Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute

Stephanie Hartmann

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Stephanie Hartmann, Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute, 40 N.C. J. Int’l L. 629 (2014).
Available at: https://scholarship.law.unc.edu/ncilj/vol40/iss3/1

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute

Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol40/iss3/1
Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC–Seal Products Dispute

Stephanie Hartmann†

I: Introduction ........................................................................................................629
II: National Treatment Under the GATT Agreements ............................................634
III: EC–Seal Products ..............................................................................................643
   A. Background of the Dispute ..............................................................................643
   B. The Panel Decision ..........................................................................................644
      1. TBT Annex 1:1: Technical Regulation .........................................................644
      2. TBT Article 2.1 ..............................................................................................645
      3. GATT Article III:4 .........................................................................................649
      4. GATT Article XX(a) .......................................................................................650
      5. GATT Article XX Chapeau ..........................................................................651
   C. The Appellate Body Decision ..........................................................................652
IV: Implications of the Appellate Body Decision in EC–Seal Products ..................658
   A. The TBT National Treatment Obligation Is Less Strict Than That of the GATT ..................................................658
   B. It Is Nearly Impossible to Satisfy the Chapeau Test of GATT Article XX .......660
   C. The Appellate Body Has a Conflicted Relationship with the Issue of Intent ..................................................664
   D. Discriminatory Intent Can Be Addressed in the GATT Article XX Sub-Paragraphs ..................................670
V: Implication for Regulators ....................................................................................673
VI: Conclusion .........................................................................................................677

I: Introduction

In spite of the significant number of disputes brought before the Dispute Settlement Body of the World Trade Organization

† I would like to thank Prof. Christopher Parlin for his assistance in writing this article and Jordan Cox for all his love and support.
(WTO) since its inception in 1995,\textsuperscript{1} there has been a paucity of jurisprudence on one particular agreement under the General Agreement on Tariffs and Trade (GATT)\textsuperscript{2} umbrella of agreements, specifically the Agreement on Technical Barriers to Trade (TBT).\textsuperscript{3} This trend ended very recently when four disputes involving claims under the TBT were all decided in a relatively short two-year period.\textsuperscript{4} This sudden flood of decisions relating to the TBT has greatly expanded the scope of jurisprudence on this agreement and yielded some interesting results, particularly with respect to the interpretation of TBT Article 2.1 and the chapeau to GATT.

\textsuperscript{1} From 1995-2013, there have been 474 disputes initiated by a request for consultations. Kara Leitner & Simon Lester, WTO Dispute Settlement 1995-2013—A Statistical Analysis, 17 J. INT’L ECON. L. 191, 192 (2014).


Article XX.  

The three recently issued Appellate Body decisions in U.S.–Clove Cigarettes, U.S.–Tuna II, and U.S.–COOL are notable for their uniform approach to interpreting TBT Article 2.1 by incorporating the sixth recital of the preamble to the TBT as context, and using jurisprudence from the chapeau to GATT Article XX to inform this analysis. The panel report in EC–Seal Products takes this approach to generate its logical conclusion by replicating the analysis under TBT Article 2.1 under the chapeau of GATT Article XX, thereby taking a uniform approach to regulatory measures and the national treatment obligation under both agreements, the TBT and the GATT.  

This result was presciently anticipated by scholar Hajin Kim, but it is not clear that the EC–Seal Products panel’s approach is the best way to interpret the chapeau of GATT Article XX or that it is consistent with prior WTO jurisprudence on the chapeau. In fact, when the panel decision was appealed, the Appellate Body completely rejected the panel’s parallel interpretation of the national treatment obligations in the GATT and the TBT, and its transposition of analysis under TBT Article 2.1 to the chapeau.  

In doing so, the Appellate Body further clarified the legal standards applicable to the national treatment obligations of the GATT and the TBT.

This paper is primarily concerned with the principle of non-discrimination as it applies to the national treatment obligation.

---


10 Id.

11 A regulatory measure may also discriminate in a manner that violates the most-favored nation obligation. For example, the differential treatment in terms of negotiation between the United States and several South American countries in comparison with certain Asian countries gave rise to a most favored nation violation in the U.S.–Shrimp dispute. However, it is more likely that a superficially origin-neutral regulatory measure motivated by satisfying a domestic constituency will violate the national treatment
National treatment as a general principle "imposes an obligation of like treatment and non-discrimination between domestic and foreign goods." National treatment is implicated not just by tariffs, but also by non-tariff trade barriers that are facially non-discriminatory but function so as to impede trade. The aim of national treatment obligations is "to prevent domestic tax and regulatory policies from being used as protectionist measures that would defeat the purpose of tariff bindings" and to provide 'equal conditions of competition once goods had been cleared through customs." As a result, the national treatment obligations in the GATT Agreements have the potential to encroach on Member states’ right to pursue domestic regulatory objectives.

Trade liberalization is often perceived to be at odds with domestic regulatory interests, particularly in the area of environmental protections. Cases such as U.S.–Tuna I, U.S.–Gasoline, and U.S.–Shrimp, where environmental regulations were obligation by providing more favorable treatment to the domestic constituency’s products than like imported products. Therefore, this paper will focus on non-discrimination as it applies under the national treatment obligation in the context of regulatory measures.


13 Danielle Spiegel Feld, Ensuring that Imported Biofuels Abide by Domestic Environmental Standards: Will the Agreement on Technical Barriers to Trade Tolerate Asymmetrical Compliance Regimes?, 29 PACE ENVT'L. L. REV. 79, 93 (2011); see also Norbert L. W. Wilson, Clarifying the Alphabet Soup of the TBT and the SPS in the WTO, 8 DRAKE J. AGRIC. L. 703, 704 (2003).


16 Feld, supra note 13, at 97.

17 Kim, supra note 7, at 10,823. However, studies suggest concerns about a “race to the bottom” of regulatory standards due to trade liberalization are overblown and, in fact, the GATT Agreements are more likely to incentivize excessive, non-discriminatory regulation. See Robert W. Staiger & Alan O. Sykes, Int’l Trade, Nat’l Treatment, & Domestic Regulation, 40 J. LEGAL STUD. 149, 155 (2011) ("[L]arge’ nations may have an incentive to impose discriminatory product standards against imported goods once border instruments are constrained and ... inefficiently stringent standards may emerge . . . .")
struck down as unfairly applied, ignited a debate that cast the WTO as anti-environment and hostile to domestic environmental regulations. However, a more nuanced view of the interaction between the WTO agreements and domestic regulatory measures demonstrates that non-discriminatory standards can withstand scrutiny and, as stronger standards emerge, ensure added environmental benefits. The difficulty arises when exclusions or carve-outs are included in otherwise facially non-discriminatory regulatory measures to satisfy a domestic constituency. For example, the regulatory measures in U.S.–Clove Cigarettes and EC-Seal Products both included exceptions, the former for menthol cigarettes predominantly manufactured in the United States, and the latter for seal products resulting from Inuit hunts and marine resource management programs conducted in EU countries. A regulation that combines a prohibition on foreign or imported products with a carve-out for a domestic constituency is most likely to result in a finding of inconsistency with national treatment obligations due to unfair or uneven application of the regulation.

