the public into precise requirements, by relying on their

[480] European Union's other appellant's submission, para. 77.
[481] European Union's other appellant's submission, para. 79 (referring to Panel Reports, para. 7.100).
[482] European Union's other appellant's submission, para. 81.
[483] European Union's other appellant's submission, para. 83 (referring to Panel Reports, fn 153 to para. 7.106). In its opening statement at the oral hearing, the European Union explained that the purpose of a ban is not to set out product characteristics or related PPMs, compliance with which would allow certain products to have access to the market. The purpose of a ban, thus, fundamentally differs from the purpose of a technical regulation. The European Union noted that, like a ban, a technical regulation may have as a consequence the exclusion of certain products from the market; however, unlike a ban, a technical regulation also ensures that conforming products, which possess the required product characteristics or related PPMs, are given access to the market.
[484] European Union's other appellant's submission, para. 87 (referring to Appellate Body Report, *EC – Asbestos*, para. 74).
[485] European Union's other appellant's submission, para. 88.
[486] European Union's other appellant's submission, para. 88.
[487] European Union's other appellant's submission, para. 91 (quoting Panel Reports, para. 7.275).
[488] European Union's other appellant's submission, para. 92.
[489] European Union's other appellant's submission, para. 107.
[490] European Union's other appellant's submission, para. 107 (quoting Panel Reports, para. 7.402).
[491] European Union's other appellant's submission, para. 108.
[492] European Union's other appellant's submission, para. 108. (emphasis original)

superior knowledge of the specific factual circumstances."[493] This means, according to the European Union, that, even if it could be concluded that the IC exception is not "grounded in the concerns of EU citizens", this would not imply that the IC exception is "rationally disconnected" from the public morals objective pursued by the EU Seal Regime.[494]

2.158. The EU Seal Regime, according to the European Union, reflects the "moral standard" that "humans ought not to inflict suffering upon animals without a sufficient justification".[495] The European Union claims that the IC exception reflects a "balancing of interests which is an integral part of that moral standard".[496] The European Union finds the Panel's conclusion to be "all the more difficult to understand" in view of the fact that the Panel, in reaching its earlier finding that public concerns regarding the welfare of seals were "moral" in nature, had found ample evidence for the existence of a "well-established moral doctrine" grounding these concerns.[497] According to the European Union, the Panel totally disregarded that evidence when considering whether the IC exception was rationally connected to the public morals objective of the EU Seal Regime. Nevertheless, the European Union claims that the IC exception is in fact the outcome of the application of that moral doctrine in the context of seal hunting.

2.159. The European Union further explains that the fundamental tenet of the moral doctrine of "animal welfarism" is that it is morally acceptable to inflict suffering upon animals where sufficiently justified by human needs.[498] The European Union notes that none of the laws on animal welfare cited by the Panel stipulate an absolute prohibition on inflicting suffering upon animals; rather, all of them provide for exceptions based on overriding human needs. The European Union further submits that the evidence before the Panel confirmed that the IC exception was the result of a proper application of the moral standard invoked by the European Union. The European Union points to the Panel's finding that "seal hunting represents a vital element of the tradition, culture, and livelihood of Inuit and indigenous populations", and submits that the EU legislators could reasonably have concluded that these specific circumstances rendered the IC exception necessary.[499]

2.160. The European Union submits that the Panel misinterpreted and misapplied Article 2.1 of the TBT Agreement when examining whether the IC exception is even-handed in its design and application. According to the European Union, the Panel should have examined whether the IC exception was designed and applied "in a reasonable, impartial and harmonious manner", having regard to its objective, namely, to protect the interests of Inuit and other indigenous communities traditionally engaged in seal hunting for subsistence purposes.[500] Instead, the Panel determined that the IC exception was *de facto* available exclusively to Greenland, without examining the actions and omissions of the relevant Canadian authorities and operators. The European Union further submits that the Panel wrongly focused on the greatest similarities between seal hunts in Greenland and commercial hunts, which is irrelevant for the assessment of even-handedness, given that the Panel had already found that seal hunts in Greenland are IC hunts conducted for subsistence purposes.[501]

2.161. More specifically, the European Union recalls that the IC exception makes a distinction between IC and commercial hunts in view of their purposes – i.e. subsistence versus primarily or solely for profit – and that the requirements to qualify under the IC exception are "reasonable, tailor-made and harmonious with the objective" of the IC exception – i.e. the protection of Inuit interests. The European Union further argues that the operation and application of the IC exception is fair, impartial, and harmonious with its objective, in that only seal products derived from hunts conducted by Inuit communities for subsistence purposes can benefit from the exception. The European Union notes that any entity within the Inuit communities in Canada or elsewhere can meet the requirements to become a recognized body for the purposes of assessing conformity with the IC exception. The European Union submits that the fact that, so far, only an

[493] European Union's other appellant's submission, para. 109.
[494] European Union's other appellant's submission, para. 107 (quoting Panel Reports, para. 7.402).
[495] European Union's other appellant's submission, para. 110.
[496] European Union's other appellant's submission, para. 110.
[497] European Union's other appellant's submission, para. 111.
[498] European Union's opening statement at the oral hearing.
[499] European Union's other appellant's submission, para. 143 (referring to Panel Reports, para. 7.295).
[500] European Union's other appellant's submission, para. 151.
[501] European Union's other appellant's submission, para. 151 (referring to Panel Reports, paras. 7.288 and 7.289).

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 permanent defect in the IC exception that prevents Inuit communities, other than those in Greenland, from taking advantage of it.[502]

2.162. The European Union further submits that the Panel's focus on the *de facto* exclusivity of the IC exception to Greenland, where the Inuit hunt bears the greatest similarities to commercial hunts, is misdirected. According to the European Union, the Panel wrongly assessed the even-handedness of the IC exception by looking at the effects of the measure in a particular period of time. The European Union underscores that, while Canada and its Inuit communities have not taken any steps to benefit from the IC exception despite numerous efforts made by the EU authorities, they could do so at any time in the future, if and when they so wish, based on their assessment of whether exports to the European Union are desirable. In the European Union's view, the fact that the Canadian authorities purchase Inuit products under a targeted programme means that they have, in principle, a convenient and easy means to identify the seal products qualifying for the IC exception.

2.163. With respect to the Panel's findings on the degree of the commercial aspect in seal hunts in Greenland, the European Union expresses its understanding that the Panel did not find that seal hunts in Greenland should be characterized as "commercial hunts" – i.e. as hunts having as their sole or primary purpose to make a profit out of selling seal products on the market. The European Union submits that, as long as these hunts meet the criteria to qualify as a legitimate indigenous subsistence activity, and are thus "'subsistence'/IC hunts", the extent to which some of the by-products of these hunts are sold through commercial channels by Inuit communities in Greenland is irrelevant for assessing even-handedness in the design and application of the IC exception.[503] The European Union notes that the commercial aspect of subsistence hunts "by definition" resembles the commercial characteristics of commercial hunts.[504] The European Union argues that, given that the Panel accepted the legitimacy of an exception to the sales ban for the marketing of by-products of indigenous subsistence hunting, the fact that such marketing then "actually happen[ed]" cannot invalidate that legitimacy on the basis of a lack of even-handedness.[505] For the European Union, the Panel's reference to the degree of commercialization of seal products in Greenland is, therefore, "logically erroneous".[506]

2.4.2.1 Claims under Article 11 of the DSU

2.164. The European Union maintains that the evidence on which the Panel relied – consisting of opinion polls and a public consultation – lends no support to the Panel's finding that the IC exception is not "grounded in the concerns of EU citizens".[507] Before the Panel, the European Union had argued that two opinion polls referenced in the 1986 Report of the Royal Commission on seals and sealing in Canada[508] (Royal Commission Report) confirmed that the EU public's concerns varied according to the purpose of the hunt, and more specifically, that the public was less concerned with the hunts conducted by the Inuit for subsistence purposes than with commercial hunts. In the first poll – conducted by the Royal Commission (RC poll) – respondents were asked which, if any, of various types of seal hunts they found acceptable. According to the European Union, the results showed that only a very small percentage of respondents found commercial seal hunts acceptable, while a very large percentage found seal hunting by indigenous communities for food and clothing acceptable. The European Union contends that, while the percentage of respondents who found Inuit seal hunting for cash or to finance hunting for food acceptable was significantly smaller, it was still much higher than the percentage of respondents who found acceptable either the purely commercial hunts or all hunts.[509] In the second poll – conducted by

[502] European Union's other appellant's submission, para. 193.
[503] European Union's other appellant's submission, paras. 206 and 207 (referring to Panel Reports, paras. 7.285, 7.287, and 7.288).
[504] European Union's other appellant's submission, para. 208.
[505] European Union's other appellant's submission, para. 208.
[506] European Union's other appellant's submission, para. 208.
[507] European Union's other appellant's submission, para. 112 (quoting Panel Reports, para. 7.402).
[508] Report of the Royal Commission, *Seals and Sealing in Canada* (1986), Vol. I, Chapter 11, "Public Opinion on Sealing" (Panel Exhibit EU-48).
[509] European Union's other appellant's submission, para. 114 (citing information taken from Royal Commission Report, Table 11.6, at p. 169).

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] In addition, although the Panel relied on the observation of the Royal Commission that the responses to the RC poll "may perhaps imply little general understanding of the essential economic structure" of Inuit hunts[516], the European Union contends that the Royal Commission went on to conclude that both the RC poll and the CSA poll "showed that the purpose behind the hunt may have a great effect on public reaction to it".[517] In the European Union's view, the public's relatively low level of knowledge as to the economic realities of Inuit hunts would not render "unreliable" the opinions expressed by the public or the underlying moral views.[518]

2.166. Regarding the public consultation conducted by the EU Commission in connection with the adoption of the EU Seal Regime, the European Union took note of the Panel's observation that 62% of respondents stated that seals should not be hunted for any reason, whereas 18% stated that hunting is most acceptable when the hunter belongs to a traditional seal culture/community or depends on the seal hunt for his main income.[519] The European Union also notes the comment by COWI that the consultation showed that there is a "greater level of acceptance of the hunt if it is embedded in a traditional seal hunting culture"[520], and further observes that the representativeness of the respondents was limited, and that there are "clear indications" that the consultation underestimates the actual percentage of members of the public who regard traditional hunts conducted for subsistence purposes as more acceptable than other hunts.[521]

2.167. In the alternative, the European Union alleges that the Panel acted inconsistently with Article 11 of the DSU in finding that: (i) the text, legislative history, and application of the IC exception indicate that the IC exception is available *de facto* exclusively to Greenland; and (ii) the commercial aspect of seal hunts in Greenland is comparable to that of commercial hunts. The European Union further claims that the Panel's finding that "the text of the IC exception, its legislative history, and the actual application of the IC exception, cast serious doubt on the even-handedness of the design and application of the IC exception" is inconsistent with the Panel's duty under Article 11 of the DSU to make an objective assessment of the facts.[522] The

[510] European Union's other appellant's submission, para. 115 (citing information taken from Royal Commission Report, p. 160).

[511] European Union's other appellant's submission, para. 116 (referring to Panel Reports, fn 676 to para. 7.410).

[512] European Union's other appellant's submission, para. 116.

[513] European Union's other appellant's submission, para. 116 (quoting Panel Reports, fn 676 to para. 7.410).

[514] European Union's other appellant's submission, para. 117 (quoting Royal Commission Report, p. 185).

[515] European Union's other appellant's submission, para. 117.

[516] European Union's other appellant's submission, para. 118 (quoting Royal Commission Report, p. 168).

[517] European Union's other appellant's submission, para. 118 (quoting Royal Commission Report, p. 185).

[518] European Union's other appellant's submission, para. 118.

[519] European Union's other appellant's submission, para. 119 (referring to Panel Reports, fn 652 to para. 7.398 and fn 676 to para. 7.410, in turn referring to COWI, *Assessment of the potential impact of a ban of products derived from seal species* (April 2008) (Panel Exhibit JE-20) (COWI 2008 Report), pp. 124-127).

[520] European Union's other appellant's submission, para. 121 (quoting COWI 2008 Report, pp. 126-127).

[521] European Union's other appellant's submission, para. 122 (quoting COWI 2008 Report, p. 125).

[522] European Union's other appellant's submission, para. 223 (quoting Panel Reports, para. 7.317).

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 lends support to the conclusion that "only Greenland could benefit from the IC exception".[529]

2.170. With respect to the COWI 2010 Report on the study on implementing measures for trade in seal products, the European Union asserts that the Panel took certain statements by COWI out of context, and that they were in any event unsupported by any evidence. For example, the COWI statement that the Panel relied upon was made in the context of assessing the impact of adopting stricter, as compared to less stringent, systems of traceability of seal products. The European Union notes that COWI merely found that "[t]he more stringent the implementing rules (i.e. the traceability system), the more likely this would result in the diversion of all exempted trade to Greenland."[530] The European Union further submits that the Panel ignored a number of statements contained in the COWI 2010 Report that indicated that the IC exception was potentially available to many Inuit communities.[531] The European Union further notes that the Panel gave an inappropriate value to COWI's statements. The European Union underscores that COWI did not have the authority, the qualifications, or the mandate to engage in the legal interpretation of the Basic Regulation. Moreover, the European Union highlights that the Implementing Regulation, which specifies the conditions for qualifying for the IC exception, was adopted well after the COWI 2010 Report was issued. The statement contained in the COWI 2010 Report was thus "mere speculation".[532] With respect to the Parliament Report and the COWI 2008 Report on the assessment of the potential impact of a ban of products derived from seal species, the European Union claims that it is unable to identify how these sources lend support to the Panel's findings, as the propositions that the Panel attributes to those sources cannot be found in them. The European Union, therefore, submits that the Panel failed to provide reasoned and adequate explanations, and that these sources do not support the Panel's conclusion.

2.171. With respect to the actual application of the IC exception, the European Union argues that the fact that the Danish customs authorities, based on their interpretation of the Implementing Regulation, processed imports based on certificates issued by the Greenlandic authorities prior to a Greenlandic entity obtaining recognized body status, says very little as to whether the

[523] European Union's other appellant's submission, para. 224 (quoting Panel Reports, para. 7.308).
[524] European Union's other appellant's submission, para. 225.
[525] See *supra*, fns 221 and 520.
[526] European Union's other appellant's submission, para. 226 (quoting Panel Reports, para. 7.315).
[527] European Union's other appellant's submission, para. 227.
[528] European Union's other appellant's submission, para. 228.
[529] European Union's other appellant's submission, para. 228.
[530] European Union's other appellant's submission, para. 236; COWI 2010 Report, p. 84.
[531] European Union's other appellant's submission, para. 237 (referring to COWI 2010 Report, pp. v, 24, 27, 30, and 33).
[532] European Union's other appellant's submission, para. 239.

IC exception only benefits imports from Greenland. The European Union notes that it took more than two years for the EU authorities to process Greenland's request to become a recognized body. Further, the EU authorities issued explicit invitations and made substantial efforts so that entities in Canada could also become recognized bodies, and the Canadian Inuit could benefit from the IC exception. The European Union argues that this shows that the application of the IC exception does not reveal that the IC exception could only benefit Greenland. The European Union submits that the above errors made by the Panel in its assessment of the even-handedness of the IC exception were material and that the Panel's reasoning and ultimate conclusion cannot stand.

2.172. The European Union alleges that the Panel erred in finding that "the degree of the commercial aspect of [Greenland's IC] hunts is comparable to that of the commercial hunts", and that "the Inuit hunt [in Greenland] bears the greatest similarities to the commercial characteristics of commercial hunts."[533] The European Union notes that these Panel findings rested on three factors: (i) the level of development of the commercial aspect of Greenlandic seal hunts; (ii) the volume of sealskins trade in Greenland; and (iii) the integrated nature of the seal product industries in Greenland, Canada, and Norway. The European Union submits that the Panel wrongly assessed these factors and provided incoherent reasoning, thus failing to make an objective assessment of the facts.[534]

2.173. The European Union submits that, with respect to the development of the commercial aspect of Greenlandic seal hunts, the Panel made "a fundamental mistake".[535] The European Union points out that the source on which the Panel relied for its statement that "over 50 per cent of the hunted seals in Greenland are sold to the tannery of Great Greenland A/S"[536] actually states that "the *skins* from just over half of all caught seals are sold by the hunters to the tannery of Great Greenland A/S".[537] The European Union emphasizes that, while half of the skins are sold, the other parts of the seals hunted by Inuit in Greenland are still consumed by them. For the European Union, this indicates that the commercial aspect of Greenland's hunts is not comparable to that of commercial hunts, where 100% of the seals hunted are sold in their entirety.[538]

2.174. With respect to the volume of sealskins traded in Greenland, the European Union points out that the volumes in Greenland are relatively constant, whereas the volumes in Canada reflect market conditions. For the European Union, the relative inelasticity of the production of seal products in Greenland is an "important difference" that the Panel ignored when relying on the volume of the hunts in Greenland as a basis to conclude that such a volume "was comparable to that of commercial … hunts in Canada".[539] The European Union further alleges that the Panel disregarded the fact that Greenland provides subsidies to support Inuit hunters in order to support the subsistence of Inuit communities and allow them to preserve their cultural identity. Finally, the European Union points to the fact that the volume of seals hunted in commercial hunts is produced by a few hunters killing many seals in a short period of time, whereas the volume of seals hunted by Inuit communities derives from a large population that hunts throughout the year. The European Union submits that, in ignoring these factors, the Panel wrongly assessed the relevance of the volume of sealskins traded in Greenland.

2.175. With respect to the allegedly integrated nature of the seal product industries in Greenland, Canada, and Norway, the European Union alleges that the Panel's findings are not supported by the evidence on the record. The European Union notes that, in response to the question asked by the Panel on this issue, the complainants recognized that there was "little direct cooperation" between their industries and Greenland.[540] Moreover, the European Union points out that the one example of integration that the Panel mentions – the purchase of sealskins from Canada by Great Greenland A/S – was a "one-off situation in the rather distant past", and was not based on general

[533] European Union's other appellant's submission, para. 248 (quoting Panel Reports, paras. 7.313 and 7.317, respectively).

[534] European Union's other appellant's submission, para. 248.

[535] European Union's other appellant's submission, para. 250.

[536] European Union's other appellant's submission, para. 249 (quoting Panel Reports, para. 7.309).

[537] European Union's other appellant's submission, para. 250 (quoting Greenland 2012 Seal Management Report, p. 25). (emphasis added by the European Union)

[538] European Union's other appellant's submission, para. 251 (referring to Panel Reports, para. 7.240; and Nunavut Economy Fact Sheet (Panel Exhibit CDA-102), p. 1).

[539] European Union's other appellant's submission, para. 257 (quoting Panel Reports, para. 7.310).

[540] European Union's other appellant's submission, para. 264; Canada's and Norway's responses to Panel question No. 152.

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 the 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 "subsistence" 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, contrary to Article 11 of the DSU, and to reverse the Panel's finding that the IC exception was not designed and applied in an even-handed manner.[543]

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

2.178. The European Union requests the Appellate Body to reverse the Panel's finding that the legal standard for the non-discrimination obligation under Article 2.1 of the TBT Agreement does not "equally apply" to claims under Articles I:1 and III:4 of the GATT 1994.[544] In addition, the European Union requests the Appellate Body to reverse the Panel's conclusion that the measure at issue is inconsistent with Article I:1 of the GATT 1994 because it does not "immediately and unconditionally" extend the same market access advantage to Canadian and Norwegian seal products compared to seal products originating from Greenland.[545]

2.179. The European Union submits that the Panel's interpretation of Articles I:1 and III:4 is in error for the following reasons: (i) it is contrary to established Appellate Body jurisprudence under Article III:4 of the GATT 1994; (ii) it fails to take account of the context provided by Article III:1 of the GATT 1994; and (iii) it is incoherent with the interpretation of Article 2.1 of the TBT Agreement and renders that provision irrelevant.

2.180. The European Union contends that, in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body clarified that a detrimental effect on imports alone does not indicate a *de facto* "less favourable treatment" of imports under Article III:4.[546] This finding, according to the European Union, is in line with the Appellate Body's earlier finding in *EC – Asbestos* that "a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products."[547] The European Union observes that, in *US – Clove Cigarettes*, the Appellate Body clarified that, in *Dominican Republic – Import and Sale of Cigarettes*, a violation of Article III:4 was not established because the detrimental impact on competitive opportunities for "like" imported products was not attributable to the specific measure at issue.[548] For the European Union, this confirms that the analysis under Article III:4 goes beyond a consideration of whether there has been a detrimental impact on the competitive opportunities for "like" imported products.

2.181. The European Union submits further that the Panel erred in its interpretation of Articles I:1 and III:4 because it failed to take into account the context of Article III:1 of the GATT 1994. In this regard, the European Union points out that, in *Japan – Alcoholic Beverages II*, the Appellate Body considered that the general principle reflected in Article III:1 – that internal measures should

[541] European Union's other appellant's submission, para. 269.
[542] European Union's other appellant's submission, para. 272 (quoting Panel Reports, para. 7.313).
[543] European Union's other appellant's submission, para. 275.
[544] European Union's other appellant's submission, para. 310; Panel Reports, para. 7.586.
[545] European Union's other appellant's submission, paras. 314 and 315 (referring to Panel Reports, para. 7.600).
[546] European Union's other appellant's submission, paras. 292 and 293 (quoting Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).
[547] European Union's other appellant's submission, para. 294 (quoting Appellate Body Report, *EC – Asbestos*, para. 100).
[548] European Union's opening statement at the oral hearing.

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 European Union argues that the Panel failed to put forward any convincing reason as to why the interpretation of Articles III:4 and I:1 should be "clinically isolated from the context given by Article 2.1 of the TBT Agreement", and lead to diverging results with regard to *de facto* discrimination.[554]

2.183. According to the European Union, under the Panel's interpretation, a technical regulation could be considered non-discriminatory under the agreement specifically addressing these types of measures, but still violate the GATT 1994 addressing goods-related measures. 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 of the TBT Agreement, 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 its objective did not fall within the subparagraphs of Article XX of the GATT 1994.[555] The European Union concedes that such an "asymmetrical outcome" would not arise in the context of these disputes "since the Panel rightly considered that the objective of the EU Seals Regime fell within the list of objectives of Article XX".[556] However, under the Panel's interpretation of Articles I:1 and III:4, the regulatory space under the TBT Agreement could, in other cases, be "significantly" wider than the regulatory space under the GATT 1994.[557] This would "render Article 2.1 of the TBT Agreement irrelevant" as complainants would have a strong incentive not to invoke Article 2.1 of the TBT Agreement, and, instead, to bring claims under the GATT 1994, even if the measure at issue qualified as a technical regulation.[558]

2.184. Finally, the European Union notes that its proposed interpretation of Articles I:1 and III:4 of the GATT 1994 requiring, in respect of *de facto* discrimination claims, a determination of whether any detrimental impact on imports resulting from the measure stems exclusively from a legitimate regulatory distinction leaves "significant space" for Article XX, which would remain

[549] European Union's other appellant's submission, paras. 295-297 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111).
[550] European Union's other appellant's submission, paras. 295-297 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).
[551] European Union's other appellant's submission, para. 299 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120).
[552] European Union's other appellant's submission, para. 300 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).
[553] European Union's other appellant's submission, para. 300.
[554] European Union's other appellant's submission, para. 304.
[555] European Union's other appellant's submission, para. 307.
[556] European Union's other appellant's submission, para. 307.
[557] European Union's other appellant's submission, para. 307.
[558] European Union's other appellant's submission, para. 308.

applicable to provisions not relating to discrimination, for example, Article XI and to *de jure* discrimination claims.[559]

2.185. With regard to the Panel's finding that the requirements of the IC exception are inconsistent with Article I:1 of the GATT 1994, the European Union contends that this finding is based on the Panel's incorrect interpretation of the legal standards under Articles I:1 and III:4 of the GATT 1994. Consequently, the European Union requests the Appellate Body to reverse the Panel's finding that the measure at issue is inconsistent with Article I:1 of the GATT 1994 because it does not immediately and unconditionally extend the same market access advantage accorded to seal products of Greenlandic origin to like seal products of Canadian and Norwegian origin.[560]

2.4.4 Article XX of the GATT 1994

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

2.186. In the event that the Appellate Body upholds the Panel's finding that the IC exception is inconsistent with Article I:1 of the GATT 1994, the European Union appeals the Panel's finding that the IC exception was not justified under Article XX(a) of the GATT 1994 because it fails to meet the requirements of the chapeau.[561] Given that, in its analysis under the chapeau of Article XX, "the Panel applied *mutatis mutandi* the analysis that it had conducted in the context of Article 2.1 of the TBT Agreement"[562], the European Union refers to its other appeal of the Panel's findings of even-handedness under Article 2.1 of the TBT Agreement.[563] The European Union requests, if the Appellate Body accepts its arguments with respect to Article 2.1 and reverses the Panel's finding that the IC exception was not designed and applied in an even-handed manner, that it also reverse the Panel's finding under the chapeau of Article XX(a).[564] Finally, since the IC exception is "applied in a reasonable, impartial and harmonious manner, where all Inuit communities can equally benefit from the IC exception", the European Union requests the Appellate Body to complete the legal analysis under the chapeau of Article XX(a) and find that the IC exception meets the requirements under Article XX(a) of the GATT 1994, including its chapeau.[565]

2.4.4.2 The Panel's analysis under Article XX(b)

2.187. In the event that the Appellate Body upholds the Panel's finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994, and reverses the Panel's finding that the EU Seal Regime is provisionally justified under Article XX(a) of the GATT 1994, the European Union appeals the Panel's finding that "the European Union has failed to establish a *prima facie* case for its claim under Article XX(b)".[566] The European Union takes issue with the three reasons provided by the Panel in support of its appealed finding, and claims that the Panel failed to conduct an objective assessment of the matter as required by Article 11 of the DSU. First, the European Union considers that the Panel's statement that "the European Union never submitted in this dispute that the protection of seal welfare was as such the objective of the EU Seal Regime" is "factually inaccurate".[567] The European Union asserts that it "identified the objective of contributing to the welfare of seals as being 'simultaneously a legitimate objective *on its own* and one of the instruments to achieve the first, broader and overarching, objective.'"[568] Second, the European Union argues that the Panel could "hardly justify its finding that the European Union failed to establish a *prima facie* case" merely on the basis that it found the objective of the EU Seal Regime was to address EU public moral concerns regarding seal welfare, and that this objective fell within

[559] European Union's other appellant's submission, para. 309.
[560] European Union's other appellant's submission, para. 314 (referring to Panel Reports, para. 7.600).
[561] European Union's other appellant's submission, para. 316 (referring to Panel Reports, para. 7.650).
[562] European Union's other appellant's submission, para. 317 (referring to Panel Reports, para. 7.649).
[563] European Union's other appellant's submission, para. 318.
[564] European Union's other appellant's submission, para. 318.
[565] European Union's other appellant's submission, fn 336 to para. 319 (referring to ibid., paras. 191 and 192).
[566] European Union's other appellant's submission, para. 320 (quoting Panel Reports, para. 7.640).
[567] European Union's other appellant's submission, paras. 326 and 328, respectively (referring to European Union's second written submission to the Panel, para. 273).
[568] European Union's other appellant's submission, para. 328 (quoting European Union's second written submission to the Panel, para. 273). (emphasis added by the European Union in its other appellant's submission)

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 one 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 the European Union's argument is also "incorrect as a matter of fact"[572], because, with respect to Article XX(b), the European Union "cross-referred to arguments and evidence previously submitted under Article 2.2 [of the TBT Agreement] and … Article XX(a) [of the GATT 1994]".[573] The European Union contends that the arguments and evidence analysed by the Panel for its "contribution" analysis under Article 2.2 "would have allowed the Panel to determine whether the EU Seal Regime was 'necessary' to attain the objective mentioned under … Article XX(b) [of the GATT 1994]".[574] Similarly, the European Union adds, the arguments and evidence examined by the Panel under its chapeau analysis are equally relevant, "irrespective of whether the EU Seal Regime is deemed necessary to achieve the objective mentioned under letter a) and/or under letter b) of … Article XX [of the GATT 1994]".[575] For these reasons, in the event that the two conditions for its other appeal under Article XX(b) are met, the European Union requests the Appellate Body to reverse the Panel's finding that the European Union failed to establish a *prima facie* case under Article XX(b) and to complete the legal analysis and find that the EU Seal Regime is justified under Article XX(b) of the GATT 1994.[576]

2.5 Arguments of Canada – Appellee

2.5.1 Annex 1.1 to the TBT Agreement

2.189. Canada requests the Appellate Body to uphold the Panel's finding that the EU Seal Regime is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. Canada agrees with the Panel's interpretation of the terms "product characteristics" and "applicable administrative provisions" and considers that the Panel correctly applied Annex 1.1 to the TBT Agreement to the facts of the case in finding that the measure at issue constitutes a "technical regulation".

2.190. Canada submits that the European Union "incorrectly characterizes the Panel's conclusion as being that 'any document containing administrative provisions relating to identifiable products' will constitute applicable administrative provisions under Annex 1.1".[577] Instead, Canada argues, 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'".[578] Moreover, the Panel correctly found that, in order to place seal-containing products on the EU market, "the requirements of the IC and MRM exceptions had to be met and certain administrative provisions (such as the criteria to be met to qualify for an exception and the production of an attesting document) had to be followed."[579] In Canada's view, 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".[580] 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

[569] European Union's other appellant's submission, para. 329.
[570] European Union's other appellant's submission, para. 329 (referring to Panel Reports, para. 7.400).
[571] European Union's other appellant's submission, para. 329.
[572] European Union's other appellant's submission, para. 330.
[573] European Union's other appellant's submission, para. 330.
[574] European Union's other appellant's submission, para. 330.
[575] European Union's other appellant's submission, para. 330.
[576] European Union's other appellant's submission, para. 331.
[577] Canada's appellee's submission, para. 34 (quoting European Union's other appellant's submission, para. 53).
[578] Canada's appellee's submission, para. 37 (quoting Panel Reports, para. 7.106, in turn referring to Norway's second written submission to the Panel, paras. 154 and 155).
[579] Canada's appellee's submission, para. 39.
[580] Canada's appellee's submission, para. 40 (referring to European Union's other appellant's submission, para. 55).

administrative provisions", as the administrative provisions under the EU Seal Regime apply to "products that contain seal" that meet the requirements of one of the exceptions.[581]

2.191. Canada further argues that, by focusing on a single sentence in paragraph 7.110 of the Panel Reports, the European Union fails to take into account the broader context of the Panel's interpretation of "product characteristics", which includes, in Canada's view, "the Panel's findings that the exceptions define the scope of the prohibitive aspects of the EU Seal Regime, and … also set out the 'administrative provisions with which compliance is mandatory'".[582] Canada maintains that the Panel described the criteria under the exceptions as identifying the seal products that may be placed on the EU market "by defining the categories of seal that can be used as an input".[583] In Canada's view, the Panel "carefully considered the interplay among these various elements of the EU Seal Regime" prior to finding that the measure as a whole lays down product characteristics.[584] The European Union's focus on the Panel's reference to the criteria under the exceptions as constituting "objectively definable features" of seal products is therefore, according to Canada, a mischaracterization of the Panel's overall analysis of the role played by the exceptions in the EU Seal Regime.[585]

2.192. Lastly, Canada argues that the Panel correctly recalled the Appellate Body's conclusion in *EC – Asbestos* that a measure must be examined as "an integrated whole" to determine whether it constitutes a technical regulation.[586] Canada agrees with the Panel that the Appellate Body report in *EC – Asbestos* "does not suggest that for a measure consisting of a ban and certain exceptions to qualify as a technical regulation, both the prohibition and the exceptions must individually lay down product characteristics or their related PPMs".[587] In addition, Canada maintains that the Panel was correct in relying on the measure at issue in *EC – Asbestos* to describe the EU Seal Regime, which "operates as a ban on seal products, combined with an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation".[588]

2.193. In Canada's view, the EU Seal Regime and the measure at issue in *EC – Asbestos* are "essentially the same in all material respects relevant to determining whether a measure is a technical regulation".[589] According to Canada, both measures: (i) prohibit "pure" products – i.e. asbestos fibres or seal products containing only seal inputs; (ii) prohibit products from exhibiting an intrinsic characteristic – i.e. containing asbestos fibres or seal inputs, thus laying down product characteristics in a negative form; (iii) contain exceptions to the prohibition that set out criteria to be met to qualify for market access – i.e. the absence of a safer substitute for asbestos fibres, or the identity of the hunter and purpose of the hunt for seal products; and (iv) set out administrative provisions with which compliance is mandatory to allow a product containing the proscribed characteristic to be placed on the relevant market. Canada notes that "the exceptions under both the Asbestos measure and the EU Seal Regime do not themselves set out product characteristics" but ,rather, "merely set out criteria that must be met in order for the product to contain the otherwise proscribed characteristic".[590] In Canada's view, the Panel properly engaged in a thorough examination of the discrete elements of the EU Seal Regime, including the prohibitive and permissive aspects of the measure, the criteria to be applied to determine whether a given product is permitted to contain seal inputs, and the administrative provisions, in order to reach its conclusion on whether the EU Seal Regime constitutes a technical regulation.

[581] Canada's appellee's submission, para. 41 (referring to European Union's other appellant's submission, para. 56).
[582] Canada's appellee's submission, para. 44.
[583] Canada's appellee's submission, para. 45 (quoting Panel Reports, para. 7.110).
[584] Canada's appellee's submission, para. 46 (referring to Panel Reports, para. 7.111).
[585] Canada's appellee's submission, para. 47.
[586] Canada's appellee's submission, para. 50 (quoting Panel Reports, para. 7.99).
[587] Canada's appellee's submission, para. 51 (quoting Panel Reports, para. 7.100).
[588] Canada's appellee's submission, para. 54 (quoting Panel Reports, para. 7.56).
[589] Canada's appellee's submission, para. 62 (referring to European Union's other appellant's submission, para. 85; Panel Reports, fn 153 to para. 7.106, and paras. 7.108 and 7.109; and Appellate Body Report, *EC – Asbestos*, paras. 72-74).
[590] Canada's appellee's submission, para. 60.

2.194. In the event that the Appellate Body were to reverse the Panel's finding that the EU Seal Regime lays down product characteristics and/or applicable administrative provisions, Canada requests the Appellate Body to complete the legal analysis and find that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[591]

2.5.2 Article 2.1 of the TBT Agreement

2.195. With respect to the European Union's appeal of the Panel's finding that the IC exception does not bear a rational relationship to the objective of addressing the EU public moral concerns regarding seal welfare, Canada submits that the problem with the European Union's conception of a "moral norm" is that "it is open-ended, and therefore not a standard at all."[592] Canada argues that, "[i]f it is simply left to the legislator to decide when the suffering of animal[s] is justified, the content of the so-called moral standard becomes inherently subjective and therefore arbitrary."[593] As Canada sees it, the Panel found that the IC exception is not grounded in public moral concerns, but in a decision of the legislator that the pursuit of the public morals objective should not damage the interests of Inuit and other indigenous communities.

2.196. Canada further submits that the European Union does not accurately characterize the previous jurisprudence on the notion of "public morals".[594] Canada highlights that a panel is only required to give some scope to a Member's definition of its public morals. Finally, Canada notes that the Panel did not look directly to moral doctrine to determine the objective of the EU Seal Regime, but instead based its determination on the evidence presented by the European Union. According to Canada, this evidence persuaded the Panel to find that animal welfare is an issue of an ethical and moral nature in the European Union, but did not demonstrate that protecting the interests of Inuit and other indigenous communities also fell within the scope of the objective of addressing the EU public moral concerns regarding seal welfare.

2.197. Canada responds to the European Union's appeal of the Panel's conclusion that the IC exception is not designed and applied even-handedly by arguing that "the European Union's conception of the "even-handedness" test is not reflected in the jurisprudence."[595] Canada further considers that the terminology introduced by the European Union does not add anything to, or clarify, the legal standard as established by the Appellate Body.[596] Canada also takes issue with the European Union's suggestion that the test of even-handedness focuses on the relationship between the regulatory distinction and the objective that the distinction pursues. Canada argues that the question is instead whether the regulatory distinction can be shown to be rationally connected to the objective of the measure. At the same time, Canada acknowledges that the Panel's finding of a lack of even-handedness in this case was based on its consideration of "the rationale or cause of the exception", namely, the subsistence of Inuit and other indigenous communities.[597] According to Canada, the Panel contrasted this rationale with its finding that the IC exception, as designed and applied, is *de facto* available exclusively to Greenland, and thus effectively allows only large-scale, sophisticated Inuit sealing operations to take advantage of the market access it offers. According to Canada, this approach is entirely consistent with the Appellate Body's analysis in previous disputes, which focused on the question of whether the design and application of the measure effectively addressed the specific problem or concern that the responding party claimed to be addressing.[598]

2.198. With respect to the European Union's argument that the Panel erred by discounting the lack of action by Canadian authorities and Canadian Inuit authorities to seek access to the EU market under the IC exception, Canada submits that the Panel did in fact consider the behaviour of the Canadian authorities. Canada further alleges that the European Union has misunderstood the thrust of the Panel's reasoning. According to Canada, the Panel's concerns

[591] Canada's appellee's submission, para. 66.
[592] Canada's appellee's submission, para. 84.
[593] Canada's appellee's submission, para. 84.
[594] Canada's appellee's submission, para. 85 (referring to European Union's other appellant's submission, para. 106, in turn referring to Panel Reports, *US – Gambling*, para. 6.461; and *China – Publications and Audiovisual Products*, para. 7.759).
[595] Canada's appellee's submission, para. 120. (fn omitted)
[596] Canada's appellee's submission, para. 120.
[597] Canada's appellee's submission, para. 126 (quoting Panel Reports, para. 7.317).
[598] Canada's appellee's submission, para. 127 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 225; and *US – Tuna II (Mexico)*, para. 285).

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 'major factors contributing to the ineffectiveness of the Inuit exemption to the EU seal ban'".[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 degree of commercialization of the seal hunt in Greenland – are highly relevant to determine the even-handedness of the regulatory distinction.

2.200. Canada responds that the European Union mischaracterizes the Panel's approach to the arguments and evidence concerning the scope of the EU public's moral concerns. Canada argues that, contrary to what the European Union suggests, the Panel did not rely "exclusively" on the two opinion polls and the public consultation cited by the European Union.[601] Rather, the Panel based its conclusion on "all the evidence before it".[602] According to Canada, the Panel found that the polls were of "limited probative value", and that the "reliability of the results" had not been clearly demonstrated.[603]

2.201. Canada notes that the European Union does not challenge the finding that the polls cited in the Royal Commission Report have limited probative value. Instead, Canada argues, the European Union selectively identifies aspects from the two polls that, in its view, do not support the Panel's finding that the EU public's concerns about seal welfare relate to seal hunting in general and not to any particular type of hunt. Canada submits that the results of the RC poll are "unclear" and "not evidently reliable".[604] Canada also points to the fact that the RC poll was conducted in 1985 and only included respondents from three EU member States. Canada asserts that the RC poll provides "no information on the EU public's views on the moral concerns with respect to different types of seal hunts".[605]

2.202. With respect to the CSA poll, Canada notes that the specific results in the poll cited by the European Union are responses to the question that the Royal Commission found to raise "uncertainties".[606] In response to the European Union's argument that the Panel failed explicitly to state that these uncertainties rendered the CSA poll unreliable, Canada submits that the Panel's finding was due to the failure of the European Union to demonstrate the reliability of the results. Canada claims that, as the European Union had presented the Royal Commission Report in support of its factual claim, it was incumbent on the European Union to explain why the Panel should disregard the uncertainties.

[599] Canada's appellee's submission, para. 133 (quoting Nunavut 2012 Report, p. 9).
[600] Canada's appellee's submission, para. 136.
[601] Canada's appellee's submission, para. 96.
[602] Canada's appellee's submission, paras. 96 and 97, respectively. (fn omitted)
[603] Canada's appellee's submission, para. 97 (referring to Panel Reports, fn 676 to para. 7.410).
[604] Canada's appellee's submission, para. 104. (fn omitted)
[605] Canada's appellee's submission, para. 104 (referring to Canada's opening statement at the second Panel meeting, para. 75).
[606] Canada's appellee's submission, para. 106.

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 "crucial element" in its analytical framework.[610]

2.205. With respect to the Panel's examination of the legislative history of the IC exception, Canada submits that the European Union misconstrues the findings of the COWI 2010 Report. According to Canada, COWI's comments to the effect that Greenland would be the only Inuit community that would be able to make use of the IC exception were based not only on the potential stringency of the compliance regime, but also on the relative sizes of the Canadian and Greenlandic Inuit hunts. Moreover, even though COWI could not have known at that time which compliance regime the European Union would eventually adopt, Canada submits that the Panel could rely on COWI's statements given that it had "full knowledge" of the actual compliance regime that the European Union had put in place.[611] Canada also disputes the European Union's claim that other statements in the COWI 2010 Report express the view that the Canadian Inuit will benefit from the IC exception. According to Canada, those statements only suggest that Canadian Inuit products might be able to comply with the requirements of the IC exception. Canada submits that those statements were, therefore, not probative considerations in the Panel's assessment of even-handedness.

2.206. With respect to the actual application of the IC exception, Canada also contests the European Union's claim that the Panel wrongly suggested that the European Union had favoured Greenlandic seal products in applying the exception. According to Canada, the Panel made no such suggestion. Canada submits that the Panel merely considered the uncontroverted fact that Greenlandic seal products had been processed in advance of obtaining approval to enter the EU market in order to confirm that Greenland is a *de facto* beneficiary of the IC exception. Canada argues that, since the evidence does not contradict the Panel's finding, there is no violation of Article 11 of the DSU. In sum, Canada submits that the Panel did not incorrectly assess the evidence and that, even if there were errors, they were not material.

2.207. Canada considers that the European Union's challenge to the Panel's findings concerning the commercial aspects of Greenland's hunts is entirely without merit. With respect to the level of development of the commercial aspect of Greenland's hunts, Canada takes issue with the way in which the European Union contrasts the fact that only seal skins are processed on an industrial scale in Greenland with the conditions in commercial hunts. Canada alleges that it is also true for commercial hunts that only certain parts of the seal are commercialized.[612] Canada notes, for example, that seal meat has been commercialized only to a very limited extent.[613] Canada adds

[607] Canada's appellee's submission, para. 110.
[608] Canada's appellee's submission, para. 112.
[609] Canada's appellee's submission, para. 152 (quoting Panel Reports, para. 7.308 and fn 486 thereto).
[610] Canada's appellee's submission, para. 152.
[611] Canada's appellee's submission, para. 157.
[612] Canada's appellee's submission, para. 167 (referring to Canadian Seal Harvest Overview, pp. 3-4).
[613] Canada's appellee's submission, para. 167 (referring to Canada's first written submission to the Panel, paras. 68-70; and Canadian Seal Harvest Overview, p. 5).

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 government's intention to provide subsidies in response to "world market prices" as evidence of the commercial characteristics of the Greenlandic hunt.[619]

2.211. With respect to the Panel's findings regarding the allegedly integrated nature of the seal product industries in Greenland, Canada, and Norway, Canada submits that the European Union misrepresents the complainants' submissions on this issue. According to Canada, the fact that there is "little direct cooperation" between the Canadian industry and Greenland does not mean that the seal product industries are not integrated.[620] Canada also argues that the Panel's finding with respect to the integrated nature of the seal industry is but one element in its overall conclusion that the Greenlandic seal industry exhibits characteristics closely related to commercial hunts.

2.212. Canada responds to the European Union's argument that the Panel provided incoherent reasoning in attributing commercial characteristics to what it had previously found to be a subsistence hunt by alleging that the European Union fails to take into account the Panel's explanation of what is a subsistence hunt. Canada recalls the Panel's finding that the subsistence purpose of IC hunts encompasses not only direct use and consumption of seal products, but also a commercial component. Thus, Canada submits that a finding that an Inuit hunt has characteristics closely related to those of commercial hunts is not inconsistent with the Panel's characterization of what constitutes a subsistence hunt. In conclusion, Canada asserts that the Panel did not err in its findings regarding the commercial aspect of Greenland's hunts. Canada claims that none of the European Union's allegations have merit and, even if factually correct, they do not rise to the level of a violation by the Panel of Article 11 of the DSU.[621]

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[614] Canada's appellee's submission, para. 168 (referring to COWI 2010 Report, p. 44).
[615] Canada's appellee's submission, para. 169 (referring to COWI 2010 Report, p. 29).
[616] Canada's appellee's submission, para. 170 (referring to Panel Reports, para. 7.309; and Greenland 2012 Seal Management Report, Figure 14, at p. 25).
[617] Canada's appellee's submission, para. 170 (referring to Panel Reports, para. 7.309; and COWI 2010 Report, p. 43).
[618] Canada's appellee's submission, para. 173 (referring to Panel Reports, para. 7.310).
[619] Canada's appellee's submission, para. 174 (quoting Greenland 2012 Seal Management Report, p. 26).
[620] Canada's appellee's submission, para. 176.
[621] Canada's appellee's submission, para. 184.

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

2.213. Canada submits that the Panel was correct in finding that the legal standard with respect to the non-discrimination obligations under Article 2.1 of the TBT Agreement does not equally apply to claims under Articles I:1 and III:4 of the GATT 1994.[622] Therefore, Canada requests the Appellate Body to dismiss the European Union's appeal of the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994. In the event that the Appellate Body reverses the Panel's interpretation of Articles I:1 and III:4, Canada requests the Appellate Body to complete the legal analysis and find that the measure at issue is inconsistent with Articles I:1 and III:4 of the GATT 1994.[623]

2.214. Turning to the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 is not supported by the Appellate Body's jurisprudence, Canada notes that the European Union relies largely on jurisprudence developed under Article III:4 to support its interpretation of both Articles I:1 and III:4. In doing so, the European Union fails to take account of the fact that Article I:1 does not refer to "treatment no less favourable", but rather requires that "*any* advantage, favour, privilege or immunity granted to *any* product originating in or destined to another WTO Member be granted *immediately* and *unconditionally* to the like product of every other WTO Member."[624] Canada submits that the Appellate Body has expressly excluded consideration of the policy rationale underlying the challenged measure for the purpose of an analysis under Article I:1. Instead, the Appellate Body "has been clear" that discrimination between like products originating from different WTO Members is inconsistent with Article I:1 unless the obligation has been waived or the measure falls within one of the exceptions set out in the GATT 1994.[625]

2.215. In addition, Canada submits that the Appellate Body's findings in *Dominican Republic – Import and Sale of Cigarettes* and *EC – Asbestos* do not support the European Union's interpretation of Articles I:1 and III:4 of the GATT 1994. Canada points out that, in *US – Clove Cigarettes*, the Appellate Body rejected an argument that its finding in *Dominican Republic – Import and Sale of Cigarettes* stood for the proposition that, similar to Article 2.1 of the TBT Agreement, under Article III:4 of the GATT 1994, a panel is required to inquire into the rationale of a measure causing detrimental impact to imported products.[626] Instead, the Appellate Body found in *US – Clove Cigarettes* that the "'treatment no less favourable standard' under Article III:4 … 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".[627]

2.216. Canada considers that the European Union's reading of the Appellate Body report in *EC – Asbestos* is also incorrect. That report, according to Canada, indicates that, while a distinction between products in itself will not automatically result in a finding of less favourable treatment under Articles I:1 and III:4, a distinction that modifies the conditions of competition in the relevant market to the detriment of imported products will result in such a finding.[628] For Canada, the Appellate Body was referring to distinctions between products that do not themselves result in less favourable treatment of imported products. However, Canada points out that, in the current disputes, the Panel's factual findings indicate that there is a direct relationship between the measure and the detrimental impact on competitive opportunities for Canadian and Norwegian seal products.[629] The Panel was therefore correct in not considering, under Articles I:1 and III:4,

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[622] Canada's appellee's submission, para. 194 (referring to Panel Reports, para. 7.586).