Section II of this paper discusses national treatment obligations under both the GATT and the TBT. Section III discusses the EC-Seal Products case, comparing the more textual approach of the panel with the Appellate Body’s strongly contextual approach to interpretation of the texts. Section IV analyzes the implications of the Appellate Body decision, including the implications that (1) the different standards applicable to the national treatment obligations in the GATT and the TBT potentially render the latter a nullity, and (2) satisfying the test for justifying a discriminatory regulation under the chapeau of GATT Article XX is nearly impossible. Additionally, the Appellate Body maintains its firm refusal to consider evidence of regulatory intent. However,

---

18 Kim, supra note 7, at 10,824, 10,832.
19 Id.
21 See Panel Report, EC-Seal Products, supra note 4, ¶ 7.1.
22 Id.
23 See infra Sec. V; see also Appellate Body Report, EC-Seal Products, supra note 4, ¶¶ 5.316–339.
24 See generally Appellate Body Report, EC-Seal Products, supra note 4 (demonstrating the Appellate Body’s refusal to consider Canada’s evidence of regulatory
because addressing intentional discrimination is part of the object and purpose of the GATT, discriminatory intent could, and should be addressed under the sub-paragraphs of GATT Article XX.25

Section V discusses implications for regulators of the EC–Seal Products decision, which builds on the other recently decided TBT disputes. The obvious takeaway is that the likelihood that a regulatory measure will be found inconsistent with WTO obligations increases dramatically if the measure includes carve-outs for domestic constituencies.26 Nevertheless, the political reality of domestic regulation and factors reducing the significance of an adverse WTO ruling suggest that Members will continue to include carve-outs in regulatory measures as necessary to satisfy domestic constituents.

II: National Treatment Under the GATT Agreements

Regulatory measures can be challenged as inconsistent with the principle of national treatment under two agreements—Article III:4 of the GATT 1994 and the analogous provision of the TBT, Article 2.1.27 The GATT and the TBT apply in parallel, making it possible for the same measure to be challenged under both agreements simultaneously.28 GATT Article III:4 applies to all internal laws, regulations, and requirements other than internal taxation measures.29 The TBT has a narrower scope, applying specifically to technical regulations and standards.30 “Technical regulation” is defined in Annex 1:1 of the TBT as any “document which lays down product characteristics, or their related processes and production methods . . . with which compliance is mandatory.”31 Technical regulations are distinguished from standards, in that compliance with the former is mandatory, while compliance with the latter is optional.32

The touchstone for interpretation of the WTO Agreements is

\[25\text{ See GATT 1994, supra note 2.}\]
\[26\text{ See infra Sec. V: IMPLICATION FOR REGULATORS }\]
\[27\text{ TREBILCOCK, ET AL., THE REGULATION OF INTERNATIONAL TRADE 309 (2013).}\]
\[28\text{ Id.}\]
\[29\text{ GATT 1994, supra note 2, art. III:4; TREBILCOCK, ET AL., supra note 27, at 138.}\]
\[30\text{ TREBILCOCK, ET AL., supra note 27, at 309.}\]
\[31\text{ TBT, supra note 3, Annex 1:1.}\]
\[32\text{ TREBILCOCK, ET AL., supra note 27, at 309.}\]
Article 3.2 of the Dispute Settlement Understanding (DSU), which provides that the WTO agreements, including the GATT and the TBT, are to be interpreted "in accordance with customary rules of interpretation of public international law." The Appellate Body has interpreted the reference to public international law in Article 3.2 to incorporate the Vienna Convention on the Law of Treaties (VCLT), which provides in Article 31 that "treat[ies] shall be interpreted in good faith in accordance with the ordinary meaning [o]f the terms of the treaty in their context and in light of its object and purpose." Supplementary tools of interpretation—such as subsequent agreements or evidence of the drafters' intent—may be used only to confirm the meaning derived from an Article 31 analysis, or to clarify when the Article 31 analysis yields an ambiguous or manifestly absurd or unreasonable result. While a panel or the Appellate Body may consider other WTO agreements in considering the ordinary meaning of the text under VCLT Article 31, they generally decline to consider the negotiating


36 VCLT Article 31(2) states that the "context" to Article 31(1) includes the text, its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Article 31(3) provides that additional context may come from any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. VCLT, supra note 34, art. 31(2), (3); see also Divya Murthy, Comment, The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPS Agreement and Public Health, 17 AM. U. INT’L L. REV. 1299, 1317-18 (2002).

37 See Appellate Body Report, U.S.—Shrimp, supra note 34, ¶¶ 129-30 (looking to other "modern international conventions and declarations" outside the GATT in performing an Article 31 ordinary meaning analysis of the term "exhaustible natural resources").
history of the texts.38

Accordingly, under DSU Article 3.2, an interpretation of GATT Article III:4 and TBT Article 2.1 should focus on the text of the two provisions, in context and in light of each agreement’s object and purpose. The text of the two provisions is roughly identical. Article III:4 of the GATT requires that Members ensure that their internal regulations do not discriminate against foreign goods,39 stating as follows:

The products of the territory of any contracting party imported into the territory of any contracting party shall be accorded treatment no less favorable 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.40

Panels and the Appellate Body have interpreted GATT Article III:4 as laying down a three-prong test: first, whether the products are like products; second, whether the measure is an internal law, regulation, or requirement; and third, whether the imported products are accorded less favorable treatment than like domestic products.41

TBT Article 2.1 sets forth a similar national treatment obligation that applies only to technical regulations. Article 2.1 states that “[m]embers 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.”42 Panels and the Appellate Body have interpreted TBT Article 2.1 by reference to GATT Article III:4, applying the same three-prong test laid out above,43 because of the


39 Feld, supra note 13, at 91.

40 GATT, supra note 2, art. III:4; TREBILCOCK, ET AL., supra note 27, at 154.


42 TBT, supra note 3, art. 2.1.

similarity in language of the two provisions.\textsuperscript{44}

The text of each provision must also be read in light of its context. GATT Article III must be read in conjunction with GATT Article XX, which provides a list of exceptions that allow WTO Members to introduce or maintain measures that are inconsistent with the substantive obligations of the GATT.\textsuperscript{45} The GATT Article XX exceptions serve the important function of allowing Members to participate in the WTO system while preserving certain aspects of national sovereignty over domestic policy issues.\textsuperscript{46} There is a three-part analysis under GATT Article XX whereby a measure found provisionally inconsistent with an obligation under the GATT must: first, be within the scope of one of the policy interests protected by the subparagraphs of Article XX; second, satisfy the relational clause of that subparagraph; and third, meet the requirements of the chapeau.\textsuperscript{47} The policy interests protected in the subparagraphs of Article XX include the protection of human, animal, or plant life or health.\textsuperscript{48} The chapeau of GATT Article XX was included to prevent the general exceptions of Article XX from being abused by a lack of good faith,\textsuperscript{49} and requires that a measure, provisionally justified under

\textsuperscript{44} Appellate Body Report, \textit{U.S.--Clove Cigarettes, supra} note 4, ¶¶ 99-100 (“We note that the language of the national treatment obligation of Article 2.1 of the TBT Agreement closely resembles the language of Article III:4 of the GATT 1994... The national treatment obligations of Article 2.1 and Article III:4 are built around the same core terms, namely, “like products” and “treatment no less favorable... The very similar formulation of the provisions, and the overlap in their scope of application in terms of technical regulations, confirm that Article III:4 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the TBT Agreement.”). See generally Simon Lester, \textit{Finding the Boundaries of International Economic Law}, 17 J. INT’L ECON. L. 3 (2014) (discussing the negotiating history of TBT Article 2.1).


\textsuperscript{46} Id. at 90-92; Christiane R. Conrad, \textit{Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals} 247, (2011) (“Article XX recognizes that the ability of any sovereign nation to act and promote the listed policy purposes is more important, even if such action is in conflict with various GATT obligations.”).


\textsuperscript{48} See GATT 1994, \textit{supra} note 2, art. XX(b).

\textsuperscript{49} Zleptnig, \textit{supra} note 45, at 116.
one of the subparagraphs of Article XX, not constitute arbitrary or unjustifiable discrimination or operate as a disguised restriction on trade.50

The TBT has no analogous provision to GATT Article XX providing for exceptions, and the GATT Article XX exceptions have never been interpreted as applicable to the TBT.51 However, there are two provisions of the TBT that, when combined with TBT Article 2.1, resemble GATT Article XX: TBT Article 2.2 and the sixth recital of the TBT preamble.52 In addition to the basic national treatment obligation in TBT Article 2.1, TBT Article 2.2 requires that technical regulations not be applied so as to create unnecessary obligations to international trade and to not be more trade-restrictive than necessary.53 This requirement is similar in content to the exceptions to the GATT in Article XX.54 However, unlike the exceptions in GATT Article XX, TBT Article 2.2 imposes an affirmative obligation of least-trade-restrictiveness, as opposed to permitting an exception to an obligation, so long as it is not more trade-restrictive than necessary.55 TBT Article 2.2 cannot be invoked as a defense to a violation of the TBT.56

The more important TBT provision, which informs TBT Article 2.1 and draws parallels between the interpretation of TBT Article 2.1 and of GATT Articles III:4 and XX, is the sixth recital of the preamble to the TBT.57 The trilogy of recent Appellate
Body decisions involving the TBT, *U.S.–Clove Cigarettes*, *U.S.–Tuna II*, and *U.S.–COOL*, significantly added to our understanding of the appropriate interpretation of TBT Article 2.1 by incorporating the sixth recital of the TBT preamble as context in interpreting Article 2.1. The sixth recital of the TBT preamble provides that countries may take measures necessary for the protection of animal or human life or health so long as the measures do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. The sixth recital is very similar in content to the affirmative defense under GATT Article XX(b) and the chapeau of Article XX. While the sixth recital does not technically operate as an affirmative defense, but rather is considered as context for the “treatment no less favorable” requirement in TBT Article 2.1, the Appellate Body has applied it as a burden-shifting device analogous to an affirmative defense. The combined effect of TBT Article 2.1 and the sixth recital of the preamble to the TBT balances between avoiding unnecessary trade restrictions and recognizing Members’ right to regulate, and mirrors the balance between the general obligations under the GATT and the general exceptions in GATT Article XX.

The Appellate Body first incorporated the sixth recital to the TBT as context for interpreting Article 2.1 in *U.S.–Clove Cigarettes*, where the Appellate Body held that the sixth recital suggests Members have a right to use technical regulations in pursuit of legitimate objectives, provided they do so in an even-
handed manner that does not constitute arbitrary or unjustifiable discrimination.64 If a measure is not de jure discriminatory, the particular circumstances of the case (namely the design, architecture, revealing structure, operation, and application of the technical regulation)65 must be scrutinized to determine if the regulation is even-handed in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.66 The Appellate Body determined that the U.S. measure banning imported clove cigarettes, but permitting domestically-produced menthol cigarettes, had a detrimental impact on competitive opportunities for clove cigarettes from Indonesia and therefore discriminated against the group of like-imported cigarettes.67 Furthermore, this discrimination did not stem from a legitimate regulatory distinction because the same concern over youth-smoking applied to both clove and menthol cigarettes.68 Consequently, the Appellate Body concluded that the measure accorded imported cigarettes less favorable treatment than domestic cigarettes, thereby violating TBT Article 2.1.69

In U.S.—Tuna II, the Appellate Body reiterated that the sixth recital "sheds light on the meaning ... of the 'treatment no less favorable' requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination."70

The analysis under TBT Article 2.1 of "treatment no less favorable" therefore incorporates language from the sixth recital of the preamble and requires more than just a showing of less favorable treatment or detrimental effect.71 If a complainant makes a prima facie case that a technical regulation treats imported goods less favorably, for example, by showing that the measure is not even-handed in application and thus inconsistent with TBT Article 2.1, then the respondent has an opportunity to show that

---

64 Appellate Body Report, U.S.—Clove Cigarettes, supra note 4, ¶95, 173.
65 Id. ¶182.
66 Id. ¶216.
67 Id. ¶¶221–24.
68 Id. ¶225.
69 Id. ¶226.
71 Id. ¶¶214–15.
the detrimental impact "stems exclusively from a legitimate regulatory distinction" and is not arbitrary or unjustifiable.\textsuperscript{72} The Appellate Body held that Mexico established a \textit{prima facie} case that the U.S. "dolphin-safe" labeling requirement had a detrimental impact on circumstances of competition for Mexican tuna disproportionately caught using a prohibited fishing method.\textsuperscript{73} The United States failed to rebut this case by showing that the detrimental impact on Mexican tuna stemmed exclusively from a legitimate regulatory distinction because the measure was not even-handed in addressing the risks to dolphins posed by other, non-prohibited fishing methods.\textsuperscript{74}

In its most recent decision to address the TBT, the Appellate Body in \textit{U.S.-COOL} followed the relevant guidance from \textit{U.S.-Clove Cigarettes} and \textit{U.S.-Tuna II} in interpreting TBT Article 2.1, specifically the term "treatment no less favorable."\textsuperscript{75} The Appellate Body reiterated that a measure with a detrimental impact on imported products "may not be inconsistent with [TBT] Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction."\textsuperscript{76} A regulatory distinction is not legitimate where it is "not designed and applied in an even-handed manner because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination . . . ."\textsuperscript{77} The Appellate Body held that the U.S. country of origin labeling requirements had a detrimental impact on imported livestock because it incentivized U.S. producers to process exclusively U.S.-origin livestock.\textsuperscript{78} Additionally, the detrimental impact was not based on a legitimate regulatory distinction.\textsuperscript{79} The measure necessitated segregating imported livestock; there was also a disconnect between the detailed recordkeeping and verification requirements on producers mandated by the measure, and the minimal information provided

\textsuperscript{72} Id. \S 216.
\textsuperscript{73} Id. \S 284.
\textsuperscript{74} Id. \S\S 292, 297--98.
\textsuperscript{75} Appellate Body Report, \textit{U.S.-COOL}, supra note 4, \S 269.
\textsuperscript{76} Id. \S 270.
\textsuperscript{77} Id.
\textsuperscript{78} Id. \S\S 289, 292.
\textsuperscript{79} Id. \S 330.
to consumers on origin—the ostensible purpose of the measure. The measure was not applied in an even-handed manner, and thus violated TBT Article 2.1, because "the regulatory distinctions imposed by the COOL measure amounted to arbitrary and unjustifiable discrimination against imported livestock . . ." The GATT and the TBT offer distinct approaches to determining that a regulation is discriminatory, and therefore inconsistent with a substantive obligation, while permitting the respondent to justify the discriminatory aspects of a regulation as legitimate and not arbitrary or unjustifiable. The TBT is generally interpreted as imposing stricter obligations, albeit with a narrower scope of application, namely only covering technical regulations, because it does not have an analogous set of exceptions as in GATT Article XX. Nevertheless, one commentator argues that the Appellate Body’s application of the “arbitrary or unjustifiable” standard in GATT Article XX chapeau, effectively requiring an affirmative showing of positive conduct taken to ameliorate discriminatory effect, has prevented successful utilization of the Article XX affirmative defenses. In contrast, the TBT jurisprudence more easily justifies regulations because of the reduced burden on respondents of merely demonstrating "even-handedness" or a lack of discriminatory intent. This relative weighing of the burdens imposed by the nondiscrimination obligations in the GATT and the TBT, gleaned from the three prior TBT decisions discussed above, was tested and confirmed in EC–
III: EC–Seal Products

A. Background of the Dispute

Canada and Norway brought a dispute against the European Union (EU) at the WTO alleging that an EU regulatory regime prohibiting the importation and sale of seal products violated the EU's WTO obligations. The regulatory regime, termed the EU Seal Regime, was composed of two primary regulations, a Basic Regulation and an Implementing Regulation, and prohibited the importation or sale of seal products in the EU unless certain conditions were met. The conditions provided two primary exceptions: an exception for “seal products obtained from seals hunted by Inuit or indigenous communities” (IC exception) and an exception for “seal products obtained from seals hunted for marine resource management” (MRM exception). These exceptions to the basic ban on the sale of seal products were provided for in Articles 3:1 and 3:2(b) of the Basic Regulation, respectively.