[623] Canada's appellee's submission, para. 256.

[624] Canada's appellee's submission, para. 211. (emphasis original)

[625] Canada's appellee's submission, para. 215 (referring, as example, to Appellate Body Report, *EC – Bananas III*, paras. 191 and 206).

[626] Canada's appellee's submission, para. 201 (referring to Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 96; and *US – Clove Cigarettes*, fn 372 to para. 179).

[627] Canada's appellee's submission, para. 203 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 179, in turn referring to Appellate Body Report, *Dominican Republic – Sale and Import of Cigarettes*, para. 96).

[628] Canada's appellee's submission, para. 208 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

[629] Canada's appellee's submission, para. 209 (referring to Panel Reports, paras. 7.159, 7.164, and 7.168).

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 and III:4 disregards the context provided by Article III:1, Canada submits that the European Union misinterprets the Appellate Body's comments in *Japan – Alcoholic Beverages II* on the relevance of Article III:1 for the interpretation of the legal standard under Article III:2, second sentence.[630] In Canada's view, the Appellate Body simply recognized that, under Article III:2, second sentence, panels should consider the relevant circumstances, including the design, structure, operation, and application of the measure at issue in determining whether the measure at issue results in *de facto* discrimination. The Appellate Body did not, according to Canada, "suggest this to mean that discrimination under Article III could be justified by regulatory distinctions".[631]

2.218. Canada considers as unfounded the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994 is incoherent with the interpretation of Article 2.1 of the TBT Agreement. In Canada's view, the European Union is suggesting that the legal standards under Articles I:1 and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand, should be the same. Canada submits, however, that this is not supported by the text, context or jurisprudence of Articles I:1 or III:4.

2.219. Canada observes that, in setting out the "alleged incoherency" between the *de facto* discrimination standards under the GATT 1994 and the TBT Agreement, the European Union "incorrectly compares" Article 2.1 of the TBT Agreement with Articles I:1 and III:4 of the GATT 1994.[632] In Canada's view, the proper comparison is between, on the one hand, Article 2.1 of the TBT Agreement, as interpreted in the light of the preamble of the TBT Agreement, and, on the other hand, Articles I:1, III:4, and XX of the GATT 1994. Canada submits that the Appellate Body confirmed in *US – Clove Cigarettes* that the balance between the pursuit of trade liberalization under Articles I:1 and III:4 and the right to regulate under Article XX "corresponds to" the balance found in Article 2.1 itself, read in the light of the context and object and purpose of the TBT Agreement.[633]

2.220. Canada disagrees with the European Union's argument that, because the list of possible legitimate objectives under the TBT Agreement is open while the list of objectives under Article XX of the GATT 1994 is closed, accepting the Panel's approach would result in divergent outcomes under the TBT Agreement and the GATT 1994, in respect of the same measure.[634] Noting the Appellate Body's statement in *US – Clove Cigarettes* that the TBT Agreement and the GATT 1994 should be "interpreted in a coherent and consistent manner", Canada submits that "the more reasonable view with respect to the scope or range of objectives that may be considered legitimate for the purposes of the TBT Agreement is that it mirrors the scope of Article XX of the GATT 1994".[635]

2.221. Finally, Canada submits that the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994 would render Article 2.1 of the TBT Agreement irrelevant is entirely speculative. Further, Canada asserts that this interpretation cannot justify ignoring the textual and contextual differences between the TBT Agreement and the GATT 1994 simply to prevent the possibility that Members may choose not to invoke Article 2.1 of the TBT Agreement, and instead proceed solely under the GATT 1994 in challenging technical regulations.

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[630] Canada's appellee's submission, paras. 218 and 219 (referring to European Union's other appellant's submission, paras. 299 and 300; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, pp. 120-121).

[631] Canada's appellee's submission, para. 220.

[632] Canada's appellee's submission, para. 231.

[633] Canada's appellee's submission, para. 236 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 95, 96, and 109).

[634] Canada's appellee's submission, para. 238 (referring to European Union's other appellant's submission, para. 307).

[635] Canada's appellee's submission, para. 240 (referring to and quoting Appellate Body Report, *US – Clove Cigarettes*, para. 91).

2.222. Canada, therefore, requests the Appellate Body to dismiss the European Union's appeal that the Panel erred in its interpretation and application of the legal tests under Article I:1 and Article III:4 of the GATT 1994. If, however, the Appellate Body reverses the Panel's finding that Articles I:1 and III:4 of the GATT 1994 do not include a "legitimate regulatory distinction" test, and consequentially reverses the Panel's findings of violations under these two provisions, Canada requests the Appellate Body to complete the legal analysis to find that the detrimental impact to the competitive opportunities of Canadian seal products caused by the IC and MRM exceptions does not stem exclusively from a legitimate regulatory distinction, and that, therefore, the IC and MRM exceptions violate Articles I:1 and III:4 of the GATT 1994.[636]

2.5.4 Article XX of the GATT 1994

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

2.223. Canada requests the Appellate Body to reject the European Union's other appeal that the IC exception is justified under Article XX(a) of the GATT 1994 because it meets the requirements of the chapeau. Canada refers to the arguments set out in its appellant's submission to assert that "[t]the Panel's transposition of the ['legitimate regulatory distinction'] test into the chapeau analysis is incorrect as a matter of law."[637] According to Canada, the European Union's other appeal requests the Appellate Body to repeat this error, while disregarding the proper test under the chapeau.[638] Even if the Appellate Body reverses the Panel's finding with respect to the "legitimate regulatory distinction" test under Article 2.1 of the TBT Agreement, Canada asserts that the Appellate Body must undertake an independent assessment, based on the proper test under the chapeau of Article XX, to determine whether the IC exception meets the requirements under the chapeau. For these reasons, should the Appellate Body reverse the Panel's findings under Article 2.1 of the TBT Agreement, and the chapeau of Article XX of the GATT 1994, Canada requests the Appellate Body to complete the legal analysis under the chapeau and find that the IC exception does not meet its requirements "because it arbitrarily and unjustifiably discriminates between Canadian seal products and Greenlandic seal products".[639]

2.5.4.2 The Panel's analysis under Article XX(b)

2.224. Canada requests the Appellate Body to reject the European Union's conditional claims of error with respect to the Panel's findings under Article XX(b) of the GATT 1994. Specifically, Canada argues that the European Union fails to show that the Panel exceeded the bounds of its discretion as the initial trier of facts under Article 11 of the DSU.[640] Canada points out that, contrary to the European Union's arguments on appeal, its written submissions to the Panel did not clearly identify the welfare of seals as an independent objective for the purpose of Article XX(b). Canada asserts that the European Union's second written submission to the Panel instead referred to the objectives of the measure under Article 2.2 of the TBT Agreement.[641] Canada adds that, in the European Union's first written submission to the Panel, it "merely referred to the EU Seal Regime as making 'a substantial contribution to the welfare of seals'", which is "entirely consistent" with the Panel's finding that seal welfare is one aspect of the moral concerns in question, rather than a second objective of the EU Seal Regime.[642] Canada argues that the Panel "carefully considered the European Union's varied articulations of the policy objective"[643] and "did not find that '… the protection of seal welfare *as such* was the objective of the EU Seal Regime'".[644] Canada argues that the Panel considered the European Union's arguments with

[636] Canada's appellee's submission, paras. 255 and 256.
[637] Canada's appellee's submission, para. 264.
[638] Canada's appellee's submission, para. 264.
[639] Canada's appellee's submission, para. 266.
[640] Canada's appellee's submission, para. 280.
[641] Canada's appellee's submission, para. 275 (referring to European Union's second written submission to the Panel, para. 273).
[642] Canada's appellee's submission, para. 276 (quoting European Union's first written submission to the Panel, para. 36; and Panel Reports, para. 7.411).
[643] Canada's appellee's submission, para. 277.
[644] Canada's appellee's submission, para. 277 (quoting Panel Reports, para. 7.640). (emphasis added by Canada)

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 asserts that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU, and, therefore, requests the Appellate Body to dismiss the European Union's claim of error with respect to Article XX(b) of the GATT 1994.[649]

2.5.5 Non-violation nullification or impairment in the sense of Article XXIII:1(b) of the GATT 1994

2.226. Canada recalls that it had presented arguments and evidence before the Panel to demonstrate that, if the EU Seal Regime was not found to be inconsistent with either the TBT Agreement or the GATT 1994, the measure's application nevertheless nullifies or impairs benefits that would otherwise accrue to Canada in the sense of Article XXIII:1(b) of the GATT 1994. Canada points to its arguments before the Panel that the EU Seal Regime has upset the competitive relationship between Canadian seal products and seal products from the European Union and Greenland, thereby frustrating Canada's legitimate market access expectations arising from concessions granted by the European Union in the Tokyo and Uruguay Rounds.[650]

2.227. Canada notes that, having found the IC and MRM exceptions to be inconsistent with the European Union's obligations under the TBT Agreement and the GATT 1994, the Panel considered it unnecessary to address Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994. According to Canada, the Panel thereby left Canada's claim "unresolved".[651]

2.228. In the light of the European Union's claims of error in these appeals, and in the event that the Appellate Body reverses the Panel's findings that the EU Seal Regime is inconsistent with the TBT Agreement and the GATT 1994, Canada requests the Appellate Body to complete the legal analysis under Article XXIII:1(b) of the GATT 1994.[652] In this regard, Canada points the Appellate Body to the arguments and evidence that it had submitted to the Panel with respect to its claim under Article XXIII:1(b).[653]

2.6 Arguments of Norway – Appellee

2.6.1 Annex 1.1 to the TBT Agreement

2.229. Norway requests the Appellate Body to reject the appeal of the European Union with respect to the legal characterization of the EU Seal Regime as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

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[645] Canada's appellee's submission, para. 278.
[646] Canada's appellee's submission, para. 279.
[647] Canada's appellee's submission, para. 279 (referring to European Union's other appellant's submission, paras. 322 (referring to European Union's second written submission to the Panel, paras. 272 and 273) and 323).
[648] Canada's appellee's submission, para. 279.
[649] Canada's appellee's submission, para. 280.
[650] Canada's appellee's submission, para. 281 (referring to Canada's first written submission to the Panel, paras. 734-751; second written submission to the Panel, paras. 345-358; and response to Panel question No. 51, paras. 197-220).
[651] Canada's appellee's submission, para. 284.
[652] Canada's appellee's submission, para. 286.
[653] Canada's appellee's submission, para. 287 (referring to Canada's first written submission to the Panel, paras. 735*bis*-751; second written submission to the Panel, paras. 345-358; and response to Panel question No. 51, and Panel Exhibits referred to therein).

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 provisions under the measure at issue in *EC – Asbestos* applied to products possessing the regulated product characteristic of containing chrysotile asbestos[655], while the exceptions under the EU Seal Regime include administrative provisions that "'apply' to products possessing the regulated product characteristic" of containing seal.[656] Thus, these administrative provisions are "inextricably linked to the mandatory requirements regarding product characteristics laid down in the measure".[657] According to Norway, "the close nexus between 'administrative provisions' and 'product characteristics' arises *because* the products exhibit or possess the 'product characteristic' laid down in the document in question."[658] For Norway, the products subject to the administrative provisions are identifiable not just as products in general but because they possess the regulated product characteristic.

2.231. Norway further agrees with the Panel's characterization of the EU Seal Regime as a measure that "lays down, in positive and negative terms, characteristics for all products, namely, when and under what conditions products may, and may not, contain seal inputs".[659] Like the measure at issue in *EC – Asbestos*, the EU Seal Regime contains permissive elements that form an "integral part of the measure", as they "define the scope of the prohibitive elements" without having an "independent meaning in the absence" thereof.[660] These permissive elements "appl[ied] to products possessing defined objective characteristics (i.e. products containing chrysotile asbestos or seal)", and "operate[d] on the basis of a defined set of criteria".[661] In Norway's view, the EU Seal Regime, "through the combination of the prohibitive and permissive elements", lays down product characteristics in the negative form for all products that might contain seal.[662] Norway adds that the "criteria for determining when and under what conditions a product may contain a particular input lay down an 'intrinsic' feature of the subject products" and this, in turn, defines "an aspect of product 'composition'".[663]

2.232. Lastly, like Canada, Norway considers that "the prohibition and exceptions need not 'individually' lay down product characteristics, so long as, as a whole, they did so."[664] In Norway's view, the Panel's finding that the EU Seal Regime constitutes a technical regulation was based on a holistic examination of the "ban" and the "exceptions" components of the measure. Norway adds that the Panel correctly found that the EU Seal Regime, through its exceptions, lays down applicable administrative provisions. As to the European Union's argument that the ban on "pure seal products" does not lay down product characteristics, Norway contends that seal products are not in their "naturally occurring state" as "'live' seals or 'dead' seal carcasses", but rather involve some form of processing, such as in the preparation of skins, blubber, oil, meat, or further processed seal products.[665] Moreover, Norway recalls that "the majority of seal products subject to the measure are mixed products that include non-seal inputs", and "the extent of pure seal products is so limited" that it does not affect the overall finding that the EU Seal Regime, through the combination of its prohibitive and permissive elements, lays down product characteristics for all products that might contain seal inputs.[666] Norway adds that the mere fact that the EU Seal Regime applies to pure seal products does not preclude the measure from being characterized as a technical regulation, considering that it lays down characteristics for all products containing seal inputs.

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[654] Norway's appellee's submission, para. 63.

[655] Norway's appellee's submission, para. 61 (referring to Appellate Body Report, *EC – Asbestos*, para. 73).

[656] Norway's appellee's submission, para. 63.

[657] Norway's appellee's submission, para. 63.

[658] Norway's appellee's submission, para. 80. (emphasis original)

[659] Norway's appellee's submission, para. 44. (fn omitted)

[660] Norway's appellee's submission, para. 57.

[661] Norway's appellee's submission, para. 57.

[662] Norway's appellee's submission, para. 58.

[663] Norway's appellee's submission, para. 45 (referring to Norway's second written submission to the Panel, para. 146; and response to Panel question No. 127).

[664] Norway's appellee's submission, para. 88 (referring to Panel Reports, para. 7.100).

[665] Norway's appellee's submission, paras. 93 and 94, respectively (referring to European Union's other appellant's submission, paras. 82 and 83).

[666] Norway's appellee's submission, para. 96.

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 for the sole reason that objective distinctions are drawn between like products."[674] According to Norway, "[t]he mere fact that a regulating Member may draw objective distinctions, under Article III:4, between like products does not mean that, if the distinction gives rise to a detrimental impact on imports, the regulating Member may justify those distinctions under Article III:4."[675]

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[667] Norway's appellee's submission, para. 98 (referring to European Union's other appellant's submission, para. 85).

[668] Norway's appellee's submission, para. 98 (quoting European Union's other appellant's submission, para. 87).

[669] Norway's appellee's submission, para. 98.

[670] Norway's appellee's submission, para. 98 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, fn 44 to para. 142; *US – FSC (Article 21.5 – EC)*, para. 215; and *China – Auto Parts*, para. 171).

[671] Norway's appellee's submission, para. 101.

[672] Norway's appellee's submission, para. 327.

[673] Norway's appellee's submission, para. 266 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 179).

[674] Norway's appellee's submission, para. 272.

[675] Norway's appellee's submission, para. 273.

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 entertain "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] Instead, if dissimilar taxation results in such detrimental impact, then the respondent may justify that detrimental impact under Article XX of the GATT 1994.

2.240. Norway further disagrees with the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994 is incoherent with Article 2.1 of the TBT Agreement. First, Norway considers that the Appellate Body's statement, in *US – Clove Cigarettes*, that the TBT Agreement and the GATT 1994 "should be interpreted in a coherent and consistent manner" does not mean that the provisions of the two agreements should be given the same meaning.[681] Norway notes in this regard the Appellate Body's statement in *US – Tuna II (Mexico)* that the scope and content of Article 2.1 of the TBT Agreement and of Articles I:1 and III:4 of the GATT 1994 are not the same.[682]

2.241. Second, Norway disagrees with the European Union's argument that, because the list of legitimate policy objectives under Article 2.1 of the TBT Agreement is open, in contrast to the closed list of objectives under Article XX of the GATT 1994, the Panel's interpretation could lead to diverging results under the two agreements. In Norway's view, the European Union overstates the supposed gap between the list of policy interests that may justify a detrimental impact on imports under the TBT Agreement and the GATT 1994. According to Norway, although the range of legitimate interests that may be pursued under Article 2.1 is wider than the range of interests under Article XX, it is not wider than the range of interests reflected in all provisions of the covered agreements. Even assuming, for the sake of argument, that there is some policy interest that may be pursued under the TBT Agreement, but not under the GATT 1994, "it would not be appropriate to circumvent the drafters' decision by allowing a policy interest not reflected in the GATT 1994 to justify a trade-restrictive measure under that Agreement."[683]

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[676] Norway's appellee's submission, para. 279 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111).

[677] Norway's appellee's submission, para. 286 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134).

[678] Norway's appellee's submission, para. 286 (quoting Appellate Body Report, *Canada – Periodicals*, p. 18, DSR 1997:I, p. 464, in turn referring to GATT Panel Reports, *US – Tobacco*, para. 99; *US – Malt Beverages*, para. 5.6; *Canada – Provincial Liquor Boards (EEC)*, para. 5.6; *US – Section 337 Tariff Act*, para. 5.13; *US – Superfund*, para. 5.1.9; and *Brazil – Internal Taxes*, para. 15).

[679] Norway's appellee's submission, para. 282 (quoting European Union's other appellant's submission, para. 300).

[680] Norway's appellee's submission, para. 283. (emphasis omitted)

[681] Norway's appellee's submission, para. 288 (quoting European Union's other appellant's submission, para. 302, in turn quoting Appellate Body Report, *US – Clove Cigarettes*, para. 91).

[682] Norway's appellee's submission, para. 289 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 405).

[683] Norway's appellee's submission, para. 300.

2.242. Finally, in response to the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994 renders Article 2.1 of the TBT Agreement irrelevant, Norway contends that the European Union ignores the "fundamental interpretative principle" that the obligations in the different WTO covered agreements are cumulative.[684] Thus, "[a]bsent an express statement modifying the cumulative application of the TBT Agreement and the GATT 1994, there are no grounds to conclude that a measure could not be consistent with … Article 2.1 of the TBT Agreement[] and inconsistent with … Article III:4 of the GATT 1994".[685]

2.6.3 Article XX of the GATT 1994

2.243. In its appellee arguments under Article XX of the GATT 1994, Norway addresses certain of the European Union's claims on appeal, including those concerning Article 2.1 of the TBT Agreement. Norway submits, for instance, that the European Union's appeal of the Panel's finding that the IC exception does not bear a rational relationship to the measure's objective of addressing the EU public moral concerns regarding seal welfare must be dismissed on the basis that the European Union has not linked its argument that "the Panel erred in *interpreting* the term 'public morals' to the language of Articles 2.1 and 2.2" of the TBT Agreement.[686] According to Norway, a party that alleges an error in a panel's "*interpretation* of the existing provisions of a covered agreement … must somehow tie its claims and arguments to the words that are used in the treaty."[687] Norway, therefore, requests the Appellate Body to dismiss the European Union's interpretative appeal insofar as it relates to Articles 2.1 and 2.2 of the TBT Agreement.[688]

2.244. With respect to the notion of "public morals" under Article XX of the GATT 1994, Norway argues that a panel cannot "simply accept the respondent's assertions on the precise and specific content of an alleged moral that purportedly justifies a GATT-inconsistent measure, even when the measure is adopted by the Member's 'representative institutions'".[689] Norway notes that "[a] respondent could easily tailor the scope of an alleged moral norm to fit the precise contours of the … legal norm that its legislator has adopted."[690] Norway is concerned that, if "the legislator's adoption of the contested measure, effectively, becomes proof of the measure's asserted moral objective", then "the respondent's justification of the measure becomes entirely circular", since the measure is "ultimately justified by its own adoption".[691]

2.245. Norway further asserts that "[t]he Panel engaged in careful scrutiny of the evidence and rejected the view that the public moral at stake varied according to the type of seal hunt."[692] According to Norway, "the Panel saw no evidentiary basis to conclude that the adoption of the IC requirements by the EU legislator reflected the establishment of a public moral that IC interests are morally more important than seal welfare."[693] In sum, Norway submits that "the European Union was unable to substantiate its assertion that the EU legislator acted on the basis of, or established, a public moral in adopting the IC requirements."[694]

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

2.246. Norway also addresses in its appellee's submission the Panel's analysis of even-handedness of the IC exception in the context of Article 2.1 of the TBT Agreement. Norway notes that the European Union's appeal under the chapeau of Article XX of the GATT 1994 is "closely intertwined" with its appeal under Article 2.1 of the TBT Agreement.[695] Norway argues that, in the light of its own appeal under Article XX, the Appellate Body need not consider the European Union's other appeal under the chapeau.[696] In the event that the Appellate Body were to

[684] Norway's appellee's submission, para. 304.
[685] Norway's appellee's submission, para. 310.
[686] Norway's appellee's submission, para. 145. (emphasis original)
[687] Norway's appellee's submission, para. 144. (emphasis original)
[688] Norway's appellee's submission, para. 147.
[689] Norway's appellee's submission, para. 167 (quoting European Union's other appellant's submission, para. 109). (emphasis omitted)
[690] Norway's appellee's submission, para. 168.
[691] Norway's appellee's submission, para. 170.
[692] Norway's appellee's submission, para. 177.
[693] Norway's appellee's submission, para. 182.
[694] Norway's appellee's submission, para. 186.
[695] Norway's appellee's submission, para. 332.
[696] Norway's appellee's submission, paras. 335 and 370.

address its other appeal, Norway submits that the 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 solely 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] Norway recalls that, during the legislative process leading up to the adoption of the EU Seal Regime, "much narrower definitions of 'subsistence'" than the current formulation of the IC requirements, which do not "specify the degree to which the hunt must be for 'subsistence' purposes", were proposed and rejected by the EU legislators.[701] Norway submits that "the Greenlandic hunt, which more closely resembles a commercial hunt, thereby benefits from the absence of any definition in the measure that would ensure that qualifying hunts are truly subsistence hunts."[702]

2.248. Norway further argues that the Panel did not err in relying on its finding that the IC exception is *de facto* only available to Greenland in drawing its conclusion on the even-handedness of the IC exception. According to Norway, "the Panel explicitly acknowledged that the fact that Greenland has so far been the only beneficiary under the IC requirements was not … sufficient to establish arbitrariness in the design or application of the IC requirements", but was "merely 'an indication' that had to be considered with other factors".[703] Norway further submits that "the Panel adequately examined the implications" of the actions and omissions of the Canadian authorities and operators.[704] Norway highlights the Panel's observation that "it is not cost effective under the current circumstances to segregate [Canadian] Inuit products from other products".[705] Norway also underscores the Panel's suggestion that this result had been anticipated by the EU legislator. Norway submits that the European Union cannot claim that the requirements of the IC exception do not discriminate against Canadian Inuit when the EU legislator in fact knew that this would be the case. According to Norway, it is because of the terms of the measure that Canadian Inuit, who truly pursue a subsistence hunt, are effectively denied the choice to benefit from the IC exception. Norway asserts that the European Union is, therefore, wrong when it argues that "the failure of the Canadian Inuit to *de facto* qualify under the IC requirements cannot be 'attributed' to the EU Seal Regime, or the European Union".[706]

2.249. Norway also takes issue with what it understands as the European Union's assertion that the extent of the commercialization of the Greenlandic hunt is immaterial in determining even-handedness, so long as the hunt satisfies the formal criteria for an IC hunt. Norway alleges that, for the Panel, "the extent of commercialization of the Greenland hunt called into question the very basis on which the distinction between the IC and commercial hunt is supposedly drawn."[707] Norway submits that the Panel was right in focusing on the paradoxical result of the operation of the IC requirements, namely, the fact that "genuine subsistence hunts were not benefitting from the IC requirements, whereas the Greenlandic hunt, which more closely resembles a commercial

[697] Norway's appellee's submission, paras. 336 and 372.
[698] Norway's appellee's submission, para. 382.
[699] Norway's appellee's submission, para. 384 (quoting Panel Reports, para. 7.306). (emphasis omitted)
[700] Norway's appellee's submission, para. 388.
[701] Norway's appellee's submission, para. 390 (referring to Parliament Report, pp. 34-35).
[702] Norway's appellee's submission, para. 390.
[703] Norway's appellee's submission, para. 394. (emphasis omitted)
[704] Norway's appellee's submission, para. 395.
[705] Norway's appellee's submission, para. 396 (quoting Panel Reports, para. 7.314).
[706] Norway's appellee's submission, para. 402.
[707] Norway's appellee's submission, para. 406. (emphasis omitted)

hunt, was."[708] In Norway's view, the Panel did not err in finding that these factors "'cast serious doubt' on the even-handedness of the design and application" of the IC exception.[709]

2.250. Norway submits that the Panel was within its discretion as the trier of fact to weigh the evidence and find that the European Union had not met its burden of proving that the EU public moral concerns regarding seal welfare vary according to the type of hunt. Norway agrees with Canada that "[t]he Panel made its finding that 'the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts'" not solely on the basis of the two polls and the public consultation, but rather in "'light of the evidence before' it as a whole".[710] Norway notes that this evidence included non-governmental organization surveys that indicated the absence of support for the proposition that the EU public's animal welfare concerns vary according to the type of hunt, or that substantiated the opposite conclusion.[711]

2.251. Norway further alleges that the European Union misreads a footnote in the Panel Reports that explains why the Panel chose not to ascribe probative weight to the two polls and the public consultation.[712] Norway argues that the Panel did not rely on these three pieces of evidence to reach its finding, let alone exclusively rely on this evidence, as Norway understands the European Union to be suggesting. In Norway's view, the Panel inserted this footnote "to describe the basis on which it [had] found that the European Union's evidence did not carry probative weight".[713] Norway submits that the European Union has failed to show that the Panel exceeded the bounds of its discretion in doing so.

2.252. In response to the European Union's argument that the Panel failed to make an objective assessment of the facts in finding that the text of the IC exception, its legislative history, and its actual operation cast doubt on the even-handedness of the design and application of the exception, Norway submits that the Panel made no error in assessing these elements. Norway argues that the Panel was correct in examining the text of the IC exception as the starting point of its analysis. For Norway, the European Union's arguments regarding the Panel's assessment of the legislative history of the IC exception miss the point. According to Norway, in this part of its analysis, the Panel observed that the EU legislator was aware of "these important differences" between the Greenlandic hunt and the Canadian Inuit hunt in respect of their scale and their capability to make the investments that are required to benefit, as a matter of fact, from the IC exception.[714] Norway submits that the Panel made no error, in reviewing the facts, in reaching this view. Norway also sees no error in the Panel's consideration of the fact that Danish customs authorities allowed imports from Greenland before the Greenlandic authorities had obtained the status of a recognized body. For Norway, this fact illustrates that the IC exception has benefitted Greenland in practice. Norway submits that the Panel made no error in its objective assessment by weighing this fact, together with other facts, to find that the IC requirements lack even-handedness.

2.253. In respect of the European Union's claim that the Panel erred in assessing the level of development of the commercial aspect of the Greenlandic hunt, Norway submits that the European Union's argument is "absurd" because "[t]he facts before the Panel regarding the commercial focus of a large proportion of the … Greenlandic hunt were compelling and the Panel made no error in weighing them".[715] Norway notes that the volume of seal skins caught in Greenland that are sold to Great Greenland A/S – at 95,000 skins annually – "dwarfs the size of the Norwegian 'commercial' seal hunt[s], all other indigenous hunts, and also represents an important amount of total world trade".[716] Norway further highlights that only full-time hunters may sell seal skins to

[708] Norway's appellee's submission, para. 407.
[709] Norway's appellee's submission, para. 412.
[710] Norway's appellee's submission, para. 207 (quoting Panel Reports, para. 7.410, in turn referring to Royal Commission Report; and European Union's response to Panel question No. 31).
[711] Norway's appellee's submission, para. 208 (referring to the public opinion surveys contained in Panel Exhibits EU-49 to EU-59, in particular, EU-52 and EU-53).
[712] Norway's appellee's submission, para. 209 (referring to Panel Reports, fn 676 to para. 7.410).
[713] Norway's appellee's submission, para. 210. (emphasis omitted)
[714] Norway's appellee's submission, paras. 429 and 430 (referring to Panel Reports, para. 7.315).
[715] Norway's appellee's submission, para. 437.
[716] Norway's appellee's submission, para. 438 (referring to Panel Reports, para. 7.457; COWI 2010 Report, pp. 23-36; and European Union's other appellant's submission, Table 3-1, at para. 256).

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] Accordingly, Norway sees no contradiction or incoherency in the Panel's reasoning.

2.6.3.2 The Panel's analysis under Article XX(b)

2.255. Norway requests the Appellate Body to reject the European Union's conditional claims of error with respect to the Panel's findings under Article XX(b) of the GATT 1994. Norway submits that, contrary to the European Union's arguments, the Panel made an objective assessment of the facts as required by Article 11 of the DSU in finding that the European Union did not make a *prima facie* case under Article XX(b). Norway highlights that, while the European Union identifies three alleged factual errors by the Panel, it does not explain why these errors are "failures by the Panel to objectively assess the *facts*, pursuant to the standard laid down by Article 11 of the DSU, such that they may invalidate the entire conclusion of the Panel".[722] To the contrary, Norway contends the Panel's statements were "accurate" and "within the bounds of its discretion".[723] Norway argues that the European Union "never submitted" that it pursued a "separate and distinct objective of promoting seal welfare".[724] Rather, Norway adds, the paragraph to which the European Union referred addresses the objectives of the measure under Article 2.2 of the TBT Agreement, and is contained in a section in which the European Union "emphatically states" that the EU Seal Regime pursued a "single *public morals* objective".[725] Norway argues that the Panel's finding of the "limited extent" of the European Union's arguments with respect to Article XX(b) is also "accurate" and within the bounds of the Panel's discretion. Norway observes that, even in its other appellant's submission, the European Union refers to only three paragraphs of its second written submission to the Panel. According to Norway, "[b]y any measure, this is indeed an argument of 'limited extent', particularly one where the European Union bore the burden of proof."[726]

2.256. Norway compares the European Union's failure to make a *prima facie* case under Article XX(b) to the failure of Thailand to make a *prima facie* case under Article XX(d) in *Thailand – Cigarettes (Philippines).* Specifically, Norway takes issue with the "erroneous", "ineffective" cross-referencing by the European Union to other parts of its first written submission to the Panel, and notes that the Appellate Body used ineffective or erroneous cross-referring as a basis for

[717] Norway's appellee's submission, para. 438.
[718] Norway's appellee's submission, para. 441.
[719] Norway's appellee's submission, para. 447.
[720] Norway's appellee's submission, para. 449. (fns omitted)
[721] Norway's appellee's submission, para. 450.
[722] Norway's appellee's submission, para. 471. (emphasis original)
[723] Norway's appellee's submission, para. 472.
[724] Norway's appellee's submission, para. 472.
[725] Norway's appellee's submission, para. 472 (referring to European Union's second written submission to the Panel, paras. 271-276). (emphasis original)
[726] Norway's appellee's submission, para. 473.

disposing of claims by the complainants in *Thailand – Cigarettes (Philippines)*.[727] In referring to its arguments that the EU Seal Regime was "necessary" to protect "public morals" under Article XX(a), Norway considers that the European Union failed to demonstrate how the arguments and evidence with respect to public morals under Article XX(a) was relevant to claims regarding animal health and life under Article XX(b). Norway submits that it is no "substitute" for a claim under Article XX(b) to give "passing and scant reference" to arguments about public morals in Article XX(a).[728] Moreover, Norway notes that the European Union, through its cross-referencing, failed to provide legal arguments and evidence, based on the proper legal standard of necessity, as to how the discriminatory aspects of the measure – i.e. the IC and MRM exceptions – are necessary under Article XX(b). In Norway's view, the European Union's arguments before the Panel dealing with the "necessity" analysis under Article XX(a) of the GATT 1994 and Article 2.2 of the TBT Agreement address "solely" the necessity of the prohibitive features of the measure – i.e. the ban – and not the discrimination that has arisen from the IC and MRM exceptions.[729] Finally, Norway notes that the European Union failed to identify or explain in more than a "few lines" how the EU Seal Regime was justified under the chapeau, even assuming that the EU Seal Regime pursued an independent objective under Article XX(b).[730] In particular, Norway claims, since the risk of inhumane treatment of seals is the same in all countries where seals are hunted, the European Union never explained how the distinction between IC and MRM hunts, on the one hand, and the Norwegian and Canadian hunts, on the other hand, is not "arbitrary and [un]justifiable discrimination between countries where the same conditions prevail" under the chapeau.[731]

2.257. Even if the Appellate Body were to reverse the Panel's finding under Article XX(b), and proceed to complete the legal analysis, Norway requests the Appellate Body to find that the EU Seal Regime is not justified under Article XX(b) of the GATT 1994.[732] Norway considers that, under the proper legal test, the European Union has to show that the discriminatory aspects of the measure – i.e. the IC and MRM exceptions – are necessary to protect the life and health of seals under Article XX(b).[733] Norway contends that the EU Seal Regime, by providing market access to seal products from the Greenlandic hunts, which has the worst animal welfare outcomes, "undermines" seal welfare, even when considered "as a whole".[734]

2.6.4 Non-violation nullification or impairment in the sense of Article XXIII:1(b) of the GATT 1994

2.258. Norway conditionally requests the Appellate Body to complete the legal analysis of Norway's claim of non-violation nullification or impairment in the sense of Article XXIII:1(b) of the GATT 1994.[735] Norway's request is conditional upon findings by the Appellate Body to the effect that the EU Seal Regime is either not a technical regulation or not inconsistent with Article 2.2 of the TBT Agreement, and that the EU Seal Regime is not inconsistent with the GATT 1994. Norway refers to the materials set forth in its submissions before the Panel with respect to its claim under Article XXIII:1(b) of the GATT 1994. Norway considers that these materials provide sufficient uncontested evidence for the Appellate Body to complete the analysis.[736]

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[727] Norway's appellee's submission, para. 482 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 180).

[728] Norway's appellee's submission, para. 484.

[729] Norway's appellee's submission, para. 487. (emphasis omitted)

[730] Norway's appellee's submission, paras. 489 and 490 (referring to European Union's first written submission to the Panel, para. 590).

[731] Norway's appellee's submission, para. 490 (quoting European Union's first written submission to the Panel, para. 590).

[732] Norway's appellee's submission, paras. 492 and 493.

[733] Norway's appellee's submission, para. 493.

[734] Norway's appellee's submission, para. 494.

[735] Norway's appellee's submission, para. 497.

[736] Norway's appellee's submission, para. 502 (referring to Norway's first written submission to the Panel, section VIII; response to Panel question No. 51, paras. 266-285; second written submission to the Panel, section VIII; opening statement at the second Panel meeting; as well as to all of the evidence referred to in these sections of Norway's submissions to the Panel).

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 systemic interest in the interpretation of Article 2.1 of the TBT Agreement, Ecuador wishes to address the Panel's finding that the distinction between commercial and IC hunts is justified. Ecuador supports the Panel's consideration of subsistence as including income generating activities necessary to support traditional forms of life for indigenous communities, and its reference to international instruments to inform its analysis. Ecuador moreover considers that the Panel was correct to evaluate the relevant distinction through a case-by-case approach.

2.7.2 Iceland

2.260. Iceland focuses on the test established by the Panel for ascertaining whether a measure aims to address a "public morals" concern, namely: (i) whether the concern in question exists in the society of the regulating Member; and (ii) whether this concern falls within the scope of "public morals" as defined and applied by the regulating Member "in its territory, according to its own systems and scales of values".[737] Iceland argues that this test differs significantly from previous WTO jurisprudence and results "in a considerable extension" of what constitutes "public morals" within the meaning of Article 2.2 of the TBT Agreement.[738] Iceland also maintains that the Panel failed to explain what "standard of right and wrong conduct" exists in the European Union that makes selling seal products a public morals concern.[739] Iceland further emphasizes that the exceptions under the EU Seal Regime appear seriously to undermine the same moral principle that the measure allegedly aims to protect.[740] Thus, Iceland suggests that the reference to the protection of the life and health of animals under Article 2.2 is sufficient to address concerns related to animal welfare, and there is no need to make the "public morals" provision a "catch-all" exception.[741]

2.261. With respect to Article XX(a) of the GATT 1994, Iceland takes issue with the Panel's test on how to assess whether a measure aims to address a "public morals" concern.[742] Iceland highlights that the Panel's approach in the present disputes differs from the approach taken by the panel in *US – Gambling*, because, in that case, the panel based its conclusion that public moral concerns existed on the "prior associations between the concern in question (gambling) and the concept of 'public morals', particularly in the context of earlier multilateral trade negotiations".[743] By contrast, Iceland notes that the present Panel adopts a two-pronged test, which seeks to determine: (i) whether a concern exists in the society in question; and (ii) whether that concern, according to the system and scale of values in the Member concerned, falls within the scope of "public morals".[744] This approach, Iceland contends, provides "little in terms of actually clarifying the scope of 'public morals'", because the Panel's reasoning is "tautolog[ical]", as it appears to suggest that the European Union's claim of acting to address the concerns of its public was "proof enough" that it was acting out of public concern.[745] Moreover, Iceland argues that "[t]he Panel only provide[d] a general statement to the effect that animal welfare is a matter of ethical or moral nature in the European Union."[746] In Iceland's view, the Panel's test suggests that it is "sufficient to declare that a measure was taken because a 'concern' existed, and establish a link between this 'concern' and an abstract moral issue".[747]

[737] Iceland's third participant's submission, para. 7 (quoting Panel Reports, para. 7.383).
[738] Iceland's third participant's submission, para. 9.
[739] Iceland's third participant's submission, para. 13.
[740] Iceland's third participant's submission, para. 15.
[741] Iceland's third participant's submission, para. 17.
[742] Iceland's third participant's submission, para. 7 (referring to Panel Reports, para. 7.383).
[743] Iceland's third participant's submission, para. 8 (referring to Panel Reports, *US – Gambling*, para. 3.278; and *China – Publications and Audiovisual Products*, para. 7.763).
[744] Iceland's third participant's submission, para. 10 (referring to Panel Reports, para. 7.383).
[745] Iceland's third participant's submission, para. 11 (referring to Panel Reports, para. 7.389).
[746] Iceland's third participant's submission, para. 13.
[747] Iceland's third participant's submission, para. 13.

2.262. Iceland submits that the Panel erred when it stated that "the exceptions to the EU Seal Regime must be distinguished from the main objective of the measure as a whole" because, if a measure is supposed to serve a "moral principle", then the existence of such a principle "must be assessed on the basis of the measure as a whole, including its exceptions".[748] Furthermore, Iceland submits that there is "no need to rely on the notion of 'public morals' to justify measures taken to meet animal welfare concerns", and Article 2.2 of the TBT Agreement and Article XX(b) of the GATT 1994 are "entirely sufficient" to address animal welfare concerns.[749] In Iceland's view, the "public morals" provisions, such as Article XX(a), should not be a "catch-all" exception that Members can rely on when they cannot justify their measures under other provisions.[750] Finally, Iceland takes issue with the Panel's approach to the less trade-restrictive alternative measures proposed by the complainants. According to Iceland, the Panel considered that "the alternative measures should be assessed on the basis of the professed objective of the measure", and not the "actual contribution" of a measure "in reality".[751] According to Iceland, the "problem" with such an approach is "not only that a guarantee of this sort would be hard to meet in any trade with animal products, but that the EU Seal Regime itself patently does not prevent marketing of seal products that may be derived from sealing with poor animal welfare outcomes".[752] Instead, Iceland suggests that the alternative measures should be assessed on the basis of the "actual contribution" of the EU Seal Regime to its objective.[753] Under such an approach, Iceland concludes, Canada's and Norway's proposed alternatives would "easily meet" the requirement of making an "equivalent or greater" contribution to the fulfilment of the EU Seal Regime's objective.[754]

2.7.3 Japan

2.263. Japan submits that, in order to analyse whether the regulatory distinction that gives rise to a detrimental impact on imported products is even-handed or legitimate, the Panel should have carried out an analysis involving the following four steps: (i) an examination of whether the regulatory distinction is rationally connected to the objective of the measure; (ii) if this is not the case, an examination of whether there is any other rationale that can justify the regulatory distinction; (iii) an analysis of whether the distinction is rationally connected to this rationale; and (iv) an inquiry into whether the distinction is actually calibrated towards the rationales or objectives pursed by the distinction.[755] Japan considers that a regulatory distinction that undermines the stated objective of a measure can manifestly not be justified on the basis of the alleged legitimacy of that objective. Unless the regulatory distinction is justifiable under a different rationale, there would then be a presumption that such a regulatory distinction cannot be considered as legitimate.

2.264. Japan submits that a "conflict" between the regulatory distinction and the stated objective of a measure would seem "impossible to justify" unless it is the "necessary consequence" of the need to protect certain justifiable policy objectives that would otherwise be impaired by the measure.[756] Japan considers that any such policy objectives must themselves be justifiable as "separate legitimate objectives"[757], and that there must be a "rational connection" between the policy objective and the regulatory distinction at issue.[758] Moreover, Japan suggests that the regulatory distinction must be calibrated to the rationale or objective that it pursues.

2.265. Japan considers that, in the present disputes, the analysis under Article 2.1 should focus on the regulatory distinction between commercial hunts, on the one hand, and IC and MRM hunts, on the other hand, since this is the distinction that causes the detrimental impact on the competitive opportunities of imported seal products. In Japan's view, the Panel erred when it analysed the even-handedness of the distinction by comparing the treatment of seal products from IC hunts in Canada and Greenland. Japan underscores that it is the regulatory distinction between

[748] Iceland's third participant's submission, para. 15 (referring to Panel Reports, para. 7.402).
[749] Iceland's third participant's submission, para. 17.
[750] Iceland's third participant's submission, para. 17.
[751] Iceland's third participant's submission, para. 20.
[752] Iceland's third participant's submission, para. 19 (referring to European Union's appellee's submission, para. 127).
[753] Iceland's third participant's submission, para. 20.
[754] Iceland's third participant's submission, para. 20.
[755] Japan's third participant's submission, para. 8.
[756] Japan's third participant's submission, para. 13.
[757] Japan's third participant's submission, para. 14.
[758] Japan's third participant's submission, para. 17.

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 the similarities and differences in characteristics of commercial hunts and IC hunts are such that the distinction drawn by the European Union allows the differentiation among seal products according to the two conflicting objectives of addressing the moral concerns of the EU public regarding the welfare of seals while protecting IC interests. According to Japan, such a calibration exercise requires a detailed examination of the similarities between IC hunts and commercial hunts and the identification of the aspects of IC hunts that are necessary to ensure the subsistence of indigenous communities.[759]

2.266. Japan further comments in its submission on two issues under Article 2.2 of the TBT Agreement: (i) the degree of contribution to the legitimate objective of the measure at issue and the alternative measures; and (ii) the "arbitrary and unjustifiable discrimination" test. First, Japan asserts that the Panel's finding that the EU Seal Regime makes "some contribution" or contributes "to a certain extent" to the legitimate objective does not reveal the actual "degree" of contribution of the measure to its objective.[760] Given that it failed to ascertain this degree of contribution, the Panel could not have properly reached a conclusion as to whether the alternative measure could make an "equivalent or greater" contribution to the objective.[761]

2.267. Second, Japan argues that, contrary to Norway's contention, the requirement that a technical regulation does not give rise to an "arbitrary or unjustifiable discrimination" is provided under the sixth recital of the preamble of the TBT Agreement, and can neither be transposed to, nor read as a separate and independent test from, Article 2.2. The wording of Article 2.2 already reflects the balance between trade-liberalization and the Members' right to regulate trade by concerning itself with "restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective".[762] Being an aspect separate from the issue of a measure's consistency with the TBT Agreement, the text of the sixth recital cannot, according to Japan, be made part of such inquiry.

2.268. In its opening statement at the oral hearing, Japan made submissions concerning the European Union's other appeal of the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994. With regard to the European Union's appeal of the Panel's finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4, Japan observes that there are textual differences between Articles I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement. In addition, Japan notes that the "legitimate regulatory distinction" test under Article 2.1 has been developed primarily in the context of the national treatment obligation, and having regard to the text of Article III:4 but not of Article I:1.

2.269. Japan further notes the European Union's argument that, because the list of possible legitimate objectives that may factor into an analysis under Article 2.1 is open, in contrast to the closed list of objectives enumerated under Article XX of the GATT 1994, the Panel's interpretation might lead to a situation where a technical regulation could be considered non-discriminatory under Article 2.1 of the TBT Agreement, but still violate Article III:4 of the GATT 1994, because the legitimate objective it pursues is not covered under Article XX.[763] Japan agrees that the objectives that can justify a measure under Article XX are limited. Japan submits, however, that the legitimate objectives to be considered under Article 2.1 are not unlimited. In this connection, Japan points out that, in the context of Article 2.2 of the TBT Agreement, the Appellate Body, in *US – Tuna II (Mexico)*, considered several factors that may inform what might be considered to be a legitimate objective under Article 2.2. These factors, Japan submits, also inform what might be considered to be a legitimate objective under Article 2.1.

[759] Japan's third participant's submission, para. 20.
[760] Japan's third participant's submission, para. 25 (referring to Panel Reports, paras. 7.443 and 7.460).
[761] Japan's third participant's submission, para. 27 (referring to Panel Reports, paras. 7.446 and 7.479).
[762] Japan's third participant's submission, para. 36 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 319).
[763] Japan's opening statement at the oral hearing.

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 of like imported products. Second, Japan adds that, "if some flexibility" were introduced into Article III:4, the question would arise as to whether this would render Article XX of the GATT 1994 meaningless.[765]

2.271. Regarding the Panel's analysis under Article XX of the GATT 1994, Japan considers that the Appellate Body's observations in *Thailand – Cigarettes (Philippines)* "imply that what a panel needs to focus on in an Article XX examination is the aspects leading to a finding of less favourable treatment".[766] Japan notes, however, that, in *Brazil – Retreaded Tyres*, the Appellate Body suggested that the panel "might have opted for a more holistic approach" by examining the import ban at issue in combination with the MERCOSUR exemption, and whether the "combined measure" or the "resulting partial import ban" could be considered necessary within the meaning of Article XX(b) invoked in that case.[767] In the present case, Japan understands the Panel to have followed such a "more holistic" approach.[768] According to Japan, it was "essential to take into account the ban together with the IC and MRM exceptions".[769]

2.272. With respect to the "necessity" test under Article XX(a), Japan notes that, although both Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 require a determination of the contribution of the measure to the achievement of a particular objective, the legal standard or "test" under the two provisions is "clearly different".[770] Under Article 2.2, Japan notes that the analysis is not focused on whether a technical regulation is "necessary" to achieve the legitimate objective identified, but on whether "the technical regulation is not 'more trade-restrictive than necessary to fulfil the legitimate objective'".[771] Japan adds that, under Article 2.2, a technical regulation is not required to achieve a "certain degree of contribution" to the legitimate objective.[772] Japan considers that, under Article XX(a), when examining whether a measure is "necessary to protect public morals", the issue is not whether a measure makes "a" or "some" contribution to the protection of public morals, but, instead, whether the measure at issue "is closer to the pole of indispensable rather than simply making a contribution to protect public morals".[773] In Japan's view, to the extent that the "necessity" test under Article XX(a) requires that a measure must "make[] a material contribution" to its objective, it appears that the Panel's finding of "some contribution" or a contribution "to a certain extent", with respect to the EU Seal Regime's contribution, would not meet the "necessity" requirement under Article XX(a).[774]

2.273. Japan also disagrees with the Panel's reliance on its "legitimate regulatory distinction" analysis under Article 2.1 of the TBT Agreement in its analysis under the chapeau of Article XX for two reasons. First, Japan notes that the Panel's "extrapolation" of its Article 2.1 analysis to its assessment under the chapeau of Article XX does not include any analysis of the text of the two provisions.[775] Second, Japan considers that, to the extent that the "legitimate regulatory distinction" test involves "taking into account rationales other than the one which has been

[764] Japan's opening statement at the oral hearing.
[765] Japan's opening statement at the oral hearing.
[766] Japan's third participant's submission, para. 45 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177).
[767] Japan's third participant's submission, para. 45 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 126).
[768] Japan's third participant's submission, para. 46.
[769] Japan's third participant's submission, para. 47.
[770] Japan's third participant's submission, para. 49 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 317).
[771] Japan's third participant's submission, para. 50.
[772] Japan's third participant's submission, para. 50.
[773] Japan's third participant's submission, para. 52 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 141, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).
[774] Japan's third participant's submission, para. 53 (quoting Panel Reports, paras. 7.637, 7.460, and 7.638, respectively).
[775] Japan's third participant's submission, para. 61.

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 different type of analysis when not every component of the measure at issue meet[s] the definition of a 'technical regulation' in isolation".[778]

2.275. Mexico recalls that the Appellate Body established a two-step test for discrimination under Article 2.1 of the TBT Agreement. This test involves, first, an assessment of whether the measure at issue modifies the conditions of competition to the detriment of imported products and, second, an inquiry as to whether this detrimental impact stems exclusively from a legitimate regulatory distinction. Mexico takes issue with the Panel's decision to divide the second step of the analysis into three separate questions. Mexico agrees with Canada that the questions of whether a distinction is rationally connected to the objective of a measure or whether it is otherwise justified should be part of the overall assessment of the even-handedness of the relevant regulatory distinction.[779]

2.276. Mexico further observes that the Panel appears to equate even-handedness to the absence of arbitrary or unjustifiable discrimination. Mexico submits that the Appellate Body has not limited the meaning of even-handedness in this way, but instead has considered the presence of arbitrary and unjustifiable discrimination as an example of a lack of even-handedness.[780] In Mexico's view, any fact that could indicate a lack of even-handedness is relevant to the examination, including a consideration of whether a measure is a disguised restriction on trade, or whether it is fair, impartial, reasonable, and harmonious, having regard to the objective it pursues.

2.277. Mexico agrees with Canada that the Panel should have included "the risks non-fulfilment would create" – namely, "the nature of the risks at issue and gravity of consequences that would arise from non-fulfilment of the objective[s] pursued by the Member through the measure" – as the third factor in its assessment of "necessity" under Article 2.2 of the TBT Agreement.[781] Further, Mexico argues that, in the comparative analysis of the challenged measure and the possible alternative, ascertaining the degree of contribution of the latter "means more than simply 'having the same result' or a similar narrow definition that would apply to 'equivalent contribution' when viewed in isolation".[782] Thus, Mexico contends that, in such a comparative analysis, the degree of contribution of the alternative measure to the legitimate objective does not have to be the same as that of the challenged measure, but could also be of a lesser degree if it is justified in the light of the risks non-fulfilment would create. In Mexico's view, "[t]his interpretation is consistent with the concept of proportionality."[783]

2.278. Mexico submits that the European Union's interpretation of Articles I:1 and III:4 of the GATT 1994 would undermine the scope and application of these provisions. In Mexico's view, a measure accords less favourable treatment to imported products compared to like domestic products under Article III:4 where it modifies the conditions of competition in the relevant market to the detriment of the like imported products. Noting the Appellate Body's statement that the

[776] Japan's third participant's submission, para. 62 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225-228).

[777] Mexico's third participant's submission, para. 6.

[778] Mexico's third participant's submission, para. 6 (referring to the European Union's other appellant's submission, para. 77).

[779] Mexico's third participant's submission, para. 9 (referring to Canada's appellant's submission, para. 66).

[780] Mexico's third participant's submission, para. 10 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 95 and 271; and *US – COOL*, paras. 272, 293, 340, and 341).

[781] Mexico's third participant's submission, para. 18 (referring to Canada's appellant's submission, paras. 303-306; and quoting Appellate Body Reports, *US – COOL*, para. 378).

[782] Mexico's third participant's submission, para. 22.

[783] Mexico's third participant's submission, para. 23.

term "treatment no less favourable" in Article 2.1 of the TBT Agreement is to be interpreted in the light of the specific context provided by that agreement, Mexico agrees with the Panel that the additional element that the Appellate Body considered as necessary to complete an analysis under Article 2.1 reflects the absence in the TBT Agreement of a general exceptions clause equivalent to that of Article XX of the GATT 1994.[784] In Mexico's view, because of this difference between the TBT Agreement and the GATT 1994, there is no legal basis to introduce into Article III:4 the two-step approach that has been developed for determining *de facto* less favourable treatment under Article 2.1 of the TBT Agreement.

2.7.5 Namibia

2.279. Pursuant to Rule 24(4) of the Working Procedures, Namibia chose not to submit a third participant's submission, but it did make an opening statement at the oral hearing. Namibia submits that the Panel erred under Article 2.2 of the TBT Agreement. In Namibia's view, there is no logical connection for upholding the ban under the EU Seal Regime in order to protect public morals. Namibia contends that, by allowing the ban for seals emanating from outside the European Union, while animal welfare or public moral considerations are not applied to seal products originating in the European Union, the Panel's ruling condones for the European Union what it condemns for others. Namibia further contends that "public morals" is not a legitimate objective within the meaning of Article 2.2, and that, given that it is an important issue, the drafters would have listed it in the list of legitimate objectives under Article 2.2 if they had wanted to include it. In addition, the *travaux préparatoires* make no reference to "public morals". Namibia expresses its concern that, absent an explicit reference to public morals in a challenged measure, a Member may seek *ex post facto* to adjust the content of the objective to justify the measure.

2.280. Namibia also criticizes the Panel for not referring to legislation and regulations of Namibia that illustrate that compliance and monitoring in respect of seal harvesting can be achieved. Namibia urges the Appellate Body to take into account the stringent measures that Namibia has put in place for the protection of animal welfare, including the protection of seal welfare.

2.7.6 United States

2.281. The United States argues that, within the meaning of Annex 1.1 to the TBT Agreement, "[a] measure that simply prohibits the sale of a product does not prescribe a product characteristic."[785] Instead, a measure with different aspects "would need to be analyzed separately for purposes of the definition in the TBT Agreement".[786]

2.282. The United States observes that WTO Members may ban the sale of products for various reasons, and, as part of the effort to prevent the sale of those products, a WTO Member "may also ban the sale of products containing the banned product".[787] It is not clear to the United States why, under the Panel's logic, this action "would result in a finding every time that the ban should be considered to be a technical regulation".[788] For the United States, the Panel's finding that a ban prescribes product characteristics in the negative – "no product sold can contain the banned product" – does not appear to be consistent with the text of the Annex 1.1 to the TBT Agreement, read in its context, and in the light of the object and purpose of the Agreement.[789] Referring to the 1991 sixth edition of the ISO/IEC general terms and definitions concerning standardization[790] (ISO/IEC Guide), the United States points out that the focus of standards, as well as technical regulations, "is on ensuring that a product is fit for its purpose or aim".[791] By contrast, the purpose of a technical regulation "is not to ban a product but to ensure that the product possesses or does not possess a product characteristic that makes it usable, compatible, safe, protective of the environment or health, etc."[792] Consequently, "to the extent that a measure bans the sale of a

[784] Mexico's third participant's submission, para. 29 (referring to Panel Reports, para. 7.585).
[785] United States' third participant's submission, para. 30.
[786] United States' third participant's submission, para. 31.
[787] United States' third participant's submission, para. 32.
[788] United States' third participant's submission, para. 32.
[789] United States' third participant's submission, para. 32 (referring to Panel Reports, para. 7.106).
[790] International Organization for Standardization/International Electrotechnical Commission, *Guide 2:1991 – General terms and their definitions concerning standardization and related activities*, 6th edn.
[791] United States' third participant's submission, para. 35 (referring to ISO/IEC Guide, definitions for "standardization", "aims of standardization", and "product standard").
[792] United States' third participant's submission, para. 35.

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 must, under the customary rules of interpretation of public international law, have the same ordinary meaning.[798] The United States contends that neither the context of these provisions, nor the object and purpose of the agreements in which they appear, indicates that the identical terms in these provisions should have different meanings. For the United States, the second recital of the preamble of the TBT Agreement – "Desiring to further the objectives of the GATT 1994" – also indicates that Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement should be interpreted in the same way.[799]

2.285. The United States further contends that the Panel's interpretations of Articles I:1 and III:4 of the GATT 1994 create an incoherent and inconsistent relationship between the TBT Agreement and the GATT 1994. Noting that the Appellate Body has concluded that the TBT Agreement and the GATT 1994 "should be interpreted in a coherent and consistent manner", the United States maintains that the Panel's interpretations of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are contrary to the principle that Article III:4 serves as relevant context for the interpretation of Article 2.1.

2.286. In the United States' view, the Appellate Body's finding in *US – Clove Cigarettes* that Article 2.1 of the TBT Agreement does not prohibit technical regulations reflecting "solely" legitimate regulatory distinctions "followed naturally" from the context of past Appellate Body reports examining Article III:4 of the GATT 1994.[800] Thus, interpreting Article III:4 and Article 2.1 as setting forth different legal standards would be contradictory, given the origin of the Appellate Body's approach to the interpretation of Article 2.1.[801]

2.287. The United States rejects Canada's suggestion that the EU Seal Regime fails to make any contribution to its objective because it does not completely prevent consumers from being exposed to seal products from inhumanely killed seals.[802] In the view of the United States, a challenged measure is not inconsistent with Article 2.2 of the TBT Agreement merely because it does not fulfil its legitimate objective completely. The United States adds that a proposed alternative must then be assessed to determine whether it would achieve the legitimate objective at the level chosen by the Member. The United States further contends that Canada conflates the legal tests under

[793] United States' third participant's submission, para. 38.
[794] United States' third participant's submission, para. 39.
[795] United States' third participant's submission, para. 40.
[796] United States' third participant's submission, para. 43.
[797] United States' opening statement at the oral hearing.
[798] United States' third participant's submission, paras. 5 and 6, respectively.
[799] United States' third participant's submission, para. 6 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 91).
[800] United States' third participant's submission, para. 15 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 91 and 100; *US – Tuna II (Mexico)*, paras. 214 and 215; and *US – COOL*, para. 269).
[801] United States' third participant's submission, para. 16 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 91).
[802] United States' opening statement at the oral hearing.

Article 2.2 of the TBT Agreement and Article XX of the GATT 1994. According to the United States, Article 2.2 is not about whether the measure is necessary to achieve the designated objective, but rather whether the trade-restrictiveness of the measure is greater than necessary. Additionally, the United States maintains that Norway conflates these two provisions by arguing that Article 2.2 prohibits arbitrary or unjustifiable discrimination. The United States asserts that Article 2.2 is not about discrimination, but rather about whether a measure is more trade restrictive than necessary.

2.288. The United States submits further that the Panel's interpretation of Article III:4 of the GATT 1994 "establishes the illogical possibility that a technical regulation could be found to be consistent with the national treatment obligation" of the TBT Agreement, but "inconsistent with the same national treatment language in the more general agreement, the GATT 1994".[803] According to the United States, "[t]he Panel's interpretation would yield this result for a whole class of measures, namely technical regulations that pursue objectives that fall outside of the scope of Article XX" of the GATT 1994, and that "result in a detrimental impact" on imported products that "stems exclusively from legitimate regulatory distinctions".[804]

2.289. The United States submits that the Panel's interpretation of Article III:4 of the GATT 1994 "contradicts the principle that the [TBT Agreement and the GATT 1994] strike the same balance" between trade-liberalization and Members' right to regulate trade.[805] The United States explains that the list of possible legitimate objectives that may justify a technical regulation is "open and broad" under Article 2.1 of the TBT Agreement, while Article XX of the GATT 1994 presents a closed list of legitimate objectives.[806] Thus, under the Panel's interpretation of Article III:4 of the GATT 1994, the balance between Members' right to regulate trade and the general interest of trade-liberalization would be completely different under the GATT 1994 and the TBT Agreement. Under Article 2.1 of the TBT Agreement, technical regulations serving objectives that fall outside the scope of Article XX of the GATT 1994 could be justified, while, under the Panel's interpretation of Article III:4, measures serving these same objectives could not be justified.

2.290. With respect to Article XX of the GATT 1994, the United States submits that Article XX(a) does not require some prescribed degree of consistency between public moral concerns in different situations.[807] As regards the Panel's reliance upon its assessment under Article 2.1 of the TBT Agreement for the purposes of its analysis under the chapeau of Article XX, the United States submits that the question under Article 2.1 is whether the measure discriminates, while the question under the chapeau is whether any discrimination is arbitrary or unjustifiable. According to the United States, while the analysis under Article 2.1 can end once discrimination is found, this is only the "starting point" for the analysis under the chapeau of Article XX, and the chapeau becomes relevant only once discrimination has been found. Finally, the United States expresses its concern about Canada's and Norway's reading of the Appellate Body report in *Brazil – Retreaded Tyres*, and submits that the chapeau does not limit the justification for discrimination only to a justification based on the objective under the relevant subparagraph of Article XX, rather than other "legitimate and non-protectionist" objectives.

[803] United States' third participant's submission, para. 19.
[804] United States' third participant's submission, para. 20.
[805] United States' third participant's submission, para. 22 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 109).
[806] United States' third participant's submission, para. 23.
[807] United States' opening statement at the oral hearing.

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 exception 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 objective 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 and IC hunts is justifiable (raised by Canada); and

iii. in finding that the manner in which the IC exception is designed and applied does not meet the requirements of the chapeau (raised by the European Union).

4 BACKGROUND AND OVERVIEW OF THE MEASURE AT ISSUE

4.1. Before addressing the participants' claims on appeal, we provide an overview of the measure at issue in these disputes.[808] As noted by the Panel, the measure consists of the following two 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[809] (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[810] (Implementing Regulation).

[808] For additional details on the measure at issue, recourse should be had to paragraphs 7.10 to 7.24 of the Panel Reports.

[809] *Official Journal of the European Union*, L Series, No. 286 (31 October 2009) (Panel Exhibit JE-1).

[810] *Official Journal of the European Union*, L Series, No. 216 (17 August 2010) (Panel Exhibit JE-2).

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] The term "seal products" is defined by the Basic Regulation as "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins".[815]

4.5. Article 3 of the Basic Regulation sets out rules regarding "conditions for placing on the market" of seal products:

Article 3

Conditions for placing on the market

> 1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.
>
> 2. By way of derogation from paragraph 1:
>
> (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;
>
> (b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.
>
> The application of this paragraph shall not undermine the achievement of the objective of this Regulation. …

[811] See Panel Reports, paras. 7.8 and 7.26.
[812] See Panel Reports, paras. 2.1, 2.3, 3.7, 7.1, and 7.8.
[813] Panel Reports, paras. 7.386 and 7.387.
[814] Basic Regulation, Article 1.
[815] Basic Regulation, Article 2(2).

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 defined in the EU Seal Regime.[820] Article 3(1) also states that the conditions in the first paragraph shall apply at the time or point of *import* for imported products.[821]

4.7. The second paragraph of Article 3 begins with the phrase "by way of derogation from paragraph 1" and provides for two situations where derogation from paragraph 1 is allowed. First, Article 3(2)(a) allows the *import* of seal products where: (i) the act of import is of an occasional nature; and (ii) the goods at issue are for the "personal use of travellers or their families".[822] Second, Article (3)(2)(b) allows the placing on the market of seal products where: (i) the seal products result from by-products of hunting that is regulated by national law; (ii) the hunting is conducted for the sole purpose of the sustainable management of marine resources (also referred to by the Panel as "marine resource management" or "MRM"); and (iii) the placing on the market is only on a non-profit basis.[823] Both provisions contain a final sentence stipulating that "[t]he nature and quantity of [such goods/the seal products] shall not be such as to indicate that they are being [imported/placed on the market] for commercial reasons." The EU Seal Regime does not provide a definition for the terms "commercial" or "commercial reasons".[824]

4.8. As noted by the Panel, "the practical implication of Article 3 is that seal products derived from hunts other than IC or MRM hunts cannot be imported and/or placed on the EU market" except to the extent that the Travellers exception permits limited imports for personal use.[825] Furthermore, as the Panel observed, the EU Seal Regime creates "*implicit exceptions* for seal products for transit, inward processing, and importation for auction and re-export".[826]

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[816] The Basic Regulation defines "placing on the market" as "introducing onto the Community market, thereby making available to third parties, in exchange for payment". (Basic Regulation, Article 2(3))

[817] The Basic Regulation defines "Inuit" as "indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)". (Basic Regulation, Article 2(4))

[818] The Implementing Regulation defines "other indigenous communities" as:

> [C]ommunities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

(Implementing Regulation, Article 2(1)) Neither the Basic Regulation nor the Implementing Regulation defines the meaning of "subsistence".

[819] The Panel referred to this provision as setting out the "IC exception". (See e.g. Panel Reports, paras. 7.53 and 7.377) We do the same in these Reports.

[820] Panel Reports, para. 7.283 (referring to COWI, *Study on implementing measures for trade in seal products, Final Report* (January 2010) (Panel Exhibit JE-21) (COWI 2010 Report), p. 9).

[821] The Basic Regulation defines "import" as "any entry of goods into the customs territory of the Community". (Basic Regulation, Article 2(5))

[822] The Panel referred to this exception as the "Travellers exception". (See e.g. Panel Reports, para. 7.53) We do the same in these Reports.

[823] The Panel referred to this exception as the "MRM exception". (See e.g. Panel Reports, paras. 7.53 and 7.377) We do the same in these Reports. The Implementing Regulation defines "placing on the market on a non-profit basis" as "placing on the market for a price less than or equal to the recovery of the costs borne by the hunter reduced by the amount of any subsidies received in relation to the hunt". (Implementing Regulation, Article 2(2))

[824] Panel Reports, para. 7.41 (referring to European Union's response to Panel question No. 123, para. 84).

[825] Panel Reports, para. 7.45.

[826] Panel Reports, para. 7.53 (referring to European Union's response to Panel questions Nos. 75, 101, 131, and 177; and Canada's and Norway's comments on European Union's response to Panel questions Nos. 75, 101, 131, and 177). (emphasis original)

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 "moral 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 terminology 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 distinguishes 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, provided that they comply with the relevant requirements. In these Reports, we refer, as did the Panel, to hunts other than IC or MRM hunts as "commercial hunts" for ease of reference and without prejudice to the existence of a commercial element in IC and MRM hunts.[832]

5 ANALYSIS OF THE APPELLATE BODY

5.1 Legal characterization of the EU Seal Regime – Annex 1.1 to the TBT Agreement

5.1.1 Introduction

5.1. Before the Panel, Canada and Norway challenged the consistency of the EU Seal Regime with various provisions of the GATT 1994 and the TBT Agreement.[833] The Panel determined that it would first examine the complainants' claims under the TBT Agreement. Before proceeding to address the substance of these claims, the Panel addressed the threshold question of whether, as contended by Canada and Norway, the measure at issue constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. In its analysis of this question, the Panel referred to what it described as a "three-tier test" and made three intermediate findings.[834] First, the Panel found that the measure applies to an "identifiable group of products"[835], namely, seal products. Second, the Panel determined that the EU Seal Regime "lays down characteristics for all products that might contain seal" as well as "applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition under the measure [at issue]".[836] Third, the Panel found that the measure imposes mandatory compliance.[837]

5.2. The European Union does not contest the Panel's finding that the measure applies to an "identifiable group of products".[838] Nor does it take issue with the Panel's determination[839] that the measure imposes mandatory compliance. Instead, the European Union's appeal focuses on the Panel's finding that the measure lays down product characteristics, including the applicable administrative provisions, and the Panel's conclusion that the EU Seal Regime is a technical

[828] Panel Reports, para. 6.7 (referring to Norway's comments on the Interim Panel Reports, paras. 37 and 38).

[829] Panel Reports, para. 6.7.

[830] Panel Reports, para. 6.7.

[831] Panel Reports, para. 6.9.

[832] Panel Reports, paras. 6.7-6.9 and 7.179 (referring to Norway's comments on the Interim Panel Reports, paras. 37 and 38).

[833] Specifically, both complainants brought claims under Articles I:1, III:4, XI:1, and XXIII:1(b) of the GATT 1994, and Articles 2.2, 5.1.2, and 5.2.1 of the TBT Agreement. Additionally, Canada presented a claim under Article 2.1 of the TBT Agreement. Norway also brought a claim under Article 4.2 of the Agreement on Agriculture.

[834] Panel Reports, para. 7.85 (referring to Appellate Body Report, *EC – Sardines*, para. 176, in turn referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70; and Appellate Body Reports, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*).

[835] Panel Reports, para. 7.117 (quoting Appellate Body Report, *EC – Asbestos*, para. 70; and referring to Appellate Body Report, *EC – Sardines*, para. 180).

[836] Panel Reports. para. 7.111.

[837] Panel Reports, para. 7.125.

[838] European Union's other appellant's submission, para. 38 (referring to Panel Reports, para. 7.117).

[839] Panel Reports, para. 7.125.

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 applicable 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 requirements relating to the identity of the hunter or the type or purpose of the hunt. According 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 considered 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 (PPMs) 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 its 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 issue 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 products may not contain seal".[853] Nor does the EU Seal Regime, when considered as a whole, lay down "product characteristics" within the meaning of Annex 1.1 to the TBT Agreement.[854]

5.5. Canada and Norway consider that the Panel properly interpreted the scope of Annex 1.1 and rightly characterized the EU Seal Regime as a technical regulation. Canada maintains that the "administrative provisions" in the EU Seal Regime "apply" to product characteristics because the relevant provisions in the Implementing Regulation operate to ensure that products containing seal

[840] European Union's other appellant's submission, para. 89.
[841] Panel Reports, para. 7.106.
[842] Panel Reports, para. 7.108.
[843] Panel Reports, para. 7.112.
[844] European Union's other appellant's submission, para. 53.
[845] European Union's other appellant's submission, para. 58.
[846] European Union's other appellant's submission, para. 66.
[847] European Union's other appellant's submission, para. 59.
[848] European Union's other appellant's submission, para. 66.
[849] European Union's other appellant's submission, para. 67.
[850] European Union's other appellant's submission, para. 76 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).
[851] European Union's other appellant's submission, para. 79 (referring to Panel Reports, para. 7.100).
[852] European Union's other appellant's submission, para. 81.
[853] European Union's other appellant's submission, para. 88.
[854] European Union's other appellant's submission, para. 88.

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 out 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 criteria set out in the exceptions under the EU Seal Regime lay down an "intrinsic" feature of the subject 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 finding that the EU Seal Regime lays down product characteristics was that the prohibitive elements of the measure, in conjunction with the permissive elements that define their scope, lay down a product characteristic in the negative form by requiring that all products not contain seal.[861] Norway further submits that the administrative provisions in the EU Seal Regime are applicable to certain products because these products exhibit or possess the "product characteristic" of containing seal inputs.[862] In that sense, according to Norway, these administrative provisions "apply, pertain and relate to the product characteristic".[863] Finally, Norway maintains that the Panel conducted a "holistic analysis" of the EU Seal Regime[864], and correctly understood the import of *EC – Asbestos* to mean that "the prohibition and exceptions need not 'individually' lay down product characteristics, so long as, as a whole, they [do] so."[865]

5.7. We turn to review the text of Annex 1.1 in the light of the various issues implicated by the European Union's appeal.

5.1.2 Interpretation of Annex 1.1 to the TBT Agreement

5.8. Article 1.2 of the TBT Agreement stipulates that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies". The first paragraph of Annex 1.1 defines the term "technical regulation" as follows:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

5.9. Annex 1.1 describes a technical regulation by reference to a "document". As noted by the Appellate Body in *US – Tuna (II) (Mexico)*, the use of the term "document" could "cover a broad range of instruments or apply to a variety of measures".[866]

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[855] Canada's appellee's submission, para. 40.
[856] Canada's appellee's submission, para. 40.
[857] Canada's appellee's submission, para. 41 (quoting European Union's other appellant's submission, para. 56).
[858] Canada's appellee's submission, para. 46 (referring to Panel Reports, para. 7.111).
[859] Norway's appellee's submission, para. 45 (referring to Norway's second written submission to the Panel, para. 146; and Norway's response to Panel question No. 127).
[860] Norway's appellee's submission, paras. 46-64.
[861] Norway's appellee's submission, para. 69 (referring to Panel Reports, paras. 7.106 and 7.111).
[862] Norway's appellee's submission, para. 83.
[863] Norway's appellee's submission, para. 80.
[864] Norway's appellee's submission, para. 89.
[865] Norway's appellee's submission, para. 88 (quoting Panel Reports, para. 7.100).
[866] Appellate Body Report, *US – Tuna II (Mexico)*, para. 185.

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 "related [PPMs]" may play an additional or alternative role vis-à-vis "product characteristics" under Annex 1.1. The noun "process" is ordinarily understood to refer to "a course of action, a procedure, a series of actions or operations directed to some end, as in manufacturing".[873] We further note that the dictionary defines the term "production" as "[t]he process of being manufactured commercially, esp. in large quantities"[874], while the word "method" is defined as "a (defined or systematic) way of doing a thing".[875] The ordinary meaning of the term "related" is "[h]aving relation; having mutual relation; connected".[876] A plain reading of Annex 1.1 thus suggests that a "related" PPM is one that is "connected" or "has a relation" to the characteristics of a product. The word "their", which immediately precedes the words "related processes and production methods", refers back to "product characteristics". Thus, in the context of the first sentence of Annex 1.1, we understand the reference to "or their related processes and production methods" to indicate that the subject matter of a technical regulation may consist of a process or production method that is *related* to product characteristics. In order to determine whether a measure lays down related PPMs, a panel thus will have to examine whether the processes and production methods prescribed by the measure have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics.

5.13. Continuing with our review of the first sentence of Annex 1.1, we note the reference to "applicable administrative provisions", which is linked to the words "product characteristics or their related processes and production methods" by the conjunctive "including". The word "provision" is relevantly defined as "a legal or formal statement providing for some particular matter".[877] The

[867] Appellate Body Report, *US – Tuna II (Mexico)*, para. 185.

[868] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1562.

[869] Appellate Body Report, *EC – Asbestos*, para. 67.

[870] Appellate Body Report, *EC – Asbestos*, para. 67.

[871] Appellate Body Report, *EC – Asbestos*, para. 67. In that appeal, the Appellate Body considered that such "related" characteristics may pertain to "the means of identification, the presentation and the appearance of a product". (Ibid.)

[872] Appellate Body Report, *EC – Asbestos*, para. 67.

[873] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2356.

[874] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2359.

[875] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1767.

[876] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2519.

[877] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2384.

adjective "administrative", in turn, is defined as "[p]ertaining to management of affairs".[878] The term "applicable" in this context indicates that the relevant "administrative provisions" must "refer" to or be "relevant" to the product characteristics or their related PPMs as prescribed in the relevant document.[879] The word "including" suggests that, where a mandatory document laying down product characteristics or their related processes and production methods also contains "administrative provisions" that refer to those "product characteristics" or "related processes and production methods", those administrative provisions are to be considered as an integral part of the technical regulation and are thus subject to the substantive provisions of the TBT Agreement. In the context of Annex 1.1, we understand the appositive clause "including the applicable administrative provisions" to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods.

5.14. The second sentence of Annex 1.1 further enumerates specific elements that technical regulations "may also include or deal exclusively with", namely, "terminology, symbols, packaging, marking or labelling requirements" as they apply to a product, process or production method. The use of the words "also include" and "deal exclusively with" at the beginning of the second sentence indicates that the second sentence includes elements that are additional to, and may be distinct from, those covered by the first sentence of Annex 1.1.

5.15. Having reviewed the text of Annex 1.1, we turn to examine whether the Panel erred in its application of Annex 1.1 to the facts of this case when it found that the EU Seal Regime constitutes a technical regulation. We consider it useful to begin by recalling the relevant aspects of the measure that the Panel found in this case to constitute a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

5.1.3 Whether the EU Seal Regime constitutes a technical regulation

5.1.3.1 Overview of the EU Seal Regime

5.16. As noted by the Panel, the EU Seal Regime establishes "rules concerning the placing on the market of seal products".[880] Specifically, Article 3(1) of the Basic Regulation prescribes that the placing on the market of seal products is allowed "only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence".[881] Article 3(2) of the Basic Regulation sets out two "derogations" from Article 3(1). First, Article 3(2)(a) allows the importation of a seal product by a traveller under certain conditions. Second, Article 3(2)(b) allows the placing on the market of seal products where: (i) the seal products result from by-products of hunting that is regulated by national law; (ii) the hunting is conducted for the sole purpose of the sustainable management of marine resources; and (iii) the placing on the market is only on a non-profit basis. Specific requirements for each of the three conditions for importing and/or placing seal products on the market are elaborated in the Implementing Regulation.[882]

5.17. Referring to the IC, MRM, and Travellers exceptions, the Panel noted that the conditions set out under the EU Seal Regime, together, both allow and prohibit the placing of seal products on the market. The Panel therefore correctly considered that the EU Seal Regime does not constitute a "total" or "general" ban on seal products, but instead "consists of both prohibitive and permissive components and should be examined as such".[883]

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[878] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 28.

[879] See *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 103.

[880] Panel Reports, para. 7.40 (referring to Basic Regulation, Article 1).

[881] Panel Reports, para. 7.13 (quoting Basic Regulation, Article 3(1)).

[882] See *supra*, paras. 4.9-4.11.

[883] Panel Reports, para. 7.54.

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.

5.19. First, the Appellate Body has emphasized that a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[884] As the Appellate Body has explained, this analysis should give particular weight to the "integral and essential" aspects of the measure.[885] In determining whether a measure is a technical regulation, a panel must therefore carefully examine the design and operation of the measure while seeking to identify its "integral and essential" aspects.[886] It is these features of the measure that are to be accorded the most weight for purposes of characterizing the measure, and, thereby, for determining whether it is subject to the disciplines of the TBT Agreement. The ultimate conclusion as to the legal characterization of the measure must be made in respect of, and having considered, the measure as a whole.

5.20. Second, the issue of how best to characterize a measure at issue which comprises several different elements is one that arises in many disputes. The question is of particular significance in cases where the inclusion or exclusion of certain elements in the definition of the measure can affect the legal characterization, or substantive analysis of the measure. A panel may, in some cases, find it appropriate to treat several domestic legal instruments together as a single measure in order to facilitate its analysis of that measure in the light of the claims raised or defences invoked.[887] Conversely, there may be instances where a panel may choose to consider different elements set out in a single legal instrument as different "measures", for purposes of its analysis.[888] As regards the measure at issue in the present disputes, the Panel noted that: (i) the Basic Regulation and the Implementing Regulation "operate in conjunction with each other in governing the importation and the placing of seal products on the EU market"[889]; (ii) the permissive and the prohibitive elements of the measure are intertwined within the EU Seal Regime[890]; and (iii) the parties agreed that the EU Seal Regime should be treated as a single measure.[891] For the purpose of Annex 1.1, we therefore consider it appropriate to draw conclusions regarding the legal characterization of the EU Seal Regime as a whole on the basis of an integrated analysis of the constituent parts of the measure.

5.21. Third, regarding the scope of this aspect of the European Union's appeal, we recall that the European Union does not contest the Panel's finding that the measure applies to an "identifiable group of products"[892] or the Panel's determination that the measure imposes mandatory compliance.[893] We consider it useful nonetheless to note, as did the Panel, that the product scope of the EU Seal Regime is defined in Article 2(2) of the Basic Regulation as "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins". This confirms that the measure at issue applies to an identifiable group of products, that is, seal products as defined in Article 2(2).

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[884] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).

[885] Appellate Body Report, *EC – Asbestos*, para. 72.

[886] Appellate Body Report, *EC – Asbestos*, para. 72.

[887] For example, in *EC – Bananas III*, the EC Banana Regime comprised the Council Regulation (EEC) 404/931 "and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime". (Panel Reports, *EC – Bananas III*, para. 1.1) Treating multiple legal instruments as a single measure does not preclude a complainant from challenging different aspects of such a measure under different provisions of the WTO covered agreements.

[888] See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 126 and 127.

[889] Panel Reports, para. 7.26.

[890] For example, in the case of the IC exception, Article 3(1) of the Basic Regulation prescribes that the *placing on the market* of seal products is allowed "*only* where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence". (emphasis added)

[891] Panel Reports, para. 7.26 (referring to parties' responses to Panel question No. 2).

[892] Panel Reports, para. 7.117.

[893] Panel Reports, para. 7.125.

5.22. Moreover, the EU Seal Regime is mandatory in the sense that it prescribes rules concerning the placing on the market of seal products "in a binding or compulsory fashion".[894] Specifically, the EU Seal Regime prohibits seal products from the EU market, except in cases where they meet the conditions prescribed in Article 3 of the Basic Regulation and Articles 3 and 5 of the Implementing Regulation. The mandatory nature of the EU Seal Regime is therefore found in the conditions that govern the placing on the EU market of seal products, as defined in Article 2(2) of the Basic Regulation.

5.23. Although the Panel's findings regarding these features of the EU Seal Regime have not been appealed, they may nonetheless assist us in determining whether, in the light of the design and operation of the EU Seal Regime, the Panel properly determined that the measure lays down product characteristics, including the applicable administrative provisions, and, therefore, constitutes a "technical regulation" within the meaning of Annex 1.1.

5.24. With these considerations in mind, we turn to examine the Panel's analysis of the EU Seal Regime in the light of the European Union's appeal.

5.1.3.3 Whether the EU Seal Regime lays down product characteristics including the applicable administrative provisions

5.1.3.3.1 The Panel's approach

5.25. Referring to the Appellate Body report in *EC – Asbestos*, the Panel stated that it would "proceed to examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1".[895] The Panel recalled the Appellate Body's finding in *EC – Asbestos* that the prohibition on asbestos fibres "as such" did not lay down "product characteristics" because it simply banned asbestos fibres in their natural state.[896] The Panel further noted, however, that the prohibition on asbestos-containing products was found by the Appellate Body "to lay down a product characteristic in the negative form by requiring that all products must not contain asbestos".[897] Turning to the measure at issue in the instant disputes, the Panel observed that the EU Seal Regime "prohibits all seal products, whether they are made exclusively of seal or contain seal as an input" and that it makes an exception "with regard to the import and/or placing on the market of seal products in three situations, namely when they result from IC hunts, MRM hunts, or in the case of Travellers imports".[898] Based on the text of the measure, and in the light of the reasoning of the Appellate Body in *EC – Asbestos*, the Panel concluded:

> [W]e believe that the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal.[*][899]

[*fn original] [153] We note that such conclusion is not affected by the fact that the prohibition of seals "in their natural state" might not, in itself, prescribe or impose any "characteristics". In this regard, Norway argues that the appropriate analogues to the "raw mineral form" of asbestos in the context of the EU Seal Regime would be live seals or unprocessed seal carcasses. In Norway's view, the majority of seal products are in fact "mixed" products, i.e. they must be combined with other products derived from other sources. (Norway's second written submission, paras. 154-155).

[894] Appellate Body Report, *EC – Asbestos*, para. 68.

[895] Panel Reports, para. 7.102. See also para. 7.99 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).

[896] Panel Reports, para. 7.104 (referring to Appellate Body Report, *EC – Asbestos*, para. 71). See also Panel Reports, para. 7.99.

[897] Panel Reports, para. 7.104.

[898] Panel Reports, para. 7.105 (referring to Basic Regulation, Articles 3(1), 3(2)(a), and 3(2)(b)).

[899] Panel Reports, para. 7.106.

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 paragraph 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 elements 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 permissive 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 (i.e. seal products obtained from IC hunts, MRM hunts, and those imported under the Travellers imports category)".[904] Although the Panel set out to "examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1"[905], it appears that the Panel's conclusion that the measure lays down product characteristics rests on its assessment of a single component of the measure. In other words, having compartmentalized its assessment of the various components of the EU Seal Regime in this manner, the Panel seemed satisfied once it had found that the prohibition on seal-containing products laid down product characteristics in the negative form. The Panel then proceeded to find that other components of the measure, i.e. the exceptions under the EU Seal Regime, constitute "applicable administrative provisions" because they "define the scope of the prohibition" of the EU Seal Regime; and that the "nature of the exceptions is to allow products containing seal" subject to "strict administrative requirements" based on a "set of criteria".[906] It is not apparent from its Reports that the Panel conducted a holistic assessment of the weight and relevance of each of the relevant components of the EU Seal Regime before reaching a conclusion as to the legal characterization of the measure "as a whole".

5.29. As noted, the Appellate Body has emphasized that a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[907] In *EC – Asbestos*, the Appellate Body placed particular emphasis on the "integral and essential" aspects of the measure[908], "taking into account, as appropriate, the prohibitive and the permissive elements that are part of it".[909] In order to determine the proper legal characterization of the EU Seal Regime, the Panel should therefore have examined the design and operation of the measure while seeking to identify its "integral and essential" aspects before reaching a final conclusion as to the legal characterization of the measure

[900] European Union's other appellant's submission, para. 76 (referring to Panel Reports, para. 7.101).
[901] European Union's other appellant's submission, para. 88.
[902] Panel Reports, para. 7.106.
[903] Panel Reports, para. 7.54.
[904] Panel Reports, para. 7.56.
[905] Panel Reports, para. 7.102.
[906] Panel Reports, para. 7.108. We further note in this regard that the Panel found that the criteria under the exceptions of the EU Seal Regime constitute "objectively definable features" of the seal products and "consequently lay down particular 'characteristics' of the final products". (Panel Reports, para. 7.110)
[907] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).
[908] Appellate Body Report, *EC – Asbestos*, para. 72.
[909] Appellate Body Report, *EC – Asbestos*, para. 64. In reaching this conclusion, the Appellate Body took into account the content of Canada's request for the establishment of a panel (i.e. Canada's identification of the Decree concerned as "the measure at issue") as well as the content of the measure itself (consisting of prohibitions and limited exceptions). The Appellate Body then examined each component (i.e. prohibitions and exceptions) of the measure before making an overall assessment of whether the measure, viewed as an integrated whole, was a "technical regulation" within the meaning of Annex 1.1.

in respect of, and having considered, the measure as a whole. Although a measure that comprises, among other elements, a prohibition of seal-containing products may include a component that appears to prescribe product characteristics, we consider the Panel to have erred, to the extent it reached a final conclusion as to the legal character of the measure on the basis of an examination of the aspect of the EU Seal Regime that sets out a "prohibition on seal-containing products" taken alone.[910] The Panel could not have properly reached a conclusion as to the legal character of the measure at issue without analysing the weight and relevance of the essential and integral elements of the measure as an integrated whole.

5.30. Having expressed our concern regarding the overall approach adopted by the Panel, we turn to address the participants' arguments as they relate to the three specific aspects of the EU Seal Regime: (i) the prohibition on products consisting exclusively of seal (pure seal products); (ii) the prohibition on seal-containing products ("mixed" products); and (iii) the conditions under the IC/MRM/Travellers exceptions. Then, to the extent necessary, we address the participants' arguments regarding the applicable administrative provisions. We do so in order to assess whether, and to what extent, these aspects of the measure have features prescribing product characteristics while seeking to identify the essential and integral features of the measure. Following our examination of the EU Seal Regime as a whole, we draw a conclusion as to whether the Panel erred in finding that the measure lays down product characteristics including applicable administrative provisions in the sense of Annex 1.1 to the TBT Agreement.

5.1.3.3.2 Prohibitive and permissive elements

5.31. We note, first, that the Appellate Body has previously explained that a measure "may provide, positively, that products *must possess* certain 'characteristics'", or it "may require, negatively, that products *must not possess* certain 'characteristics'".[911] As the Appellate Body has explained, the legal result is the same in both cases: "the document 'lays down' certain binding 'characteristics' for products, in one case affirmatively, and in the other by negative implication."[912]

5.32. The European Union observes that one aspect of the EU Seal Regime consists of a prohibition on pure seal products.[913] According to the European Union, the Panel erred by failing to take into account that such a ban on pure seal products does not set out product characteristics. The European Union adds that this aspect of the measure is similar to the prohibition of asbestos fibres "as such" in *EC – Asbestos*, which the Appellate Body found did not constitute a technical regulation.[914]

5.33. Norway counters that the mere fact that the EU Seal Regime applies to pure seal products does not preclude the measure from being characterized as a technical regulation, considering that it lays down characteristics for all products containing seal inputs.[915] Norway adds that the majority of seal products subject to the EU Seal Regime are "mixed products" that include non-seal inputs, such as "tanned seal fur skin; boots with seal fur skins; slippers with seal fur skin; refined seal oil; omega-3 oil capsules; and processed seal meat".[916] According to Norway, "the extent of pure seal products is so limited" that it does not affect the overall finding made by the Panel that the EU Seal Regime lays down product characteristics for all products that might contain seal inputs.[917]

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[910] Panel Reports, para. 7.106.

[911] Appellate Body Report, *EC – Asbestos*, para. 69. (emphasis original)

[912] Appellate Body Report, *EC – Asbestos*, para. 69.

[913] 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". (Panel Reports, para. 7.410)

[914] European Union's other appellant's submission, para. 33 (referring to Appellate Body Report, *EC – Asbestos*, paras. 71 and 72).

[915] Norway's appellee's submission, para. 95.

[916] Norway's appellee's submission, para. 96 (referring to Norway's first written submission to the Panel, paras. 85-102).

[917] Norway's appellee's submission, para. 96.

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] Norway notes, in particular, that the Panel reasoned that the exceptions "define the scope of the prohibition" of the EU Seal Regime and that the "nature of the exceptions is to allow products containing seal" subject to "strict administrative requirements" under the measure.[926]

5.39. In *EC – Asbestos*, the Appellate Body found that an "integral and essential aspect of the measure [was] the regulation of '*products containing asbestos fibres*'".[927] The Appellate Body attached importance to the fact that the measure at issue in that case effectively prescribed "certain objective features, qualities or 'characteristics' on all products".[928] The prohibition on seal-containing products as such may be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal. Yet, that prohibition is but one of the components of the EU Seal Regime and has to be analysed together with other

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[918] Appellate Body Report, *EC – Asbestos*, para. 71.
[919] Appellate Body Report, *EC – Asbestos*, para. 71. (emphasis original)
[920] Appellate Body Report, *EC – Asbestos*, para. 72 (referring to Panel Report, *EC – Asbestos*, paras. 3.418 and 3.439).
[921] Panel Reports, paras. 7.240 and 7.241.
[922] Panel Reports, fn. 153 to para. 7.106 (quoting Appellate Body Report, *EC – Asbestos*, para. 71).
[923] European Union's other appellant's submission, para. 34 (referring to European Union's first written submission to the Panel, para. 216). (emphasis original)
[924] Canada's appellee's submission, para. 37 (referring to Panel Reports, para. 7.106).
[925] Norway's appellee's submission, para. 49.
[926] Norway's appellee's submission, para. 50 (quoting Panel Reports, para. 7.108).
[927] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis original)
[928] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis omitted)

components of the measure before reaching a conclusion under Annex 1.1. As the Appellate Body has previously noted, "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole."[929] Moreover, the Appellate Body in *EC – Asbestos* did not conclude that the relevant French Decree qualified as a technical regulation merely on the basis of its intermediate finding that the aspect of the measure setting out a prohibition on "mixed products" prescribed "certain objective features, qualities or 'characteristics' on all products".[930] Rather, the Appellate Body reached its conclusion only after further examining other aspects of the measure (i.e. certain exceptions to such prohibition). Given that the EU Seal Regime "consists of both prohibitive and permissive components"[931], we consider it necessary further to examine the permissive elements of the measure before drawing, on the basis of all relevant components of the EU Seal Regime, an overall conclusion as to whether the measure prescribes product characteristics.

5.40. As noted, Article 1 of the Basic Regulation, entitled "Subject matter", states that the Regulation establishes "rules concerning the placing on the market of seal products". Article 3, the key substantive provision of the Basic Regulation, entitled "Conditions for placing on the market", starts with a paragraph prescribing that the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.[932] The second paragraph of Article 3 provides for two situations where derogation from paragraph 1 is allowed. First, the placing on the market of seal products on a non-profit basis is allowed where a seal product is derived from MRM hunts and is not being placed on the market for "commercial reasons" (Article 3(2)(b)).[933] Second, the import by travellers of a seal product is allowed to the extent that it is not for "commercial reasons" (Article 3(2)(a)). Specific requirements for each of the three conditions for importing and/or placing seal products on the market are elaborated in other parts of the Basic Regulation and the Implementing Regulation.[934]

5.41. Before turning to examine the conditions under the exceptions, we consider it helpful to observe the different features of the measures at issue in *EC – Asbestos* and in these disputes. First, we note that, under the French Decree, asbestos-containing products were regulated due to the carcinogenicity or toxicity of the physical properties of the subject products – i.e. the fact that those products contained asbestos fibres. By contrast, the EU Seal Regime does not prohibit seal-containing products merely on the basis that such products contain seal as an input. Rather, such prohibition is imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. In *EC – Asbestos*, by contrast, the identity of the producer or manufacturer, or the type or purpose of manufacturing, did not feature in the French Decree as conditions for the prohibition or permission to place asbestos products on the market. Moreover, the prohibition of products containing asbestos set out in Article 1, paragraphs I and II of the French Decree, was an "integral and essential aspect" of the measure at issue in *EC – Asbestos*.[935] On the other hand, under the EU Seal Regime, in particular, Article 3 of the Basic Regulation, the prohibition on the products containing seal seems to be derivative of the three (IC/MRM/Travellers) market access conditions, that is, the permissive component of the measure.