88 Id. ¶ 2.2 (noting that the Basic Regulation was “Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, adopted September 16, 2009”).
90 Id. ¶ 7.105 (prohibiting “all seal products, whether they are made exclusively of seal or contain seal as an input”).
91 Id. ¶¶ 7.1, .45 (“[T]he practical implication of [the measure] is that seal products derived from hunts other than IC or MRM hunts cannot be imported and/or placed on the EU market.”).
92 Id. ¶ 7.1.
93 Panel Report, EC–Seal Products, supra note 4, ¶ 7.12. Article 3:1 “conditions for placing on the market, provided 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.” Id. Article 3:2(b) provided that derogation from Article 3:1 was permitted 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.” Id. The MRM exception was further limited to sales on a nonprofit basis. Id. The Implementing Regulation further clarified that for seal products to fall under the IC exception, the seal products must originate from seal hunts that satisfy the following
Canada and Norway challenged the EU Seal Regime as inconsistent with Articles I:1, III:4, XI:1, and XXIII:1(b) of the GATT 1994; Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT; and Article 4.2 of the Agreement on Agriculture.  

B. The Panel Decision

The Panel found that the EU Seal Regime violated TBT Article 2.1 and GATT Articles I:1 and III:4, and thus could not be justified under GATT Article XX(a) or (b).

1. TBT Annex 1:1: Technical Regulation

The panel first considered "the complainants' claims under the TBT Agreement"; as a preliminary matter, the panel had to "determine whether the EU Seal Regime constitute[d] a 'technical regulation' within the meaning of Annex 1:1 of the TBT Agreement and thus [fell] within the scope of the Agreement." The Appellate Body has developed a three-part test to establish whether a document qualifies as a technical regulation: (1) "the document must apply to an identifiable product or group of products," (2) "the document must lay down one or more characteristics of the product," and (3) "compliance with the product characteristics must be mandatory." The parties agreed that the measure satisfied the first and third requirements, and the

conditions: the hunts must be "conducted by Inuit or other indigenous communities with a tradition of seal hunting in the community and in the geographical region"; the products from the hunts must be "partly used, consumed[,] or processed within the communities according to its traditions"; and the hunts must "contribute to the subsistence of the community." Commission Regulation 737/2010, art. 3, 2010 O.J. (L 216) 1, 2 (EU). The Implementing Regulation also provided that to fall within the MRM exception, seal products must originate from seal hunts that satisfy the following conditions: the hunts must be "conducted under a national or regional natural resources management plan which uses scientific population models... and applies the ecosystem-based approach"; the hunts must "not exceed the total allowable catch quota established" according to the aforementioned management plan; and the by-products of the hunts must be "placed on the market in a nonsystematic way on a nonprofit basis." Id. art. 5.

94 Panel Report, EC–Seal Products, supra note 4, ¶ 3.1, .4.
95 Id. ¶¶ 7.353, .505,.600,.609.
96 Id. ¶¶ 7.640,.651.
97 Id. ¶ 7.83.
The only issue in dispute was whether the measure, which consisted of a prohibition and certain exceptions, sufficiently laid down product characteristics. The panel first noted that "for a measure consisting of a ban and certain exceptions to qualify as a technical regulation," it was not necessary that "both the prohibition and the exceptions... indvidually lay down product characteristics." The panel then concluded that the second requirement of the test was met because "the EU Seal Regime... as a whole [laid] down characteristics for all products" containing seal and "[laid] down the applicable administrative provisions for certain products... that [were] exempted" from the measure's prohibition on seal products. Consequently, the measure was a technical regulation that fell within the scope of Annex 1:1 of the TBT Agreement.

2. TBT Article 2.1

The panel then considered whether the EU Seal Regime was inconsistent with TBT Article 2.1. Having found that the measure was a technical regulation, the panel followed the approach to TBT Article 2.1 laid out by the Appellate Body in U.S.–Clove Cigarettes, asking first whether "the imported and domestic... products at issue" were alike, and second whether "the treatment accorded the imported products [was] less favourable than that accorded to like domestic... products." The panel concluded that the imported and domestic products were like products because the only distinction between seal products that conform to the EU Seal Regime and those that do not conform is the type or purpose of the seal hunt from which the products

100 Id. ¶¶ 7.114–16, 7.120–125.
101 Id. ¶ 7.102.
102 Id. ¶ 7.100.
103 Id. ¶ 7.111.
104 Id. ¶ 7.125.
106 Id. ¶ 7.129, n.173. In U.S.–Clove Cigarettes, the Appellate Body stated that it was appropriate to look to GATT Article III:4 as context in interpreting TBT Article 2.1. Appellate Body Report, U.S.–Clove Cigarettes, supra note 4, ¶ 87.
107 Panel Report, EC–Seal Products, supra note 4, ¶ 7.129; Appellate Body Report, U.S.–Clove Cigarettes, supra note 4, ¶ 87 (completing the same analysis only after determining whether a measure at issue is a "technical regulation").
were derived,\textsuperscript{108} which does not affect any of the four criteria relevant to whether products are "like" under GATT Article III:4.\textsuperscript{109}

The panel then went on to consider whether there was less favorable treatment, asking whether the EU Seal Regime causes a detrimental impact on competitive opportunities for imported products and whether any detrimental impact on imports can be explained by a legitimate regulatory distinction.\textsuperscript{110} Whether a measure has a detrimental impact on competition depends on "the design, structure, and expected operation of the measure," as well as any relevant market features.\textsuperscript{111} The panel found that the IC exception was designed so that all or virtually all seal products from Greenland would be able to access the EU market\textsuperscript{112} and that the MRM exception was designed to allow all or virtually all seal products from Sweden only to access the EU market.\textsuperscript{113} The fact that a small number of Canada's seal products "could enter the EU market [did] not change the fact that the vast majority of Canada's seal products [were] in fact excluded" from the market as nonconforming.\textsuperscript{114} Therefore, the panel concluded that the EU Seal Regime had "a detrimental impact on the competitive opportunities" of imported seal products.\textsuperscript{115}

Having found that there was a detrimental impact, the panel finished its analysis under TBT Article 2.1 by asking whether that detrimental impact stemmed "exclusively from legitimate

\textsuperscript{108} Panel Report, EC--Seal Products, supra note 4, ¶¶ 7.138--139.

\textsuperscript{109} Id. ¶¶ 7.139--140. The four criteria relevant under GATT Article III:4 are: (a) the properties of the products, (b) "the end-uses of the products," (c) "consumers' tastes and habits," and (d) "the tariff classification of the products." Appellate Body Report, European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 101, WT/DS135/AB/R (Mar. 12, 2001).

\textsuperscript{110} Panel Report, EC--Seal Products, supra note 4, ¶¶ 7.130--132.