5.42. In addition, we note the difficulty of verifying precisely whether a particular product contains seal as an input.[936] This may suggest, albeit indirectly, that the regulation of the "mixed products" is not an equally important feature of the EU Seal Regime as far as the *operation* of the measure is concerned, as it was the case for the regulation of products containing chrysotile asbestos fibres under the measure at issue in *EC – Asbestos*. Finally, we note that, with respect to the exceptions regarding crysotile asbestos fibres, pursuant to Article 2 of the French Decree at issue in *EC – Asbestos*, the exceptions under that measure applied on "an exceptional and temporary

[929] Appellate Body Report, *EC – Asbestos*, para. 64.
[930] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis omitted)
[931] Panel Reports, para. 7.54.
[932] Panel Reports, para. 7.13.
[933] Article 3(2)(b) of the Basic Regulation states, at the end: "The nature and quantity of the seal products shall not be such as to indicate that they are being *placed on the market* for commercial reasons." (emphasis added)
[934] See *supra*, paras. 4.9-4.11.
[935] Appellate Body Report, *EC – Asbestos*, para. 72.
[936] European Union's response to questioning at the oral hearing.

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

[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 Article 2.9 of the TBT Agreement envisages that technical regulations have "technical content". While the term "technical" can have a range of meanings, it does not appear plausible that a measure that purportedly distinguishes between seal products on the basis of criteria relating to the identity of the hunter and the purpose of the hunt would be "technical" in nature or have "technical" content.
[943] Implementing Regulation, Article 7.
[944] Implementing Regulation, Article 9(1).
[945] Implementing Regulation, Article 4(3).
[946] Panel Reports, para. 7.108.

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]

5.51. Norway agrees with the Panel's finding that the EU Seal Regime "prescribes 'applicable administrative provisions' for products with certain objective characteristics".[955] The administrative provisions under the measure at issue in *EC – Asbestos* applied to products possessing the regulated product characteristic of containing chrysotile asbestos[956], while the exceptions under the EU Seal Regime include administrative provisions, which "'apply' to products possessing the regulated product characteristic" of containing seal.[957] According to Norway, "the close nexus between 'administrative provisions' and 'product characteristics' arises *because* the products exhibit or possess the 'product characteristic' laid down in the document in question."[958]

5.52. As noted above, we read the clause "including the applicable administrative provisions" in Annex 1.1 to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods. To the extent that the essential and integral aspects of the EU Seal Regime that were identified above do not set out product characteristics, it follows that their related administrative provisions cannot be characterized as being applicable to product characteristics.

5.53. We further note that the EU Seal Regime differs from the measure at issue in *EC – Asbestos* in the sense that the exceptions contained in the latter measure were found by the Appellate Body to involve product characteristics, and the Appellate Body could therefore find that the "administrative provisions" in that dispute *applied* to such product characteristics. Specifically, in *EC – Asbestos*, the Appellate Body found that the nature of the exceptions in that case was to permit "the use of certain products *containing chrysotile asbestos fibres*, subject to compliance with strict administrative requirements".[959] The Appellate Body added that "[t]he scope of the

[947] Panel Reports, para. 7.108.
[948] Panel Reports, para. 7.108.
[949] European Union's other appellant's submission, para. 53 (referring to Panel Reports, para. 7.108).
[950] European Union's other appellant's submission, para. 55.
[951] European Union's other appellant's submission, para. 58.
[952] European Union's other appellant's submission, para. 58.
[953] Canada's appellee's submission, para. 40 (referring to the European Union's other appellant's submission, para. 55).
[954] Canada's appellee's submission, para. 41 (quoting the European Union's other appellant's submission, para. 56).
[955] Norway's appellee's submission, para. 63 (referring to Panel Reports, para. 7.109).
[956] Norway's appellee's submission, para. 61 (referring to Appellate Body Report, *EC – Asbestos*, para. 73).
[957] Norway's appellee's submission, para. 63.
[958] Norway's appellee's submission, para. 80. (emphasis original)
[959] Appellate Body Report, *EC – Asbestos*, para. 73. (emphasis added)

exceptions [was] determined by an 'exhaustive list' of *products that are permitted to contain chrysotile asbestos fibres*".[960] It is uncontested that the conditions governing the exception in *EC – Asbestos* applied to products possessing defined objective characteristics – i.e. products containing chrysotile asbestos fibres. Moreover, the inclusion of a product in the list of exceptions depended "on the absence of an acceptable alternative fibre for *incorporation into a particular product*, and the demonstrable provision of 'all technical guarantees of safety'".[961] We further note that, under the measure at issue in *EC – Asbestos*, the alternative fibre, the absence of which gave rise to the exception, was designed to be *incorporated* into a particular product and provide all technical guarantees of safety, which would seem to be features closely related to product characteristics.

5.54. Ultimately, the Appellate Body considered that, *through these exceptions*, the measure at issue in *EC – Asbestos* set out "*applicable administrative provisions*" for products with particular characteristics.[962] Unlike the measure at issue in *EC – Asbestos*, the EU Seal Regime does not prohibit (or permit) the importation or placing on the EU market of products depending on whether or not they *contain* seal as an input. Instead, as the Panel observed:

> [I]n order to fall under the IC or MRM exceptions, products containing seal must meet *inter alia* the following criteria relating to seal hunts from which the seals used as their input are derived: the identity of the hunter (Inuit or indigenous); the type of hunt (traditional Inuit hunts); the purpose of the hunt (subsistence or marine resource management); and the way in which the products are marketed (non-systematically and on a non-profit basis).[963]

5.55. In this way, the measure conditions market access on the type and purpose of the seal hunt, and the identity of the hunter.[964] As we pointed out above, such criteria do not constitute product characteristics in the sense of Annex 1.1.

5.56. Referring to Articles 3(2), 5(2), and 7(1) of the Implementing Regulation, the Panel noted that, under the EU Seal Regime:

> Any person wishing to import and/or place seal products on the market under these exceptions must have such products certified by a recognized body as meeting the necessary criteria under each exception. Furthermore, the products must be accompanied by an attesting document at the time of placing on the market. In addition, with respect to the particular unit of seal products for which it is issued, the attesting document indicates whether the products result from hunts conducted by Inuit or other indigenous communities, or from hunts for the sustainable management of marine resources.[965]

5.57. Although the administrative provisions under the EU Seal Regime "apply" to products containing seal, this does not, in our view, mean that the measure at issue amounts to a technical regulation for that reason alone. Rather, as we see it, the administrative provisions serve to identify the exempted products, through the type and purpose of the relevant seal hunt, and the identity of the hunter. The administrative provisions under the EU Seal Regime also require that these products be certified by a recognized body as meeting the necessary criteria under each exception.[966] Yet, when viewed together with the exceptions under the EU Seal Regime, we consider that this aspect of the measure is ancillary, and does not render the measure a "technical regulation" within the meaning of Annex 1.1.

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[960] Appellate Body Report, *EC – Asbestos*, para. 73. (emphasis added)

[961] Appellate Body Report, *EC – Asbestos*, para. 73. (emphasis added)

[962] Appellate Body Report, *EC – Asbestos*, para. 74 (referring to Panel Report, *EC – Asbestos*, para. 8.69). (emphasis added)

[963] Panel Reports, para. 7.109. (fn omitted)

[964] See *supra*, paras. 4.4-4.11.

[965] Panel Reports, para. 7.109. (fns omitted)

[966] Articles 6 through 10 of the Implementing Regulation prescribe the procedural requirements that must be met to place seal products on the EU market, that is, for a seal product to be placed on the EU market, it must be accompanied by an attesting document (Article 7) issued by a recognized body (Article 6). A reference to the attesting document number must be included in any further invoice (Article 7(4)). A model attesting document is attached as an annex to the Implementing Regulation. (See Panel Reports, para. 7.24)

5.1.3.3.4 Conclusion

5.58. Having reviewed the relevant aspects of the EU Seal Regime, we see only one feature that may suggest that the measure lays down product characteristics, while all others suggest that this is not the case. For example, to the extent that the measure *regulates* the placing on the EU market of pure seal products, which is a part of the integral and essential aspects of the measure, it does *not* prescribe or impose any "characteristics" on the products themselves. To the extent the measure prohibits the placing on the EU market of seal-containing products, it could be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal. However, as stated above, we are not persuaded that this part of the Regulation constitutes the main feature of the measure at issue. Moreover, the EU Seal Regime's prohibition of "mixed" products differs, to a considerable extent, from the prohibitive aspects of the French Decree under *EC – Asbestos*. More importantly, as noted by the Panel, the EU Seal Regime "consists of both prohibitive and permissive components and should be examined as such".[967] As we see it, when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics. This is not changed by the fact that the administrative provisions under the EU Seal Regime may "apply" to products containing seal.

5.59. In the light of the above, we reverse the Panel's findings, in paragraphs 7.111 and 7.112 of the Panel Reports, that the EU Seal Regime lays down product characteristics. The Panel's conclusion that the EU Seal Regime constitutes a "technical regulation" relied on its intermediate finding that the EU Seal Regime lays down product characteristics. Accordingly, having reversed this finding by the Panel, we also reverse the Panel's findings in paragraphs 7.125 and 8.2(a) of the Panel Reports that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

5.60. In our analysis above, we have addressed the participants' arguments as they pertain to the Panel's interpretation and application of the terms "product characteristics" and "applicable administrative provisions" in the first sentence of Annex 1.1. In doing so, we have focused on the text and the immediate context found in Annex 1.1 as well as on previous jurisprudence by the Appellate Body. In future cases, depending on the nature of the measure and the circumstances of the case, a panel may find it helpful to seek further contextual guidance in other provisions of the TBT Agreement, for example, those pertaining to standards[968], international standards[969], and conformity assessment procedures[970], in delimiting the contours of the term "technical regulation".[971] It may also be relevant for a panel to examine supplementary means of interpretation such as the negotiating history of the TBT Agreement or the types and the nature of claims that have been brought by the complainants. Indeed, as the Appellate Body has emphasized, a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[972]

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[967] Panel Reports, para. 7.54.

[968] TBT Agreement, Annex 1.2.

[969] TBT Agreement, Articles 2.4, 2.5, 2.6, and 2.9.

[970] TBT Agreement, Article 5 and Annex 1.3. If the requirements set out in a measure are not apt to be subject to "conformity assessment procedures" as defined in Annex 1.3, this may be an indication that the measure at issue is not a technical regulation.

[971] Thus, for example, if a measure has characteristics of a "standard" within the meaning of Annex 1.2, it would not constitute a technical regulation. In determining whether this is the case, it may also be relevant to consider provisions such as Articles 2.4, 2.5, 2.6, and 2.9 of the TBT Agreement.

[972] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).

5.1.3.4 Completing the legal analysis

5.61. We note that both Canada and Norway have requested, should we find that the Panel erred in determining that the EU Seal Regime lays down "product characteristics" and/or "applicable administrative provisions" within the meaning of Annex 1.1, and reverse either of those findings of the Panel, that we complete the analysis and find that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[973] Hence, having reversed the Panel's finding that the measure lays down "product characteristics", we now consider whether we can complete the legal analysis as requested by the complainants.

5.62. We begin by noting that, in its Notice of Other Appeal, the European Union appealed the Panel's finding that the EU Seal Regime is a "technical regulation" and alleged specifically that the Panel erred: (i) in finding the exceptions under the EU Seal Regime constitute "applicable administrative provisions"; (ii) in concluding that the measure laid down "product characteristics"; and (iii) in failing to make a holistic assessment of the measure at issue. In our reasoning above, we have addressed each of the issues raised on appeal by the European Union.

5.63. In some previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.[974] However, the Appellate Body has done so only if the factual findings of the panel and the undisputed facts on the panel record provide it with a sufficient basis for its own analysis.[975] In addition, the Appellate Body has been unable to complete the legal analysis in the light of the complexity of the legal issues involved, in conjunction with the absence of full exploration of the issues before the panel, and, consequently, considerations pertaining to parties' due process rights.[976] Moreover, the Appellate Body has declined to complete the legal analysis of a panel in circumstances where that would involve addressing claims "which the panel had not examined at all".[977]

5.64. Turning to the specific case before us, we recall that the first sentence of Annex 1.1 indicates that the subject matter of a technical regulation may consist of either "product characteristics" *or* "their related processes and production methods". Hence, we might, in principle, be able to complete the analysis by ruling on whether the EU Seal Regime lays down "their related processes and production methods" and therefore qualifies as a technical regulation even though it does not lay down product characteristics.

5.65. The European Union argued at the oral hearing that the Appellate Body would not be in a position to determine whether the EU Seal Regime lays down "related processes and production methods" in the absence of sufficient factual findings by the Panel. We are not entirely convinced. As we see it, the text of the measure provides us with some basis to determine whether the EU Seal Regime lays down "related processes and production methods" within the meaning of

[973] Canada's appellee's submission, para. 66; Norway's appellee's submission, para. 101.

[974] See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117 and 118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

[975] See Appellate Body Reports, *Australia – Salmon*, paras. 241 and 255; *Korea – Dairy*, para. 102; *Canada – Autos*, paras. 133 and 144; and *Korea – Various Measures on Beef*, para. 128. See also Appellate Body Reports, *EC – Asbestos*, para. 79; and *EC – Export Subsidies on Sugar*, para. 337.

[976] See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339). In *EC – Export Subsidies on Sugar*, the Appellate Body stated that, "in the light of Article 21 of the *Agreement on Agriculture* and the chapeau of Article 3 of the *SCM Agreement*, the question of the applicability of the *SCM Agreement* to the export subsidies in this dispute raises a number of complex issues." (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 339 (referring to Appellate Body Report, *US – Upland Cotton*, paras. 532 and 533, in turn quoting Appellate Body Report, *EC – Bananas III*, para. 155; and referring to Appellate Body Report, *Chile – Price Band System*, para. 186)) In that case, the Appellate Body considered that, "in the absence of a full exploration of these issues, completing the analysis might affect the due process rights of the participants." (Ibid.)

[977] Appellate Body Report, *EC – Asbestos*, para. 79. See also Appellate Body Report, *EC – Poultry*, para. 107.

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 alternative 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 seal products for community subsistence)."[980] Regarding the MRM category, Norway claimed that "the measure imposes a particular course of action relating to the purpose of the hunt (sustainable marine resource management); the way in which the hunt is conducted (regulated at national level pursuant to a resource management plan); and the way in which the seal products are marketed (not-for-profit, non-commercial nature and quantity)."[981] Furthermore, "the action also has a defined end (the sale of MRM by-products)."[982] Norway further argued that the processes prescribed through the IC and MRM exceptions under the EU Seal Regime "'relate' to defined product characteristics" in the sense that they lay down "when a product containing seal can be marketed".[983] For its part, Canada argued that "the identity of the producers of a product could be a relevant factor in the identification of a PPM."[984] In particular, Canada noted that "certain elements of the Inuit Communities category could be characterized as [PPMs]".[985]

5.67. Although the Panel recognized in its Reports[986] that the complainants had made arguments on "related PPMs" in the alternative, it also noted that "[t]he meaning of the phrase 'their related PPMs' has not yet been examined in a WTO dispute."[987] In addition, the Panel expressly stated that it did "not find it necessary to examine whether the EU Seal Regime also lays down PPMs".[988] The Panel did not develop any interpretation of "related PPMs", nor did it make any findings on whether the EU Seal Regime lays down "related processes and production methods".[989] Under the Panel's logic, as it found the EU Seal Regime to lay down product characteristics including the applicable administrative provisions, it saw no reason to examine this issue. Consequently, the Panel proceedings were conducted without the Panel exploring this issue with the parties, and we thus lack the benefit of sufficient elaboration by the parties of their arguments on this matter.

5.68. In their written submissions on appeal, the complainants have not developed argumentation on whether and why the EU Seal Regime lays down related PPMs. At the oral hearing, Norway reiterated its argument that a PPM is "related" to product characteristics when compliance with the prescribed PPM determines whether a product can or cannot have a particular characteristic.[990] For its part, Canada confirmed at the oral hearing that it had not argued in these proceedings that the

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[978] In *China – Auto Parts*, the Appellate Body recalled that:

> [T]he municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU. The Appellate Body has reviewed the meaning of a Member's municipal law, on its face, to determine whether the legal characterization by the panel was in error, in particular when the claim before the panel concerned whether a specific instrument of municipal law was, as such, inconsistent with a Member's obligations.

(Appellate Body Reports, *China – Auto Parts*, para. 225 (fns omitted))

[979] Panel Reports, para. 7.90.

[980] Panel Reports, para. 7.90 (referring to Norway's second written submission to the Panel, para. 162).

[981] Panel Reports, para. 7.90 (referring to Norway's second written submission to the Panel, para. 162).

[982] Panel Reports, para. 7.90 (referring to Norway's second written submission to the Panel, para. 162).

[983] Norway's second written submission to the Panel, para. 162.

[984] Panel Reports, para. 7.91 (referring to Canada's response to Panel question No. 21, para. 109).

[985] Panel Reports, para. 7.91 (quoting Canada's response to Panel question No. 21, para. 109).

[986] Panel Reports, paras. 7.90 and 7.91.

[987] Panel Reports, para. 7.103.

[988] Panel Reports, para. 7.112.

[989] In *US – Gambling*, the Appellate Body noted that, "in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis".[989] (Appellate Body Report, *US – Gambling*, para. 344)

[990] Norway's response to questioning at the oral hearing.

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 had made no findings. Importantly, it has not completed the analysis in the absence of a full exploration of issues before the panel that might have given rise to concerns about the parties' due process rights. We believe that all these elements are present in this case. We further note that the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues. Although we explored the issue of whether the EU Seal Regime lays down related PPMs with the participants and third participants at the oral hearing, and while the participants' answers to the Division's questions did shed at least some light on the issue, we consider that in order to develop an interpretation of that phrase in the first sentence of Annex 1.1 and in order to reach a conclusion in this respect regarding the EU Seal Regime, more argumentation by the participants and exploration in questioning would have been required. The Panel has made no findings on this issue and the question was not explored by the Panel. Moreover, the complainants focused in their argumentation on the issue of whether the EU Seal Regime lays down "product characteristics" and "applicable administrative provisions" within the meaning of Annex 1.1. In these circumstances, we do not consider it appropriate to complete the legal analysis by ruling on whether the EU Seal Regime lays down "related processes and production methods" within the meaning of Annex 1.1 to the TBT Agreement.

5.1.4 Overall conclusion

5.70. Having reversed the Panel's finding that the EU Seal Regime constitutes a technical regulation subject to the disciplines of the TBT Agreement and having found that we are not in a position to complete the legal analysis in this case, we declare moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.

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

5.71. We turn now to consider the European Union's appeal of the Panel's findings under Articles I:1 and III:4 of the GATT 1994. The European Union appeals the Panel's interpretation of Articles I:1 and III:4, as well as the Panel's conclusion that the EU Seal Regime is inconsistent with Article I:1. The European Union does not appeal the Panel's conclusion that the EU Seal Regime is inconsistent with Article III:4 of the GATT 1994.[995]

5.72. With regard to the Panel's interpretation of Articles I:1 and III:4, the European Union requests the Appellate Body to reverse the Panel's finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not "equally apply" to claims under Articles I:1 and III:4 of the GATT 1994.[996] With respect to the Panel's conclusion under Article I:1, the European Union requests the Appellate Body to reverse the Panel's finding that the measure at issue is inconsistent with Article I:1 because it does not "immediately and unconditionally" extend the same market access advantage accorded to seal products of Greenlandic origin to like seal products of Canadian and Norwegian origin.[997] The European Union's

[991] See also Canada's response to Panel question No. 21, paras. 108-110.
[992] Canada's and Norway's responses to questioning at the oral hearing.
[993] Norway's response to questioning at the oral hearing.
[994] See *supra*, para. 5.63.
[995] Norway's appellee's submission, para. 227; European Union's response to questioning at the oral hearing.
[996] European Union's other appellant's submission, para. 310. Article 2.1 of the TBT Agreement provides: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."
[997] European Union's other appellant's submission, paras. 314 and 315 (referring to Panel Reports, para. 7.600).

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.[998]

5.73. Canada and Norway contend that the Panel was correct in finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. Thus, Canada and Norway request the Appellate Body to reject the European Union's appeal of the Panel's interpretation of Articles I:1 and III:4, and of the Panel's conclusion that the measure at issue is inconsistent with Article I:1.[999]

5.74. In addressing the European Union's appeal, we begin by reviewing the Panel's findings with respect to the relationship between the non-discrimination obligations under Articles I:1 and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand.

5.2.1 The Panel's findings

5.75. At the outset of its analysis, the Panel considered that, because the complainants had raised claims under the non-discrimination obligations of both the GATT 1994 and the TBT Agreement, it was useful "to review the relationship between, and the legal standards under, the GATT 1994 and the TBT Agreement" before examining the specific claims under the GATT 1994.[1000]

5.76. The Panel noted that the Appellate Body had provided guidance on the relationship between the obligations under the TBT Agreement and the GATT 1994 in recent disputes involving claims under the TBT Agreement.[1001] Referring to previous Appellate Body reports, the Panel found that:

> [U]nder the GATT 1994 (Articles I:1 and III:4) … the "treatment no less favourable" standard prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products *vis-à-vis* the group of domestic like products, whereas under the TBT Agreement, the "treatment no less favourable" standard does not prohibit detrimental impact on imports that stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[1002]

5.77. Based on this understanding of, on the one hand, Articles I:1 and III:4 of the GATT 1994, and, on the other hand, Article 2.1 of the TBT Agreement, the Panel rejected the European Union's argument that the legal standard under Article 2.1 applies equally to claims under Articles I:1 and III:4.[1003] The Panel explained that, under the GATT 1994, the objective of trade liberalization – including the obligation to respect the non-discrimination obligations under Articles I:1 and III:4 – is balanced against the right of Members to regulate under Article XX of the GATT 1994.[1004] According to the Panel, the additional element in the analysis under Article 2.1 – whether a measure's detrimental impact on imports stems exclusively from a legitimate regulatory distinction – reflects the absence in the TBT Agreement of a general exceptions provision that resembles Article XX of the GATT 1994.[1005]

5.2.2 The legal standards of the obligations under Article I:1 and Article III:4 of the GATT 1994

5.78. We note that, in reviewing the European Union's argument that the legal standard of the obligations under Article 2.1 of the TBT Agreement applies equally to claims under Articles I:1 and III:4 of the GATT 1994, the Panel appears to have focused its analysis on the phrase "treatment no less favourable" – a phrase contained in Article 2.1 of the TBT Agreement and

[998] European Union's response to questioning at the oral hearing.

[999] Canada's appellee's submission, paras. 255 and 262; Norway's appellee's submission, paras. 317 and 329.

[1000] Panel Reports, para. 7.581.

[1001] Panel Reports, para. 7.582 (referring to Appellate Body Reports, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*).

[1002] Panel Reports, para. 7.585 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 180-182 and 215; and *US – Tuna II (Mexico)*, para. 215).

[1003] Panel Reports, para. 7.586 (referring to European Union's first written submission to the Panel, para. 528).

[1004] Panel Reports, para. 7.586.

[1005] Panel Reports, para. 7.585.

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.

5.80. Second, we note that Article I:1 incorporates "all matters referred to in paragraphs 2 and 4 of Article III". Thus, there is overlap in the scope of application of Articles I:1 and III:4, insofar as "internal matters may be within the purview of the MFN obligation".[1007]

5.81. Third, there are textual differences between Articles I:1 and III:4. Like the national treatment and MFN obligations under Article 2.1 of the TBT Agreement, the national treatment obligation under Article III:4 of the GATT 1994 is also expressed through a "treatment no less favourable" standard. By contrast, as Canada rightly points out, the MFN obligation in Article I:1 of the GATT 1994 is not expressed through a "treatment no less favourable" standard.[1008] Instead, the legal standard under Article I:1 of the GATT 1994 is expressed through an obligation to extend *any* "advantage" granted by a Member to *any* product originating in or destined for *any* other country "immediately and unconditionally" to the "like product" originating in or destined for all other Members.

5.82. Finally, we observe that, notwithstanding the textual differences between Articles I:1 and III:4, each provision is concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like domestic products.[1009] It is for this reason that neither Article I:1 nor Article III:4 require a demonstration of the *actual* trade effects of a specific measure.

[1006] Panel Reports, para. 7.585 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 180-182 and 215; and *US – Tuna II (Mexico)*, para. 215). We note that, in the paragraphs of the Appellate Body reports cited by the Panel, the Appellate Body made observations concerning the relationship between the national treatment obligations articulated in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. The Appellate Body did not, as the Panel seems to suggest, comment specifically on the relationship between the most favoured nation (MFN) obligations in Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994.

[1007] Panel Reports, *EC – Bananas III*, para. 7.176. See also Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.713.

[1008] Canada's appellee's submission, para. 211.

[1009] In the context of Article III:4 of the GATT 1994, see Appellate Body Reports, *US – Clove Cigarettes*, para. 176 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10); *China – Publications and Audiovisual Products*, para. 305 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 and 136); *Thailand – Cigarettes (Philippines)*, para. 126 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109); and *Korea – Alcoholic Beverages*, para. 127. In the context of Article I:1 of the GATT 1994, see Panel Reports, *US – COOL*, para. 7.571 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236, in turn referring to Panel Report, *Argentina – Hides and Leather*, para. 11.20, in turn referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109; and *Korea – Alcoholic Beverages*, paras. 119, 120, and 127).

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 granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

5.86. Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as "pervasive", a "cornerstone of the GATT", and "one of the pillars of the WTO trading system".[1011] Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members.

5.87. Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different countries.[1012] In so doing, Article I:1 protects expectations of equal competitive opportunities for like imported products from all Members.[1013] As stated above, it is for this reason that an inconsistency with Article I:1 is not contingent upon the actual trade effects of a measure. We consider that an interpretation of the legal standard of the obligation under Article I:1 must take into account the fundamental purpose of Article I:1, namely, to preserve the equality of competitive opportunities for like imported products from all Members.

[1010] European Union's other appellant's submission, para. 313.

[1011] Appellate Body Report, *EC – Tariff Preferences*, para. 101 (referring to Appellate Body Reports, *Canada – Autos*, para. 69; and *US – Section 211 Appropriations Act*, para. 297).

[1012] Appellate Body Report, *Canada – Autos*, para. 84.

[1013] Panel Reports, *US – COOL*, para. 7.571 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236, in turn referring to Panel Report, *Argentina – Hides and Leather*, para. 11.20, in turn referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109; and *Korea – Alcoholic Beverages*, paras. 119, 120, and 127).

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. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.

5.89. For the European Union, the analysis under Article I:1 is not limited to an assessment of whether a measure has a detrimental impact on competitive opportunities for like imported products. Instead, if it is found that a measure has a detrimental impact on competitive opportunities for like imported products, the analysis under Article I:1 must consider further the rationale for such impact, and, more specifically, whether it stems exclusively from a legitimate regulatory distinction.

5.90. Contrary to what the European Union suggests, we see no basis in the text of Article I:1 to find that, for the purposes of establishing an inconsistency with that provision, it must be demonstrated that the detrimental impact of a measure on competitive opportunities for like imported products does not stem exclusively from a legitimate regulatory distinction. Instead, we consider that, where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1.

5.91. The European Union advances three arguments to support its claim that the Panel erred in finding that the legal standard for the non-discrimination obligation 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: (i) that the Panel's interpretation is "contrary to established Appellate Body jurisprudence" under Article III:4[1015]; (ii) that the Panel's interpretation fails to take account of the context provided by Article III:1; and (iii) that the Panel's interpretation is incoherent with the interpretation of Article 2.1 of the TBT Agreement and renders Article 2.1 "irrelevant".[1016]

5.92. The arguments advanced by the European Union do not, in our view, provide a basis for interpreting the legal standard under Article I:1 as requiring an inquiry into whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. We note, as argued by Norway and Canada, that the European Union's arguments rely principally on WTO jurisprudence developed under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.[1017] Moreover, the European Union's arguments appear to be directed at the Panel's interpretation of the term "treatment no less favourable" in Article III:4 of the GATT 1994. Thus, we consider these arguments in examining the Panel's interpretation of the legal standard under that provision.

5.93. In the light of the above, we consider that Article I:1 prohibits Members from conditioning the extension of an "advantage", within the meaning of Article I:1, on criteria that have a detrimental impact on the competitive opportunities for like imported products from any Member. A panel is not required, under Article I:1, to assess whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. Such an assessment is a necessary analytical element of Article 2.1 of the TBT Agreement, but not of Article I:1 of the GATT 1994.

5.94. In the light of the above, we reject the European Union's claim on appeal that the Panel erred in finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 of the GATT 1994.

[1014] Panel Report, *EC – Tariff Preferences*, para. 7.59.
[1015] European Union's other appellant's submission, para. 289.
[1016] European Union's other appellant's submission, para. 289.
[1017] Canada's appellee's submission, para. 210; Norway's appellee's submission, paras. 262 and 276.

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 Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5.99. There are three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4: (i) that the imported and domestic products are "like products"; (ii) that the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue; and (iii) that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products.[1021]

5.100. The European Union's appeal is directed at the Panel's interpretation of the term "treatment no less favourable" in Article III:4. The participants dispute whether, for the purposes of establishing a violation of Article III:4, a finding that a measure has a detrimental impact on competitive opportunities for imported products, compared to like domestic products, is

[1018] Panel Reports, para. 7.597.

[1019] Panel Reports, para. 7.600. Although some aspects of the Panel's reasoning can be read as suggesting that an analysis of the actual trade effects of a measure is necessary under Article I:1 of the GATT 1994, we consider that the Panel's reliance on the "design, structure, and *expected operation*" of the measure highlights that, under Article I:1, the focus of the analysis is on the impact of a measure on *competitive opportunities* for like imported products, rather than the *actual trade effects* of a measure. (emphasis added)

[1020] European Union's response to questioning at the oral hearing.

[1021] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 127 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 133).

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 exclusively from a legitimate regulatory distinction. Thus, in the European Union's view, the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement applies equally to claims under Article III:4. By contrast, Canada and Norway contend that this additional inquiry is a necessary step in the analysis under Article 2.1 of the TBT Agreement, but not under Article III:4 of the GATT 1994.

5.101. The meaning of the term "treatment no less favourable" in Article III:4 has been considered by panels and the Appellate Body in prior disputes. As a result, the following propositions are well established. First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products.[1022] Second, a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products.[1023] Third, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products.[1024] If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4.[1025] Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.[1026]

5.102. In response to questioning at the oral hearing, the European Union explained that it is not suggesting that the legal standard of the obligation under Article 2.1 of the TBT Agreement should be transposed to Article III:4 of the GATT 1994. Instead, the European Union argues that WTO jurisprudence under Article III:4 establishes that the analysis of whether imported products are accorded treatment less favourable than that accorded to like domestic products "goes beyond" a consideration of the detrimental effect of a measure on the competitive opportunities for like imported products.

5.103. The European Union contends that, in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body found that a detrimental effect on imports alone does not indicate that a measure accords *de facto* "less favourable treatment" to imports under Article III:4.[1027] In this regard, the European Union notes that, in *US – Clove Cigarettes*, the Appellate Body clarified that a violation of Article III:4 had not been established in *Dominican Republic – Import and Sale of Cigarettes*, because the detrimental impact on competitive opportunities for like imported products was not attributable to the specific measure at issue.[1028]

[1022] Appellate Body Reports, *US – Clove Cigarettes*, para. 176 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10); *China – Publications and Audiovisual Products*, para. 305 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 and 136); and *Thailand – Cigarettes (Philippines)*, para. 126 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109).

[1023] Appellate Body Reports, *US – Clove Cigarettes*, para. 177 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137); and *Thailand – Cigarettes (Philippines)*, para. 128 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

[1024] Appellate Body Reports, *US – Clove Cigarettes*, paras. 177 and 179; *Thailand – Cigarettes (Philippines)*, para. 129; and *Korea – Various Measures on Beef*, para. 137.

[1025] Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137.

[1026] Appellate Body Reports, *US – COOL*, para. 270 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, fn 457 to para. 214, in turn referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134).

[1027] European Union's other appellant's submission, paras. 292 and 293 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

[1028] European Union's response to questioning at the oral hearing (referring to Appellate Body Report, *US – Clove Cigarettes*, fn 372 to para. 179).

5.104. As Canada and Norway observe, in *US – Clove Cigarettes*, the Appellate Body explained its earlier finding in *Dominican Republic – Import and Sale of Cigarettes*.[1029] The Appellate Body explicitly rejected the notion that its finding in *Dominican Republic – Import and Sale of Cigarettes* stands for the proposition that, under Article III:4, panels should conduct an inquiry into whether the detrimental impact of a measure on imports is unrelated to the foreign origin of the imported products. The Appellate Body buttressed this explanation of its finding in *Dominican Republic – Import and Sale of Cigarettes* by pointing out that, subsequent to its finding in that case, it had, in the context of a claim under Article III:4 in *Thailand – Cigarettes (Philippines)*, "eschewed an additional inquiry" as to whether the detrimental impact of a measure on imports is related to the foreign origin of the products.[1030] The Appellate Body also pointed out that, in *Thailand – Cigarettes (Philippines)*, it had clarified that, for a finding of less favourable treatment under Article III:4, "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably".[1031]

5.105. In *US – Clove Cigarettes*, the Appellate Body thus clarified that a violation of Article III:4 had not been established in *Dominican Republic – Import and Sale of Cigarettes*, since, in that dispute, the detrimental impact on competitive opportunities for like imported products was not attributable to the specific measure at issue. The Appellate Body has stated that, in determining whether the detrimental impact on competitive opportunities for like imported products is attributable to, or has a genuine relationship with, the measure at issue, the relevant question is "whether it is the governmental measure at issue that 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'".[1032] Thus, contrary to what the European Union suggests, an analysis of whether the detrimental impact on competitive opportunities for like imported products is attributable to the specific measure at issue does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction.

5.106. The European Union also relies on the Appellate Body's statement in *EC – Asbestos* that "a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products".[1033] In the European Union's view, this statement supports its contention that, for the purposes of establishing a violation of Article III:4, a finding that a measure has a detrimental impact on competitive opportunities for like imported products is not dispositive.

5.107. Canada and Norway disagree with the European Union's reading of *EC – Asbestos*. In Canada's view, *EC – Asbestos* is consistent with the Appellate Body's earlier finding, in *Korea – Various Measures on Beef*, that "a distinction between products in itself will not automatically result in a finding of less favourable treatment" under Article III:4. Canada submits that "a distinction that modifies the conditions of competition in the relevant market to the detriment of imported products" will, however, result in less favourable treatment under Article III:4.[1034] Like Canada, Norway submits that the Appellate Body's statement in *EC – Asbestos* that Article III:4 is not violated for the sole reason that objective distinctions are drawn between imported and domestic like products, does not mean that if these distinctions give rise to a detrimental impact on the like imported products, a Member may justify such detrimental impact under Article III:4.[1035]

5.108. In our view, the Appellate Body, in *EC – Asbestos*, merely highlighted that the term "treatment no less favourable" in Article III:4 has a more unfavourable connotation than the drawing of distinctions between imported and domestic like products. WTO Members are free to impose different regulatory regimes on imported and domestic products, provided that the

[1029] Canada's appellee's submission, para. 201; Norway's appellee's submission, para. 265.

[1030] Appellate Body Report, *US – Clove Cigarettes*, fn 372 to para. 179.

[1031] Appellate Body Report, *US – Clove Cigarettes*, fn 372 to para. 179 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134).

[1032] Appellate Body Reports, *US – COOL*, para. 270 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 149).

[1033] Appellate Body Report, *EC – Asbestos*, para. 100.

[1034] Canada's appellee's submission, paras. 206-208 (referring to Appellate Body Reports, *EC – Asbestos*, para. 100; and *Korea – Various Measures on Beef*, para. 137).

[1035] Norway's appellee's submission, paras. 272 and 273.

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 imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[1036]

5.109. The proposition that distinctions may be drawn between imported and like domestic products without necessarily according less favourable treatment to the imported products implies only that the "treatment no less favourable" standard, under Article III:4, means something more than drawing regulatory distinctions between imported and like domestic products. There is, however, a point at which the differential treatment of imported and like domestic products amounts to "treatment no less favourable" within the meaning of Article III:4. The Appellate Body has demarcated where that point lies, in the following terms:

> [T]he mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. *If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4.*[1037]

5.110. In the light of the above, we do not agree with the European Union's reading of the Appellate Body's statement in *EC – Asbestos*. Specifically, we do not consider that the Appellate Body's statement that a Member may draw distinctions between imported and like domestic products without necessarily violating Article III:4 stands for the proposition that the detrimental impact of a measure on competitive opportunities for like imported products is not dispositive for the purposes of establishing a violation of Article III:4.

5.111. The European Union further contends that the Panel's interpretation of the legal standard under Article III:4 fails to take account of the general principle, expressed in Article III:1 of the GATT 1994, that internal regulations should not be applied "so as to afford protection" to domestic production. The European Union observes that the Appellate Body has found that the protective application of a measure, within the meaning of Article III:1, can most often be discerned from the design, the architecture, and the revealing structure of a measure.[1038] In the European Union's view, this "test" "corresponds to the second step of the *de facto* discrimination analysis" under Article 2.1 of the TBT Agreement.[1039] Thus, by suggesting that "this analysis is unnecessary for finding *de facto* discrimination" under Article III:4, the Panel, in the European Union's view, failed to take account of the context provided by the general principle articulated in Article III:1.[1040]

5.112. Canada responds that, in the context of claims under Article III:2, second sentence, of the GATT 1994, the Appellate Body has "simply recognized" that panels should consider the relevant circumstances, including the design, structure, operation and application of the measure at issue to determine whether the measure at issue results in *de facto* discrimination.[1041] Canada emphasizes that the Appellate Body did not "suggest this to mean that discrimination under Article III could be justified by regulatory distinctions".[1042] In addition, Canada points out that the Appellate Body has confirmed that the term "treatment no less favourable" in Article III:4

[1036] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (emphasis original)

[1037] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128. (emphasis added; fn omitted)

[1038] European Union's other appellant's submission, para. 299 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120).

[1039] European Union's other appellant's submission, para. 300.

[1040] European Union's other appellant's submission, para. 300.

[1041] Canada's appellee's submission, para. 220 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120).

[1042] Canada's appellee's submission, para. 220.

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.

5.115. As both Canada and Norway have pointed out, Article III:4, like Article III:2, first sentence, does not explicitly refer to Article III:1. As clarified by the Appellate Body, this does not mean that Article III:1 does not apply to Article III:2, first sentence. Rather, "the first sentence of Article III:2 is, in effect, an application of" the general principle in Article III:1.[1048] We consider that, just as the omission of a textual reference to Article III:1, in Article III:2, first sentence, must be given meaning, so too must the absence of a reference to Article III:1 in Article III:4. In our view, Article III:4 is, itself, an expression of the principle set forth in Article III:1. Consequently, "[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."[1049]

5.116. As noted above, the term "treatment no less favourable" in Article III:4 requires effective equality of opportunities for imported products to compete with like domestic products.[1050] Thus, Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products. Hence, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4.

5.117. In the light of the above, we consider that the "treatment no less favourable" standard under Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of like domestic products. We do not consider, as argued by the European Union, that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.

[1043] Canada's appellee's submission, para. 221 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

[1044] Norway's appellee's submission, paras. 284 and 286.

[1045] Norway's appellee's submission, para. 286 (quoting Appellate Body Report, *Canada – Periodicals*, p. 18, DSR 1997:I, p. 464, in turn referring to GATT Panel Reports, *US – Tobacco*, para. 99; *US – Malt Beverages*, para. 5.6; *Canada – Provincial Liquor Boards (EEC)*, para. 5.6; *US – Section 337 Tariff Act*, para. 5.13; *US – Superfund*, para. 5.1.9; and *Brazil – Internal Taxes*, para. 15).

[1046] Appellate Body Report, *EC – Asbestos*, para. 94.

[1047] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111.

[1048] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111.

[1049] Appellate Body Report, *EC – Asbestos*, para. 100.

[1050] See *supra*, para. 5.101.

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 subparagraphs of Article XX of the GATT 1994.[1052] For the European Union, the Panel's interpretation of Articles I:1 and III:4 would thus "render Article 2.1 of the TBT Agreement irrelevant" as complainants would have a strong incentive not to invoke Article 2.1 of the TBT Agreement, and, instead, would bring claims under the GATT 1994, even if the measure at issue qualified as a technical regulation.[1053]

5.119. Canada disagrees with the European Union's argument that accepting the Panel's approach would result in divergent outcomes under the TBT Agreement and the GATT 1994.[1054] Noting the Appellate Body's statement that the TBT Agreement and the GATT 1994 should be "interpreted in a coherent and consistent manner", Canada submits that "the more reasonable view with respect to the scope of objectives that may be considered legitimate for the purposes of the TBT Agreement is that it mirrors the scope of Article XX of the GATT 1994."[1055] Canada asserts, in addition, that the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT 1994 would render Article 2.1 of the TBT Agreement "irrelevant" is entirely speculative.

5.120. Norway, like Canada, disagrees with the European Union's argument that the Panel's interpretation of Articles I:1 and III:4 is incoherent with Article 2.1 of the TBT Agreement.[1056] First, Norway considers that the Appellate Body's statement that the TBT Agreement and the GATT 1994 "should be interpreted in a coherent and consistent manner" does not mean that the provisions of the two agreements should be given the same meaning.[1057] Second, Norway considers that the European Union overstates the supposed gap between the list of policy interests that may justify a detrimental impact on imports under Article 2.1 of the TBT Agreement, on the one hand, and Article XX of the GATT 1994, on the other hand.[1058] According to Norway, although the range of legitimate interests that may be pursued under Article 2.1 is wider than the range of interests under Article XX, this is not wider than the range of interests reflected in all provisions of the covered agreements.[1059] Norway submits that, even assuming, for the sake of argument, that there is some policy interest that may be pursued under the TBT Agreement but not under the GATT 1994, it would be inappropriate to "circumvent the drafters' decision by allowing a policy interest not reflected in the GATT 1994 to justify a trade-restrictive measure under that Agreement".[1060]

5.121. At the outset, we recall that, in *US – Clove Cigarettes*, the Appellate Body made certain observations of "general import" concerning, *inter alia*, the preamble of the TBT Agreement; the relevance of Article III:4 of the GATT 1994 in interpreting Article 2.1 of the TBT Agreement; and the absence among the provisions of the TBT Agreement of a general exceptions provision similar to Article XX of the GATT 1994. The Appellate Body considered that the language of the second recital of the TBT Agreement indicates that the TBT Agreement expands on pre-existing

[1051] European Union's other appellant's submission, para. 307.
[1052] European Union's other appellant's submission, para. 307.
[1053] European Union's other appellant's submission, para. 308.
[1054] Canada's appellee's submission, para. 238 (referring to European Union's other appellant's submission, para. 307).
[1055] Canada's appellee's submission, para. 240 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 91).
[1056] Norway's appellee's submission, para. 287.
[1057] Norway's appellee's submission, para. 288 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 91).
[1058] Norway's appellee's submission, paras. 290 and 291.
[1059] Norway's appellee's submission, para. 296.
[1060] Norway's appellee's submission, para. 300.

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

5.122. In addition, the Appellate Body considered that the very similar formulation of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and the overlap in their scope of application in respect of technical regulations, confirm that Article III:4 is relevant context for the interpretation of the national treatment obligation under Article 2.1. Thus, in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994.[1062] Turning to the preamble of the TBT Agreement, the Appellate Body considered that the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of a Member's 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.[1063]

5.123. We observe that the GATT 1994, the TBT Agreement and the other covered agreements are integral parts of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Thus, the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.[1064] This principle applies to the relationship between the TBT Agreement and the GATT 1994, as confirmed and reinforced by the second recital of the preamble of the TBT Agreement. We do not consider that the principle that the provisions of the WTO covered agreements should be read in a coherent and consistent manner means that the legal standards for *similar* obligations – such as Articles I:1 and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand – must be given identical meanings.

5.124. The Appellate Body has observed that the TBT Agreement does not contain a general exceptions clause similar to Article XX of the GATT 1994. This does not mean, however, that Members do not have a right to regulate under the TBT Agreement. Instead, the sixth recital of the preamble of the TBT Agreement suggests that a Member's right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement.[1065] As the Appellate Body has explained, it is the specific context of Article 2.1 of the TBT Agreement – which includes Annex 1.1; Article 2.2; and the second, fifth, and sixth recitals of the preamble – that supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction on international trade.[1066]

5.125. By contrast, as noted by the Panel, the obligations assumed by Members to respect the non-discrimination disciplines under Articles I:1 and III:4 of the GATT 1994 are balanced by a Member's right to regulate in a manner consistent with the requirements of the separate general exceptions clause of Article XX and its chapeau.[1067] In our view, the fact that, under the GATT 1994, a Member's right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. In the light of the immediate contextual differences between the TBT Agreement and the GATT 1994, we do not consider that the legal

[1061] Appellate Body Report, *US – Clove Cigarettes*, para. 91.

[1062] Appellate Body Report, *US – Clove Cigarettes*, para. 100.

[1063] Appellate Body Report, *US – Clove Cigarettes*, paras. 93-96.

[1064] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570; and *US – Upland Cotton*, paras. 549 and 550 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and fn 72 thereto, in turn referring to Appellate Body Reports, *Korea – Dairy*, para. 81; *US – Gasoline*, p. 23, DSR 1996:I, p. 21; *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, p. 106; and *India – Patents (US)*, para. 45).

[1065] Appellate Body Report, *US – Clove Cigarettes*, para. 95.

[1066] Appellate Body Reports, *US – COOL*, para. 268 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 212).

[1067] Beyond the general exceptions clause of Article XX, we note that the GATT 1994 also contains specific exceptions, e.g. Article XXI and Article XXIV.

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 European 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 the 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 constitutes a technical regulation under Annex 1.1 to the TBT Agreement. Therefore, the asymmetrical outcomes 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 Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 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 within 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 Agreement, 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 uphold 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 Regime. Second, we address the claims of Canada and Norway that relate to the Panel's analysis of whether 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] European Union's other appellant's submission, para. 307 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 255; *US – Tuna II (Mexico)*, para. 286; and *US – COOL*, paras. 341-350).

[1070] See *supra*, para. 5.127.

[1071] At the oral hearing, the European Union confirmed that its appeal of the Panel's conclusion under Article I:1 is based solely on its claim that the Panel erred in finding that the legal standard for the non-discrimination obligation under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1. We note that the Panel concluded that the measure at issue is also inconsistent with Article III:4 because, while virtually all domestic seal products are likely to qualify for market access under the MRM exception, the vast majority of seal products from Canada and Norway are excluded from the EU market under the terms of the MRM exception. The Panel thus found that the measure at issue has a detrimental impact on competitive conditions for like imported products from Canada and Norway. The European Union has not appealed this finding.

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 identify the "objective" of the EU Seal Regime in the context of its analysis under Article 2.2 of the TBT Agreement.[1072] The Panel relied on that assessment in its analysis under Article 2.1 of the TBT Agreement, as well as under Article XX of the GATT 1994. In the context of Article XX, the Panel's characterization of the objective of the measure has implications both in respect of the analysis under subparagraph (a), as well as under the chapeau. Accordingly, before we turn to the claims on appeal directed at the Panel's analysis under Article XX, we first address the Panel's characterization of the objective of the EU Seal Regime.