\textsuperscript{111} Id. ¶¶ 7.156--157 (explaining how relevant features could include "particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, as well as historical trade patterns"); Appellate Body Report, U.S.--COOL, supra note 4, ¶ 269. A determination that a measure has a detrimental impact on competitive opportunities for imported products does not have to be "based on the actual effects of the contested measure in the market place." Panel Report, EC--Seal Products, supra note 4, ¶ 7.156.

\textsuperscript{112} Panel Report, EC--Seal Products, supra note 4, ¶ 7.164.

\textsuperscript{113} Id. ¶¶ 7.167--168 n.228.

\textsuperscript{114} Id. ¶ 7.163.

\textsuperscript{115} Id. ¶ 7.170.
The regulatory distinctions made in the EU Seal Regime were between conforming and nonconforming products, namely products that fall within the IC and MRM exceptions and those that do not. In analyzing whether the distinctions between seal hunting under the IC and MRM exceptions and commercial hunting were legitimate, the panel followed the example of the Appellate Body in *U.S.—Clove Cigarettes* and looked to Appellate Body guidance in previous disputes concerning obligations under the chapeau of GATT Article XX. The chapeau to GATT Article XX provides that a measure must not be "applied in a manner [that] would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail ...." Meeting this standard is necessary in order for a measure that has been found to be discriminatory, and therefore inconsistent with one of the substantive obligations of the GATT, to fall within an exception under Article XX.

Under the chapeau to Article XX, discrimination is arbitrary or unjustifiable where "the cause or rationale of the discrimination does not rationally relate to the objective of the measure." The panel combined the guidance of the Appellate Body under TBT Article 2.1 and the chapeau to GATT Article XX to craft a three-part test for "the legitimacy of a regulatory distinction," asking first, whether the regulatory distinction between commercial and noncommercial (i.e. IC and MRM) seal hunts was rationally related "to the objective of the EU Seal Regime," in order "to address the moral concerns of the EU public with regard to the welfare of seals"; second, if not, whether there exists "any

---

116 Id. ¶ 7.172.
117 Id. ¶ 7.176. These distinctions were based on several criteria: "[T]he identity of the hunter; the type of hunt; the purpose of the hunt; and the way ... the products [were] marketed." Id.
119 GATT 1947, supra note 2, art. XX.
120 See id.
123 Id. ¶ 7.274.
cause or rationale that can justify the distinction;\textsuperscript{124} and third, whether the distinction is "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination such that it lacks even-handedness."\textsuperscript{125} A regulatory distinction must pass either the first or the second part of the test and the third part of the test to be considered legitimate.\textsuperscript{126}

The panel applied its three-part test to the IC exception and found that the regulatory distinction was not legitimate because it failed the third requirement of being designed and applied in an even-handed manner.\textsuperscript{127} Although the IC exception failed the first part of the test, because the same animal welfare concerns arising from commercial seal hunts also exist in IC hunts,\textsuperscript{128} the second part of the test was satisfied because the purpose of the IC hunts, for the subsistence and culture of Inuit communities, was different from the purpose of commercial hunts.\textsuperscript{129} Nevertheless, the panel concluded that the IC hunts failed the third part of the test because the IC exception was crafted to apply exclusively to Inuit hunts in Greenland, and therefore "was not designed or applied in an even-handed manner . . . ."\textsuperscript{130}

The panel then applied the three-part test to the MRM exception and concluded that it failed all three parts.\textsuperscript{131} The MRM exception failed the first part of the test because the same animal welfare concerns arising from commercial seal hunts also exist in MRM hunts, and therefore the regulatory distinction between commercial and noncommercial seal hunts does not bear a rational relationship to the objective of the measure.\textsuperscript{132} The MRM exception failed the second part of the test because the purpose of the MRM hunts included a commercial aspect, and thus was no different from the purpose of commercial hunts.\textsuperscript{133} Finally, the MRM exception failed the third part of the test because the MRM

\textsuperscript{124} Id. ¶ 7.259.
\textsuperscript{125} Id. (internal quotation marks omitted).
\textsuperscript{126} See id.
\textsuperscript{127} Id. ¶ 7.319.
\textsuperscript{128} Panel Report, EC–Seal Products, supra note 4, ¶ 7.275.
\textsuperscript{129} Id. ¶¶ 7.289, .300.
\textsuperscript{130} Id. ¶ 7.317.
\textsuperscript{131} Id. ¶¶ 7.337–.340.
\textsuperscript{132} Id.
\textsuperscript{133} Id. ¶¶ 7.343, .346.
exception was designed to apply to seal products from certain EU member states, namely Sweden, Finland, and possibly the United Kingdom, and therefore was not designed in an even-handed manner.\textsuperscript{134} The panel therefore concluded that the IC and MRM exceptions were inconsistent with TBT Article 2.1 because “the detrimental impact caused by the IC exception” did not stem “exclusively from a legitimate [regulatory] distinction.”\textsuperscript{135}

Instead of asserting a violation of TBT Article 2.1 as Canada did, Norway alleged that the EU Seal Regime violated GATT Article I:1 by restricting market access to a limited group of countries, namely Greenland.\textsuperscript{136} GATT Article I:1 imposes an obligation of most-favored nation treatment.\textsuperscript{137} A measure violates GATT Article I:1 where it provides an advantage to products originating in one Member country, but does not immediately provide the same advantage to products originating in other Member countries.\textsuperscript{138} The panel found that because the EU Seal Regime granted an advantage of access to the EU market for seal products from Greenland,\textsuperscript{139} and did not “immediately and unconditionally” extend the same market access advantage to Norway’s imports, it thereby violated GATT Article I:1.\textsuperscript{140}

3. \textit{GATT} Article III:4

Finally, the panel analyzed the EU Seal Regime under the national treatment obligation of GATT Article III:4.\textsuperscript{141} The panel compared the analysis under TBT Article 2.1 and GATT Article III:4, noting that the former permits a measure which has a detrimental impact on imports if there is a legitimate regulatory distinction, whereas the latter’s “treatment no less favorable” standard categorically prohibits WTO [M]embers from modifying the conditions of competition…to the detriment of imports.\textsuperscript{142} The stricter standard under GATT Article III:4 reflects the availability

\textsuperscript{135} Id. ¶¶ 7.319, .353.
\textsuperscript{136} Id. ¶¶ 7.588–.590.
\textsuperscript{137} GATT 1947, supra note 2, art. I:1.
\textsuperscript{139} Id. ¶ 7.597.
\textsuperscript{140} GATT 1947, supra note 2, art. I:1.
\textsuperscript{141} Id. ¶ 7.585.
\textsuperscript{142} Appellate Body Report, \textit{EC–Seal Products}, supra note 4, ¶ 5.117.
of the general exceptions clause in GATT Article XX, which can be used to justify a measure found to be inconsistent with Article III:4.143 There is a three-part test under GATT Article III:4, which asks first, whether the measure is a law, regulation, or requirement “affecting [the] internal sale, offering for sale, purchase ... or use” of goods; second, whether the products at issue are “like;” and third, whether the imported products are accorded less favorable treatment than that accorded to like domestic products.144 The panel found that the EU Seal Regime was a law or regulation and, as previously discussed in the context of TBT Article 2.1, the imported and domestic products at issue are “like” within the meaning of GATT Article III:4.145 Finally, the third element of the test under Article III:4 was met because the EU Seal Regime excludes virtually all Canadian and Norwegian seal products from the EU market while excepting products from certain EU countries, thereby according less favorable treatment to imported products than the like domestic products.146 Consequently, the EU Seal Regime was inconsistent with GATT Article III:4.147

4. GATT Article XX(a)

The EU attempted to justify its measure as falling within the exception in GATT Article XX(a), for measures necessary to protect public morals.148 In order for a measure to fall within one of the exceptions under GATT Article XX, a respondent must demonstrate that three elements are met: first, the measure must fall within the scope of the subparagraph invoked; second, the relational clause of the subparagraph must be satisfied; and third, the measure must meet the requirements of the chapeau.149 The panel found that the first element of the exceptions test was met because the policy objective pursued by the EU in enacting the EU

143 Id.
144 Id. ¶ 7.605; see also Appellate Body Report, Korea–Beef, supra note 41, ¶ 133 (noting the three elements required in order to avoid a violation of Article III:4).
146 Id. ¶ 7.608.
147 Id. ¶ 7.609.
148 Id. ¶ 7.640. The EU also tried to justify the measure under GATT Article XX(b), for measures necessary to protect human, animal or plant life or health, but the panel found that the EU failed to make a prima facie case with respect to Article XX(b). Id.
Seal Regime, to address the public moral concerns on seal welfare, fell within the scope of Article XX(a): to protect public morals. The panel also found that the second element, satisfaction of the relational clause, was met because the measure contributed sufficiently to the objective of addressing public moral concerns on seal welfare and there were no reasonably available, less trade-restrictive alternatives.

5. **GATT Article XX Chapeau**

Nevertheless, the panel concluded that the measure could not be justified under GATT Article XX because the requirements of the chapeau were not met. The chapeau to GATT Article XX requires that measures not be “applied in a manner [that] would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail . . . .” Here, the panel recalled that the TBT and the GATT 1994 are to be read in context, and referred to its prior analysis under TBT Article 2.1, under which discrimination is arbitrary or unjustifiable where a regulatory distinction is not rationally related to the objective of the measure or not otherwise based on justifiable grounds, and where a regulatory distinction is not applied in an even-handed manner. The panel then reiterated its findings that the regulatory distinction in the IC exception is otherwise justifiable, despite the lack of a rational connection to the measure’s objective, but nevertheless arbitrary and unjustifiable because of a lack of even-handedness in application. Additionally, the MRM exception is arbitrary and unjustifiable because it is not rationally related to “the objective of the EU Seal Regime,” nor otherwise justifiable, and “not designed [or] applied in an even-handed manner.” Consequently, the EU Seal Regime

---

151 *Id.* ¶¶ 7.638–639.
152 *Id.* ¶ 7.643.
153 GATT 1947, supra note 2, art. XX.
155 *Id.* ¶ 7.289. The IC exception is otherwise justifiable because the purpose of the IC hunts, for the subsistence and culture of Inuit communities, was different from the purpose of commercial hunts. *Id.* ¶ 7.300.
156 *Id.* ¶ 7.650.
157 *Id.*
does not meet the requirements of the chapeau and cannot be justified under GATT Article XX.\textsuperscript{158}

\textbf{C. The Appellate Body Decision}

The Appellate Body decision in \textit{EC–Seal Products} illustrates the correct approach to a contextual analysis and highlights a fundamental inconsistency in the panel’s analysis.\textsuperscript{159} One of the pitfalls that plagues the panel report, and many Members’ approach to interpretation, is that the panel, when analyzing the context of a term, looked for identical text in other articles or agreements and then adopted the same interpretation broadcloth, treating it as conclusive without considering \textit{differences} in the two textual provisions.\textsuperscript{160} This approach is a fundamental misapplication of contextualism, as can be demonstrated by comparing the relationship between TBT Article 2.1 and GATT Article III:4 with the relationship between TBT Article 2.1 and the chapeau to GATT Article XX.\textsuperscript{161}

The Appellate Body upheld the majority of the panel’s findings while squarely disagreeing with the panel’s analysis, particularly with regard to the chapeau to GATT Article XX.\textsuperscript{162} Nevertheless, the Appellate Body did reverse the panel’s findings with respect to the TBT Agreement because there were insufficient

\textsuperscript{158} \textit{Id.} ¶ 7.651.


\textsuperscript{160} \textit{See id.} ¶ 5.308; \textit{see also} Panel Report, \textit{EC–Seal Products}, supra note 4, ¶ 7.258 (using the “similarities in their texts” to justify interpreting “whether discrimination is ‘arbitrary or unjustifiable’ under the chapeau” under the TBT Agreement through past analysis of GATT 1994).

\textsuperscript{161} \textit{Compare} TBT, supra note 3, art. 2.1 (“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.”), \textit{with} GATT 1947, \textit{supra} note 2, art. III:4 (“The products of the territory of any contracting party imported into the territory of any other contracting party 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.”), \textit{and id.} art. XX, chapeau (“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 contracting party of measures . . .” obligated under the General Agreement.).

facts to determine whether the EU Seal Regime falls within its scope. Article 2 of the TBT applies only to "technical regulations," which are defined in Annex 1:1 of the TBT as "[d]ocument[s] which lay[ ] down product characteristics or their related processes and production methods . . . ." The Appellate Body reversed the panel’s finding that the EU Seal Regime constitutes a technical regulation under TBT Annex 1:1, finding that the panel improperly characterized the measure as laying down product characteristics without fully examining its design and operation. The Appellate Body then determined that neither the prohibition on seal products nor the exceptions to the prohibition under the EU Seal Regime prescribe or impose any characteristics on seal products. Having found that the EU Seal Regime does not establish product characteristics, and therefore cannot constitute a technical regulation on that basis, the Appellate Body declined to complete the legal analysis of “whether the EU Seal Regime lays down ‘. . . processes and production methods’ within the meaning of [TBT] Annex 1:1,” because the issue was not fully examined at the panel stage. Consequently, the Appellate Body concluded that it was unable to determine whether the measure at issue, the EU Seal Regime, falls within the scope of the TBT, and therefore reversed all of the panel’s findings under TBT Articles 2.1, 2.2, 5.1.2, and 5.2.1. Consequently, the Appellate Body did not address the specifics of the panel’s reasoning under TBT Article 2.1.

The Appellate Body did, however, address the panel’s analysis of GATT Articles III:4. After upholding the panel’s finding of a violation under GATT Articles I:1, the Appellate Body turned to Article III:4, specifically the issue of whether “the legal standard under . . . 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

163 See id. ¶¶ 5.27–29.
164 TBT, supra note 3, art. 2, Annex 1:1.
166 Id. ¶¶ 5.27–29.
167 Id. ¶¶ 5.35, 5.54–57.
168 Id. ¶¶ 5.61, 5.69.
169 Id. ¶ 5.70.
170 Id. ¶ 5.96.
distinction."\textsuperscript{171} The EU argued in favor of incorporating the concept of a "legitimate regulatory distinction" into Article III:4 because of the clause "treatment no less favorable," which also appears in TBT Article 2.1.\textsuperscript{172} The Appellate Body, in the few recent decisions that have analyzed TBT Article 2.1, has consistently interpreted "treatment no less favorable" in TBT Article 2.1 to permit differential treatment, \textit{i.e.} a detrimental impact on competitive opportunities for like imported products, so long as the difference in treatment stems exclusively from a legitimate regulatory distinction.\textsuperscript{173}

Nevertheless, the Appellate Body upheld the panel’s finding that, in spite of the identical terminology in GATT Article III:4 and TBT Article 2.1, it was not appropriate to read into the former the latter’s exception for a detrimental impact, which is based on a legitimate regulatory distinction.\textsuperscript{174} The mere fact that the two provisions impose "similar [legal] obligations" does not mean that they "must be given identical meanings."\textsuperscript{175} The Appellate Body affirmed that the phrase "treatment no less favorable" in TBT Article 2.1 must be read in the context of the sixth recital of the preamble to the TBT Agreement, which recognizes the right of Member countries to take necessary regulatory measures.\textsuperscript{176} In contrast, the balance between a Member’s right to regulate and

\textsuperscript{171} Appellate Body Report, \textit{EC-Seal Products}, supra note 4, ¶ 5.97. The EU did not challenge the panel’s ultimate finding that the measure at issue violates GATT Article III:4 because it has a detrimental impact on competitive conditions for like imported products from Canada and Norway, rather, it only challenged the panel’s interpretation of the phrase "treatment no less favorable" in Article III:4. \textit{Id.} ¶ 5.130, n.1071.