5.3.1.1 The Panel's findings

5.134. According to the Panel, the disagreement between the parties regarding the objective of the EU Seal Regime was limited to two issues.[1073] First, although the parties did not dispute that the EU Seal Regime is aimed at addressing public concerns regarding seal welfare, they disagreed on whether the public concerns at issue are *moral* concerns for the EU public. Second, the parties contested whether other interests addressed through the exceptions in the measure (i.e. the IC, MRM, and Travellers exceptions) constitute objectives of the EU Seal Regime that are separate and independent from the objective of addressing seal welfare concerns. Referring to prior Appellate Body jurisprudence, the Panel stated that it would assess the objectives of the EU Seal Regime on the basis of available evidence such as the texts of the statutes, the legislative history, and other evidence regarding the structure and operation of the measure at issue.[1074] The Panel also recalled the meaning and scope of "public morals" as discussed in prior disputes.[1075]

5.135. The Panel first reviewed the text of the measure and stated that it was able to discern that, in designing the EU Seal Regime, the European Union "sought to address the public concerns on seal welfare" and, in doing so, "also took into account certain other interests (i.e. IC, MRM, and Travellers interests)".[1076] The Panel also reviewed the legislative history of the measure, concluding that, similar to the text of the EU Seal Regime, the legislative history "demonstrates the existence of the EU public's concerns about seal welfare".[1077] The Panel went on to observe that the EU public's concerns on seal welfare found in the evidence "are related to seal hunting in general, and not to any particular type of hunting", and that public survey results submitted by the European Union were also informative, although "to a limited extent", in demonstrating the EU public's concerns.[1078]

[1072] Panel Reports, para. 7.372. Article 2.2 of the TBT Agreement provides:

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

[1073] Panel Reports, para. 7.377.

[1074] Panel Reports, para. 7.378 and fn 627 thereto (referring, *inter alia*, to Appellate Body Report, *US – Tuna II (Mexico)*, para. 314).

[1075] Panel Reports, paras. 7.379-7.383.

[1076] Panel Reports, para. 7.389.

[1077] Panel Reports, para. 7.398.

[1078] Panel Reports, para. 7.398 and fns 652 and 653 thereto.

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 collective participation as consumers in, and exposure to ("abetting"), the economic activity which sustains the market for' seal products derived from inhumane hunts."[1091] The Panel further concluded that, in the light of the evidence before it, "the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts".[1092] For this reason, the Panel explained, the second aspect of the objective of the EU Seal Regime pertains to

[1079] Panel Reports, para. 7.399.
[1080] Panel Reports, paras. 7.400 and 7.401.
[1081] Panel Reports, para. 7.401.
[1082] Panel Reports, para. 7.402.
[1083] Panel Reports, para. 7.402.
[1084] Panel Reports, para. 7.402.
[1085] Panel Reports, para. 7.404.
[1086] Panel Reports, para. 7.404 (referring to European Union's opening statement at the second Panel meeting, para. 44; and European Union's response to Panel question No. 104).
[1087] Panel Reports, para. 7.404.
[1088] Panel Reports, para. 7.409.
[1089] Panel Reports, para. 7.409.
[1090] Panel Reports, para. 7.410.
[1091] Panel Reports, para. 7.410.
[1092] Panel Reports, para. 7.410 (referring to European Union's response to Panel question No. 31, in turn referring to Report of the Royal Commission, *Seals and Sealing in Canada* (1986), Vol. I, Chapter 11, "Public Opinion on Sealing" (Panel Exhibit EU-48) (Royal Commission Report), p. 160).

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 European 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 objective 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 "contest 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 did not "form independent policy objectives of the EU Seal Regime as a whole".[1099]

5.142. The European Union maintains that the Panel correctly found that the "principal" or "main" objective of the EU Seal Regime is to address public 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 structure 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 from 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 appeals 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".[1103] In that context, the European Union is critical of the Panel's conclusion in paragraph 7.404 of its Reports that, because the Panel did not consider that IC and MRM interests 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

[1093] Panel Reports, para. 7.410 (quoting European Union's response to Panel question No. 9).
[1094] Panel Reports, para. 7.418.
[1095] Panel Reports, para. 7.418.
[1096] Panel Reports, para. 7.419.
[1097] Norway's appellant's submission, para. 44.
[1098] Norway's appellant's submission, para. 67.
[1099] Panel Reports, para. 7.402.
[1100] European Union's appellee's submission, para. 138 (quoting Panel Reports, paras. 7.401 and 7.402).
[1101] European Union's appellee's submission, para. 141.
[1102] European Union's appellee's submission, para. 142.
[1103] Panel Reports, para. 7.275.

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(s).[1108] Indeed, the panel must take account of all evidence put before it in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the measure at issue.[1109] A panel's identification of the "objective" of a measure is a matter of legal characterization subject to appellate review under Article 17.6 of the DSU.[1110]

5.145. Contrary to what Norway suggests, the Panel did not find that addressing EU public moral concerns regarding seal welfare was the "sole objective" of the EU Seal Regime. Following its review of the text of the EU Seal Regime, the Panel concluded that the European Union, in designing the measure, "*sought to address* the public concerns on seal welfare".[1111] The Panel also surveyed the legislative history and considered that it "*demonstrates the existence* of the EU public's concerns about seal welfare".[1112] The Panel further found that the EU public's concerns on seal welfare "are related to seal hunting in general, and not to any particular type of hunting".[1113] On this basis, the Panel concluded that "*the principal objective of adopting a regulation on trade in seal products* was to address public concerns on seal welfare."[1114]

5.146. In the light of the Panel's conclusion that the "main"[1115] or "principal"[1116] element of the objective consisted of addressing EU public concerns regarding seal welfare, the Panel then proceeded to find that the IC and other interests had been "accommodated" in the measure.[1117] Thus, when the Panel stated that the other interests "must be distinguished from the main

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[1104] Panel Reports, para. 7.404 (referring to European Union's opening statement at the second Panel meeting, para. 44; and European Union's response to Panel question No. 104).

[1105] European Union's other appellant's submission, paras. 96 (referring to European Union's second written submission to the Panel, paras. 139-146) and 110.

[1106] European Union's other appellant's submission, para. 110.

[1107] European Union's other appellant's submission, para. 98 (referring to European Union's first written submission to the Panel, paras. 38-40; European Union's second written submission to the Panel, paras. 275 and 276; and European Union's response to Panel questions Nos. 10, 31, 104, 136).

[1108] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314 (referring to Appellate Body Report, *US – Gambling*, para. 304).

[1109] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

[1110] In *China – Auto Parts*, the Appellate Body stated:

> The Appellate Body has explicitly stated that the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU.

(Appellate Body Reports, *China – Auto Parts*, para. 225 (referring to Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 105; and *India – Patents (US)*, paras. 65, 66, and 68) (fns omitted))

[1111] Panel Reports, para. 7.389. (emphasis added)

[1112] Panel Reports, para. 7.398. (emphasis added)

[1113] Panel Reports, para. 7.398 (referring to COWI 2008 Report, pp. 124-127).

[1114] Panel Reports, para. 7.401. (emphasis added) The Panel subsequently found that the overall objective of the EU Seal Regime was to address public moral concerns on seal welfare in respect of two aspects consisting of: (i) EU public participation as consumers in and exposure to products derived from inhumanely killed seals; and (ii) the number of inhumanely killed seals. (See e.g. ibid., paras. 7.410 and 7.443)

[1115] Panel Reports, para. 7.402.

[1116] Panel Reports, para. 7.401.

[1117] Panel Reports, paras. 7.399 and 7.402.

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, we do not understand the Panel to have excluded the role of IC and other interests in the design and implementation of the measure.

5.148. Finally, we note that, although the Panel did not determine the moral content of IC and MRM interests, either alone or as part of a single moral standard governing the concerns in respect of seal welfare, the Panel also did not accept the European Union's contention that the benefits to Inuit communities "outweighed" concerns in respect of seal welfare.[1124] Thus, the Panel concluded that, while the EU public had moral concerns regarding seal welfare in general, the Panel did not consider that the evidence before it supported the European Union's position that "the EU public attributes a higher moral value to the protection of Inuit interests as compared to seal welfare".[1125] In this regard, the Panel referred to its conclusion that the evidence before it indicated that

[1118] Panel Reports, para. 7.402.
[1119] Panel Reports, para. 7.402.
[1120] Panel Reports, para. 7.402.
[1121] Panel Reports, para. 7.389. (emphasis added)
[1122] Panel Reports, para. 7.399. (emphasis added)
[1123] Panel Reports, para. 7.401 (referring to Council Directive No. 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, *Official Journal of the European Communities*, L Series, No. 91 (9 April 1983), pp. 30-31 (Panel Exhibit CDA-12) (EC Seal Pups Directive); European Commission, Proposal for a Regulation of the European Parliament and the Council concerning trade in seal products (23 July 2008) COM(2008) 469 final (Panel Exhibit JE-9) (Commission Proposal), p. 5; Committee on the Internal Market and Consumer Protection, *Report on the proposal for regulation of the European Parliament and of the Council concerning trade in seal products* (5 March 2009), A6-0118 (Panel Exhibit JE-4) (Parliament Report), p. 10 (Justification for Amendment 8)). The Panel further stated:

> The legislative history of the EU Seal Regime shows that exceptions for Inuit and indigenous communities from the regulation on seal products, albeit varying in scope, were consistently a consideration. The European Commission's proposed regulation, subsequent comments on the regulation, and the parliament's proposal also indicate references to exempting imports of occasional nature and for personal use.

(Ibid., fn 658 to para. 7.401 (referring to Commission Proposal, p. 5; and Parliament Report, p. 10))
[1124] Panel Reports, para. 7.299 (referring to European Union's response to Panel question No. 31).
[1125] Panel Reports, para. 7.299 (referring to ibid., para. 7.410 and fn 676 thereto).

EU public concerns on seal welfare appear to be related to seal hunts in general, and not to any particular type of seal hunts.[1126]

5.149. Before we reach a conclusion regarding the objective of the EU Seal Regime, we first examine whether, as Norway contends, the Panel acted inconsistently with Article 11 of the DSU in its identification of the objective of the EU Seal Regime.[1127]

5.150. Article 11 of the DSU requires a panel to make "an objective assessment of the matter", which includes an objective assessment of the facts of the case. We recall the standard articulated in past Appellate Body reports for establishing a violation of Article 11 of the DSU. In accordance with Article 11 of the DSU, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[1128] In particular, "panels [may not] make affirmative findings that lack a basis in the evidence contained in the panel record".[1129] Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".[1130] In this regard, the Appellate Body has stated that it will not "interfere lightly" with a panel's fact-finding authority but, rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded its authority as the trier of facts".[1131] In other words, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU"[1132], but only those that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter before it.[1133] Accordingly, it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence. Ultimately, the party raising the claim bears the onus of explaining why the alleged error meets the standard of review under Article 11.[1134]

5.151. Norway's contention that the Panel acted inconsistently with its obligations under Article 11 of the DSU rests on several grounds. Norway first contends that the Panel disregarded evidence provided by Norway allegedly showing that the legislative objectives of the EU Seal Regime included protecting the economic and social interests of indigenous communities, and separately promoting the sustainable management of marine resources. According to Norway, the Panel undertook a "selective" and "unbalanced" review of the evidence of the legislative history, dedicating most of its analysis to addressing evidence that supported the public morals objective asserted by the European Union.[1135] By contrast, the Panel's "discussion and consideration of the IC and [M]RM objectives asserted by Norway receive[d] a few cursory lines of commentary".[1136] According to Norway, the Panel made only the limited statement that it "*noticed* references in certain evidence relating to the measure's legislative history that the interests of Inuit and indigenous communities engaged in seal hunting should be protected from possible trade

[1126] Panel Reports, para. 7.410 and fn 676 thereto.

[1127] Norway's appellant's submission, para. 170.

[1128] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines,* para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Alcoholic Beverages*, paras. 161 and 162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258.

[1129] Appellate Body Report, *US – Carbon Steel*, para. 142 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 161 and 162).

[1130] Appellate Body Report, *EC – Hormones*, para. 135. The Appellate Body has also stated that: a panel has to base its findings on a sufficient *evidentiary* basis on the record (Appellate Body Report, *EC – Fasteners (China)*, para. 441); may not apply a double standard of proof (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293); and its treatment of the evidence must not "lack even-handedness" (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292).

[1131] Appellate Body Report, *US – Wheat Gluten*, para. 151.

[1132] Appellate Body Report, *EC – Fasteners (China)*, para. 442.

[1133] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

[1134] Appellate Body Report, *EC – Fasteners (China)*, para. 442. (emphasis omitted)

[1135] Norway's appellant's submission, para. 182.

[1136] Norway's appellant's submission, para. 183.

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] Yet, according to 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".[1142] Norway argues that the evidence of the legislative history does not support the Panel's "ultimate conclusion that addressing public moral concerns about seal welfare was the *sole* objective of the measure and that the protection of the IC and [M]RM interests are not objectives".[1143]

5.153. As noted by the Panel, the Commission Proposal refers to the public concerns about "the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering".[1144] The Impact Assessment accompanying the Commission Proposal[1145] (Commission 2008 Impact Assessment) also describes the main overarching objectives of the initiative as "[p]rotect[ing] seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process", and "[a]ddress[ing] the concerns of the general public with regard to the killing and skinning of seals".[1146] The Panel further observed that "the Commission Proposal describes public concerns as relating to 'ethical' considerations."[1147] For example, the Panel noted that the following expressions were used in the Commission Proposal: "out of ethical reasons"; "citizens' deep indignation and repulsion regarding the trade in seal products in such conditions"; "the public's growing awareness and sensitivity to ethical considerations in how seal products are obtained".[1148] The Panel added that the Commission Proposal stated:

> For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing. Those concerns have therefore been expressed by members of the public *out of ethical reasons*. The Commission received during the last years a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions.[1149]

[1137] Norway's appellant's submission, para. 183 (quoting Panel Reports, para. 7.401). (emphasis added by Norway)

[1138] Norway's appellant's submission, para. 184. (emphasis omitted)

[1139] Norway's appellant's submission, para. 188.

[1140] European Commission, Proposal for a Regulation of the European Parliament and the Council concerning trade in seal products (23 July 2008) COM(2008) 469 final (Panel Exhibit JE-9).

[1141] Norway's appellant's submission, para. 188 (referring to ibid., paras. 116 and 131).

[1142] Norway's appellant's submission, para. 188 (referring to Commission Proposal, p. 5). (emphasis original) Norway also claims that the Panel did not address "key reports and opinions, which reflected the considerations expressed in relevant committees of the EU Parliament". (Norway's appellant's submission, para. 189) These reports, Norway maintains, "provide key insights into why, and how, the IC and [M]RM interests were important to EU legislators, and even highlighted how they contradicted the animal welfare considerations under the EU Seal Regime". (Ibid.)

[1143] Norway's appellant's submission, para. 196. (emphasis original)

[1144] Panel Reports, para. 7.394 (referring to Commission Proposal, pp. 2-3, 8, and 11).

[1145] European Commission, "Commission Staff Working Document accompanying document to the Proposal for a regulation of the European Parliament and of the council concerning trade in seal products – Impact Assessment on the potential impact of a ban of products derived from seal species" (23 July 2008), COM(2008) 469 final (Panel Exhibit JE-16).

[1146] Panel Reports, para. 7.394 (referring to Commission 2008 Impact Assessment, p. 23).

[1147] Panel Reports, paras. 7.394 and 7.395 (referring to Commission Proposal, p. 2 (Explanatory memorandum)).

[1148] Panel Reports, para. 7.395 (quoting Commission Proposal, pp. 2-3 (Explanatory memorandum)).

[1149] Panel Reports, para. 7.395 (quoting Commission Proposal, p. 2 (Explanatory memorandum)). (emphasis added by the Panel)

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":

> The various prohibitions provided for by this Regulation would respond to the animal welfare concerns expressed by members of the public as to the possible introduction into the Community of seal products obtained from seals that might not have been killed and skinned without causing avoidable pain, distress and other forms of suffering.
>
> It should however be possible for trade in seal products to take place where the killing and skinning methods used would be such as offering reasonable guarantees that the killing and skinning occur without causing avoidable pain, distress and other forms of suffering.
>
> The regulatory framework so established would therefore be designed so as giving incentives to countries concerned to review and improve, where need be, their legislation and practice concerning the methods to be complied with when killing and skinning seals.[1153]

5.157. Like the single sentence that Norway claims the Panel overlooked, the above observations are also not quoted in the Panel Reports. Moreover, we note that they all articulate concerns regarding seal welfare, rather than concerns regarding the protection of indigenous communities.

5.158. To establish that the Panel acted inconsistently with Article 11 of the DSU, it must be established that the Panel exceeded the bounds of its discretion as the trier of fact, including in its treatment of the evidence regarding the legislative history. As the Appellate Body noted in *Korea – Alcoholic Beverages*, it is not an error of law under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it".[1154] In reviewing the Panel's findings regarding the legislative history, we consider that the Panel acted within its discretion in ascribing weight to the evidence. As we noted, the Panel concluded that EU public concerns regarding seal welfare were what principally motivated the adoption of the EU Seal Regime. At the same time, although the Panel rejected the contention that IC and other interests reflected independent objectives of the EU Seal Regime, it noted that these interests were accommodated in the design and implementation of the measure. We are not persuaded that the Panel undertook a "selective" and "unbalanced" review of the evidence of the legislative history. Rather, it declined to attribute to certain aspects of the legislative history of the EU Seal Regime the weight and significance that Norway considers it should have.

5.159. Regarding the text of the measure, Norway argues that the Panel erred by failing to take into account its own findings. For example, according to Norway, the Panel found that the preamble of the Basic Regulation "sets out three main considerations with *equal* prominence, which *included* those relating to IC and [M]RM interests".[1155] According to Norway, the Panel's failure to explain why, in the light of that finding, "it still gave prominence singularly to the seal

[1150] Panel Reports, para. 7.396.
[1151] Norway's appellant's submission, para. 653 (quoting Commission Proposal, p. 5).
[1152] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[1153] Commission Proposal, pp. 4-5.
[1154] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.
[1155] Norway's appellant's submission, para. 198. (emphasis original)

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 the Regime, the European Union sought to address the public concerns on seal welfare."[1161] The Panel added that, in doing so, "the European Union also took into account certain other interests (i.e. IC, MRM, and Travellers interests)."[1162]

5.162. We therefore do not agree with Norway that the Panel somehow ignored its own findings or other features of the text of the EU Seal Regime. Although Norway contends that the Panel failed to take into account how the text of the measure "catered to the goals of Member States, such as Sweden and Finland" to protect MRM interests and to the "desire to protect the interests of the Inuit communities"[1163], we do not consider that the Panel committed legal error in failing to attribute to evidence of these interests the meaning and significance Norway considers it should be given. Moreover, we consider that, notwithstanding the role played by the Implementing Regulation in enforcing the EU Seal Regime, the Panel was acting within its discretion in stating that it considered that the Implementing Regulation "does not in itself assist us in identifying the objective of the measure".[1164]

5.163. Norway recalls that the reasons given by the Panel for finding that IC and MRM interests are 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 [course of the] legislative process"; and (iv) that the exception in *Brazil – Retreaded Tyres* was not argued to constitute an "objective".[1165] In Norway's view, "these reasons do not provide a coherent basis for the Panel's conclusion."[1166] Moreover, according to Norway, the Panel's reasoning fails to reconcile its finding with "the considerable evidence showing that protection of the IC and MRM interests were objectives of the measure."[1167]

5.164. We have addressed Norway's arguments concerning the reasons given by the Panel for finding that protecting IC and MRM interests were not objectives of the EU Seal Regime in paragraphs 5.146 and 5.147 of these Reports and have rejected Norway's arguments in that context. We therefore see no grounds separately to consider these issues under Article 11 of the DSU.

[1156] Norway's appellant's submission, para. 198.
[1157] Norway's appellant's submission, para. 201.
[1158] Panel Reports, para. 7.387.
[1159] Norway's appellant's submission, para. 198. (emphasis omitted)
[1160] Norway's appellant's submission, para. 198.
[1161] Panel Reports, para. 7.389.
[1162] Panel Reports, para. 7.389.
[1163] Norway's appellant's submission, para. 199.
[1164] Panel Reports, fn 633 to para. 7.388.
[1165] Norway's appellant's submission, para. 208 (quoting Panel Reports, para. 7.402).
[1166] Norway's appellant's submission, para. 209 (referring to ibid., paras. 66-110).
[1167] Norway's appellant's submission, para. 209.

5.165. Regarding the expected operation of the measure, Norway argues that the Panel failed 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"[1168] seal products from Greenland under the IC exception; and that seal products from certain EU countries, including Sweden, would "likely qualify"[1169] under the MRM exception. 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"[1170] and 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."[1171]

5.166. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts. This margin includes the discretion of the panel to decide which evidence it chooses to utilize in making its findings[1172], and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case.[1173] A panel does not commit error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[1174] Although the Panel could have provided more reasoning to support its findings, we do not think that any shortcomings in the Panel's analysis of the expected operation of the EU Seal Regime are so serious as to amount to a failure to make an objective assessment of the matter before it. Nor do we see why the Panel's finding that the EU Seal Regime will operate to allow into the EU market "all, or virtually all"[1175] seal products from Greenland under the IC exception, and that seal products from certain EU countries, including Sweden, would "likely qualify"[1176] under the MRM exception, would necessarily mean that the protection of IC and MRM interests amount to separate objectives of the EU Seal Regime.

5.167. For the reasons stated above, we reject Norway's contentions that the Panel erred in its characterization of the objective of the EU Seal Regime, and that the Panel failed to comply with its duties under Article 11 of the DSU in its assessment of the evidence regarding the objective of the EU Seal Regime. Having reviewed the Panel's findings and the participants' arguments on appeal, we consider that the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests.

5.3.2 Article XX(a) of the GATT 1994

5.168. Article XX(a) of the GATT 1994 reads:

Article XX

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; …

[1168] Norway's appellant's submission, para. 204 (quoting Panel Reports, para. 7.164).
[1169] Norway's appellant's submission, para. 204 (quoting Panel Reports, para. 7.351).
[1170] Norway's appellant's submission, para. 205.
[1171] Norway's appellant's submission, para. 206.
[1172] Appellate Body Report, *EC – Hormones*, para. 135.
[1173] Appellate Body Report, *Korea – Dairy*, para. 137.
[1174] Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; and *Korea – Alcoholic Beverages*, para. 164.
[1175] Norway's appellant's submission, para. 204 (quoting Panel Reports, para. 7.164).
[1176] Norway's appellant's submission, para. 204 (quoting Panel Reports, para. 7.351).

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

[1177] Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; and *US – Shrimp*, paras. 119 and 120. See also Appellate Body Report, *US – Gambling*, para. 292.

[1178] Appellate Body Report, *US – Gambling*, para. 292. Although the issue on appeal in *US – Gambling* concerned Article XIV(a) of the GATS, the Appellate Body stated that the two-tier analysis set out in WTO jurisprudence is contemplated under both Article XIV of the GATS and Article XX of the GATT 1994. (Ibid.)

[1179] Panel Report, *US – Gambling*, para. 6.455.

[1180] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

[1181] Appellate Body Report, *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (referring to Appellate Body Report, *US – Gambling*, para. 307). In the context of Article 2.2 of the TBT Agreement, the Appellate Body stated that "[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 322) The Appellate Body then proceeded to identify circumstances in which comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective. (Ibid., fn 647 to para. 322)

[1182] Appellate Body Report, *US – Gambling*, paras. 309-311. The Appellate Body additionally noted that a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements, the Appellate Body stated, do not contemplate such an impracticable and impossible burden. (Ibid., para. 309)

[1183] Panel Reports, para. 7.639.

[1184] Panel Reports, paras. 7.638 and 7.639.

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] The participants did not address this issue in their submissions on appeal.[1191] Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.

5.174. Before turning to each of Canada's and Norway's claims as set out above, we first recall the Panel's findings under Article XX(a).

5.3.2.1 The Panel's findings on Article XX(a)

5.175. The Panel first addressed the issue of what aspects of the EU Seal Regime must be justified under Article XX of the GATT 1994. Although the parties agreed that it is the aspect of a measure infringing the GATT 1994 that must be justified under Article XX, the Panel stated that it need not limit itself to considering that aspect of the measure in order to determine the measure's justifiability under Article XX.[1192] Instead, the Panel observed that the aspects of a measure that must be considered in an Article XX analysis are to be identified in the light of the specific circumstances of a given dispute, including the nature and characteristics of the measure at issue, the manner in which the complainants present their claims, and the relationship between the GATT 1994 and the other covered agreements that were also examined with respect to the given measure.[1193]

[1185] Canada's appellant's submission, paras. 407 and 408; Norway's appellant's submission, paras. 858-867.

[1186] There are certain claims raised by Canada and Norway in respect of Article 2.2 of the TBT Agreement on which we need not rule by virtue of our mooting of the Panel's findings under the TBT Agreement. (See *supra*, para. 5.132) For example, we do not rule on Canada's claim that the Panel failed properly to assess the risks non-fulfilment would create, or to conduct a relational analysis taking into account such risks of non-fulfilment, as required by Article 2.2. (Canada's Notice of Appeal, pp. 1-2) To the extent that Canada contends that the Panel was required under Article XX(a) to reach a preliminary determination of necessity before proceeding to compare the challenged measure with possible alternatives, we disagree. (See *infra*, fn 1300) We also do not rule on Norway's claims that the Panel failed to address its contention that the three contested conditions under the MRM requirements make no contribution to the measure's objective (Norway's Notice of Appeal, para. 7, bullet point 3), and failed to address arbitrary or unjustifiable discrimination in its analysis under Article 2.2 (ibid., para. 8). These claims are set out, respectively, in sections IV.B.2.g and IV.B.3 of Norway's appellant's submission, which were not incorporated by reference in its claims under Article XX(a). (Norway's appellant's submission, paras. 863 (referring to section IV.B.2.e), 864 (referring to section IV.B.2.f), and 867 (referring to sections IV.B.4.e and IV.B.4.f)) In addition, because we have rendered moot the Panel's finding in respect of Article 2.2, the conditions for Norway's request that we complete the legal analysis have not been satisfied. (Norway's Notice of Appeal, para. 11)

[1187] Appellate Body Report, *US – Shrimp*, para. 133.

[1188] Appellate Body Report, *US – Shrimp*, para. 133.

[1189] Basic Regulation, preamble, recital 3.

[1190] Basic Regulation, preamble, recital 5.

[1191] In response to questioning at the oral hearing, the participants expressed their agreement that there is a sufficient nexus between the public moral concerns and activities addressed by the measure, on the one hand, and the European Union, on the other hand. The participants also indicated that, because the parties did not dispute that there was a sufficient nexus, the Appellate Body need not explore this issue further. (Participants' responses to questioning at the oral hearing)

[1192] Panel Reports, para. 7.618.

[1193] Panel Reports, para. 7.619.

5.176. With respect to the nature and characteristics of the measure at issue in the present disputes, the Panel was of the view that the two components comprising the EU Seal Regime – i.e. the "ban" and the "exceptions" – are "closely connected" to each other since the exceptions cannot "operate in isolation" without the ban.[1194] The Panel compared this to the "similar factual circumstances" in *US – Gasoline*, where, in the Panel's view, the Appellate Body "weighed and considered the interrelationship of different components of the measure" in the context of its analysis under Article XX(g).[1195] The Panel saw no reason why the Appellate Body's approach in the context of Article XX(g) was not relevant to its analysis under Article XX(a) and (b).[1196] The Panel further noted that the IC and MRM exceptions have a "substantial" relationship with the ban given that the exceptions cannot exist without the ban, and that the exceptions inform the scope of the ban.[1197]

5.177. Next, the Panel recalled its analysis of the EU Seal Regime under the TBT Agreement, noting that the EU Seal Regime as a whole was found to constitute a "technical regulation". The Panel further noted that the policy objective pursued by the EU Seal Regime was determined to be "addressing the EU public moral concerns on seal welfare"[1198]; that the EU Seal Regime as a whole was examined for the necessity of its trade-restrictiveness in fulfilling the identified policy objective under Article 2.2; and that the justification of the detrimental impacts caused by the regulatory distinctions embodied in the IC and MRM exceptions was examined under Article 2.1.[1199]

5.178. Based on these observations, the Panel stated that:

> [A]lthough it is the aspects of the EU Seal Regime infringing the GATT 1994 (i.e. the IC and MRM exceptions) that must be *justified* under Article XX, our *analysis* under paragraphs (a) and (b) should first focus on the EU Seal Regime as a whole; it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban.[1200]

The Panel considered that it must then examine "whether the EU Seal Regime, in particular the distinctions drawn in the form of the IC and MRM exceptions, are applied in a manner consistent with the requirements under the chapeau of Article XX".[1201]

5.179. The Panel then turned to assess whether, as claimed by the European Union, the EU Seal Regime is "necessary to protect public morals" and whether it is, therefore, provisionally justified under Article XX(a). The Panel began by considering whether the policy objective pursued through the EU Seal Regime falls within the range of policies designed to protect public morals, as prescribed in Article XX(a). In answering this question, the Panel recalled its intermediate finding from its analysis under Article 2.2 of the TBT Agreement that the objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. The Panel recalled that, in reaching this finding, it had established the existence of EU public concerns on seal welfare, as well as their moral nature. The Panel also recalled that it had relied on past WTO jurisprudence on the scope of "public morals" under Article XX(a) of the GATT 1994 and Article XIV(a) of the GATS in identifying the objective of the EU Seal Regime. On this basis, the Panel found that the policy objective pursued by the European Union, namely, addressing EU public moral concerns on seal welfare, fell within the scope of Article XX(a) on the protection of public morals.[1202] The Panel also considered that the protection of public moral concerns with regard to animal welfare is an "important value or interest".[1203]

[1194] Panel Reports, para. 7.620.
[1195] Panel Reports, paras. 7.620 and 7.621.
[1196] Panel Reports, para. 7.621.
[1197] Panel Reports, para. 7.622.
[1198] Panel Reports, para. 7.623.
[1199] Panel Reports, para. 7.623.
[1200] Panel Reports, para. 7.624. (emphasis original)
[1201] Panel Reports, para. 7.624.
[1202] Panel Reports, para. 7.631.
[1203] Panel Reports, para. 7.632 (referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.817).

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 contribution exists when there is a "genuine relationship of ends and means between the objective pursued and the measure at issue".[1204] The Panel also recalled the Appellate Body's jurisprudence in the context of Article XX(b) that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it would be difficult for a panel to find the measure "necessary" unless it was satisfied that the measure was apt to make a material contribution to the achievement of its objective.[1205] Based on this, the Panel considered that, for a finding that the EU Seal Regime is "necessary" under Article XX(a), it must be shown that the contribution made by the "ban" to the identified objective is at least "material", given the extent of its trade-restrictiveness.[1206] The Panel stated that, following such an affirmative finding, the EU Seal Regime could provisionally be deemed "necessary", unless it is demonstrated that the European Union could have adopted a GATT-consistent or less trade-restrictive alternative.[1207]

5.181. Highlighting the "close relationship" between the GATT 1994 and the TBT Agreement, and the need to interpret the two agreements consistently and harmoniously, the Panel considered that its assessment of the EU Seal Regime's contribution to its objective under Article 2.2 of the TBT Agreement was relevant for its analysis under Article XX.[1208] On this basis, the Panel drew upon its Article 2.2 analysis to note that the actual degree of contribution by the ban must also be assessed by taking account of the impact of the explicit and implicit exceptions thereto.[1209] With respect to the ban, the Panel recalled its finding under Article 2.2 that the ban contributes to the European Union's objective by reducing, to a certain extent, the global demand for seal products and by helping the EU public avoid being exposed to seal products derived from seals killed inhumanely. To the extent such seal products are prohibited from the EU market, therefore, the Panel found that the "ban" makes a material contribution to the objective of the measure.[1210]

5.182. The Panel recalled its finding that the IC and MRM exceptions, combined with the absence of any mechanism under the measure to inform consumers of the presence of seal products on the EU market, "reduced the effectiveness" of the ban by providing market access to certain seal products.[1211] Similarly, the implicit exceptions also "undermine" the measure's fulfilment of the objective.[1212] Overall, however, the Panel recalled its finding that the EU Seal Regime as a whole contributed "to a certain extent" to its objective of addressing EU public moral concerns on seal welfare.[1213] With respect to a GATT-consistent or less trade-restrictive alternative, the Panel recalled its earlier finding under Article 2.2 that the alternative measure proposed by the complainants was not reasonably available to the European Union, given, *inter alia*, the animal welfare risks and challenges that it had found to exist in seal hunts. Therefore, the Panel concluded that the EU Seal Regime was provisionally justified under Article XX(a).[1214]

5.183. Finally, the Panel considered the European Union's argument that the EU Seal Regime is also justified under Article XX(b) because it contributes to protecting the health of seals. However, the Panel noted that the European Union never submitted that the protection of seal welfare as such was the objective of the EU Seal Regime. The Panel also recalled that the objective of the measure, namely, to address EU public moral concerns on seal welfare, was found to fall within the scope of Article XX(a). For these reasons, and considering the limited extent of the European Union's arguments under Article XX(b), the Panel found that the European Union failed to establish a *prima facie* case for its defence under Article XX(b).[1215]

[1204] Panel Reports, para. 7.633 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-157).
[1205] Panel Reports, para. 7.635 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150 and 151).
[1206] Panel Reports, para. 7.636.
[1207] Panel Reports, para. 7.639.
[1208] Panel Reports, para. 7.634 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 317).
[1209] Panel Reports, para. 7.636.
[1210] Panel Reports, para. 7.637.
[1211] Panel Reports, para. 7.638.
[1212] Panel Reports, para. 7.638.
[1213] Panel Reports, para. 7.638.
[1214] Panel Reports, para. 7.639.
[1215] Panel Reports, para. 7.640.

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 present disputes, since the Panel found the IC and MRM exceptions to be inconsistent with Articles I:1 and III:4 of the GATT 1994, Norway argues, it is these specific aspects of the EU Seal Regime that must be justified under Article XX(a), and not the EU Seal Regime as a whole.[1218] According to Norway, the Panel found that the EU Seal Regime "as a whole" was provisionally justified on the basis of the positive contribution of the "ban".[1219] In Norway's view, the Panel's approach "allowed aspects of the EU Seal Regime not found to be WTO-inconsistent, to shield from scrutiny under Article XX(a) those aspects of the measure found to be WTO-inconsistent".[1220] The European Union, on the other hand, submits that the "less favourable treatment" under the EU Seal Regime results from the "interplay" between the ban and the IC and MRM exceptions, and that the Panel was therefore correct in not limiting its analysis under Article XX(a) to the IC and MRM exceptions alone.[1221]

5.185. We begin by noting that the general exceptions of Article XX apply to "measures" that are to be analysed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994.[1222] Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the "differences in the regulation of imports and of like domestic products" giving rise to the finding of less favourable treatment under Article III:4.[1223] Thus, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.

5.186. Turning to the specifics of this case, we recall the Panel's statement that:

> [A]lthough it is the aspects of the EU Seal Regime infringing the GATT 1994 (i.e. the IC and MRM exceptions) that must be *justified* under Article XX, our *analysis* under paragraphs (a) and (b) should first focus on the EU Seal Regime as a whole; it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban.[1224]

5.187. The Panel stated that the EU Seal Regime "consists of both prohibitive and permissive components".[1225] The "prohibitive" component of the EU Seal Regime "operates as a ban on seal products", while the "permissive" component flows from "an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation (i.e. seal products obtained from IC hunts, MRM hunts, and those imported under the Travellers imports category)".[1226] As noted above, the IC exception refers to the requirements under Article 3(1) of the Basic Regulation and Article 3 of the Implementing Regulation that must be met in order for seal products derived from IC hunts to be placed on the EU market. Similarly, the term MRM exception refers to the requirements under Article 3(2)(b) of the Basic Regulation and Article 5 of the

[1216] Norway's appellant's submission, para. 775.
[1217] Norway's appellant's submission, para. 779. (emphasis omitted)
[1218] Norway's appellant's submission, paras. 779-787 (referring to Panel Reports, paras. 7.56, 7.173, 7.594, 7.600, 7.604, 7.618, and 7.624; and Norway Panel Report (DS401), para. 8.3(a) and (b)).
[1219] Norway's appellant's submission, para. 795 (referring to Panel Reports, paras. 7.636 and 7.638).
[1220] Norway's appellant's submission, para. 795.
[1221] European Union's appellee's submission, para. 407.
[1222] Appellate Body Report, *US – Gasoline*, pp. 13-14, DSR 1996:I, pp. 12-13. In that dispute, the Appellate Body criticized the panel for designating what ought to have been justified under Article XX(g) in terms such as "difference in treatment", "less favourable treatment", or "discrimination" for the purposes of its analysis. (Ibid.)
[1223] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.
[1224] Panel Reports, para. 7.624. (emphasis original)
[1225] Panel Reports, para. 7.54.
[1226] Panel Reports, para. 7.56.

Implementing Regulation that must be met in order for seal products derived from MRM hunts to be placed on the EU market.

5.188. With respect to the claims under Article I:1 of the GATT 1994, the Panel found that, "in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affects the conditions of competition on the market [for seal products] of Canadian and Norwegian origin as compared to seal products of Greenlandic origin."[1227] As we see it, the existence of the permissive component in the form of the IC exception alone cannot confer an advantage to seal products of Greenlandic origin, unless it is compared to the treatment of seal products of Canadian and Norwegian origin. It is only the combined operation of the permissive aspect of the EU Seal Regime (i.e. the IC exception, which grants market access to seal products of Greenlandic origin), together with the prohibitive aspect of the EU Seal Regime (i.e. the "ban" that restricts market access for Canadian and Norwegian seal products), that leads to a finding of *de facto* discrimination under Article I:1.

5.189. Similarly, in the context of the claims under Article III:4 of the GATT 1994, we note that the Panel's finding that the measure accords treatment to Canadian and Norwegian seal products that is less favourable than the treatment accorded to EU seal products was based on an examination of the combined operation of the permissive component of the EU Seal Regime (i.e. the MRM exception, which allows the placing on the market of seal products of EU origin), together with the prohibitive component (i.e. the "ban" that restricts market access for Canadian and Norwegian seal products). As with the Panel's analysis of the IC exception under Article I:1, the permissive aspect of the MRM exception and the requirements thereunder would not have led to a finding of violation under Article III:4 in the absence of the "ban".

5.190. On the basis of these findings by the Panel, we disagree with Norway that the "precise aspects" of the EU Seal Regime that violate the provisions of the GATT 1994 are the IC exception and the MRM exception.[1228] At the same time, it may not be accurate to state that the analysis under Article XX(a) must focus on the EU Seal Regime "as a whole" insofar as the measure consists of elements other than the prohibitive and permissive components of the EU Seal Regime. In any event, although the Panel stated that its analysis should focus on the EU Seal Regime "as a whole", it then made clear that it was referring to the components of the measure embodying the "ban" and the "exceptions".[1229]

5.191. Norway argues that the Panel erroneously relied on the Appellate Body's approach in *US – Gasoline* to support its approach of using the aspect of the EU Seal Regime not found to be WTO-inconsistent (i.e. the ban) to shield from scrutiny the aspects of the EU Seal Regime that were found to be WTO-inconsistent (i.e. the IC and MRM exceptions).[1230] In *US – Gasoline*, a challenge was brought against a measure enacted by the United States Environmental Protection Agency (EPA) to ensure that pollution from gasoline combustion did not exceed 1990 levels. The measure set out certain "baseline establishment rules" for domestic refiners, blenders, and importers of foreign gasoline, but differentiated between more favourable "individual" baselines (established by the entity itself) and less favourable "statutory" baselines (established by the EPA). In findings that were not appealed, the panel found that most domestic refiners were not required to meet the statutory baseline, whereas almost all importers of foreign gasoline were required to do so.[1231] The panel thus found that "imported gasoline was treated less favourably than domestic gasoline" resulting in an inconsistency under Article III:4 of the GATT 1994.[1232]

[1227] Panel Reports, para. 7.597. The Panel thus found that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994 because it does not extend the same market access advantage on the EU market to the complainants' imports as it does to imports originating from Greenland. (Ibid., para. 7.600)

[1228] Norway's appellant's submission, para. 785 (referring to Panel Reports, para. 7.56). We note that, in its request for panel establishment, Norway claimed that the EU Seal Regime gave rise to discrimination under Articles I:1 and III:4 of the GATT 1994 "[t]hrough the general prohibition and the exceptions set out therein". (Request for the Establishment of a Panel by Norway, p. 2).

[1229] The Panel stated that "it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban." (Panel Reports, para. 7.624)

[1230] Norway's appellant's submission, paras. 795 and 821. See also ibid., para. 816 (referring to Panel Reports, para. 7.620).

[1231] Panel Report, *US – Gasoline*, para. 6.15.

[1232] Panel Report, *US – Gasoline*, para. 6.16.

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 rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline)"[1234] were justified under Article XX(g).

5.193. At the same time, we do not consider that the Panel was correct to the extent that it suggested that what it considered must be "justified" in this case was limited to the permissive aspects flowing from the IC and MRM exceptions.[1235] Rather, what must be justified is, as we have said, both the prohibitive and permissive components of the EU Seal Regime, taken together. However, because the Panel, in determining what needed to be "analysed", ultimately considered whether the prohibitive and permissive aspects of the EU Seal Regime together were "necessary to protect public morals" within the meaning of Article XX(a), we find no error in the Panel's approach. Accordingly, we reject Norway's claim, and find that the Panel did not err in concluding that the analysis under Article XX(a) of the GATT 1994 should examine the prohibitive and permissive aspects of the EU Seal Regime.

5.3.2.3 The Panel's analysis of the protection of public morals under Article XX(a)

5.194. We next consider Canada's claim that the Panel failed to establish that there was a risk to EU public morals consisting of concerns regarding animal welfare that are particular to seals. Canada principally claims that the Panel erred in finding that the EU Seal Regime falls within the scope of application of Article XX(a) without identifying a "risk" against which the measure seeks to "protect". According to Canada, the Panel failed to determine the content of the relevant public moral, consisting of the exact standard of right and wrong conduct, in the European Union.[1236] Relying on the panel report in *EC – Asbestos*, Canada argues that the use of the phrase "to protect" in Article XX(a) requires the identification of a risk to public morals against which the EU Seal Regime seeks to protect. Canada contends that a "risk" to public morals in the European Union can be found to exist only if the evidence shows that "the commercial seal hunts targeted by the ban exhibit a degree or incidence of animal suffering that falls below the standard or norm of right and wrong conduct in the context of animal welfare shown to prevail within the [European Union]."[1237] In this regard, Canada recalls that it presented evidence to show that "EU policies and practices with respect to animal welfare included a tolerance for a certain degree of animal suffering, both for slaughterhouses and wildlife hunts."[1238] In Canada's view, the welfare risks associated with commercial seal hunts are "commonplace" in situations that involve the killing of animals, especially in the context of wildlife hunts, regardless of whether they take place inside or outside the European Union.[1239] On this basis, Canada argues that the Panel failed to consider whether the risks associated with commercial seal hunts "exceeded the accepted level of risk of compromised animal welfare, as reflected in the [European Union's] policies and practices in this field".[1240] Canada also argues that the Panel acted inconsistently with Article 11 of the DSU by

[1233] Norway's appellant's submission, paras. 818 and 821.
[1234] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 17.
[1235] Panel Reports, para. 7.624.
[1236] Canada's appellant's submission, para. 394.
[1237] Canada's appellant's submission, para. 396.
[1238] Canada's appellant's submission, para. 395 (referring to Canada's first written submission to the Panel, paras. 146-162 and 198-213; Canada's second written submission to the Panel, paras. 45-49; Canada's opening statement at the second Panel meeting, paras. 44-50; Canada's response to Panel question No. 60, paras. 248-250; and the following Exhibits submitted by Canada to the Panel: CDA-29; CDA-34, p. 453; CDA-47; CDA-98; CDA-122; CDA-123, p. 14; CDA-124; JE-08; JE-17; and JE-22, p. 88 (see list of Panel Exhibits on pp. 9-10)).
[1239] Canada's appellant's submission, paras. 395 and 396.
[1240] Canada's appellant's submission, para. 397.

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 the existence of a risk to public morals in order to determine that the measure falls within the scope of Article XX(a). According to the European Union, in order for a measure to fall within the scope of Article XX(a), it only needs to be shown that the measure is designed to protect public morals.[1242] In the European Union's view, Canada's interpretation would introduce a "strict consistency test", requiring Members to prove that "the relevant standard of morality is consistently applied by them in each and every situation involving similar risks."[1243] Given the Panel's finding 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, a finding that has not been appealed by Canada, the European Union submits that the Panel was entitled to conclude that the EU Seal Regime is designed to protect public morals and, therefore, falls within the scope of Article XX(a) of the GATT 1994.[1244] In response to Canada's claim under Article 11 of the DSU challenging the Panel's assessment of evidence relating to terrestrial wildlife hunts, the European Union points out that the Panel gave detailed reasons for its findings on the uniqueness and distinctiveness of the welfare risks associated with seal hunts, and that these have not been challenged by Canada on appeal.[1245]

5.196. In our view, Canada's arguments are built around the notion of an identifiable "risk" that it finds implicit in the phrase "to protect" in Article XX(a). According to Canada, identifying such a "risk" requires the identification of a precise standard of animal welfare in the European Union, and an assessment of the incidence of suffering in commercial seal hunts against that standard. Central to Canada's position is its contention that the animal welfare risks in commercial seal hunts are not unique to those types of hunts, and can be found in all forms of wildlife hunts, including those conducted in the European Union.[1246] In other words, Canada argues that the Panel, upon proper consideration of the evidence, should have concluded that the animal welfare risks associated with seal hunts are not any higher than the animal welfare risks associated with slaughterhouses and other terrestrial wildlife hunts, such as deer hunts, in the European Union. In the absence of a higher risk associated with seal hunts, Canada asserts that the European Union cannot justify its measure on public moral grounds.

5.197. Canada's claim asks us to consider whether the use of the phrase "to protect" in Article XX(a) requires a panel to identify a risk against which the measure that is to be justified seeks to protect. The ordinary meaning of the verb "protect" includes "defend or guard against injury or danger; shield from attack or assault; support, assist …; keep safe, take care of …".[1247] The meaning of "to protect" in a given provision also requires taking into account the context in which the phrase is used. The phrase "to protect" is used in three subparagraphs of Article XX that concern the "protection" of different non-economic interests and concerns.[1248] In *EC – Asbestos*, in addressing the term "to protect" in Article XX(b), the panel noted that "the notion of 'protection' … impl[ies] the existence of a health risk".[1249] We note that Article XX(b) focuses on the protection of "human, animal or plant life or health". It may be that the protection of human, animal, or plant life or health implies a particular focus on the protection from or against certain dangers or risks.

[1241] Canada's appellant's submission, paras. 401 and 402.

[1242] European Union's appellee's submission, paras. 343 and 344 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 157).

[1243] European Union's appellee's submission, para. 347.

[1244] European Union's appellee's submission, paras. 345 and 346.

[1245] European Union's appellee's submission, paras. 355 and 356 (referring to Panel Reports, paras. 7.187, 7.188, 7.190, 7.204, 7.209, 7.214, 7.215, 7.217, 7.218, 7.221-7.223, and fns 300 and 339 to paras. 7.206 and 7.218, respectively).

[1246] Canada's appellant's submission, para. 369.

[1247] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2376.

[1248] Article XX(a) talks of measures "necessary to protect public morals". Article XX(b) is concerned with measures "necessary to protect human, animal or plant life or health". Finally, Article XX(f) talks of measures "imposed for the protection of national treasures of artistic, historic or archaeological value".

[1249] Panel Report, *EC – Asbestos*, para. 8.170. (emphasis omitted)

For example, the concepts of "risk" and "protection" 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 identify 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 required 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 requirement "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

[1250] The preamble to the SPS Agreement states, in relevant part, "Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." Article 5.1 of the SPS Agreement concerns the "assessment of risk", taking into account risk assessment techniques developed by the relevant international organizations. Article 5.2 further requires that, in the assessment of risks, Members shall take into account, *inter alia*, relevant scientific evidence. Article 5.3 draws a link between "protection" and "risk" by stating that "[i]n assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account ….". (SPS Agreement, Article 5.3) Article 5.3 therefore relates the concepts of "protection" and "risk" by using the phrase "protection from such risk".

[1251] Panel Reports, para. 7.380 (quoting Panel Report, *US – Gambling*, para. 6.465).

[1252] Panel Reports, para. 7.380 (referring to Panel Report, *US – Gambling*, para. 6.461).

[1253] Panel Report, *US – Gambling*, para. 6.461 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 176; and *EC – Asbestos*, para. 168). We note that the panel in *EC – Asbestos* took a similar position in the context of Article XX(b) when it stated that, although it must examine the particular health risk posed by chrysotile asbestos fibres, it was not required to assess France's choice to protect its population against that risk. (Panel Report, *EC – Asbestos*, paras. 8.170 and 8.171)

do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way.[1254]

5.201. For these reasons, we reject Canada's argument that the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations such as terrestrial wildlife hunts. We therefore also do not consider it necessary to address Canada's claim under Article 11 of the DSU regarding the same issue. Accordingly, we find that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994.[1255]

5.202. In addition, Canada claims that the Panel "misinterpreted"[1256] Canada's argument and therefore erred under Article 11 of the DSU in finding that Canada did not dispute the importance of public moral concerns regarding the protection of animal welfare. Canada points out that, while it had acknowledged that "the protection of public morals is, in principle, a highly important interest or value"[1257], Canada "did not agree that the specific public moral concern in issue was considered important or presented a serious risk".[1258] Although Canada raises this claim in the context of the Panel's assessment of the importance of the objective in a necessity analysis, Canada appears again to be advancing its central contention that the objective of the EU Seal Regime is not as important as the European Union asserts. Canada maintained before the Panel that there are "reasons to doubt the seriousness of the harm that might be expected to arise from the presence of seal products on the [EU] market".[1259]

5.203. The Panel noted the European Union's position that moral concern regarding the protection of animals is a value of high importance in the European Union. The Panel then stated: "We consider, and the parties do not dispute, that the protection of such public moral concerns is indeed an important value or interest."[1260] As we see it, the Panel was making a rather general statement about the importance of public moral concerns regarding animal welfare.[1261] Moreover, the Panel appears to have reached this conclusion on the basis of its own assessment, and therefore did not rely solely on the position it attributed to the parties. We further note that the Panel also alluded in this section to its prior assessment of the risks of non-fulfilment under Article 2.2 of the TBT Agreement[1262], where the Panel had concluded that it did not consider that "the level of protection actually achieved by the measure is as high as the European Union claims the measure initially aimed to achieve", and that it would "bear this in mind" in its assessment of the alternative measure.[1263] Therefore, while the Panel did not provide much elaboration of its assessment of the importance of the objective in the context of its analysis under Article XX(a), we do not consider that the general statement to which Canada refers shows that its position was somehow misinterpreted or misrepresented by the Panel. Canada's views about the scope and

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[1254] The drafters of the WTO agreements have elsewhere explicitly addressed the question of consistency in the setting of levels of protection. Article 5.5 of the SPS Agreement reads, in relevant part:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

[1255] Panel Reports, para. 7.631.

[1256] Canada's appellant's submission, para. 431 (referring to Panel Reports, para. 7.632).

[1257] Canada's appellant's submission, para. 432 (quoting Canada's second written submission to the Panel, para. 176).

[1258] Canada's appellant's submission, para. 434 (referring to Canada's second written submission to the Panel, para. 183).

[1259] Canada's appellant's submission, para. 433 (quoting Canada's second written submission to the Panel, para. 179).

[1260] Panel Reports, para. 7.632 (referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.817).

[1261] The Panel also referred to the statement by the panel in *China – Publications and Audiovisual Products* that the protection of public morals "ranks among the most important values or interests pursued by members as a matter of public policy". (Panel Reports, fn 972 to 7.632 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.817))

[1262] Panel Reports, fn 971 to para. 7.632.

[1263] Panel Reports, para. 7.466 (referring to European Union's first written submission to the Panel, para. 39). As we noted above at paragraph 5.172, the Panel relied on its findings under Article 2.2 of the TBT Agreement in concluding that the EU Seal Regime was "necessary" within the meaning of Article XX(a) of the GATT 1994.

content of EU public moral concerns at issue in this 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 contribution 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 meaning 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 under Article 2.2 of the TBT Agreement in addressing the elements of the legal standard of "necessity" 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 been appealed and upon which we, therefore, need not rule.[1268] For instance, the Panel found in its analysis under Article 2.2 of the TBT Agreement that the EU Seal Regime "considered in its entirety, is trade restrictive because it does 'hav[e] a limiting effect on trade' by prohibiting certain seal products, including those imported from Canada and Norway, from accessing the EU market".[1269] The Panel also referred to the trade-restrictiveness of the EU Seal Regime in the context of its analysis under Article XX(a).[1270] The Panel's analysis and findings regarding trade-restrictiveness are not appealed by Canada or Norway, either in the context of its analysis under Article 2.2 of the TBT Agreement or Article XX(a) of the GATT 1994.[1271]

5.206. Rather, the complainants challenge on appeal the Panel's analysis and findings in respect of the contribution that the EU Seal Regime makes to its objective, and in respect of the comparison of the EU Seal Regime with a less trade-restrictive alternative measure. In this section, we address the Panel's contribution analysis. As noted above, because the Panel's analysis under Article XX(a) relied on findings it made in the context of Article 2.2 of the TBT Agreement, Canada and Norway also incorporate by reference many of the arguments made in the context of their Article 2.2 claims in their appeals of the Panel's findings under Article XX(a).[1272]

5.3.2.4.1 Whether the Panel was required to show that the EU Seal Regime makes a "material" contribution to its objective

5.207. Canada and Norway argue that the Panel erred by focusing only on the prohibitive aspect of the measure, i.e. the "ban", when determining whether the EU Seal Regime made a "material" contribution to its objective of addressing EU public moral concerns regarding seal welfare.[1273] Instead, they argue that, because the Panel sought to determine whether the EU Seal Regime "as a whole" was provisionally justified under Article XX(a), it was required to consider whether the contribution of the measure "as a whole", and not just the "ban", was "material".[1274] In addition,

[1264] Panel Reports, para. 7.634.
[1265] Panel Reports, para. 7.634.
[1266] Panel Reports, paras. 7.637-7.639.
[1267] Panel Reports, para. 7.639.
[1268] We are mindful that there are differences in the text of Article 2.2 of the TBT Agreement and Article XX(a) of the GATT 1994 that may have a bearing on the interpretation of these provisions.
[1269] Panel Reports, para. 7.426 (referring to European Union's first written submission to the Panel, paras. 357 and 586; and Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; and *US – COOL*, para. 375). In referring to the prohibition on the import of seal products "including those imported from Canada and Norway", the Panel may have been referring not only to the restrictive impact of the ban, but also to any restrictive discriminatory impact caused by trade diversion between imports of seal products originating in different countries.
[1270] Panel Reports, para. 7.636.
[1271] Canada's and Norway's responses to questioning at the oral hearing.
[1272] See *supra*, para. 5.172 (referring to Panel Reports, paras. 7.638 and 7.639).
[1273] Canada's appellant's submission, para. 410 and 421; Norway's appellant's submission, para. 854.
[1274] Canada's appellant's submission, para. 420; Norway's appellant's submission, para. 855.

Canada and Norway contend that the Panel erred in finding that the EU Seal Regime made a "material" contribution. According to Norway, the Panel's findings in the context of its analysis under Article 2.2 of TBT Agreement do not demonstrate that the EU Seal Regime makes a contribution, either "to a certain extent", as found by the Panel, or "materially", as required under Article XX(a), to protecting EU public morals.[1275] Canada similarly asserts that the Panel erred in characterizing "some contribution" and "makes a contribution to" the identified objective as equivalent to making a "material" contribution.[1276]

5.208. The European Union submits that the arguments of Canada and Norway are based on a misreading of the Appellate Body report in *Brazil – Retreaded Tyres*.[1277] The European Union considers that, in that case, the Appellate Body left open "the possibility that, exceptionally, an import ban may be considered necessary even when the contribution is not 'material'".[1278] According to the European Union, following Canada's and Norway's approach would contradict the Appellate Body's approach in *US – COOL*, in the context of Article 2.2 of the TBT Agreement, in which "the Appellate Body rebuked the panel for having considered it necessary for the COOL measure to meet some minimum level of fulfilment".[1279] In any event, the European Union maintains that the Appellate Body in *Brazil – Retreaded Tyres* held that "a contribution should be deemed 'material' provided that it is not 'marginal or insignificant'".[1280] 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".[1281]

5.209. We first address the question of whether the Panel was required to determine whether the contribution of the measure was "material". The Panel stated that "the contribution made by the 'ban' to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness."[1282] Drawing on the Appellate Body's report in *Brazil – Retreaded Tyres*, the Panel stated that "when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a *material* contribution to the achievement of its objective".[1283] In a footnote, the Panel added that, in order for a measure to be considered necessary within the meaning of Article XX(a), the measure's contribution to its objective must reach a "certain minimum threshold such as a *material* or *significant* contribution".[1284] By contrast, the Panel stated that no such threshold degree of contribution exists under Article 2.2 of the TBT Agreement, which only requires an assessment of the *degree* of contribution of a measure.[1285]

5.210. In *Brazil – Retreaded Tyres*, the Appellate Body identified certain principles in evaluating the contribution of a measure in the context of a necessity analysis under Article XX:

> The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued

[1275] Norway's appellant's submission, para. 861.
[1276] Canada's appellant's submission, para. 430.
[1277] European Union's appellee's submission, paras. 421 and 422.
[1278] European Union's appellee's submission, para. 423.
[1279] European Union's appellee's submission, para. 424.
[1280] European Union's appellee's submission, para. 429.
[1281] European Union's appellee's submission, para. 429.
[1282] Panel Reports, para. 7.636.
[1283] Panel Reports, para. 7.635 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150 and 151). (emphasis original)
[1284] Panel Reports, fn 977 to para. 7.635. (emphasis original)
[1285] Panel Reports, fn 977 to para. 7.635.

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 policy".[1289] Second, the Appellate Body considered that the results obtained from, for example, certain preventive actions to reduce the incidence of diseases, "can only be evaluated with the benefit of time".[1290] As the Appellate Body explained, the broader regulatory scheme was designed to induce changes in the practices and behaviour of commercial actors in order to reduce the number of waste tyres generated and, thereby, to reduce the risks to human, animal, and plant life and health arising from the accumulation of waste tyres.[1291]

5.213. The Appellate Body in *Brazil – Retreaded Tyres* was thus confronted with the particular challenge of assessing the contribution of a measure that formed part of a broader policy scheme, and that was not yet having, or likely itself to produce, an immediately discernible impact on its objective. The Appellate Body thus sought to determine whether the measure was "apt to make a material contribution" to its objective.[1292] This reflected the Appellate Body's recognition that, notwithstanding the particular features of the measure at issue in that dispute, it was nevertheless possible to determine the level of contribution to be made by the measure, by assessing the extent to which it was *apt to do so* at some point in the future. We further note that the Appellate Body was careful not to suggest that its approach in that dispute was requiring the use of a generally applicable threshold for a contribution analysis. Rather, the Appellate Body was making the more limited statement that "when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, *it appears to us that it would be difficult* for a panel to find that measure necessary unless it is satisfied that the measure is *apt to make a material contribution* to the achievement of its objective".[1293] We therefore do not see that the Appellate Body's approach in *Brazil – Retreaded Tyres* sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994.

5.214. This understanding is supported, in our view, by the other dimensions of a necessity analysis. As we noted, the Appellate Body has explained in several disputes that 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.[1294] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.[1295] As the Appellate Body has stated, "[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another,

[1286] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.
[1287] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146.
[1288] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[1289] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[1290] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151. The Appellate Body accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately observable". (Ibid., para. 151)
[1291] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.
[1292] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.
[1293] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150. (emphasis added)
[1294] See *supra*, para. 5.169.
[1295] See *supra*, para. 5.169.

WTO-consistent measure is 'reasonably available'".[1296] Such an analysis, the Appellate Body has observed, involves a "holistic" weighing and balancing exercise "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement".[1297]

5.215. A measure's contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is "necessary" cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis. It will also depend on the nature, quantity, and quality of evidence, and whether a panel's analysis is performed in quantitative or qualitative terms.[1298] Indeed, the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature.[1299] The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor. If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis.[1300] The Appellate Body's approach in *Brazil – Retreaded Tyres* is consonant with an assessment of the contribution of a measure as one element of a holistic necessity analysis under Article XX. It is also consistent with our understanding that the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be "necessary" within the meaning of Article XX(a), subject to the result of a weighing and balancing exercise under the specific circumstances of the case and in the light of the particular nature of the measure at issue.

5.216. For these reasons, we reject the contention of Canada and Norway that the Panel was required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis. We also consider that the Panel erred to the extent that it relied on such a standard in these portions of its analysis.[1301]

5.217. The Panel then proceeded to examine the contribution of the EU Seal Regime in the context of Article XX(a) by recalling, and relying upon, its analysis conducted in the context of Article 2.2 of the TBT Agreement.[1302] As we have explained, it is evident from the Panel's analysis that it was examining the contribution of both the prohibitive and permissive aspects of the EU Seal Regime.[1303] Because the Panel properly conducted its contribution analysis in respect of both of these aspects of the measure, we need not rule on Canada's and Norway's claims that the Panel also erred in focusing exclusively on the ban, and not the ban together with the exceptions, in this part of its analysis. We turn now to address Canada's and Norway's appeals of the Panel's

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[1296] Appellate Body Report, *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

[1297] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

[1298] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145 and 146.

[1299] While there may be circumstances in which a weighing and balancing exercise would not require that a panel proceed to evaluate alternative measures (see *supra*, fn 1182), we also do not consider that such an exercise mandates a preliminary determination of the necessity of the challenged measure before proceeding to assess those alternatives. (See Appellate Body Report, *US – Gambling*, paras. 306 and 307. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 156 and 178; and *China – Publications and Audiovisual Products*, para. 241 (stating that *if* a panel reaches a preliminary conclusion that a measure is necessary, this result must be confirmed by comparing the measure with possible alternatives)) We therefore disagree with Canada's assertion that a preliminary determination of necessity is required before proceeding to compare the challenged measure with possible alternatives. (Canada's appellant's submission, paras. 310 and 318)

[1300] We also note the Appellate Body's statements that the term "necessary" refers to a range of degrees of necessity, but that a "necessary" measure would be located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". (Appellate Body Report, *Korea – Various Measures on Beef*, para. 161; Appellate Body Report, *US – Gambling*, para. 310) It is conceptually useful to distinguish the *degree of contribution* that informs the weighing and balancing exercise, from the question of where on the continuum the *necessity* of that measure lies following such a weighing and balancing exercise. The Appellate Body's above statements can be understood in this context to refer to the latter question.

[1301] Panel Reports, paras. 7.635-7.637.

[1302] See *supra*, para. 5.172 (referring to Panel Reports, paras. 7.638 and 7.639).

[1303] See *supra*, para. 5.193.

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

5.3.2.4.2 Whether the Panel properly articulated its findings on contribution

5.218. In the context of its analysis under Article 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] This was based on the Panel's prior conclusion in the context of Article 2.2 of the TBT Agreement that "the EU Seal Regime is capable of making and does make some contribution to its stated objective of addressing the public moral concerns".[1305] The complainants do not take issue with the Panel's characterization of the legal standard for determining contribution, but rather challenge the Panel's application of that legal standard to the facts of this case.

5.219. Canada and Norway argue that the Panel failed to articulate the "degree" or "extent" of the contribution made by the prohibitive and permissive parts of the EU Seal Regime. This criticism has several facets. The complainants contend that the Panel reached indeterminate conclusions regarding the positive and negative contributions made by different elements of the measure, and that the Panel therefore had no basis to reach, and in fact did not reach, an overall conclusion on the *net* contribution of the measure.[1306] The complainants also fault the Panel for reaching findings indicating a *capability* or *possibility* of a contribution, rather than the *actual* contribution.[1307] The complainants argue that the Panel failed to make "clear and precise" findings regarding the contribution of the EU Seal Regime to the identified objective, and that such findings were required in order to establish the benchmark against which alternative measures could be compared.[1308] Norway also challenges aspects of the Panel's analysis under Article 11 of the DSU.[1309]

5.220. The European Union submits that the complainants' arguments are "unfounded".[1310] According to the European Union, the WTO agreements do not prescribe the manner in which a measure's contribution to the fulfilment of its objective should be assessed, nor how specific that assessment should be. The European Union maintains that the Panel's analysis is in line with WTO jurisprudence, and that, because the quantitative evidence available did not permit a precise quantification of the contribution, "the Panel had no alternative but to resort to qualitative reasoning".[1311] The European Union further contends that the Panel's findings were no less specific than those reached by other panels examining a necessity test.[1312]

5.221. We recall that, in *Brazil – Retreaded Tyres*, the Appellate Body stated that a panel enjoys certain latitude in setting out its approach to determine contribution; that such an approach may be performed in qualitative or quantitative terms; and that it ultimately depends on the nature, quantity, and quality of evidence existing at the time the analysis is made.[1313] In the present disputes, the Panel opted for a qualitative analysis that focused mainly on the design and expected operation of the measure. During the panel proceedings, the Panel had only limited information on how certain aspects of the measure would operate in practice. While the Panel could perhaps more easily perceive how the prohibitive aspect of the measure would operate in practice, the permissive aspects were still in a relatively nascent stage of implementation. By the time the Panel

[1304] Panel Reports, para. 7.638.
[1305] Panel Reports, para. 7.460.
[1306] See e.g. Canada's appellant's submission, para. 150; and Norway's appellant's submission, para. 315.
[1307] See e.g. Canada's appellant's submission, para. 166; and Norway's appellant's submission, para. 284.
[1308] See e.g. Canada's appellant's submission, para. 158; and Norway's appellant's submission, para. 257.
[1309] Norway's appellant's submission, paras. 398-409.
[1310] European Union's appellee's submission, para. 165.
[1311] European Union's appellee's submission, para. 170.
[1312] European Union's appellee's submission, paras. 171-175 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*; *US – Tuna II (Mexico)*; *US – Gambling*; and *US – COOL*).
[1313] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145 and 146.

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 realized, but that it was "apt to" induce changes over time in the behaviour and practices of

[1314] Recognized bodies were approved by the Commission for seal products from Sweden on 18 December 2012, and for Greenland on 25 April 2013. (Panel Reports, fns 220 and 221 to paras. 7.164 and 7.166, respectively) The Panel also noted that, prior to the Greenlandic entity obtaining recognized body status, Danish customs authorities had processed imports based on certificates issued by Greenlandic authorities. (Ibid., fn 220 to para. 7.164, and para. 7.316)

[1315] Panel Reports, para. 7.456 and fn 729 thereto.

[1316] Panel Reports, fn 729 to para. 7.456.

[1317] Panel Reports, fn 729 to para. 7.456. The Panel also noted that Canada does not maintain discrete data for exports of tanned skins because such products are combined with those derived from other animals. (Ibid.)

[1318] Panel Reports, fn 730 to para. 7.456.

[1319] Panel Reports, para. 7.456.

[1320] Panel Reports, para. 7.456. (fn omitted)

[1321] Panel Reports, para. 7.458.

[1322] Panel Reports, para. 7.448.

[1323] Panel Reports, para. 7.448.

[1324] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 136 (quoting Panel Report, *Brazil – Retreaded Tyres*, para. 7.148).

[1325] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 137.

[1326] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 155.

commercial actors in a manner contributing to the objective.[1327] Such changes, however, were not measurable at the time of the proceedings, at least not in quantifiable terms. We therefore do not see that a panel falls into error by projecting what contribution will be brought about by the measure.

5.225. With regard to the second aspect of the objective – i.e. addressing public moral concerns relating to the number of inhumanely killed seals – the Panel concluded that the prohibitive aspect of the EU Seal Regime "makes a contribution" to reducing the demand for seal products within the European Union, and contributes "to a certain extent" to reducing global demand.[1328] The Panel then further stated that its observation regarding the downward trend in seal products trade also suggests that the measure "may have contributed" to reducing EU demand.[1329] We note that, although this further characterization conveys a less certain conclusion with respect to contribution, it pertains to the Panel's review of data about which it signalled its prior reservations that we referred to above. It is thus not surprising that the Panel conveyed a qualified conclusion with respect to this additional, quantitative element of its analysis.

5.226. The complainants also criticize the Panel's overall conclusion that "the EU Seal Regime is capable of making and does make some contribution to its stated objective of addressing the public moral concerns."[1330] Again, the complainants consider that this finding is not sufficiently clear and precise. We read this sentence to reflect the combination of the Panel's assessment of the contribution in respect of both aspects of the objective. Since the Panel concluded that the EU Seal Regime was "capable of making a contribution" to addressing public moral concerns relating to the EU public's participation as consumers in the market for products derived from inhumanely killed seals, and "makes a contribution" to reducing EU and global demand for seal products, the conclusion set out in the first sentence of paragraph 7.460 can be understood as simply reflecting an aggregation of those two conclusions. What follows in the remaining sentences of paragraph 7.460 thus consists of the Panel's recapitulation of its prior intermediate findings in respect of both the prohibitive and permissive aspects of the measure.

5.227. Finally, we take note of the fact that, in its analysis under Article XX of the GATT 1994, the Panel recalled its finding under Article 2.2 of the TBT Agreement that the EU Seal Regime "contributed *to a certain extent* to its objective of addressing the EU public moral concerns on seal welfare".[1331] Although it is not apparent why the Panel framed its conclusion differently in these two sections, we do not see any appreciable difference between a finding that a measure "makes a contribution" and a finding that it "contributes to a certain extent".

5.228. The complainants further contend that the Panel failed to identify how the positive and negative contributions of the different elements of the measure resulted in a *net* overall contribution to the identified objective. The complainants add that the Panel's failure to identify the *degree* of contribution in respect of each aspect of the objective meant that the Panel was not able to reach a sufficiently clear and precise conclusion with regard to the contribution of the EU Seal Regime to the stated objective. To be sure, the Panel's finding is not very detailed. The conclusion that the EU Seal Regime "is capable of making and does make some contribution"[1332] does not provide much information as to the precise *degree* or *extent* of the contribution. At the same time, however, it is not clear what greater clarity or precision the Panel could have achieved in the circumstances of this case. We recall the Appellate Body's guidance in *Brazil – Retreaded Tyres* that a Panel's inquiry ultimately depends on "the nature, quantity, and quality of evidence existing at the time the analysis is made".[1333] In these disputes, the Panel faced significant limitations in examining aspects of the measure other than through its design, structure, and *expected* operation. Principally, the Panel recognized, correctly in our view, that there was limited and

[1327] The Appellate Body stated: "Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil." (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154)

[1328] Panel Reports, para. 7.459.

[1329] Panel Reports, para. 7.459.

[1330] Panel Reports, para. 7.460.

[1331] Panel Reports, para. 7.638. (emphasis added) The Panel used similar language in the conclusions and recommendations section of the Panel Reports. (Canada Panel Report (DS400), para. 8.2(c); Norway Panel Report (DS401), para. 8.2(b))

[1332] Panel Reports, para. 7.460.

[1333] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

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 had on the EU seal product market. Given the particular nature of the measure at issue, and the specific circumstances of these disputes, it is not clear that the Panel could have done more. In sum, we do not consider that the Panel erred in concluding that the EU Seal Regime "is capable of making and does make some contribution"[1334] to its objective, or that it makes a contribution "to a certain extent".[1335]

5.229. Norway asserts a claim under Article 11 of the DSU that mirrors aspects of its claim that the Panel erred in the application of the legal standard. Norway argues, for instance, that the imprecision of the Panel's contribution analysis means that "the Panel provides an inadequate statement on how it *weighed*, *balanced*, and *reconciled* the competing evidence of positive and negative contributions."[1336] Norway adds that "as the Panel failed to explain and reconcile the evidence in arriving at its conclusion, including in making its intermediate factual findings, there is no objective basis to comprehend how it arrived at its net overall conclusion."[1337] Similarly, Norway charges that the Panel failed to make an objective assessment in reaching its net overall conclusion as to the contribution of the EU Seal Regime to its objective. According to Norway, "it is impossible to comprehend the basis on which the Panel found that the overall netting process leaves a positive contribution."[1338] Norway adds that the Panel's overall conclusion is thus "bereft of any objective and coherent basis".[1339]

5.230. To the extent that we have reviewed the Panel's reasoning, and the clarity and precision of its findings, in our assessment of Norway's claim that the Panel erred in its contribution analysis, we have also addressed the substance of Norway's criticism that the nature and quality of the Panel's reasoning was inconsistent with an objective assessment under Article 11 of the DSU. We therefore see no grounds separately to consider these issues under Article 11. In the next section, we address Norway's other claims, including its claims under Article 11 of the DSU, as they relate to whether the Panel's conclusions were properly substantiated.

5.3.2.4.3 Whether the Panel's findings regarding the contribution of the EU Seal Regime to its objective were properly substantiated

5.231. In addition to claiming that the Panel's finding failed properly to establish the degree to which the EU Seal Regime contributes to its objective, the complainants assert distinct claims that various aspects of the Panel's findings were unsubstantiated. Norway identifies various points that it considers the Panel either undervalued or overvalued in assessing the contribution of the EU Seal Regime to the public morals objective.[1340] Separately, Canada and Norway both maintain that the Panel failed to substantiate its conclusion that the EU Seal Regime contributes to reducing EU and global demand for seal products and the incidence of inhumanely killed seals.[1341]

5.232. We note that certain of the claims by Canada and Norway present overlapping challenges concerning the Panel's application of the law to the facts, as well as the Panel's assessment of the facts under Article 11 of the DSU. The Appellate Body has recognized the difficulty of distinguishing "clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact", and has stated that "{i}n most cases … an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both."[1342] The Appellate Body has found that allegations implicating a panel's assessment of the facts and

[1334] Panel Reports, para. 7.460.
[1335] Panel Reports, para. 7.638; Canada Panel Report (DS400), para. 8.2(c); Norway Panel Report (DS401), para. 8.2(b).
[1336] Norway's appellant's submission, para. 415. (emphasis original)
[1337] Norway's appellant's submission, para. 418.
[1338] Norway's appellant's submission, para. 460.
[1339] Norway's appellant's submission, para. 465.
[1340] Norway's appellant's submission, paras. 316-397.
[1341] Canada's appellant's submission, paras. 176-208; Norway's appellant's submission, paras. 381-394, and 420-451.
[1342] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 955 (referring to *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).

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*, para. 132.

[1345] Norway's appellant's submission, paras. 324-360.

[1346] Norway's appellant's submission, paras. 472-474.

[1347] Canada's appellant's submission, paras. 169-175.

[1348] Norway's appellant's submission, para. 328 (referring to Panel Reports, paras. 7.164 and 7.608).

[1349] Norway's appellant's submission, paras. 325-327 (referring to, *inter alia*, Panel Reports, para. 7.447).

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]

5.237. Canada and Norway also point to Panel findings and evidence in the Panel record that, in their view, support the conclusion that the EU Seal Regime would lead to the replacement by Greenlandic seal products of imports previously derived from commercial hunts in Canada and Norway. The complainants assert that these findings and evidence demonstrate that Greenlandic trade could by itself satisfy EU demand.[1351] First, the complainants note the Panel's conclusion that "all, or virtually all, seal products from Greenland are eligible to access the EU market under the IC exception".[1352] Second, the complainants cite the Panel's statement that Greenland, for the period from 1993 to 2009, always caught over 163,000 seals annually, half the skins of which were normally traded.[1353] Norway compares the over 80,000 skins estimated to be annually traded by Greenland with an estimation of, on average, 20,000 skins imported annually from Canada and Norway into the European Union between 2002 and 2008.[1354] The complainants also point to the Panel's observation that "Greenland has stored around 300,000 sealskins since the introduction of the EU Seal Regime".[1355] Finally, we note that the complainants repeatedly refer to a statement in the COWI 2010 Report, not cited by the Panel, that "Greenlandic trade is more than enough to cover the EU demand by itself".[1356]

5.238. The European Union contends that the evidence on which Canada and Norway rely is unsupported and contradicted by other facts. The European Union argues that the complainants' main piece of evidence contained in the COWI 2010 Report "is not supported by any evidence or reasoning and it is not possible to know on what basis COWI came to that view".[1357] The European Union identifies other facts that, in the European Union's view, contradict the appellants' position: (i) the number of seals hunted in Canada and Norway has traditionally exceeded the number of catches in Greenland; (ii) unlike in Canada and Norway, a large part of the seal skins in Greenland are consumed domestically rather than traded internationally; (iii) a large part of the seal skins are exported from Greenland to markets outside the European Union; (iv) there are Inuit exceptions under other countries' bans that would absorb exports of seal skins traded by Greenland; (v) global demand for seal products may not remain unchanged at currently depressed levels; (vi) the IC exception is subject to conditions that constrain Greenland's ability to expand supply more than traditional levels; (vii) Greenland's supply capacity is declining; and (viii) Greenlandic export data shows stable or declining exports to the European Union.[1358]

5.239. The European Union further contends that this evidence demonstrates that, due to depressed global demand and prices resulting in part from the EU Seal Regime, imports from Greenland "have not even returned to their usual level"[1359] before seal product bans were first introduced in the European Union in 2007. The European Union also maintains that Norway's assertion that Greenland's supply of 80,000 seal skins per year can easily supply the European Union's average imports of 20,000 skins is flawed.[1360] This data, the European Union argues, only covers tanned skins, whereas Canada's principal exports to the European Union consisted of raw skins. Noting that Canada exported more than 100,000 raw skins to the European Union in 2006, the 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."[1361] Norway responded at the oral hearing that the European Union had itself acknowledged before the Panel that the Canadian export data include transit goods that do not enter the EU market and therefore overstate the level of EU imports from Canada. Norway added

[1350] Canada's appellant's submission, para. 170 (referring to Panel Reports, paras. 7.164, 7.314, and 7.315).

[1351] Canada's appellant's submission, para. 172; Norway's appellant's submission, para. 356.

[1352] Panel Reports, para. 7.164.

[1353] Panel Reports, para. 7.310.

[1354] Norway's appellant's submission, paras. 352-355 (calculated on the basis of data set out at paragraphs 7.310 and 7.456 of the Panel Reports).

[1355] Panel Reports, para. 7.310.

[1356] Canada's appellant's submission, paras. 6 and 171; Norway's appellant's submission, paras. 3, 205, 356, 382, and 470 (both quoting COWI 2010 Report, p. 84). The Panel referred to this page of the COWI 2010 Report in support of a different proposition. (Panel Reports, para. 7.315)

[1357] European Union's appellee's submission, para. 184.

[1358] European Union's appellee's submission, paras. 185-196.

[1359] European Union's appellee's submission, para. 196.

[1360] European Union's appellee's submission, para. 199.

[1361] European Union's appellee's submission, para. 199.

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 methods lead to higher rates of inhumanely killed seals. The complainants note, for instance, the Panel's statement 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".[1365] With regard to hunting with rifles from boats in open water, the Panel referred to evidence showing that shooting seals in open water can contribute to struck and lost rates, and that there was anecdotal evidence showing higher struck and lost rates in Greenlandic hunts than in commercial hunts.[1366] Regarding trapping and netting, the Panel also pointed to evidence that such hunting practices lead to severe seal welfare concerns, and that the use of nets is not allowed in Canadian and Norwegian commercial seal hunts.[1367] The complainants also pointed to differences observed by the Panel in compliance monitoring efforts as between Greenland, and Canada and Norway.[1368]

5.241. We note that other findings in the Panel Reports either highlight the particular seal welfare risks associated with both Inuit and commercial hunts, or indicate that such risks are equivalent. Thus, the Panel found that the existence of commercial motives leads to killing a greater number of seals in hunts conducted within a limited period of time, and that this "may additionally contribute to subjecting seals to the animal welfare risks identified above with respect to seal hunts in general".[1369] Moreover, the Panel noted that "similar challenges to effecting humane killing of seals exist in IC hunts"[1370], and that "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts".[1371] The Panel thus refrained from making a finding that seal welfare outcomes were worse in IC or MRM hunts, as compared to those in commercial hunts, and instead limited itself to the more general finding that the risks of inhumane killing of seals are present in each of commercial, IC, and MRM hunts.[1372]

5.242. Canada and Norway frame many of the above arguments in a manner suggesting that they concern the Panel's legal characterization of the facts, and therefore constitute claims of error regarding the Panel's application of law.[1373] We note that Norway has also presented certain of these matters as errors under Article 11 of the DSU.[1374] The premise that the EU Seal Regime could or does lead to worse welfare outcomes due to a replacement effect appears to have been highly contested by the parties in these disputes. We further note that the Panel did not reach the findings sought by Canada and Norway, and, in the light of the contested nature of these facts between the parties, appears to have had reasonable grounds for not doing so. Thus, even if there

[1362] Norway's opening statement at the oral hearing.
[1363] Norway's appellant's submission, para. 333 (referring, *inter alia*, to Panel Reports, para. 7.410).
[1364] Norway's appellant's submission, para. 334.
[1365] Panel Reports, para. 7.268.
[1366] Panel Reports, paras. 7.215, 7.216, and fns 324-331 thereto.
[1367] Panel Reports, para. 7.236 and fn 428 to para. 7.268.
[1368] Panel Reports, paras. 7.220 and 7.269.
[1369] Panel Reports, para. 7.245.
[1370] Panel Reports, para. 7.273.
[1371] Panel Reports, para. 7.275.
[1372] Panel Reports, paras. 7.245 (commercial), 7.275 (IC), and 7.337 (MRM). Norway confirms this point in stating that "the Panel failed to make any assessment of the animal welfare risks presented by the Greenlandic hunt in relation to the banned hunts". (Norway's appellant's submission, para. 344)
[1373] Canada contends that the Panel's failure properly to articulate the degree of contribution of the measure to the objective constitutes legal error. (See e.g. Canada's appellant's submission, paras. 168-175) Norway considers that, in matters concerning the Panel's task of determining the contribution of the measure to its public morals objective, the Panel's errors constitute errors in the legal characterization of the facts. (See e.g. Norway's appellant's submission, para. 317)
[1374] See e.g. Norway's appellant's submission, paras. 468-475.

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 treatment of the evidence". (Norway's appellant's submission, para. 469) Canada also notes that the Panel did not identify this statement from the COWI 2010 Report. (Canada's appellant's submission, para. 171) We have observed that there were significant, substantive disagreements between the parties on the issue of whether the EU Seal Regime could or does have the effect of replacing imports from commercial hunts with those from IC and MRM hunts, and that the Panel had reasonable grounds for not reaching such a finding. In these circumstances, we cannot fault the Panel for failing to attribute to this particular evidence the significance sought by Canada and Norway.

[1377] Canada also argues that the Panel confused matters by referring alternatively to the "incidence" and the "number" of inhumanely killed seals. (Canada's appellant's submission, paras. 193-195) The European Union maintains that neither it nor the Panel ever sought, in referring to the "incidence" of inhumane killing of seals, to ascribe any meaning to that term other than that relating to the number of such inhumanely killed seals. (European Union's appellee's submission, paras. 224 and 225) To the extent these terms can be seen as referring to different concepts, we note that the Panel makes clear, at paragraphs 7.443 and 7.449 of its Reports, that it understood the second aspect of the EU public morals objective for purposes of its analysis as relating to the "number" of seals killed inhumanely.

[1378] Canada's appellant's submission, para. 177.

[1379] Canada's appellant's submission, para. 189; Norway's appellant's submission, para. 394.

its conclusion that the measure affected the demand for seal products.[1380] Finally, Canada and Norway contend that these shortcomings demonstrate that the Panel acted inconsistently with its duty to make an objective assessment within the meaning of Article 11 of the DSU.[1381]

5.245. The European Union responds that the Panel properly found that the EU Seal Regime contributes to reducing EU and global demand for seal products. As the European Union observes, the complainants acknowledge that there has been a significant decrease in seal product trade from Canada and Norway into the European Union.[1382] The European Union further argues that, although the statistics relied on by the Panel were incomplete because they do not track separately all categories of seal products, "this does not mean that those statistics are unreliable".[1383] Instead of disputing that such imports have declined, the European Union adds, the complainants rely on the "speculative prediction" that imports from Canada and Norway will be replaced by imports from Greenland.[1384] 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 reducing global demand.[1385] The European Union adds that this is supported by the fact that the EU seal product market has traditionally "occupied a central position within the global market"[1386], and that trade statistics show a decline in Canada's exports and a "precipitous reduction in the number of seals hunted".[1387] Finally, the European Union argues that the Panel "was entitled to assume that a reduction in the number of 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.[1388]

5.246. Before the Panel, the European Union argued that the ban makes a partial contribution to addressing public moral concerns regarding seal welfare "by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way".[1389] Thus, by focusing on whether the ban reduces demand for seal products, the Panel appears to have accepted the proposition that reducing such demand would lead to fewer inhumanely killed seals. The complainants contend that: (i) the evidence does not support the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products; and (ii) the Panel never demonstrated that reducing demand leads to fewer inhumanely killed seals.

5.247. Taking the second point first, we note Canada and Norway's argument that the Panel omitted a critical step in its analysis by failing to assess whether a reduction in demand for seal products would actually contribute to a reduction in the number of inhumanely killed seals.[1390] The Panel did not seek to establish that a reduction in demand would lead to fewer inhumanely killed seals. However, in our view, it was not unreasonable for the Panel to assume that a decrease in demand, and hence a contraction of the seal product market, would have the effect of reducing the number of seals killed, and thus the number of inhumanely killed seals. We therefore see nothing improper in the Panel's logic when it referred to the effect of the ban as one of "reducing the overall demand for seal products within the European Union *and consequently the number of seals that may be killed inhumanely in these hunts*".[1391]

5.248. The complainants further argue that seal products derived from Greenlandic hunts could fully satisfy EU demand, and that the ban could or does lead to an increase in the number of seals killed inhumanely.[1392] We discussed in the preceding section that this argument rests on a factual premise that seems to have been highly contested by the parties, was not uniformly supported by the Panel record, and, in any event, was not found to exist by the Panel. We also considered that

[1380] Norway's appellant's submission, paras. 381-394.
[1381] Canada's appellant's submission, paras. 198-208; Norway's appellant's submission, paras. 420-451.
[1382] European Union's appellee's submission, para. 211 (referring to Panel Reports, para. 7.456 and fn 731 thereto).
[1383] European Union's appellee's submission, para. 209.
[1384] European Union's appellee's submission, para. 212.
[1385] European Union's appellee's submission, para. 213.
[1386] European Union's appellee's submission, para. 216.
[1387] European Union's appellee's submission, para. 219.
[1388] European Union's appellee's submission, para. 226.
[1389] Panel Reports, para. 7.449.
[1390] Canada's appellant's submission, para. 177; Norway's appellant's submission, para. 394.
[1391] Panel Reports, para. 7.451. (emphasis added)
[1392] Canada's appellant's submission, paras. 189 and 205-207; Norway's appellant's submission, paras. 382 and 394.

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 the evidence, inferring a lack of even-handedness and coherence in the treatment of the evidence, demonstrates a lack of objectivity." (Norway's appellant's submission, para. 430) Although the passage refers to various supply-side factors, it also refers to disruptions caused by the EU Seal Regime in the form of "income and production losses" by "importers and seal product manufacturers on the Community territory". (COWI 2008 Report, p. 102) We therefore see at least some support in this passage for a forecast of market uncertainty and the prospect of a contracting EU market for seal products with attendant consequences for the demand for seal products in the EU market.

5.251. Norway further argues that the Panel's finding regarding the impact of the EU Seal Regime on global demand is even more untenable since it lacks any supporting reasoning or evidence.[1398] In the analysis that precedes the Panel's finding that the EU Seal Regime contributes, "to a certain extent, to reducing a global demand"[1399], the Panel evaluated two aspects potentially having a bearing on global demand for seal products. First, as discussed above, the Panel reached the conclusion that the ban aspect of the measure led to a reduction of the demand for seal products within the European Union.[1400] The Panel therefore may have considered that, because EU demand for seal products is a component of the global demand for such products, reducing EU demand also contributes to reducing global demand. As the European Union argues, although various factors may contribute to reducing global demand, "the reduction in EU demand would still entail a reduction in *potential* global demand."[1401] This view is supported by the fact that the Panel's conclusion in respect of global demand was, as it stated, based on the design, structure, and *expected* operation of the measure. We also note the Panel's finding that the measure contributed to reducing global demand only "to a certain extent".[1402]

5.252. Second, the Panel also evaluated data relating to the "*actual* operation"[1403] of the measure. There, as we have noted, the Panel made several observations regarding the data presented by the parties, ultimately concluding that, while it observed certain downward trends in seal product imports into the EU market, it was nevertheless "not in a position to draw any concrete conclusions".[1404] The Panel moreover noted that it was unable to discern "the extent of the connection between the ban aspect of the measure and the reduction in the number of seals killed".[1405] We do not see that the Panel drew much support from this data for its conclusion in respect of demand for EU seal products, whether in the European Union or globally. Indeed, the Panel stated that its ultimate findings in that regard were based on the measure's "design, structure, and expected operation"[1406], which does not suggest much reliance on the limited observations the Panel previously made regarding the data in relation to the "actual operation" of the measure.

5.253. The Panel appears to have based its conclusions in respect of global demand largely on its conclusions regarding the effect of the EU Seal Regime on EU demand. We further point out that any conclusions that the Panel reached regarding the effect of EU demand on global demand were further qualified by its observations about continuing imports for subsequent export under the inward processing exception.[1407] Although the basis for these findings appears quite tenuous, we recall again the difficulties faced by the Panel in conducting any sort of quantitative analysis on the basis of the Panel record, which rendered the Panel's analysis necessarily qualitative in nature. We further note that the Panel's ultimate finding in respect of the contribution of the measure to reducing demand for seal products, and consequently the number of inhumanely killed seals, is qualified by the Panel's statement that the EU Seal Regime "*appears to be* negatively affecting the demand for seal products within the European Union and globally".[1408]

5.254. Each of these issues regarding the Panel's finding that the EU Seal Regime results in reduced EU and global demand for seal products relate, in our view, to the question of whether the Panel properly reasoned and substantiated that finding. Although the complainants assert that certain aspects of the Panel's analysis constitute an error of legal application by the Panel, we consider that this issue relates principally to the Panel's weighing and appreciation of the evidence. We therefore consider that these claims are more properly entertained under Article 11 of the DSU as challenges to the Panel's objective assessment of the facts. We have examined the alleged shortcomings identified by the complainants in the Panel's reasoning or evidentiary support for findings that it reached. We consider that the Panel has, within the constraints imposed by the evidence before it in these disputes, declined to attribute to certain arguments and evidence the weight and significance that the complainants would have liked. It is not an error under Article 11

[1398] Norway's appellant's submission, paras. 389 and 444.
[1399] Panel Reports, para. 7.459.
[1400] Panel Reports, para. 7.450.
[1401] European Union's appellee's submission, para. 214. (emphasis original)
[1402] Panel Reports, para. 7.459. (emphasis added)
[1403] Panel Reports, para. 7.456. (emphasis added)
[1404] Panel Reports, para. 7.456.
[1405] Panel Reports, para. 7.458.
[1406] Panel Reports, para. 7.459.
[1407] Panel Reports, paras. 7.453-7.455.
[1408] Panel Reports, para. 7.460. (emphasis added)

of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it".[1409] The fact that the complainants may not agree with a conclusion the Panel reached, or considered itself unable to reach, does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU. Accordingly, we do not consider that any alleged limitations identified by the complainants in respect of the Panel's finding that the EU Seal Regime led to a reduction in demand for seal products amount to a violation of Article 11 of the DSU, and we therefore reject the claims of Canada and Norway as they relate to this aspect of the Panel's contribution analysis.

5.3.2.4.3.3 Whether the Panel erred in other aspects of its contribution analysis

5.255. Finally, we address Norway's claims that the Panel undervalued two additional aspects in assessing the contribution of the EU Seal Regime to the public morals objective.

5.256. Norway argues that the Panel failed to take proper account of the negative contribution made by the implicit exceptions in its contribution analysis. Norway maintains that, despite the Panel's observations about the commercial importance of the implicit exceptions, the "significance" of these exceptions "is nowhere properly taken into account or characterized by the Panel in arriving at its overall conclusion".[1410] Although Norway may have wished that the Panel attribute greater significance to this factor than it did, we are not persuaded by Norway's complaint given that the Panel explicitly discussed the impact of inward processing on the EU market in the context its contribution analysis.[1411] In doing so, the Panel referred to the incoherency of a measure that prohibits seal product imports based on the potential incidence of inhumanely killed seals, yet allows processing activities within the European Union in respect of those very same products. The Panel went on to conclude that the inward processing exception "further reduces the contribution of the measure to the reduction of the global demand for seal products derived from inhumane killing".[1412] Moreover, in the absence of a finding or evidence that seal product imports into the EU market increased under the inward processing or other implicit exceptions[1413], we do not see how this would necessarily have a bearing on the extent to which the prohibitive aspect of the measure contributes to the objective. Given the above, we reject Norway's argument that the significance of the implicit exceptions "is nowhere properly taken into account or characterized by the Panel in arriving at its overall conclusion".[1414]

5.257. Norway further 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.[1415] Specifically, Norway points to the Panel's conclusion that, although Inuit and other indigenous communities could potentially qualify and export seal products under the IC exception, "they have not been able to benefit from the exception".[1416] Norway considers that the Panel's finding is "disingenuous"[1417] because no Greenlandic imports were possible under the IC exception until a Greenlandic body to certify imports was approved on 25 April 2013, four days before the second Panel meeting, and that the Panel was nevertheless compelled to consider the *expected* operation of the measure after that date.[1418] Norway also 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.[1419]

[1409] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.
[1410] Norway's appellant's submission, para. 374.
[1411] Panel Reports, paras. 7.453-7.455.
[1412] Panel Reports, para. 7.455.
[1413] We note the Panel's observation that, while seal skins have been exported from the European Union following the adoption of the EU Seal Regime possibly resulting from inward processing activities, these activities have occurred at reduced levels from previous years. (Panel Reports, fn 721 to para. 7.453)
[1414] Norway's appellant's submission, para. 374.
[1415] Norway's appellant's submission, paras. 361-371 (referring to Panel Reports, para. 7.452). Norway also challenges this Panel finding under Article 11 of the DSU. (Norway's appellant's submission, paras. 452-458)
[1416] Panel Reports, para. 7.452.
[1417] Norway's appellant's submission, para. 363. See also ibid., para. 455.
[1418] Norway's appellant's submission, paras. 369 and 370. See also ibid., para. 456.
[1419] Norway's appellant's submission, para. 453.