\textsuperscript{172} See supra note 161 (comparing TBT Article 2.1 with GATT Article III:4).

\textsuperscript{173} See Appellate Body Report, \textit{U.S.-Clove Cigarettes}, supra note 4, ¶¶ 169, 174, 182, 194 ("[A] panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."); see also Appellate Body Report, \textit{U.S.-Tuna II}, supra note 4, ¶ 215 ("[A] panel should... seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products \textit{vis-à-vis} the group of like domestic products or like products originating in any other country."); Appellate Body Report, \textit{U.S.-COOL}, supra note 4, ¶ 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner[,]... that distinction cannot be considered ‘legitimate’... ").

\textsuperscript{174} Appellate Body Report, \textit{EC-Seal Products}, supra note 4, ¶ 5.117.

\textsuperscript{175} \textit{Id.} ¶ 5.123.

\textsuperscript{176} \textit{Id.} ¶ 5.122.
obligation not to discriminate in the GATT is satisfied by a separate general exceptions clause in Article XX. Consequently, there is no need to read an exception for legitimate regulatory distinctions into GATT Article III:4. A contextual interpretation based on the differences in the two provisions thus trumps a strictly textual interpretation, which would treat identical phraseology consistently.

The emphasis on differences in context versus identical text can also be seen in the Appellate Body’s analysis of the chapeau to GATT Article XX. The Appellate Body first upheld the panel’s finding that the EU Seal Regime is “necessary to protect public morals” within the meaning of GATT Article XX(a). The Appellate Body affirmed the panel’s analysis under GATT Article XX(a), finding that the panel properly considered “both the prohibitive and permissive aspects of the EU Seal Regime” in “weighing and balancing” the importance of the objective, the “trade-restrictiveness” of the measure, the contribution of the measure to the goal of “protecting public morals,” and “less-restrictive alternatives.”

The Appellate Body then turned to the issue of the chapeau to GATT Article XX. After a very thorough review of prior Appellate Body decisions interpreting the chapeau, the Appellate Body flatly rejected the panel’s approach of applying the same legal test to the Article XX chapeau as it applied under TBT Article 2.1. The panel, in choosing to replicate its analysis under TBT Article 2.1, cited the Appellate Body’s prior observations regarding the relationship between the GATT and the TBT and the absence of a general exceptions clause in the latter, effectively equating the test for a legitimate regulatory distinction with the chapeau. The panel was clearly cognizant of this when enunciating the legal standard under TBT Article 2.1: the

177 Id. ¶ 5.125.
178 See id. ¶¶ 5.125–126.
179 See id. ¶ 5.129.
180 See Appellate Body Report, EC–Seal Products, supra note 4, ¶¶ 5.299–.300.
181 Id. ¶ 5.179
182 Id. ¶¶ 2.82, 5.215, 5.217, 5.289.
183 See id. ¶¶ 5.296–.306.
184 Id. ¶ 5.313.
Appellate Body incorporated language from the sixth recital of the preamble to the TBT, "subject to the requirement that [the measures] are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade . . . ." Identical language appears in the chapeau to GATT Article XX.

In rejecting the panel's application of its reasoning under TBT Article 2.1 to the GATT Article XX chapeau, the Appellate Body noted the significant differences between the two provisions, including the different legal standards applicable as well as the relative function and scope of the two provisions. With respect to the applicable legal standards, the Appellate Body noted that the standard applicable to TBT Article 2.1 is whether the detrimental impact on imported products stems exclusively from a "legitimate regulatory distinction" rather than reflects discrimination against imported products, whereas the standard under the chapeau 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." In making this contrast, the Appellate Body seems to ignore the genesis of the legal standard of "legitimate regulatory distinction" that it created in the antecedent TBT decisions, namely the sixth recital of the TBT preamble, which explicitly references "arbitrary or unjustifiable discrimination." In fact, by incorporating the sixth recital of the preamble into TBT Article 2.1, the Appellate Body created significant textual similarities between Article 2.1 and the chapeau. This would seem to support consistent

---

186 TBT, supra note 3, pmbl.
187 GATT 1947, supra note 2, art. XX, chapeau ("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 . . . .").
188 Appellate Body Report, EC-Seal Products, supra note 4, ¶¶ 5.311–312.
189 Id. ¶ 5.311; GATT 1947, supra note 2, art. XX, chapeau.
190 See supra note 173 (discussing the Appellate Body's approach with respect to the "legitimate regulatory distinction" standard in U.S.-Clove Cigarettes, U.S.-Tuna II, and U.S.-COOL).
191 See TBT, supra note 3, pmbl.
192 See id.; GATT 1947, supra note 2, art. XX, chapeau.
Nevertheless, with respect to the function and scope of the two provisions, the Appellate Body noted another important distinction, namely that "it is only the regulatory distinction that [causes] the detrimental impact . . . on imported products" which "is to be examined to determine whether it is . . . legitimate" under TBT Article 2.1. In contrast, under the chapeau, a measure could be found to be "applied in a manner that constitutes an arbitrary or unjustifiable [means of] discrimination" based on some ground other than the discrimination found to be inconsistent with the non-discrimination requirements under GATT Articles I and III. This point implicates the context of the phrase "arbitrary or unjustifiable discrimination" in the chapeau, and demonstrates why a strictly textual analysis of the two provisions, whereby the interpretation and application of the former governs the latter, is inappropriate.

Having rejected the panel’s findings under the chapeau, the Appellate Body undertook an independent analysis of whether the EU Seal Regime constitutes "arbitrary or unjustifiable discrimination." The Appellate Body concluded that the measure was applied in an "arbitrary or unjustifiable manner," in part because "the European Union made [efforts] to facilitate the access of Greenlandic Inuit to the IC exception," but failed to make comparable efforts to facilitate the access of Canadian Inuit . . . . Consequently, the measure violated GATT Articles 1:1 and III:4 and could not be justified under Article XX(a).

---

193 See supra text accompanying notes 188-192 (discussing how interpretation used to be varied but is becoming more consistent because of the Appellate Body’s recent decisions).


195 *Id.*; GATT 1947, supra note 2, art. XX, chapeau; see GATT 1947, supra note 2, art. I, III.

196 GATT 1947, supra note 2, art. XX, chapeau.

197 See, e.g., Appellate Body Report, *EC–Seal Products*, supra note 4, ¶ 5.312 (discussing key differences between TBT Article 2.1 and the chapeau of GATT XX with respect to scope and function).

198 See *id.* ¶¶ 5.316-.339.

199 *Id.* ¶ 5.338.