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 statement. Given the Panel's recognition that Greenlandic imports had already been introduced into the EU market prior to that date, we consider it unlikely that the Panel would have been referring to difficulties faced by indigenous communities in Greenland.[1423] In addition, the Panel elsewhere noted that Canadian Inuit face certain obstacles in taking advantage of the IC exception.[1424] Moreover, we observe that the Panel's conclusion in this paragraph also refers to evidence indicating that Inuit communities have been adversely affected by, in particular, the prohibitive aspect of the EU Seal Regime, which suggests an adverse impact on marketing opportunities for Inuit communities created by the restrictive impact of the ban.[1425] This points to another reason supporting the Panel's view that the interplay between the ban and the IC exception may limit the negative impact of the exception. In the light of these considerations, we do not consider that the Panel placed undue emphasis on factors concerning the eligibility of Greenlandic imports in reaching its conclusion. In our view, Norway's claim relates to a decidedly factual question of whether the Panel properly concluded that Inuit communities have not been able to benefit from the IC exception. Because this question relates solely to the Panel's assessment of the evidence, we consider that it is more properly considered under Article 11 of the DSU. In any event, for the reasons set out above, we reject Norway's claim that the Panel failed to conduct an objective assessment under Article 11 of the DSU.

5.3.2.5 The Panel's analysis of the reasonable availability of the alternative measure

5.260. We now turn to assess Canada's and Norway's claims relating to the Panel's finding that the alternative measure was not reasonably available.

5.261. We recall the Appellate Body's view that the weighing and balancing exercise under the necessity analysis contemplates a determination as to "whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'."[1426] An alternative measure may be found not to be reasonably available where it is "merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[1427] Furthermore, in order to qualify as a "genuine alternative", the proposed measure must be not only less trade restrictive than the original measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective

[1420] European Union's appellee's submission, para. 205.
[1421] European Union's appellee's submission, para. 206.
[1422] European Union's appellee's submission, para. 206.
[1423] Panel Reports, fn 220 to para. 7.164, and para. 7.316.
[1424] Panel Reports, paras. 7.162 and 7.315 (referring to Canada's explanation that Canadian Inuit would have difficulty taking advantage of the IC exception because they have limited access to the distribution networks, processing facilities, and marketing opportunities needed to export their seal products to the European Union).
[1425] Canada and the European Union acknowledge evidence on the Panel record showing that Inuit communities were opposed to the EU Seal Regime because it would have a negative impact on the market for all seal products. (Canada's appellant's submission, para. 91; European Union's appellee's submission, paras. 98, 141, 142, and 202-204)
[1426] Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.
[1427] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

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 and Norway request us to reverse the Panel's finding that the proposed alternative measure is not reasonably available.[1432] The complainants principally argue that the Panel failed to assess the alternative measure against the *actual* contribution of the EU Seal Regime, but rather did so against a standard of *complete* fulfilment of the objective. The complainants argue that, since complete fulfilment of the objective is a higher degree of contribution than what was found under the EU Seal Regime, the Panel erred in finding that the alternative measure is not reasonably available.[1433] The complainants point to various statements by the Panel that, in their view, demonstrate the Panel's error.[1434] In addition, they assert that the Panel misapplied WTO jurisprudence. In particular, Canada and Norway submit that the significance of costs and technical difficulties relates to those borne by WTO Members, not by the relevant industry.[1435]

5.263. The European Union responds that the complainants' allegations that the Panel assessed the contribution made by the alternative measure against the wrong benchmark "misrepresent the analysis conducted by the Panel and are unfounded".[1436] The European Union contends that the Panel did not ignore its findings regarding the exceptions, and that, even if it did not expressly repeat its findings with regard to the exceptions, "those findings are reflected in the Panel's overall assessment of the contribution".[1437] The European Union maintains that, because the complainants failed to articulate a sufficiently precise alternative measure, the Panel "had to assess instead the degree of contribution and the reasonable availability of two distinct hypothetical regimes within the scope of the broad [less trade-restrictive alternative] proposed by the Complainants".[1438] The European Union maintains that, although the complainants sought to establish that a more lenient regime was possible, they "failed to specify the content of such a 'more lenient regime' before the Panel, let alone provide any meaningful assessment of its contribution to the measure's objective".[1439]

5.264. We turn first to evaluate the claims on appeal by Canada and Norway that the Panel erred in finding that the proposed alternative measure was not reasonably available, before turning to address the claims under Article 11 of the DSU.

[1428] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

[1429] Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; and *US – Gambling*, para. 311.

[1430] Panel Reports, para. 7.468 (referring to Canada's first written submission to the Panel, paras. 556-560; and Norway's first written submission to the Panel, paras. 779 and 793).

[1431] Panel Reports, para. 7.472.

[1432] Canada's appellant's submission, para. 299; Norway's appellant's submission, para. 580.

[1433] Canada's appellant's submission, para. 261; Norway's appellant's submission, paras. 554 and 579.

[1434] See Canada's appellant's submission, paras. 234-277; and Norway's appellant's submission, paras. 582-612. Canada also maintains that the Panel erred by disregarding measures applied by the European Union in regulating wildlife hunts and abattoirs. (Canada's appellant's submission, paras. 278-290)

[1435] Canada's appellant's submission, paras. 291-298; Norway's appellant's submission, paras. 613-617.

[1436] European Union's appellee's submission, para. 245.

[1437] European Union's appellee's submission, para. 249.

[1438] European Union's appellee's submission, para. 260.

[1439] European Union's appellee's submission, para. 261.

5.3.2.5.1 Whether the Panel erred in finding that the proposed alternative measure was not reasonably available

5.265. Canada and Norway point to key passages of the Panel's analysis that they believe evidence its use of an inappropriately high benchmark of contribution for the EU Seal Regime.[1440] The complainants refer, for instance, to the Panel's assessment of the contribution of the alternative measure to preventing or reducing exposure of the EU public to products raising moral concerns. They take issue, in particular, with the Panel's statement that, "even if the alternative measure succeeded in limiting market access to exclusively those products derived from humanely killed seals, such products would originate in hunts that may have caused poor animal welfare outcomes for some other number of seals."[1441] In Canada's and Norway's view, by requiring that the alternative measure limit market access to only those seal products that were derived from humanely killed seals, the Panel holds the alternative measure to a higher standard that the EU Seal Regime could not meet.

5.266. Similarly, in assessing the contribution of the alternative measure to reducing the number of seals killed, the complainants note the Panel's statement that the alternative measure would potentially afford market access to seal products from commercial hunts that are currently prohibited under the EU Seal Regime. As the Panel stated, this "may in turn contribute to sustaining or increasing the overall number of seals killed, which would have the consequence of subjecting a greater number of seals to the animal welfare risks incidental to seal hunting".[1442] Canada argues that the Panel did not reconcile this statement with its observation that the alternative measure could potentially introduce an economic incentive for sealing countries to adopt and enforce animal welfare standards.[1443] Norway contends that the Panel's citation to a European Parliament report that favoured a comprehensive ban without a derogation for seal products meeting animal welfare standards confirmed that the Panel held the alternative measure to a standard that exceeded the actual contribution of the EU Seal Regime.[1444]

5.267. The essence of the complainants' contention is that it was improper for the Panel to have entertained scenarios in which an alternative measure would limit market access only to humanely killed seals, or would increase overall market access, since that is not reflective of the level of contribution actually achieved by the EU Seal Regime. We agree that several of the hypothetical outcomes considered by the Panel in its assessment of the alternative measure contemplate the consequences of a certification system that would operate to exclude all inhumanely killed seals from, and include all humanely killed seals into, the EU market, or that would potentially lead to increased EU market access for seal products. In our view, however, the Panel's analysis was inconclusive at this stage of its assessment. The Panel was at this point in its analysis simply assessing what possible scenarios might result from adoption of a certification system. Indeed, we do not see that the Panel ever reached a definitive conclusion with respect to the contribution of such a system vis-à-vis the EU Seal Regime. Rather, because it considered that the impacts of the alternative measure were "closely related to the type of animal welfare requirements to be imposed, the feasibility of enforcement of such requirements, and the attendant risks of inhumane killing in seal hunts"[1445], the Panel found that there was an "inextricable link between the contribution of the alternative measure to the objective and the

[1440] Canada also argues that the Panel erred in its assessment of the alternative measure by recalling only the contribution of the prohibitive aspect of the EU Seal Regime. (Canada's appellant's submission, paras. 237-244 (referring to Panel Reports, para. 7.478)) While it is true that the Panel did not expressly refer to its assessment of the impact of the exceptions, it implicitly did so by accurately characterizing its overall finding in that same paragraph that the EU Seal Regime "is capable of making and does actually make a contribution to the achievement of its stated objective of addressing the public moral concerns". (Panel Reports, para. 7.478)

[1441] Canada's appellant's submission, para. 240; Norway's appellant's submission, para. 593 (both referring to Panel Reports, para. 7.480). Canada also refers to the statement in that same passage that, to the extent that the alternative measure could effectively distinguish and label products from humanely and inhumanely killed seals, "the direct participation of EU consumers in the market for seal products would theoretically be confined to products that conform to the animal welfare concerns of the EU public". (Canada's appellant's submission, para. 247 (quoting Panel Reports, para. 7.480))

[1442] Canada's appellant's submission, para. 254; Norway's appellant's submission, para. 596 (both referring to Panel Reports, para. 7.482).

[1443] Canada's appellant's submission, paras. 255-257 (referring to Panel Reports, para. 7.483).

[1444] Norway's appellant's submission, paras. 596-599.

[1445] Panel Reports, para. 7.484.

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. There were several recurring elements in its analysis. We note, for instance, the Panel's explanation that it was undertaking an analytical exercise in which the contours of the animal welfare standards required as part of the alternative measure were not clearly defined, and that this had a bearing on the range of hypothetical versions of the alternative measure that the Panel was being asked to examine. As the Panel stated: "Based on the differing views on what would constitute adequate welfare standards, and absent a clearly articulated standard from the complainants, the requirements under the alternative measure could possibly span a range of different levels of stringency or leniency."[1451]

5.270. We further note that the Panel appeared quite sceptical that a certification system, even if it were to adopt the most stringent animal welfare requirements, would be able effectively to address EU public moral concerns regarding seal welfare. For instance, the Panel considered that adopting a certification system to enforce stringent animal welfare requirements would create significant difficulties in terms of monitoring and compliance. Any such system, the Panel argued, would require "accurate differentiation"[1452] between humanely and inhumanely killed seals, and the more stringent the regime, the larger the "costs and/or logistical demands on those participating in the hunt and subsequent marketing of products".[1453] The concern in part stems from the Panel's assessment that hunters would have difficulty conforming to a certification system imposing stringent animal welfare requirements in the light of the conditions under which seal hunts take place. The Panel suggested that this is a practical concern in terms of both the *ability* and *willingness* of seal hunters to conform to such requirements.[1454] Additionally, however, the Panel's concern is broader in that it extends to the implications for those involved in subsequent stages of the production and sale of seal products, and those who would be required to enforce it. In particular, the Panel noted the persistent difficulties that arise regardless of whether the regime relies on hunter licensing, or requires country or seal-by-seal certification.[1455]

[1446] Panel Reports, para. 7.485.
[1447] Canada's appellant's submission, para. 261; Norway's appellant's submission, para. 600.
[1448] Canada's appellant's submission, paras. 224 and 263; Norway's appellant's submission, para. 601 (both referring to Panel Reports, para. 7.496).
[1449] Canada's appellant's submission, paras. 263 and 264; Norway's appellant's submission, paras. 601-603.
[1450] Canada's appellant's submission, para. 267; Norway's appellant's submission, paras. 605-608.
[1451] Panel Reports, para. 7.496.
[1452] Panel Reports, para. 7.496.
[1453] Panel Reports, para. 7.497.
[1454] Panel Reports, para. 7.496 and fn 798 thereto.
[1455] Panel Reports, para. 7.498.

5.271. The Panel also expressed the concern that a certification system that sought to impose stringent welfare requirements would have consequences that would effectively undercut any potential contribution to EU public moral concerns. In other words, the Panel considered that a certification system would create an outcome in which the desire to conform to stringent certification requirements would lead to greater numbers of seals killed, and, consequently, a greater number of seals killed inhumanely. The Panel reasoned that this result would be particularly acute in larger scale hunts where an effort to harvest a number of properly certified seals would lead to even greater numbers of seal killings with an attendant increase in the number of inhumanely killed seals.[1456] The Panel also considered that a certification system would have the effect of restoring or expanding the market for seal products that had been diminished due to the ban, and that this would also lead to an increased number of seals being killed, and, consequently, a greater number of inhumanely killed seals.[1457]

5.272. We do not consider the Panel's reference to more stringent hypothesized regimes as somehow suggesting that it was comparing the alternative measure against a benchmark of complete fulfilment of the objective. Rather, we understand the Panel to have suggested that *even the more stringent* certification systems presented significant difficulties in terms of both their reasonable availability and their contribution to the objective. As the Panel stated, more stringent certification systems would likely present difficulties in terms of ensuring adequate animal welfare standards and accurately distinguishing between humanely and inhumanely killed seals, and lead to increased market access accompanied by more seal killings, and, consequently, more inhumanely killed seals. Indeed, the Panel did not suggest that the stringent alternative measure achieved complete fulfilment, but rather that it would be difficult to implement and enforce, and would lead to increased numbers of inhumanely killed seals. Alternatively, the Panel noted, a more lenient regime might very well attenuate some of these limitations, but then would have the consequence – by more weakly enforcing animal welfare standards and any distinctions drawn between humanely and inhumanely killed seals – of achieving a weak contribution in respect of EU public moral concerns regarding seal welfare. The fact that the Panel entertained, and compared, the possibility of stringent versus lenient versions of a certification system, in order to consider how a loosely defined alternative measure might contribute to the identified objective, confirms in our view that the Panel was undertaking considerable efforts to understand how such variations of the alternative measure might operate. We understand the Panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare.

5.273. We also reject the complainants' contention that the Panel erred in relying on "the Appellate Body's guidance that a responding Member cannot be reasonably expected to employ an alternative measure that involves a continuation of the very risk that the challenged measure seeks to halt".[1458] Canada and Norway argue that, by referring to the challenged measure as "halting" a "risk", the Panel was holding the alternative measure up to a higher standard of achievement than what the EU Seal Regime itself met.[1459] We do not agree that the Panel attached to this statement the significance that Canada and Norway claim it did. The reference in *EC – Asbestos* immediately follows the Panel's stated concern that the alternative measure would lead to "restored market opportunities".[1460] Given the Panel's prior finding that the EU Seal Regime appears to reduce the market for seal products, this suggests that such restored opportunities would have the potential to increase exposure of the EU public to inhumanely killed seals. In that context, we read the Panel to be referencing the Appellate Body's statement in *EC – Asbestos* only as support for the proposition that a responding Member cannot be expected to accept an alternative measure that makes less of a contribution to its objective than the challenged measure. For the above reasons, we do not agree that the Panel was comparing the alternative measure against a standard of complete fulfilment.

[1456] Panel Reports, paras. 7.480, 7.496, and 7.498.

[1457] Panel Reports, paras. 7.482, 7.484, and 7.502.

[1458] Panel Reports, para. 7.502 (referring to Appellate Body Report, *EC – Asbestos*, para. 174).

[1459] Canada's appellant's submission, paras. 270-277; Norway's appellant's submission, paras. 611 and 612. Canada asserts that the Panel's reference to *EC – Asbestos* "illustrates it[s] misinterpretation and misapplication of the 'reasonably available' requirement for an alternative measure when carrying out the necessity test". (Canada's appellant's submission, para. 271)

[1460] Panel Reports, para. 7.502.

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 to be adopted by the European Union. According to the complainants, the Appellate Body report in *Brazil – Retreaded Tyres* stands for the proposition that it is the burdens and costs imposed on the responding WTO Member, not on the industry, that are relevant for a finding on whether the alternative measure is reasonably available.[1461]

5.275. According to the European Union, the Appellate Body report in *Brazil – Retreaded Tyres* simply identifies an example of a situation where the proposed alternative would not be reasonably available, but that there "can be other circumstances where a measure would not be available because it would be 'merely theoretical in nature'".[1462] The European Union further 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".[1463]

5.276. In *Brazil – Retreaded Tyres*, the Appellate Body stated as follows:

> As the Appellate Body indicated in *US – Gambling,* "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[1464]

5.277. This passage suggests that the "prohibitive costs or substantial technical difficulties" are indeed those associated with the burden placed on a Member. At the same time, however, this language does not foreclose the possibility that there may be other indications that the alternative measure is "merely theoretical in nature". As we see it, if there are reasons why the prospect of imposing an alternative measure faces significant, even prohibitive, obstacles, it may be that such a measure cannot be considered "reasonably available". We would not exclude *a priori* the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure. We therefore consider that an assessment of the reasonable availability of an alternative measure could potentially include the burden on the industries concerned.[1465]

5.278. We also are not persuaded that the Panel erred in concluding that the situations in which other measures are applied are not sufficiently similar to the circumstances of the seal hunt to assist in determining the availability of alternative measures.[1466] Indeed, although it acknowledged that the examination of measures applied to other product areas may provide useful input in determining whether an alternative measure is reasonably available, the Panel also recalled the following: its findings regarding the particular characteristics, risks, and challenges of seal hunting; that the evidence did not establish comparable effective stunning rates in seal hunts and commercial abattoirs; and "in any case that the two situations differ significantly in areas of great relevance to the application of humane killing methods".[1467] In our view, the Panel provided a reasonable explanation as to why it did not consider regimes applicable in other situations helpful in determining the reasonable availability of the alternative measure.

5.279. In sum, having reviewed the Panel's reasoning and findings in respect of the alternative measure, we do not consider that the Panel erred in concluding that "the alternative measure is not reasonably available".[1468] In our view, the Panel undertook considerable efforts to understand what impact hypothetical variations of the alternative measure might have on the objective of the EU Seal Regime. The Panel considered that, whether focusing on addressing the EU public's

[1461] Canada's appellant's submission, paras. 291-298; Norway's appellant's submission, paras. 613-617.
[1462] European Union's appellee's submission, para. 279.
[1463] European Union's appellee's submission, para. 281.
[1464] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Reports, *US – Gambling*, para. 308). See also Appellate Body Report, *EC – Asbestos*, paras. 172-174.
[1465] See Appellate Body Report, *EC – Asbestos*, para. 174.
[1466] Canada's appellant's submission, paras. 278-290 (referring to Panel Reports, fn 815 to para. 7.504).
[1467] Panel Reports, fn 815 to para. 7.504 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 170).
[1468] Panel Reports, para. 7.504.

participation in the market for products derived from inhumanely killed seals, or the overall number of inhumanely killed seals, even the most stringent certification system would be difficult to implement and enforce, and would lead to increased numbers of inhumanely killed seals. The Panel further considered that making the welfare standards or the certification and labelling requirements more lenient would make the alternative measure more reasonably available but would not meaningfully contribute to addressing EU public moral concerns regarding seal welfare. We therefore understand the Panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare. The Panel thus was not persuaded that such a hypothetical regime constituted an alternative that is reasonably available.

5.280. Finally, we note the Panel's finding that, although the contribution of the EU Seal Regime to the fulfilment of its objective is lowered by the implicit and explicit exceptions of the measure, "the complainants have not clearly defined an alternative measure in respect of its separate components and their cumulative capability to address the moral concerns of the EU public".[1469] Under the circumstances of this case, it is not clear to us how much more could have been required of the complainants in articulating the nature and scope of the alternative measure. We have certain doubts about the Panel's criticism, particularly given what seems to be substantial engagement between the Panel and the parties regarding the features of such a certification scheme and its ability to contribute to the objective. In any event, however, our concerns are particular to the circumstances of this case, and do not alter our assessment of the Panel's overall finding.

5.3.2.5.2 Article 11 of the DSU

5.281. Finally, we consider two claims brought respectively by Canada and Norway under Article 11 of the DSU relating to the reasonable availability of the alternative measure.

5.282. Canada asserts a claim under Article 11 of the DSU regarding the Panel's finding that the alternative measure could result in an increase in the number of seals killed inhumanely. In particular, Canada argues that the Panel's finding is based on an assertion by the European Union that is itself a restatement of an unsupported assertion made in an *amicus curiae* submission. According to Canada, the Panel thus found "that a stringent animal welfare standard would lead to more seals being killed inhumanely … without any evidentiary support".[1470]

5.283. 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 alternative measure 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".[1471]

5.284. Canada is correct that the Panel – in stating that strict certification requirements "could give rise to infliction of significant suffering in larger scale hunts in order to kill other seals in accordance with the higher standards of welfare"[1472] – cited in footnote 799 of its Reports only the European Union's second written submission and the corresponding *amicus curiae* submission.[1473] The European Union notes, however, that the Panel itself stated that this was "[a]ssessed against the backdrop of the welfare risks of seal hunting".[1474] The European Union adds that the argument relates to its position that there are inherent obstacles that make it impossible to kill seals humanely on a consistent basis, and that the European Union "submitted extensive scientific evidence and argument to the Panel in order to substantiate that position".[1475] Based on the evidence and argument to which the European Union refers, the Panel had been presented with more information relating to this argument than what it referred to in footnote 799 of its Reports. We do not consider that a panel falls into error under Article 11 of the DSU for failing to cite all of

[1469] Panel Reports, para. 7.503.
[1470] Canada's appellant's submission, para. 334.
[1471] European Union's appellee's submission, para. 291.
[1472] Panel Reports, para. 7.496.
[1473] Panel Reports, fn 799 to para. 7.496.
[1474] Panel Reports, para. 7.496.
[1475] European Union's appellee's submission, para. 286 (referring to European Union's response to Panel question No. 148; and Panel Reports, paras. 7.202, 7.206, 7.207, 7.209, 7.213, and 7.214).

the arguments and evidence supporting a particular 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 extensive 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 statement 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 during 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 welfare, certification, and labelling requirements.[1477] According to Norway, "these alternatives were *completely ignored* by the Panel".[1478] In Norway's view, the Panel's failure to address the second alternative was "egregious"[1479] since the three conditions were found to restrict access to the EU market. Norway considers "manifestly inadequate" the Panel's failure to assess whether Norway's proposed alternative – which excludes these three restrictive conditions, but adds animal welfare requirements and labelling – could make an equivalent contribution to the public morals objective.[1480]

5.286. The European Union disagrees with Norway, noting that one of these proposed alternative measures consisted of removing all of the requirements of the EU Seal Regime, and "amounted effectively to repealing the EU Seal Regime".[1481] Because Norway's proposal was premised on the assumption that the EU Seal Regime made no contribution to its objective, the European Union argues, the Panel implicitly rejected this claim. The European Union argues that, although the Panel did not expressly address the second alternative measure proposed by Norway, it is clearly implicit in the Panel's reasoning and findings that this alternative measure would also fail to make an equivalent contribution to the objective of the EU Seal Regime.[1482]

5.287. The first alternative to which Norway refers appears, as the European Union maintains, to amount to the removal of the EU Seal Regime. This alternative rests on the factual premise that the EU Seal Regime could or does lead to worse seal welfare outcomes than those existing prior to the adoption of the measure. As we have explained, this premise was highly contested by the parties, was not uniformly supported by the Panel record, and, in any event, was not found to exist by the Panel. The second alternative proposes removal of three of the restrictive conditions of the MRM exception – that is, the not-for-profit, non-systematic, and sole purpose conditions – to be replaced by certain animal welfare, certification, and labelling requirements. We note that the substitution of other requirements for the existing MRM exception is critical to Norway's proposed alternative because, otherwise, removal of the restrictive conditions of the MRM exception would lead to an increase in the trade of seal products with attendant consequences for the number of inhumanely killed seals. Norway acknowledged this point during the Panel proceedings when it suggested that such requirements could be added.[1483] In that respect, what Norway proposes consists in part of a set of requirements similar to what the Panel actually analysed in its Reports. Thus, any conclusions the Panel reached regarding the likely limitations of the certification system

[1476] Norway's appellant's submission, para. 621.
[1477] Norway's appellant's submission, para. 622.
[1478] Norway's appellant's submission, para. 623. (emphasis original)
[1479] Norway's appellant's submission, para. 624.
[1480] Norway's appellant's submission, para. 625.
[1481] European Union's appellee's submission, para. 306.
[1482] European Union's appellee's submission, para. 307.
[1483] See Norway's oral statement at the second Panel meeting, para. 77: "Norway thus disagrees that 'enlarging' the scope of the [M]RM requirements by removing the unnecessary conditions would undermine the EU's animal welfare objective. In any event, if the EU wishes to ensure that the [M]RM requirements do not undermine animal welfare, it could – as a modified version of this [M]RM alternative – allow seal products from [M]RM hunts that *additionally* meet minimum animal welfare standards." (emphasis original)

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 respective cases, so long as it completes an objective assessment".[1485] We consider that, in the circumstances of this case, the additional alternatives to which Norway refers were in fact implicitly addressed by the Panel. With regard to the first additional alternative, we have noted that the Panel had grounds for not finding that the EU Seal Regime could or does lead to worse seal welfare outcomes than existed prior to the adoption of the measure. With regard to the second additional alternative, it is implicit in the Panel's reasoning and findings that this alternative would have failed on the same grounds as the alternative measure explicitly addressed by the Panel. Had the Panel explicitly addressed these two additional proposals by Norway, we do not see that it would have altered the Panel's assessment of whether there was a reasonably available alternative measure.[1486] The Panel's analysis in our view contained an implicit rejection of these additional alternatives, and we therefore do not consider that the Panel's failure to mention these two alternatives undermined the objectivity of the Panel's assessment under Article 11 of the DSU.

5.3.2.6 Conclusion

5.289. The foregoing discussion has entailed an extensive assessment of the Panel's analysis of whether the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994. We have also been called upon to consider claims and arguments by Canada and Norway that were related to the Panel's contribution analysis in the context of Article 2.2 of the TBT Agreement, but which the Panel relied on in reaching its findings under Article XX(a). The Panel correctly focused its analysis on the question of whether the prohibitive and permissive components of the EU Seal Regime are necessary to protect EU public moral concerns. The Panel then conducted a relational analysis in which it evaluated the importance of the objective of addressing EU public moral concerns regarding seal welfare, the trade-restrictiveness of the EU Seal Regime, the contribution of the EU Seal Regime to the objective, and whether the alternative measure proposed by the complainants was reasonably available.[1487] In that context, having focused on and assessed the specific claims of error advanced by Canada and Norway, we consider that the Panel did not err in concluding that the EU Seal Regime "is capable of making and does make some contribution" to its objective, or that it does so "to a certain extent". We further consider that the Panel did not err in concluding that, although the alternative measure was less trade restrictive than the EU Seal Regime, it was not reasonably available given *inter alia* the inherent animal welfare risks and challenges found to exist in seal hunting. Overall, in the light of the specific circumstances of this case, and the particular nature of the measure at issue, we have endorsed the Panel's analysis of the EU Seal Regime under Article XX(a) of the GATT 1994.

5.290. Accordingly, having rejected the claims on appeal by Canada and Norway as they relate to Article XX(a), we uphold the Panel's finding at paragraph 7.639 of its Reports that "the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994". Since we have upheld the Panel's finding that the EU Seal Regime is provisionally justified under Article XX(a), we are not called upon to address the European Union's conditional other appeal with respect to Article XX(b).[1488]

[1484] Appellate Body Report, *US – Upland Cotton*, para. 446.

[1485] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.

[1486] In *EC – Fasteners (China)*, the Appellate Body noted that a participant must explain why evidence "is so material to its case that the panel's failure explicitly to address and rely upon [it] has a bearing on the objectivity of the panel's assessment." (Appellate Body Report, *EC – Fasteners (China)*, para. 442) See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

[1487] See Panel Reports, section 7.4.4.3.2.

[1488] European Union's other appellant's submission, para. 320 (referring to Panel Reports, para. 7.640).

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 TBT Agreement.[1490] Given its findings under Article 2.1 of the TBT Agreement that these exceptions 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.[1491]

5.294. While Canada and Norway agree with the Panel's conclusion that the EU Seal Regime does not meet the requirements of the chapeau of Article XX, they appeal the Panel's reasoning in reaching that conclusion. In particular, they allege that the Panel erred in applying the same test to determine the existence of arbitrary or unjustifiable discrimination under the chapeau of Article XX as it had applied in determining whether the measure was inconsistent with Article 2.1 of the TBT Agreement.[1492] In addition, Canada requests the Appellate Body to reverse the Panel's intermediate finding that the distinction between commercial and IC hunts is "justifiable"[1493], to complete the analysis on this specific point[1494], and to find that the discrimination between Canadian commercial seal products and IC seal products arising from the application of the EU Seal Regime is arbitrary and unjustifiable.[1495] By contrast, the European Union requests the Appellate Body to reverse the Panel's conclusion that the IC exception does not meet the requirements of the chapeau, to complete the analysis, and to find instead that the IC exception meets the requirements of Article XX(a), including the chapeau.[1496]

5.295. We will begin by reviewing the requirements of the chapeau in the light of relevant WTO jurisprudence. Thereafter, we will address the claims on appeal in the light of our interpretation of the chapeau of Article XX.

5.3.3.1 Interpretation of the chapeau of Article XX of the GATT 1994

5.296. The chapeau of Article XX imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX. The chapeau does so by requiring that measures not be "applied in a manner which would constitute a means of

[1489] Panel Reports, para. 7.648.
[1490] Panel Reports, para. 7.649.
[1491] Panel Reports, para. 7.650 (referring to Panel Reports, sections 7.3.2.3.3 and 7.3.2.3.4).
[1492] Canada's appellant's submission, paras. 447-454; Norway's appellant's submission, paras. 894-898.
[1493] Canada's appellant's submission, paras. 460-466. See also Panel Reports, para. 7.650.
[1494] Canada's appellant's submission, para. 468.
[1495] Canada's appellant's submission, paras. 455-466 and 468.
[1496] European Union's other appellant's submission, paras. 316-319.

arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

5.297. The function of the chapeau of Article XX of the GATT 1994 is to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article.[1497] In that way, the chapeau operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994.[1498] Achieving this equilibrium is called for "so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves".[1499] As the Appellate Body stated in *US – Gasoline*, the burden of demonstrating that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the chapeau rests with the party invoking the exception.[1500] The Appellate Body explained that this is "a heavier task than that involved in showing that an exception … encompasses the measure at issue."[1501]

5.298. With respect to the type of "discrimination" that is at issue under the chapeau, the Appellate Body noted in *US – Gasoline* that "[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred".[1502] A finding that a measure is inconsistent with one of the non-discrimination obligations of the GATT 1994, such as those contained in Articles I and III, is thus not dispositive of the question of whether the measure gives rise to "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" under the chapeau of Article XX of the GATT 1994. Moreover, "the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994".[1503] This does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.[1504]

5.299. The examination of 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" necessitates an assessment of whether the "conditions" prevailing in the countries between which the measure allegedly discriminates are "the same". We note that the term "condition" has a number of meanings, including "a way of living or existing"; "the state of something"; "the physical state of something"; and "the physical or mental state of a person or thing".[1505] The term "conditions" could thus potentially encompass a number of circumstances facing a country. In order further to define and circumscribe the meaning of the term "conditions", the treaty interpreter should therefore seek guidance from the specific context in which that term appears in the chapeau. As we see it, only "conditions" that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the

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[1497] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, pp. 20-21.

[1498] Appellate Body Report, *US – Shrimp*, para. 156.

[1499] The Appellate Body, in *US – Shrimp*, stated that:

> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.

(Appellate Body Report, *US – Shrimp*, para. 159)

[1500] Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, p. 21.

[1501] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21.

[1502] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21. See also Appellate Body Report, *US – Shrimp*, para. 150.

[1503] Appellate Body Report, *US – Shrimp*, para. 150 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21).

[1504] In *US – Gasoline*, the Appellate Body concluded that the baseline establishment rules, which the panel in that dispute had found to be discriminatory under Article III:4 of the GATT 1994, also resulted in "unjustifiable discrimination", since certain omissions by the United States went "well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place". (Appellate Body Report, *US – Gasoline*, pp. 28-29, DSR 1996:I, p. 27)

[1505] Merriam-Webster, available at <http://www.merriam-webster.com/dictionary/condition> (accessed 28 April 2014).

measure at issue and the circumstances of a particular case should be considered under the chapeau.[1506] The question is thus whether the conditions prevailing in different countries are *relevantly* "the same".

5.300. We consider that, in determining which "conditions" prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. In other words, "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau. Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which "conditions" prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.[1507]

5.301. We recall that the function of the chapeau is to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each subparagraph of Article XX. This also lends support to our view that the identification of the relevant "conditions" under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. If a respondent considers that the conditions prevailing in different countries are not "the same" in relevant respects, it bears the burden of proving that claim.

5.302. By its terms, the chapeau of Article XX is concerned with the "manner" in which a measure that falls under one of the subparagraphs of Article XX is "applied".[1508] Although this suggests that the focus of the inquiry is on the manner in which the measure is *applied*, the Appellate Body has noted that whether a measure is *applied* in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure".[1509] It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of "both substantive and procedural requirements" under the measure at issue.[1510]

5.303. We recall that the Appellate Body has already observed, in *US – Shrimp*, that discrimination within the meaning of the chapeau of Article XX "results … when countries in which the same conditions prevail are differently treated".[1511] Where this is the case, a panel should analyse whether the resulting discrimination is "arbitrary or unjustifiable". The Appellate Body has explained that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1512]

5.304. In *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.[1513] The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. While the Appellate Body accepted that the anticipated difficulties concerning verification and

[1506] See also the Appellate Body report in *US – Shrimp*, where the Appellate Body noted that the "standards established in the chapeau are … necessarily broad in scope and reach", and that, "[w]hen applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies." (Appellate Body Report, *US – Shrimp*, para. 120)

[1507] See Appellate Body Report, *US – Gasoline*, p. 23-24, DSR 1996:I, pp. 21-22; and Appellate Body Report, *US – Shrimp*, para. 150.

[1508] See also Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, para. 115; and *Brazil – Retreaded Tyres*, para. 215.

[1509] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120.

[1510] Appellate Body Report, *US – Shrimp*, para. 160.

[1511] Appellate Body Report, *US – Shrimp*, para. 165.

[1512] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*).

[1513] See *supra*, para. 5.191 for background on the *US – Gasoline* dispute.

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 "nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners".[1516]

5.305. In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination.[1517] These factors included the fact that the discrimination resulted from: (i) a "rigid and unbending requirement" that countries exporting shrimp into the United States must adopt a regulatory programme that is essentially the same as the United States' programme[1518]; (ii) the fact that the discrimination resulted from the failure to take into account different circumstances that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles[1519]; and (iii) the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members.[1520] As the Appellate Body stated in *Brazil – Retreaded Tyres*, "[t]he assessment of these factors … was part of an analysis that was directed at the cause, or the rationale, of the discrimination."[1521]

5.306. One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.[1522] In *Brazil – Retreaded Tyres*, the Appellate Body considered this factor particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination. As the Appellate Body stated, it had "difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX".[1523] In *US – Shrimp*, the Appellate Body considered this factor as *one* element in a "cumulative" assessment of "unjustifiable discrimination".[1524]

[1514] Appellate Body Report, *US – Gasoline*, p. 26, DSR 1996:I, p. 24.

[1515] Appellate Body Report, *US – Gasoline*, p. 27, DSR 1996:I, pp. 25-26.

[1516] Appellate Body Report, *US – Gasoline*, p. 28, DSR 1996:I, p. 27.

[1517] See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225: "In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination."

[1518] Appellate Body Report, *US – Shrimp*, para. 177; see also ibid., para. 163.

[1519] Appellate Body Report, *US – Shrimp*, paras. 163 and 164.

[1520] Appellate Body Report, *US – Shrimp*, paras. 166 and 172.

[1521] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225 (referring to Appellate Body Report, *US – Shrimp*, paras. 163-166, 172, and 177).

[1522] See Appellate Body Reports, *US – Shrimp*, para. 165; and *Brazil – Retreaded Tyres*, paras. 227, 228, and 232.

[1523] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

[1524] Appellate Body Report, *US – Shrimp*, para. 176. The Appellate Body highlighted that the measure treated "*shrimp caught using methods identical to those employed in the United States*" differently from shrimp caught in the United States or other certified countries "solely because they have been caught in waters of *countries that have not been certified by the United States*" – a situation that the Appellate Body found "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles". (Ibid., para. 165 (emphasis original)) See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225 and fn 431 thereto.

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 with the Panel's reasoning in reaching this conclusion.[1528] In particular, they allege that the Panel erred in applying the same test to determine the existence of arbitrary or unjustifiable discrimination under the chapeau of Article XX as it applied in determining whether the measure was inconsistent with Article 2.1 of the TBT Agreement.[1529] Canada and Norway submit that the scope, content, and text of the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement (read together with the sixth preambular recital thereto) are not the same. Canada argues that the Panel "failed to adequately explain" why its analysis under Article 2.1 was relevant and applicable to its assessment of the legal standard under the chapeau of Article XX.[1530] Norway similarly asserts that "a panel must be faithful to the independence of the analysis to be conducted under each Agreement."[1531] Second, according to the complainants, the Panel's "three-step test" in the context of its "legitimate regulatory distinction" analysis under Article 2.1[1532] is at odds with the text of the chapeau of Article XX, as well as with well-accepted jurisprudence regarding the proper analysis of "arbitrary or unjustifiable discrimination" under the chapeau.[1533] Specifically, both complainants take issue with the Panel's substitution of its three-step "legitimate regulatory distinction" test under Article 2.1 for the proper test under the chapeau of Article XX developed by the Appellate Body in *Brazil – Retreaded Tyres*, which, the complainants assert, requires an assessment of whether the discrimination at issue is "rationally connected" to the objective of the measure.[1534]

5.309. The European Union responds that the 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 in past Appellate Body jurisprudence.[1535] 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 measure, and, as reflected in prior Appellate Body jurisprudence, may involve the consideration of other factors.[1536] According to the European Union, this is supported by *Brazil – Retreaded Tyres*, as, in that case, the Appellate Body merely found

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[1525] Panel Reports, paras. 7.649 and 7.650.
[1526] Panel Reports, para. 7.650 (referring to ibid., sections 7.3.2.3.3 and 7.3.2.3.4).
[1527] Canada Panel Report (DS400), para. 8.3(d); Norway Panel Report (DS401), para. 8.3(d).
[1528] Canada's appellant's submission, para. 436; Norway's appellant's submission, para. 892.
[1529] Canada's appellant's submission, paras. 447-454; Norway's appellant's submission, paras. 894-898.
[1530] Canada's appellant's submission, para. 450 (referring to Panel Reports, para. 7.649).
[1531] Norway's appellant's submission, para. 897.
[1532] See Panel Reports, para. 7.259. The Panel found that:

> [T]he legitimacy of the regulatory distinction between commercial hunts and IC hunts should be determined by examining the following questions: first, is the distinction rationally connected to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. "explain the existence of the distinction") despite the absence of the connection to the objective of the Regime, taking into account the particular circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination" such that it lacks "even-handedness".

(Ibid. (fns omitted))
[1533] Canada's appellant's submission, paras. 452, 453, and 457; Norway's appellant's submission, paras. 898 and 905-926.
[1534] Canada's appellant's submission, paras. 437, and 455-459; Norway's appellant's submission, paras. 904-927.
[1535] European Union's appellee's submission, paras. 443-447.
[1536] European Union's appellee's submission, paras. 448-456.

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 that 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 GATT 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] detrimental 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 Article XX is to maintain a balance between a Member's right to invoke the exceptions under the subparagraphs of Article XX and the substantive rights of the other Members under the various other provisions of the GATT 1994.[1545] Indeed, a measure can be found to be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination under the chapeau on grounds that are not necessarily the same in their "nature and quality" as the discrimination which was found to be inconsistent with the non-discrimination obligations of the GATT 1994, such as Articles I and III.[1546]

5.313. Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, we find that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.[1547] We therefore reverse the Panel's finding, in paragraph 7.651 of the Panel Reports, that the European Union has failed to establish that the

[1537] European Union's appellee's submission, para. 451 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).

[1538] See Panel Reports, para. 7.649.

[1539] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; and *US – Tuna II (Mexico)*, para. 213.

[1540] Appellate Body Report, *US – Clove Cigarettes*, para. 171.

[1541] Appellate Body Report, *US – Clove Cigarettes*, para. 175.

[1542] Appellate Body Report, *US – Clove Cigarettes*, paras. 182 and 215.

[1543] We note the Appellate Body's statement, in *US – COOL*, that a regulatory distinction that is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination cannot be considered "legitimate", and that any detrimental impact stemming from such a distinction will hence reflect discrimination prohibited under Article 2.1. (Appellate Body Reports, *US – COOL*, para. 271)

[1544] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 284 and 286.

[1545] Appellate Body Report, *US – Shrimp*, para. 156.

[1546] Appellate Body Report, *US – Shrimp*, para. 150 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21).

[1547] Panel Reports, para. 7.649.

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.

5.3.3.3 Whether the EU Seal Regime meets the requirements of the chapeau of Article XX of the GATT 1994

5.316. The discrimination that the Panel found under Article I:1 of the GATT 1994 arises from the different regulatory treatment that the measure accords to seal products derived from "commercial" hunts, on the one hand, as compared to seal products derived from IC hunts, on the other hand, in combination with the fact that seal hunts in Canada and Norway are primarily "commercial" hunts, whereas seal hunts in Greenland are predominantly IC hunts.[1551] As noted above, the circumstances that bring about the discrimination within the meaning of the chapeau may include, but are not limited to, the circumstances that led to the finding of a violation of a substantive provision of the GATT 1994. In completing the analysis under the chapeau, we will first examine whether the different regulatory treatment that the EU Seal Regime accords to seal products derived from IC hunts as compared to "commercial" hunts constitutes "arbitrary or unjustifiable discrimination". In addition, we will analyse whether the measure has any discriminatory effects on different indigenous communities and whether any such effects amount to arbitrary or unjustifiable discrimination.

5.317. As noted above, the analysis under the chapeau of Article XX of the GATT 1994 entails an assessment of whether the "conditions" prevailing in the countries between which the measure allegedly discriminates are "the same". We further found that, in conducting this assessment, the subparagraph under which a measure has been provisionally justified, as well as the provision of the GATT with which a measure has been found to be inconsistent, provide important context. In the circumstances of the present case, we do not consider that the European Union has shown that the "conditions" prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, are relevantly different. In particular, the European Union does not appear to contest Norway's claim that "the same animal welfare conditions prevail in all countries where seals are hunted"[1552], nor has the European Union appealed the Panel's finding that "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts".[1553] We also do not understand the European Union to have argued that the differences in the identity of the hunter or in the purpose of seal hunts that the Panel found to exist between "commercial" and IC hunts would render the conditions in Canada and Norway, on the one hand, and Greenland, on the other hand, relevantly different. Finally, while the European Union has pointed to "the different

[1548] Panel Reports, para. 7.650.
[1549] Panel Reports, para. 7.275.
[1550] Panel Reports, para. 7.300.
[1551] Panel Reports, paras. 7.159-7.164, 7.170, and 7.600.
[1552] Panel Reports, fn 442 to para. 7.276 (referring to Norway's first written submission to the Panel, para. 680 and fn 980 thereto, in turn referring to European Food Safety Authority, "Scientific Opinion of the Panel on Animal Health and Welfare on a request from the Commission on the Animal Welfare aspects of the killing and skinning of seals", *The EFSA Journal* (2007), No. 610, pp. 1-122 (Panel Exhibit JE-22) (EFSA Scientific Opinion), p. 13).
[1553] Panel Reports, para. 7.275.

level of development in the organisation of the marketing structures achieved by the Inuit communities in Greenland as compared to the Canadian Inuit communities"[1554], the European Union has not, in our view, sufficiently explained how these differences would render the conditions prevailing in Canada and Greenland different in a respect that would be relevant under the chapeau. Given that the European Union has not shown that the conditions prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, are relevantly different, we proceed on the basis that the conditions prevailing in these countries are "the same" for the purposes of the chapeau.

5.318. We consider that, in the present case, the causes of the "discrimination" found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau. We also note that this is not disputed by the participants. We therefore turn to examine whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau. As noted above, one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. We therefore begin our analysis with Canada's and Norway's claim that the EU Seal Regime results in arbitrary or unjustifiable discrimination because it discriminates on a basis that does not have a "rational relationship" with the objective of the measure or goes against that objective.[1555]

5.319. We recall that the objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare.[1556] In pursuit of this objective, the EU Seal Regime bans the importation and placing on the market of seal products derived from "commercial" hunts, while it allows the importation of seal products derived from hunts that satisfy certain criteria relating to the identity of the hunter, the purpose of the hunt, and the use of by-products from the hunt. The complainants allege, and the European Union does not dispute, that these criteria are not related to the welfare of seals. The complainants therefore submit that there is a rational disconnect between the IC exception and the objective of the EU Seal Regime, and that the IC exception even goes against that objective.[1557] Essentially, the complainants' arguments go to the manner in which the EU Seal Regime pursues its objective in the context of IC hunts as compared to "commercial" hunts. In response, the European Union submits that it exempts seal products derived from hunts conducted by Inuit and other indigenous peoples from the ban on the importation and placing on the market of seal products in order to mitigate the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals.[1558]

5.320. The first relevant question before us is thus whether the European Union has sufficiently explained how the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. We note that the different regulatory treatment of IC hunts, as compared to "commercial" hunts, takes the form of a significant carve-out of the former from the measure's ban on seal products. The European Union has sought to explain why it decided not to impose the ban on the importation and placing on the market of seal products derived from IC hunts. Yet, the European Union has failed to demonstrate, in our view, how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. In this connection, we note that the European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of

[1554] European Union's appellant's submission, para. 203.

[1555] Canada's appellant's submission, para. 468; Norway's appellant's submission, paras. 904, 929, 930, and 932. We note that Canada advances this claim in the context of its appeal under Article 2.1 of the TBT Agreement and the chapeau of Article XX, while Norway makes this argument in the context of its appeal under the chapeau of Article XX.

[1556] In section 5.3.1 above, we considered that the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests.

[1557] Canada's appellant's submission, para. 468; Norway's appellant's submission, paras. 904, 929, 930, and 932.

[1558] European Union's appellee's submission, para. 142.

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 consumption of by-products of the hunted seals as part of their culture and tradition, but also a commercial component, to the extent that Inuit or indigenous communities also exchange some by-products of the hunted seals for economic gain."[1564] The Panel further found this commercial aspect of IC hunts to be related more to the "need [of Inuit communities] to adjust to modern society rather than to continuing their cultural heritage of bartering".[1565] For the Panel, the commercial aspect of IC hunts "resembles the purpose of commercial hunts, which is to earn income (and make profits)

[1559] Panel Reports, para. 7.275. We note that the European Union submitted before the Panel that "[t]he Complainants have not offered any indication of how animal welfare could be improved in the hunts within the scope of the IC exception without at the same time endangering the subsistence of the Inuit and the preservation of their cultural identity." (European Union's response to Panel question No. 8, para. 24) Canada responded that "the onus is not on the complainants to offer solutions to enable Greenlandic sealers to improve animal welfare standards without putting at risk the subsistence of the Inuit and the preservation of their cultural identity." (Panel Reports, para. 7.294 (quoting Canada's second written submission to the Panel, para. 251))

[1560] We recall again that, in *US – Shrimp*, the Appellate Body considered this factor as *one* element in a "cumulative" assessment of "unjustifiable discrimination". (Appellate Body Report, *US – Shrimp*, paras. 165 and 176)

[1561] European Union's other appellant's submission, paras. 182 and 188.

[1562] Panel Reports, para. 7.308.

[1563] Panel Reports, para. 7.308. See also ibid., paras. 7.283-7.289.

[1564] Panel Reports, para. 7.288.

[1565] Panel Reports, para. 7.287.

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 requirements 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 the notion of "partial use" arises when it is applied on an aggregate basis. In response to questioning at the oral hearing, the European Union could not confirm whether the "partial use" criterion is administered and enforced with respect to each individual seal, with respect to each seal hunt, or with respect to the catch of an entire season.[1568] It is therefore not clear with respect to what benchmark the requirement that seal products be at least partly used, consumed, or processed in the community, is to be understood. We are concerned that, where conformity with the "partial use" criterion is not assessed with respect to individual seals but rather with respect to individual hunters over an extended period of time (e.g. through licensing conditions), or with respect to all hunters active in a particular area or even all members of an Inuit community, a substantial proportion of seal products that, when considered individually, might not conform to the "partial use" criterion (either because the hunter has commercialized the entire seal or because the non-commercialized parts of the seal have been disposed of rather than used) could potentially qualify for the IC exception. We consider that the ambiguity in the notion of "partial use" compounds the ambiguity of the "subsistence" criterion, with which it applies cumulatively, and thereby aggravates the overall vagueness of the IC requirements.

5.326. Given these significant ambiguities and the broad discretion in the application of the IC requirements, we are troubled by the European Union's position that, once a seal hunt has been classified as an IC hunt, the degree of commercialization is "irrelevant".[1569] In particular with regard to borderline cases, the "subsistence" and "partial use" criteria would appear to call for, if not continuous, at least regular reassessments, at a sufficiently disaggregated level, of whether the requirements of the IC exception are fulfilled.[1570] We note in this regard that the evaluation of whether a given seal product complies with the requirements of the IC exception is left entirely to the "recognized bodies" designated pursuant to Article 6 of the Implementing Regulation. Given the ambiguities that can arise with respect to at least two elements of the IC requirements, the recognized bodies would appear to enjoy broad discretion in applying the IC requirements, which could allow for instances of abuse of the IC exception, even where the recognized body is acting in good faith. Depending on how strictly the IC requirements are applied, seal products derived from what should in fact be properly characterized as "commercial" hunts could thus enter the EU market under the IC exception in some instances. As we see it, the European Union has not sufficiently explained how such instances can be prevented in the application of the IC exception.

5.327. It appears to us, in particular, that the criteria for recognized body status set out in Article 6 of the Implementing Regulation are not sufficiently precise to ensure that the "partial use"

[1566] Panel Reports, para. 7.287.

[1567] Panel Reports, para. 7.288.

[1568] At the oral hearing, the European Union pointed out that this assessment would be left to the "recognized body" designated pursuant to Article 6 of the Implementing Regulation. The European Union highlighted that the Implementing Regulation provides for the auditing of "recognized bodies". (European Union's responses to questioning at the oral hearing)

[1569] European Union's other appellant's submission, paras. 207 and 208; European Union's appellee's submission, para. 103.

[1570] It appears to us that, in certain cases, the only requirement of the IC exception that is effectively enforced might be the requirement regarding the identity of the hunter, whereas the other two requirements would be presumed to be fulfilled where the hunter is an Inuit, even if the hunt was highly commercialized.

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 can arise with respect to at least two of them, that is, the "subsistence" and "partial use" requirements. We note, in this regard, that the MRM and Travellers exceptions contain anti-circumvention clauses that would allow the denial of entry of seal products that, while formally compliant with the exception, appear to be outside the scope of the exception.[1572] The IC exception contains no such anti-circumvention clause. We recall in this respect that the primary purpose of the chapeau of Article XX is to prevent the abuse or misuse of the exceptions in the subparagraphs of Article XX.[1573] We note that the Appellate Body in *US – Shrimp* criticised the certification processes followed by the United States as being "singularly informal and casual", and as being "conducted in a manner such that these processes could result in the negation of rights of Members".[1574]

5.328. In *US – Shrimp*, the Appellate Body was concerned that there appeared to be "no way that exporting Members can be certain" whether the relevant provisions and guidelines were "being applied in a fair and just manner by the appropriate governmental agencies of the United States".[1575] We have similar concerns with regard to the process for the issuing of attesting documents by recognized bodies pursuant to Articles 6, 7[1576], and 9[1577] of the Implementing

[1571] Article 6 of the Implementing Regulation reads, in relevant part:

Article 6

1. An entity shall be included in a list of recognised bodies where it demonstrates that it fulfils the following requirements:
(a) it has legal personality;
(b) it has the capacity to ascertain that the requirements of Article 3 or 5 are met;
(c) it has the capacity to issue and manage attesting documents referred to in Article 7(1), as well as process and archive records;
(d) it has the ability to carry out its functions in a manner that avoids conflict of interest;
(e) it has the ability to monitor compliance with the requirements set out in Articles 3 and 5;
(f) it has the capacity to withdraw attesting documents referred to in Article 7(1) or suspend their validity in case of non- compliance with the requirements of this Regulation, and to take measures to inform competent authorities and customs authorities of Member States thereof;
(g) it is subject to an independent third party audit;
(h) it operates at national or regional level.

[1572] See Basic Regulation, Article 3(2), which stipulates that the "nature and quantity" of seal products that are imported or place on the market under the Travellers and MRM exceptions "shall not be such as to indicate that they are" imported or placed on the market "for commercial reasons". Article 3(2) further stipulates that "[t]he application of this paragraph shall not undermine the achievement of the objective of this Regulation".

[1573] See *supra*, para. 5.297.

[1574] Appellate Body Report, *US – Shrimp*, para. 181.

[1575] Appellate Body Report, *US – Shrimp*, para. 181.

[1576] Article 7 of the Implementing Regulation reads, in relevant part:

Article 7

1. Upon request, where the requirements for placing on the market set out in Article 3(1) or 5(1) are met, a recognised body shall issue an attesting document conforming to the models set out in the Annex.
2. The recognised body shall deliver the attesting document to the applicant and shall keep a copy for three years for record-keeping purposes.

...

7. In case of doubts relating to the authenticity or correctness of an attesting document issued in accordance with paragraph 1 as well as when further advice is required, the customs authorities and other enforcement officers shall contact the competent authorities designated by the Member State concerned in accordance with Article 9. The competent authorities shall decide on the measures to be taken.

[1577] Article 9 of the Implementing Regulation reads, in relevant part:

Article 9

1. Each Member State shall designate one or several competent authorities responsible for the following tasks:
(a) verification upon request of the customs authorities pursuant to Article 7(7) of attesting documents for imported seal products;
(b) control of the issuing of attesting documents by recognised bodies established and active in that Member State;
(c) preservation of a copy of attesting documents issued for seal products originating from seal hunts in that Member State.

Regulation. Given the ambiguities in the criteria of the IC exception and the broad discretion that the recognized bodies consequently enjoy in applying these criteria, we consider that seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception. Thus, pursuant to its design, the EU Seal Regime could be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

5.329. We now turn to the question of whether the manner in which the IC exception affects Inuit communities in different countries amounts to "arbitrary or unjustifiable discrimination". We note, in this respect, the Panel's findings that "the IC exception is available *de facto* exclusively to Greenland", and that this outcome is "directly attributable to the regime itself and not to the actions of the operators in countries like Canada".[1578] The European Union challenges these findings on appeal both as an error of law[1579] and, in the alternative, as a failure of the Panel to make an objective assessment of the facts, as required by Article 11 of the DSU.[1580] In the following, we will address the European Union's arguments, and Canada's and Norway's responses, to the extent that they are pertinent in the context of the chapeau of Article XX of the GATT 1994.

5.330. The European Union notes that any entity within the Inuit communities in Canada or elsewhere can meet the requirements to become a recognized body for the purposes of assessing conformity with the IC exception.[1581] The European Union submits that the fact that, so far, only an 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.[1582] The European Union argues that, contrary to what the Panel found, there is no "inherent flaw" or permanent defect in the IC exception that prevents Inuit communities, other than those in Greenland, from taking advantage of it.[1583] The European Union further submits that the Panel wrongly assessed the even-handedness of the IC exception by looking at the effects of the measure in a particular period of time.[1584] The European Union underscores that, while Canada and its Inuit communities have not taken any steps to benefit from the IC exception despite numerous efforts made by the EU authorities[1585], they could do so at any time in the future, if and when they so wish, based on their assessment of whether exports to the European Union are desirable.[1586] In the European Union's view, the fact that the Canadian authorities purchase Inuit products under a targeted programme means that they have, in principle, a convenient and easy means to identify the seal products qualifying for the IC exception.[1587]

5.331. Canada alleges that the European Union has misunderstood the thrust of the Panel's reasoning. According to Canada, the Panel's concerns about the design and application of the IC exception did not relate to whether Canadian Inuit seal products formally qualified for 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.[1588] 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"[1589], and that "market realities are 'major factors contributing to the ineffectiveness of the Inuit exemption to the EU seal ban'".[1590] According to Canada, the Panel agreed that there is "little point" in Canadian Inuit applying for the IC exception if, due to its

[1578] Panel Reports, paras. 7.317 and 7.318.

[1579] The European Union presents its arguments in the context of Article 2.1 of the TBT Agreement. (European Union's other appellant's submission, paras. 124-277) However, the European Union also requests the Appellate Body to reverse the Panel's finding under the chapeau on the same grounds. (Ibid., para. 318)

[1580] European Union's other appellant's submission, para. 217.

[1581] European Union's other appellant's submission, paras. 182 and 191.

[1582] European Union's other appellant's submission, paras. 182 and 192.

[1583] European Union's other appellant's submission, para. 193.

[1584] European Union's other appellant's submission, para. 195.

[1585] European Union's other appellant's submission, paras. 196, 201, and 202.

[1586] European Union's other appellant's submission, para. 203.

[1587] European Union's other appellant's submission, para. 203.

[1588] Canada's appellee's submission, para. 132.

[1589] Canada's appellee's submission, para. 133 (quoting Panel Reports, fn 219 to para. 7.162).

[1590] Canada's appellee's submission, para. 133 (quoting Panel Reports, fn 219 to para. 7.162, in turn quoting Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban*, (EC) No. 1007/2009, in Nunavut (2012) (Panel Exhibit JE-30) (Nunavut 2012 Report), p. 9).

design and application, they are unable to take advantage of it.[1591] Canada alleges that, more generally, the actions of a WTO Member or private actors, in responding to a discriminatory measure, should not form the basis for an assessment of whether that measure discriminates against that WTO Member.[1592]

5.332. Norway argues that the Panel did not err in relying on its finding that the IC exception is *de facto* only available to Greenland. According to Norway, "the Panel explicitly acknowledged that the fact that Greenland has so far been the only beneficiary of the IC requirements was not … sufficient to establish arbitrariness in the design or application of the IC requirements", but "merely 'an indication' that had to be considered with other factors".[1593] Norway further submits that "the Panel adequately examined the implications" of the actions and omissions of the Canadian authorities and operators.[1594] Norway highlights the Panel's observation that "it is not cost effective under the current circumstances to segregate [Canadian] Inuit products from other products".[1595] Norway also underscores the Panel's suggestion that this result had been anticipated by the EU legislator.[1596] Norway submits that the European Union cannot claim that the requirements of the IC exception do not discriminate against Canadian Inuit when the EU legislator in fact knew that this would be the case.[1597] According to Norway, it is because of the terms of the measure that Canadian Inuit, who truly pursue a subsistence hunt, are effectively denied the choice to benefit from the IC exception. Norway asserts that the European Union is, therefore, wrong when it argues that "the failure of the Canadian Inuit to *de facto* qualify under the IC requirements cannot be 'attributed' to the EU Seal Regime, or the European Union".[1598]

5.333. We consider that, to the extent that the IC exception is designed and applied so as to be *de facto* only available to Greenland, the EU Seal Regime would treat seal products derived from IC hunts in Greenland and Canada differently and, in this respect, result in discrimination between countries where the same conditions prevail. It is undisputed that the Inuit in Greenland are currently the only beneficiaries of the IC exception. The European Union contests, however, that this outcome can be attributed to the EU Seal Regime, suggesting that there is no "genuine relationship"[1599] between the current *de facto* exclusivity of the IC exception and the design and application of the IC exception, such that this outcome would not be "attributable" to the EU Seal Regime.[1600]

5.334. We note that, while the Panel found that the fact that only Greenland has been able to benefit from the IC exception "is directly attributable to the regime itself and not to the actions of the operators in countries like Canada"[1601], it did not point to any aspect of the IC exception itself that prevents indigenous communities in Canada from taking advantage of it. The Panel also did not explain how it accounted for the failure of the Canadian authorities to apply for recognized body status in reaching its conclusion. Canada, in turn, does not argue that the fact that the Canadian indigenous communities have not taken advantage of the IC exception is due to the design and application of the IC exception. Rather, Canada's explanation is based on the fact that the EU Seal Regime bans seal products derived from *commercial* hunts, and that the Canadian Inuit had allegedly relied on synergies with "southern producers" in order to export their seal products to the European Union.[1602] According to Canada's own explanation, the reason that Inuit communities in Canada do not have an incentive to take advantage of the IC exception is related

[1591] Canada's appellee's submission, para. 136.
[1592] Canada's appellee's submission, para. 137.
[1593] Norway's appellee's submission, para. 394 (quoting Panel Reports, para. 7.306). (emphasis omitted)
[1594] Norway's appellee's submission, para. 395.
[1595] Norway's appellee's submission, para. 396 (quoting Panel Reports, para. 7.314).
[1596] Norway's appellee's submission, paras. 398 and 399.
[1597] Norway's appellee's submission, para. 400.
[1598] Norway's appellee's submission, para. 402.
[1599] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.
[1600] See also Appellate Body Report, *US – Clove Cigarettes*, fn 372 to para. 179.
[1601] Panel Reports, para. 7.318.
[1602] See Panel Reports, para. 7.315 ("Canada also explains that it is not economically feasible for Canadian Inuit to develop their own processing and distribution chains, given that the Inuit have relied on synergies with southern producers; as those networks may no longer be viable because of the EU Seal Regime, considerable investment would be needed to develop a new processing and distribution centre.")

to the incidental effects of the ban on seal products derived from *commercial* hunts[1603], rather than any aspect of the "text", "legislative history", or "actual application of the IC exception", as the Panel suggests.[1604]

5.335. We further note that, while the Panel cited Canada's explanation and certain statements from the COWI Reports, it never made an affirmative finding that the ban on seal products derived from *commercial* hunts prevents the Canadian Inuit from taking advantage of the IC exception. In any event, the European Union submits that the Panel ignored the fact that the relevant Canadian authorities and entities have not shown any interest in benefiting from the IC exception.[1605] The European Union cites Canada's response to a Panel question to the effect that Inuit communities in Canada have "deliberately decided to focus on the development of the local (i.e. Nunavut) market".[1606] The European Union further argues that the Canadian Inuit could benefit from the IC exception "at any time in the future if and when they so wish, based on their assessment of whether exports to the EU are desirable".[1607] The European Union submits that "the fact that the Canadian authorities purchase Inuit products under a targeted programme means that they have, in principle, a convenient and easy means to identify and manage the relevant products qualifying for the IC exception".[1608]

5.336. We recall that the question before us is whether the European Union has met its burden of showing that the current *de facto* exclusivity of the IC exception cannot be attributed to the EU Seal Regime. The European Union argues that the fact that Canadian Inuit have so far not taken advantage of the IC exception is explained by the inaction of the Canadian authorities and market actors. We consider that, if the current *de facto* exclusivity of the IC exception could be attributed *entirely* to private choice, there would be no "genuine relationship" between this exclusivity and the EU Seal Regime. We recall, in this respect, that the non-discrimination obligations in the covered agreements are only concerned with "*governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[1609] We also recognize that, to the extent that the EU Seal Regime has an adverse effect on the Canadian Inuit by depressing the international market for seal products, this adverse effect would be experienced by the Greenlandic Inuit as well and thus would not affect the conditions of competition between Canadian and Greenlandic Inuit.[1610]

5.337. Nevertheless, we are not persuaded that the European Union has made "comparable efforts"[1611] to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. For example, the Danish customs authorities processed imports based on certificates by the Greenlandic authorities prior to the Greenlandic entity obtaining recognized

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[1603] See Panel Reports, fn 499 to para. 7.315 (referring to Canada's first written submission to the Panel, paras. 37-48; and Canada's response to Panel question No. 84). ("Canada further submits that the Government of Nunavut has indicated that there has been no demand for Canadian Inuit products from European Union buyers since the coming-into-force of the ban. Therefore there has not been much incentive to pursue the marketing of seal products under the IC category.")

[1604] Panel Reports, para. 7.317.

[1605] European Union's other appellant's submission, para. 201.

[1606] European Union's other appellant's submission, fn 251 to para. 203 (quoting Canada's response to Panel question No. 71, para. 304). The European Union also quoted the following excerpt from a report by the government of Nunavut that the complainants put before the Panel:

> Due to logistics and the high cost of transporting seal pelts to market, the Government of Nunavut purchases sealskins from Inuit seal hunters, and then transport the skins for marketing to national and international buyers at no cost to the hunter. This program applies exclusively to ringed seals and terrestrial furbearers, with all pelts being sold at the Fur Harvesters Auction Inc. (FHA) bi-annual auction in North Bay, Ontario, Canada. Buyers and brokers from around the world attend these auctions to bid on a wide selection of wild fur species[.]

(European Union's other appellant's submission, fn 254 to para. 203 (quoting Nunavut 2012 Report, p. 2))

[1607] European Union's other appellant's submission, para. 203.

[1608] European Union's other appellant's submission, para. 203.

[1609] Appellate Body Report, *Korea – Various Measures on Beef*, para. 149. (emphasis original) See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 236.

[1610] The European Union argues that "the Panel disregarded the fact that the challenges for Inuit communities engaged in seal hunting for subsistence purposes are similar anywhere, including Canada and Greenland". (European Union's other appellant's submission, para. 203)

[1611] See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 122.

body status within the meaning of the Implementing Regulation.[1612] While the European Union has argued that it had "engaged in 'multiple efforts' to assist the Inuit in Canada to benefit from the IC exception"[1613], the European Union also observes that "the relevant Canadian Inuit authorities wrongly interpret the EU Seal Regime as requiring the Inuit communities to process their own sealskin products to fall under the IC exception".[1614] It would appear that the European Union has not pursued cooperative arrangements to facilitate the access of Canadian Inuit to the IC exception.[1615] We recall, in this regard, that a measure may result in arbitrary or unjustifiable discrimination "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[1616] For example, it appears to us that setting up a "recognized body" that fulfils all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances. Overall, we are not persuaded that the European Union has established that it has designed and implemented the EU Seal Regime in a manner that is not arbitrary or unjustifiable.[1617]

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

5.339. For these reasons, we find 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. It follows that the European Union has not justified the EU Seal Regime under Article XX(a) of the GATT 1994.

[1612] Panel Reports, fn 220 to para. 7.164, and para. 7.316. We note that there is no evidence that Canadian Inuit communities have attempted to export seal products to the European Union since the entry into force of the EU Seal Regime.

[1613] Panel Reports, para. 7.162 and fn 218 thereto (referring to European Union's response to Panel question No. 116 and "European Commission representative visits Iqaluit on good-will trip", *Nunatsiaq Online*, 23 April 2013 (Panel Exhibit EU-145)). The European Union also submits that "the EU authorities issued explicit invitations and made substantial efforts so that entities in Canada could also become recognised bodies and the Canadian Inuit communities could benefit from the IC exception". (European Union's other appellant's submission, para. 245 (referring to ibid., fn 241 to para. 196))

[1614] European Union's other appellant's submission, para. 200.

[1615] We note that, in *US – Gasoline*, the Appellate Body found it relevant that the United States had not pursued cooperative arrangements "to the point where it encountered governments that were unwilling to cooperate". (Appellate Body Report, *US – Gasoline*, p. 27, DSR 1996:I, pp. 25-26)

[1616] Appellate Body Report, *US – Shrimp*, para. 165.

[1617] We consider that our findings are not affected by the European Union's claims on this issue under Article 11 of the DSU. We therefore do not find it necessary to address those claims.

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 Importation and Marketing of Seal Products* (WT/DS400/R) (Canada 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 Canada 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 2.1 of the TBT Agreement, in paragraphs 7.319, 7.353, and 8.2(b) of the Canada Panel Report;

   ii. Article 2.2 of the TBT Agreement, in paragraphs 7.505 and 8.2(c) of the Canada Panel Report;

   iii. Article 5.1.2 of the TBT Agreement, in paragraphs 7.528, 7.547, and 8.2(d) of the Canada Panel Report; and

   iv. Article 5.2.1 of the TBT Agreement, in paragraphs 7.580 and 8.2(e) of the Canada 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 paragraphs 7.586 of the Canada 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 Canada 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 Canadian 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 Canada 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 Canada 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 Canada 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 Canada 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

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 request the European Union to bring its measure, found in this Report, and in the Canada Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 29th day of April 2014 by:

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Thomas Graham
Presiding Member

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Yueijiao Zhang
Member

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Seung Wha Chang
Member

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

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 request the European Union to bring its measure, found in this Report, and in the Norway Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 29th day of April 2014 by:

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Thomas Graham
Presiding Member

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Yueijiao Zhang
Member

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Seung Wha Chang
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS400/8

29 January 2014

(14-0510)

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

NOTIFICATION OF AN APPEAL BY CANADA
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 24 January 2014, from the Delegation of Canada, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 20 of the Working Procedures for Appellate Review, Canada notifies its appeal of certain issues of law in the Report of the Panel in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/R) and certain legal interpretations developed by the Panel in this Report.

First, Canada seeks review by the Appellate Body of the Panel's findings and conclusions with respect to the legitimate regulatory distinction test in Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement). Specifically, the Panel erred in its intermediate finding that the distinction between commercial and IC[1] hunts based on the purpose of the hunt is justifiable.[2] The Panel erred by formulating and applying the wrong legal test, and in doing so, failed to take into account relevant information about the negative impact of the IC exception on the identified objective of the EU Seal Regime.[3]

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts pertinent to its findings under Article 2.1 of the TBT Agreement with respect to the distinctions between commercial and IC hunts.[4]

Second, Canada seeks review by the Appellate Body of the Panel's findings and conclusion that the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement. This conclusion is incorrect as a matter of law, and is based on erroneous intermediate findings on issues of law and legal interpretation including the Panel's reasoning and findings with respect to whether the

[1] IC refers to "Inuit or other indigenous communities".
[2] See e.g. Panel Report, *EC – Seal Products*, paras. 7.283-7.300.
[3] The EU Seal Regime includes the Basic Regulation and the Implementing Regulation as set out in ibid. paras. 7.7-7.24.
[4] See e.g. ibid. paras. 7.227-7.245 and 7.261-7.271.

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] Specifically, in relation to the "contribution" element, the Panel erred in finding that the EU Seal Regime as a whole contributes to the identified objective by applying the wrong legal test and failing to articulate with sufficient specificity the extent of the contribution.[7] The Panel also failed to properly assess the risks non-fulfilment would create, or to conduct a relational analysis.[8] In relation to its reasoning and findings with respect to the reasonable availability of the alternative measure advanced by Canada, the Panel erred by comparing the wrong aspects of the EU Seal Regime with the alternative measure,[9] by disregarding measures applied by the European Union in comparable situations or similar product areas,[10] and by mis-interpreting and mis-applying Appellate Body jurisprudence.[11]

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts pertinent to the above-referenced intermediate findings with respect to Article 2.2 of the TBT Agreement, including its consideration and assessment of facts and evidence pertinent to the question of whether the EU Seal Regime contributes to the identified objective, and has negatively impacted demand in the European Union.

Third, Canada seeks review by the Appellate Body of the Panel's findings and conclusion with respect to Article XX of the GATT 1994. Canada submits that the Panel erred in finding that the EU Seal Regime is provisionally justified under Article XX(a). Specifically, the Panel failed to interpret and apply the first element[12] of Article XX(a) correctly, by ignoring the words "to protect", and thereby omitting to determine whether the sale in the European Union of products derived from commercial seal hunts created a risk to an EU public moral.[13] It also erred in its interpretation and application of the necessity test under Article XX(a) with respect to the issues of the contribution of the EU Seal Regime to the identified objective, and with respect to the reasonable availability of the alternative measure advanced by Canada already noted above in the context of Canada's request for review under Article 2.2 of the TBT Agreement.[14] In addition, although it came to the correct conclusion that the EU Seal Regime is not consistent with the requirements of the chapeau of Article XX, the Panel erred in its reasoning in coming to this conclusion.[15]

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in relation to its findings under Article XX(a) by failing to make an objective assessment of the facts by not taking into account evidence relating to animal welfare standards in the European Union, including standards applied to other wild animal hunts and commercial abattoirs.[16]

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[5] See e.g. ibid. paras. 7.446-7.460.
[6] See e.g. Panel Report, *EC – Seal Products*, paras. 7.496-7.504.
[7] See e.g. ibid. paras. 7.441-7.461.
[8] See e.g. ibid. paras. 7.462-7.465 and 7.500-7.504.
[9] See e.g. ibid. paras. 7.478-7.484 and 7.493-7.503.
[10] See e.g. ibid. para. 7.504, fn 815.
[11] See e.g. ibid. para. 7.502.
[12] The measure must be designed "to protect public morals".
[13] See e.g. ibid. paras. 7.631 and 7.383-7.411.
[14] See e.g. ibid. paras. 7.636-7.639.
[15] See e.g. ibid. paras. 7.649-7.650, referring back to paras. 7.256-7.300.
[16] See e.g. ibid. paras. 7.188 and 7.222-7.224.

ANNEX 2

WORLD TRADE ORGANIZATION

WT/DS401/9

29 January 2014

(14-0508)

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

NOTIFICATION OF AN APPEAL BY NORWAY
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 24 January 2014, from the Delegation of Norway, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), Norway hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS401) ("Panel Report").

2. Pursuant to Rules 20(1) and 21(1) of the *Working Procedures*, Norway files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Norway's ability to rely on other paragraphs of the Panel Report in its appeal.

* * *

4. Norway seeks review by the Appellate Body of the following errors of law and legal interpretation by the Panel in its Report, and requests the following findings by the Appellate Body.

I. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT*

1. With respect to the Panel's identification of the objective of the EU Seal Regime:[1]

5. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the facts as required under Article 11 of the DSU, when it found

[1] Panel Report, paras. 7.410 and 8.2(b).

that the objectives of the EU Seal Regime *do not* include protecting the interests of indigenous communities ("IC"), as reflected in the "IC requirements"[2] under the measure, and promoting the sustainable management of marine resources ("SRM"), as reflected in the "SRM requirements"[3] under the measure; and rather found that the EU Seal Regime pursues a *sole* "objective" of addressing "the moral concerns of the EU public with regard to the welfare of seals".[4] In particular, the Panel erred because:

- it failed properly to consider the text, legislative history, structure, design and operation of the EU Seal Regime in identifying the objectives of the EU Seal Regime, as required under Article 2.2;[5]

- in its assessment of the evidence regarding the objectives of the EU Seal Regime, the Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU;[6] and

- assuming it did properly assess the text, legislative history, structure, design and operation of the EU Seal Regime (*quod non*), the Panel erred under Article 2.2 in finding that the IC and SRM interests reflected in the IC and SRM requirements do not qualify as objectives.[7]

6. For the reasons provided in paragraph 5 above, Norway requests that the Appellate Body reverse the Panel's finding that the objectives of the EU *do not* include protecting IC interests and promoting SRM interests, and that the EU Seal Regime's *sole* objective is to address "the moral concerns of the EU public with regard to the welfare of seals". As a result, the Appellate Body should also reverse the Panel's ultimate finding, in paragraph 8.2(b) of the Panel Report, that the EU Seal Regime is not inconsistent with Article 2.2 of the *TBT Agreement*.

2. With respect to the Panel's finding the EU Seal Regime is "not more trade restrictive than necessary to fulfil" its objective:[8]

7. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the facts as required under Article 11 of the DSU, in finding that the EU Seal Regime is capable of making, and does make, some contribution to the identified objective of addressing EU public moral concerns.[9] In particular, the Panel erred because:

- it failed properly to interpret and apply Article 2.2, by failing to articulate with sufficient clarity and precision the degree or extent of the contribution made by the EU Seal Regime to its objective, and by concluding that the EU Seal Regime is capable of making, and does make, some contribution to EU public moral concerns;[10] and

- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the EU Seal Regime is capable of making, and does make, some contribution to the identified objective of addressing EU public moral concerns;[11] and

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[2] See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(1); Implementing Regulation, Exhibit JE-2, Article 3(1).
[3] See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Exhibit JE-2, Article 5(1).
[4] Panel Report, para. 7.410.
[5] Panel Report, paras. 7.372-7.411.
[6] Panel Report, paras. 7.372-7.411.
[7] Panel Report, para. 7.402. See also Panel Report, paras. 7.399 and 7.401.
[8] Panel Report, paras. 7.505 and 8.2(b).
[9] Panel Report, para. 7.460.
[10] Panel Report, paras. 7.441-7.461.
[11] Panel Report, paras. 7.441-7.461.

- 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 "sole 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 required 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 required under Article 11 of the DSU, in finding that one of the less trade-restrictive alternative measures proposed by Norway was not reasonably available to the European Union, having regard to the level of contribution of the alternative.[13] In particular, the Panel erred because:

- it held the alternative measure up to a benchmark level of contribution that was much higher than the degree of contribution it had found was achieved by the EU Seal Regime, contrary to Article 2.2;[14] and

- it failed to make an objective assessment of the facts under Article 11 of the DSU, by not addressing or making any findings with respect to other less trade-restrictive alternatives put forward by Norway.

10. For the reasons provided in paragraphs 7, 8, and 9 above, Norway requests that the Appellate Body reverse the Panel's finding that the EU Seal Regime is not more trade-restrictive than necessary to fulfil the legitimate objective.[15] As a result, the Appellate Body should also reverse the Panel's ultimate finding, in paragraph 8.2(b) of the Panel Report, that the EU Seal Regime is not inconsistent with Article 2.2 of the *TBT Agreement*.

II. REQUEST FOR LIMITED COMPLETION OF THE ANALYSIS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT*

11. If, as requested by Norway above, the Appellate Body reverses, for any reason, the Panel's findings under Article 2.2 of the *TBT Agreement*, Norway requests the Appellate Body to complete the legal analysis under Article 2.2 of the *TBT Agreement* and make the following limited findings:

- that, in addition to pursuing the EU public morals objective, the objectives of the EU Seal Regime *also include* protecting the interests of indigenous communities and promoting sustainable marine resource management;

- that promoting sustainable marine resource management is a legitimate objective; and

- that, by virtue of the three contested SRM conditions, the EU Seal Regime is more trade-restrictive than necessary to fulfil its legitimate objectives.

[12] See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Exhibit JE-2, Articles 5(1) and 5(1)(c).
[13] Panel Report, para. 7.504.
[14] Panel Report, paras. 7.467, 7.478-7.485 and 7.493-7.505.
[15] Panel Report, para. 7.505.

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 examined whether the EU Seal Regime as a whole was provisionally justified under that provision, whereas it was required, but failed, to consider whether the specific aspects of the measure that give rise to violations of substantive provisions of the GATT 1994 could fall under, and be provisionally justified by, sub-paragraph (a).[17] Norway, therefore, requests that the Appellate Body reverse the Panel's findings at paragraphs 7.639 and 8.3(d) that the EU Seal Regime falls under, and is provisionally justified by, sub-paragraph (a).

13. Norway also requests that the Appellate Body complete the analysis and find that the specific aspects of the measure that give rise to violations of the GATT 1994 do not fall under, and are not provisionally justified by, sub-paragraph (a) of Article XX.

14. If the Appellate Body disagrees with Norway's requests under paragraphs 12 and 13 above, Norway further considers that the Panel erred in interpreting and applying sub-paragraph (a) of Article XX, and failed to make an objective assessment of the matter, as required under Article 11 of the DSU. In particular, the Panel erred because:

- it failed properly to interpret and apply subparagraph (a) of Article XX by finding that the EU Seal Regime as a whole contributes "to a certain extent" to the measure's objective;[18]

- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the EU Seal Regime as a whole contributes "to a certain extent" to the measure's objective;[19]

- it failed to apply the proper legal standard under sub-paragraph (a) of Article XX as regards a less trade-restrictive alternative measure because it held the alternative measure up to a benchmark level of contribution that was much higher than the degree of contribution it had found was achieved by the EU Seal Regime;[20] and

- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, by not addressing or making any findings with respect to other less trade-restrictive alternatives put forward by Norway.

15. As a result of the errors identified in paragraph 14 above, Norway requests that the Appellate Body reverse the Panel's ultimate finding at paragraphs 7.639 and 8.3(d).

2. With respect to the Panel's finding that the EU Seal Regime reflects arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994:[21]

16. The Panel erred in interpreting and applying the chapeau of Article XX because, in determining whether the IC and SRM requirements are applied in a manner that reflect "arbitrary

[16] Panel Report, paras. 7.639 and 8.3(d).
[17] Panel Report, paras. 7.618-7.624.
[18] Panel Report, paras. 7.630-7.639.
[19] Panel Report, paras. 7.630-7.639.
[20] Panel Report, para. 7.639.
[21] Panel Report, paras. 7.651 and 8.3(d).

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.

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

ANNEX 3

WORLD TRADE ORGANIZATION

WT/DS400/9
WT/DS401/10

31 January 2014

(14-0537)

Page: 1/4

Original: English

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

NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 29 January 2014, from the Delegation of the European Union, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the *Working Procedures for Appellate Review*, the European Union hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *European Communities – Measures prohibiting the importation and Marketing of Seal Products* (WT/DS400/R, WT/DS401/R) (Panel Report).

1. THE PANEL ERRED BY FINDING THAT THE EU SEAL REGIME IS A TECHNICAL REGULATION WITHIN THE MEANING OF THE TBT AGREEMENT

2. The European Union appeals the Panel's conclusion that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.[1]

3. This conclusion is in error for the following reasons: 1) the Panel wrongly interpreted the terms "applicable administrative provisions" and wrongly concluded that the exceptions under the EU Seal Regime constitute applicable administrative provisions;[2] 2) the Panel wrongly established the scope of products characteristics under Annex 1:1 of the TBT Agreement, which led it to erroneously conclude that the criteria under the exceptions lay down product characteristics[3]; and 3) the Panel failed to make a holistic assessment of the measure at issue[4] and, thus, wrongly found that the measure as a whole is a "technical regulation" within the meaning of Annex 1:1 of the TBT Agreement.[5]

[1] See e.g. Panel report, para. 7.111. See also the conclusion under para. 8.2.a) of both reports.
[2] Panel report, para. 7.108.
[3] Panel report, para. 7.110.
[4] Panel report, para. 7.100, 7.106, footnote 153.
[5] Panel report, paras. 7.111, 7.125.

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 finding.

3. THE PANEL ERRED BY FINDING THAT THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE 2.1 TBT AGREEMENT BECAUSE THE IC EXCEPTION IS NOT DESIGNED AND APPLIED EVEN-HANDEDLY

9. The European Union also appeals the Panel's finding that the IC exception "is not designed and applied in an even-handed manner" and that, consequently, "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction".[9]

10. This finding is in error because the Panel misinterpreted and misapplied Article 2.1 of the TBT Agreement when examining the even-handedness in the design and application of the IC exception.[10] Rather than considering whether the IC exception was designed and applied in a reasonable, impartial and harmonious manner, having regard to its objective (i.e., the protection of the interest of the Inuit and other indigenous communities traditionally engaged in seal hunting for subsistence purposes), the Panel determined that the IC exception was available *de facto* exclusively to Greenland without examining the actions (and omissions) of the relevant Canadian (and Canadian Inuit) authorities and operators. The Panel also wrongly focused on the alleged similarities of Greenland's hunts to the commercial hunts. Those similarities, however, were irrelevant for assessing even-handedness, in view of the Panel's earlier finding that the Inuit hunts are conducted primarily for subsistence purposes and can be legitimately distinguished from the commercial hunts.[11]

11. Furthermore, the European Union submits in the alternative that this finding was based on several material inaccuracies leading to erroneous factual determinations as well as incoherent

[6] See e.g. Panel report, para. 7.275.
[7] See e.g. Panel report, footnote 676.
[8] See e.g. Panel report, footnotes 652 and 676.
[9] See e.g. Panel Report, para. 7.319.
[10] Panel Report, para. 7.317.
[11] Panel Report, paras. 7.288 and 7.289.

reasoning, contrary to the Panel's duties under Article 11 of the DSU. Specifically, the European Union challenges the Panel's finding that "the IC exception is available *de facto* exclusively to Greenland"[12] based on "the text of the IC exception, its legislative history, and the actual application of the IC exception".[13] The European Union also challenges the Panel's findings that "the degree of the commercial aspect of [Greenland's] hunts is comparable to that of the commercial hunts",[14] and that "the Inuit hunt [in Greenland] bears the greatest similarities to the commercial characteristics of commercial hunts".[15] The European Union submits that these errors are material. Consequently, the European Union requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter, contrary to Article 11 of the DSU, when finding that the IC exception was not currently designed and applied in an even-handed manner.[16]

12. In view of these fundamental errors, or any combination thereof, the European Union requests the Appellate Body to *reverse* the Panel's finding that the distinction made by the IC exception between IC and commercial hunts based on the purpose of the hunt "is not designed and applied in an even-handed manner" and, thus, that "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction".[17]

4. THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION DIMINISHES THE CONTRIBUTION OF THE EU SEAL REGIME TO ITS PUBLIC MORALS OBJECTIVE

13. The European Union appeals the Panel's finding, as part of its analysis under Article 2.2 of the TBT Agreement and Article XX(a) of the GATT 1994, that the IC exception "diminishes" the contribution of the EU Seal Regime to its public morals objective.[18]

14. This finding is in error because it is premised on the Panel's earlier erroneous finding that the IC exception bears no "rational relationship" to the public morals objective pursued by the EU Seal Regime. Accordingly, the European Union requests the Appellate Body to reverse this finding.

5. THE PANEL MADE AN ERRONEOUS INTERPRETATION OF ARTICLES I:1 AND III:4 OF THE GATT 1994

15. The European Union appeals the Panel's finding that it "do[es] not consider that the legal standard with respect to the non-discrimination obligation under Article 2.1 of the TBT Agreement 'equally applies' to claims under Articles I:1 and III:4 of the GATT 1994"[19]. The European Union submits that the Panel's finding constitutes an erroneous interpretation of Articles I.1 and III:4 of the GATT 1994. Therefore, the European Union requests the Appellate Body to reverse that finding.

[12] Panel Report, paras. 7.314 – 7.317.
[13] Panel Report, para. 7.317.
[14] Panel Report, para. 7.313.
[15] See e.g. Panel Report, para. 7.317.
[16] See e.g. Panel Report, paras. 7.317 and 7.319.
[17] Panel Report, para. 7.319. See also the conclusion under paragraph 8.2 (b) with regard to the complaint by Canada (DS 400).
[18] See e.g. Panel report, para. 7.460. See also Panel report, paras. 7.447-7.448, 7.451-7.452, 7.466 and 7.638.
[19] See e.g. Panel Report, para. 7.586.

6. THE PANEL'S FINDING THAT THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT IS IN ERROR BECAUSE THE PANEL FAILED TO CONSIDER WHETHER THE IC EXCEPTION INVOLVES A LEGITIMATE REGULATORY DISTINCTION

16. The European Union also appeals the Panel's application of its erroneous interpretation of Article I:1 of the GATT 1994 in reaching its finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994.[20] Accordingly the European Union requests the Appellate Body to reverse that finding.

7. SUBSIDIARILY, THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION IS NOT JUSTIFIED UNDER ARTICLE XX(A) GATT BECAUSE IT FAILS TO MEET THE REQUIREMENTS OF THE CHAPEAU

17. Were the Appellate Body to uphold the Panel's finding that the IC exception is inconsistent with Article I:1 of the GATT 1994, the European Union appeals the Panel's finding that the IC exception is not justified under Article XX(a) of the GATT 1994 because it fails to meet the requirements of the chapeau.[21]

18. The Panel's analysis of the even-handedness of the IC exception under Article 2.1 of the TBT Agreement contained several legal errors.[22] Should the Appellate Body reverse the Panel's finding that the IC exception "is not designed and applied in an even-handed manner" and, thus, that "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction",[23] the European Union requests the Appellate Body to also *reverse* the Panel's finding under the chapeau of Article XX(a) of the GATT 1994. The European Union further requests the Appellate Body to *complete the analysis* under the chapeau of Article XX(a) of the GATT 1994 and *find*, on the basis of the considerations made before, that the IC exception is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" and, accordingly, that the IC exception meets the requirements under Article XX(a) of the GATT 1994, including its chapeau.

8. SUBSIDIARILY, THE PANEL ERRED BY FINDING THAT THE EUROPEAN UNION HAD FAILED TO ESTABLISH A PRIMA FACIE CASE FOR ITS CLAIM THAT THE IC EXCEPTION IS JUSTIFIED UNDER ARTICLE XX(B) GATT

19. Finally, in the event that the Appellate Body were to 1) uphold the Panel's finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994; and 2) reverse the Panel's finding that the EU Seal Regime falls within the scope of GATT Article XX(a), the European Union appeals the Panel's finding that "the European Union has failed to establish a *prima facie* case for its claim under Article XX(b) [of the GATT]".[24] The European Union submits that in reaching this conclusion the Panel failed to fulfil its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU. Accordingly, the European Union requests the Appellate Body: 1) to reverse the Panel's finding that the European Union failed to establish a *prima facie* case under GATT Article XX(b); and 2) to complete the analysis under GATT Article XX(b) and find that the EU Seal Regime is justified under that provision.

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[20] See e.g. Panel Report, para. 7.600. See also the conclusion under para. 8.3 a) with regard to both complaints (DS 400 and DS 401).

[21] See Panel Report, para. 7.650. See also the conclusion under para. 8.3 d) with regard to both complaints (DS 400 and DS 401).

[22] See para. 9 above.

[23] Panel Report, para. 7.319.

[24] See e.g. Panel report, para. 7.640 and para. 8.3 e) of the conclusions and recommendations in boith WT/DS400 R and WTDS401/R.

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 United States. Japan provided an email communication indicating that it has no objection to Canada and Norway's request regarding public observation and logistical arrangements for the oral hearing. Mexico also indicated that it does not object to the request of Canada and Norway, but that its position is without prejudice to its systemic views on the public observation of oral hearings. The United States indicated its support for the request of the participants regarding the public observation of the hearing, and suggested that the Division accommodate the logistical requests of Canada and Norway to the extent possible to ensure that the participants are comfortable opening the hearing to the public.

3. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in 10 previous appeals.[1] In its rulings, the Appellate Body has held that it

[1] These proceedings are:
- *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R / WT/DS321/AB/R);
- *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/AB/RW2/ECU) and *Recourse to Article 21.5 of the DSU by the United States* (WT/DS27/AB/RW/USA);
- *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R);
- *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/AB/RW);
- *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/AB/RW);
- *Australia – Measures Affecting the Importation of Apples from New Zealand* (WT/DS367/AB/R);
- *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/R);
- *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353/AB/R);
- *United States – Certain Country of Origin Labelling Requirement* (WT/DS384/AB/R / WT/DS386/AB/R); and
- *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/AB/R) / *Canada – Measures Relating to the Feed-in Tariff Program* (WT/DS4126/AB/R).

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 the integrity of the appellate process. We concur with the reasons previously expressed by the Appellate Body, and its interpretation of Article 17.10 of the DSU, in this regard, and consider that it applies equally in circumstances such as those prevailing in these appellate proceedings.

4. In this appeal, Canada and Norway have requested that the Appellate Body allow observation by the public of the oral hearing by means of 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. We agree that such modalities would operate to protect confidential information in the context of a hearing that is open to public observation, and would not have an adverse impact on the integrity of the adjudicative function performed by the Appellate Body. We also consider that during public observation in previous appeals, the rights of those third participants that did not wish to have their oral statements made subject to public observation have been fully protected.

5. For these reasons, the Appellate Body Division in these appellate proceedings authorizes the public observation of the oral hearing on the terms set out below. Accordingly, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, we adopt the following additional procedures for the purpose of these appellate proceedings:

a. The oral hearing will be open to public observation by means of simultaneous closed-circuit television broadcast, shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.

b. Third participants wishing to maintain the confidentiality of their oral statements and responses to questions will not be subject to public observation.

c. Any request by a third participant wishing to maintain the confidentiality of its oral statements and responses to questions should be received by the Appellate Body Secretariat no later than 17:00 p.m. Geneva time on Monday, 10 March.

d. An appropriate number of seats will be reserved for delegates of WTO Members that are not participants or third participants in these proceedings in the separate room where the closed-circuit television broadcast will be shown. WTO delegates wishing to observe the oral hearing are requested to register in advance with the Appellate Body Secretariat.

e. Notice of the oral hearing will be provided to the general public on the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the Appellate Body Secretariat, in accordance with the instructions set out in the WTO website notice.

6. Further details regarding the logistical arrangements for the oral hearing will be provided separately to the participants and third participants.

Geneva, 5 February 2014

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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 by the third parties. In light of the difficulties raised and the reasons given by the participants, and having also considered the size and complexity of the appeals, the Division has scheduled the oral hearing for Monday, Tuesday, and Wednesday, 17 to 19 March 2014, in Centre William Rappard, 154 rue de Lausanne, Geneva.

4. Attached is an updated Working Schedule for Appeal, which includes the revised dates for the oral hearing. Further details regarding the oral hearing and the date of circulation of the Appellate Body reports will be provided to the participants and the third participants in due course.

Geneva, 5 February 2014

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