200 See *id.* ¶ 5.339.
IV: Implications of the Appellate Body Decision in *EC–Seal Products*

The Appellate Body decision in *EC–Seal Products* is notable primarily for its emphasis on context and its approach to national treatment, both under the TBT and the GATT.\(^{201}\) This decision confirms that the legal standards applied to an allegedly discriminatory measure under TBT Article 2.1 and GATT Article III:4 differ, potentially rendering the former irrelevant.\(^{202}\) The decision also confirms the near impossibility of satisfying the test for justifying a discriminatory measure under the chapeau to GATT Article XX.\(^{203}\) Notably missing from the Appellate Body decision is any reference to the issue of discriminatory intent, which factored heavily into the panel’s analysis, thereby confirming the Appellate Body’s insistence that regulatory intent is irrelevant under GATT Article XX.\(^{204}\)

A. *The TBT National Treatment Obligation Is Less Strict Than That of the GATT*

In *EC–Seal Products*, the Appellate Body confirmed its interpretation of TBT Article 2.1 and GATT Article III:4 as imposing different levels of a non-discrimination obligation.\(^{205}\) Historically, the TBT and the GATT were interpreted as applying different levels of scrutiny relating to national treatment.\(^{206}\) Prior to *U.S.–Clove Cigarettes*, GATT Article III:4 was considered to be the less strict provision because of the availability of the

\(^{201}\) See id. ¶¶ 5.1-.339; see also Robert S. Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO’s Appellate Body Report in EC – Seal Products*, 18 ASIL INSIGHTS, Iss. 12 (June 4, 2014, 3:00 AM), http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products (discussing national treatment under the Appellate Body’s decision in *EC–Seal Products*).

\(^{202}\) See Appellate Body Report, *EC–Seal Products*, supra note 4, ¶ 5.313; see also Howse et al., supra note 201 (discussing the narrowed scope of the TBT under the Appellate Body’s analysis in *EC–Seal Products*).


\(^{204}\) See id.; see also Panel Report, *EC–Seal Products*, supra note 4, ¶ 8.2 (explaining that the objective of the EU Regime factored into their findings).


\(^{206}\) See, e.g., Appellate Body Report, *U.S.–Clove Cigarettes*, supra note 4.
exceptions in GATT Article XX which may justify a discriminatory measure. Since *U.S.–Clove Cigarettes*, once the sixth recital of the TBT preamble was incorporated, TBT Article 2.1 has been characterized as the less strict provision because it permits discriminatory treatment if there is a “legitimate regulatory distinction” and even-handedness in application, while GATT Article III:4 prohibits all discriminatory treatment. Additionally, discriminatory measures under GATT Article III:4 must satisfy the complex, multi-layered test of GATT Article XX, both with respect to the sub-paragraph invoked and the chapeau. Consequently, it was thought to be easier to justify a discriminatory regulatory measure under the legitimate regulatory distinction and even-handedness requirements of TBT Article 2.1 than under GATT Articles III:4 and XX.

The Appellate Body decision in *EC–Seal Products* cements the status of TBT Article 2.1 as the less burdensome provision, thereby potentially rendering it superfluous. It is unlikely there would ever be a situation where TBT Article 2.1 applies to a measure but GATT Article III:4 does not, because GATT Article III:4 has broader scope than TBT Article 2.1. Given that a measure is less likely to withstand scrutiny under the combination of GATT Articles III:4 and XX than under TBT Article 2.1 alone, in order to give effect to the latter provision, it would be necessary to delineate the scope of the two agreements in a disjunctive manner. There is a conflict provision in the general interpretative note to Annex 1A of the Marrakesh Agreement:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other

---

207 See *ZLEPTNIG*, *supra* note 45, at 105.
208 See *Kim*, *supra* note 7, at 10,838–40; see also *CONRAD*, *supra* note 46, at 163.
209 *VAN DEN BOSSCHE & ZDOUC*, *supra* note 51, at 552.
210 *Kim*, *supra* note 7, at 10,838–40.
212 See *GATT 1947*, *supra* note 2, art. III:4; see also *TREBILCOCK ET AL.*, *supra* note 27, at 138 (noting that GATT Article III:4 applies to all internal laws, regulations, and requirements other than internal taxation measures). In contrast, TBT Article 2.1 applies specifically to technical regulations and standards. See *TREBILCOCK ET AL.*, *supra* note 27, at 309; see also TBT, *supra* note 3, art. 2.1.
agreement shall prevail to the extent of the conflict.\textsuperscript{213}

However, there are differing interpretations of the application of the conflict rule in a situation where both the GATT and the TBT apply, but a measure is found to violate the GATT but not the TBT. Some scholars believe that in such cases the conflict rule provides that the TBT governs and no violation should be found; others believe this does not implicate the conflict rule and that the GATT violation governs.\textsuperscript{214} The conflict rule has never been interpreted, and given the uncertainty over how it should be interpreted, an amendment of the texts would be necessary to clarify that a finding of non-violation of the TBT supersedes a finding of violation of the GATT in cases where both apply, thereby preserving the protections of the TBT for technical regulations and standards.\textsuperscript{215}

B. It Is Nearly Impossible to Satisfy the Chapeau Test of


\textsuperscript{214} Compare Joost Pauwelyn, \textit{Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO}, 15 EJIL 575, 588 (2004) (asserting that once a measure is justified under the TBT Agreement, such justification trumps any violation of the more general GATT), with William J. Davey, \textit{Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations} 330-31 (2006) ("The last possibility is a measure that violates Article III (and is not excused by Article XX) but is permitted under TBT Article 2.2 . . . . If the true conflict rule were applied, and a violation of GATT but not of the TBT Agreement were found, there would be no conflict, so the GATT violation would stand notwithstanding the absence of a TBT violation. If a broader view of conflict were taken, then it might be argued that a conflict exists and that under the WTO Agreement's conflict rule, the TBT Agreement prevails over the GATT, which would mean no violation would be found. For me, it would not be appropriate to find a conflict in this situation.").

\textsuperscript{215} See Marrakesh Agreement Establishing the World Trade Organization art. X:1, Apr. 15, 1994, 1867 U.N.T.S. 154 (requiring acceptance by two-thirds of all Members for an amendment to enter into force and for it to only come into force for those Members who accept the amendment). Only one amendment has been successfully proposed to any of the WTO Agreements, TRIPS Article 31bis, and even this amendment is not yet in effect because it has not been adopted by the requisite two-thirds of Members to be included in TRIPS. The WTO Members officially accepted the amendment in 2005, but a 2007 ratification deadline and subsequent extended deadlines in 2009 and 2011 all passed without the two-thirds threshold having been met. Brin Anderson, \textit{Better Access to Medicines: Why Countries are Getting “Tripped” Up and Not Ratifying Article 31-bis}, 1 CASE W. RES. J.L. TECH & INTERNET 165, 167-68 (2010). To date, 53 Members have accepted the Amendment, which means that an additional 53 Members must ratify the Amendment before it will take effect. \textit{Members Accepting Amendment of the TRIPS Agreement}, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last updated Sept. 10, 2014).
GATT Article XX

A second conclusion that can be drawn from the Appellate Body decision in EC-Seal Products is that it is extremely unlikely a measure will ever satisfy the chapeau test of GATT Article XX.\(^\text{216}\) The hurdles of Article XX, particularly the chapeau to Article XX, have proven fatal in nearly every case in which the provision has been invoked.\(^\text{217}\) The multitudinous interpretations of what exactly is required by the chapeau, including interpretations that would require Members to take affirmative action to ameliorate discriminatory effect in order to be compliant with the chapeau, explain why it is so difficult to satisfy.\(^\text{218}\)

The Appellate Body has consistently held that the focus of the chapeau is on the manner in which a measure is being applied rather than the general design of the measure, which is covered by the individual subparagraphs of Article XX.\(^\text{219}\) An analysis under the chapeau should not duplicate the analysis conducted with respect to either the subparagraphs of GATT Article XX or the substantive obligations of the GATT.\(^\text{220}\) There are three component aspects of the chapeau: arbitrary discrimination, unjustifiable discrimination, and disguised restriction on trade.\(^\text{221}\)

In U.S.–Gasoline, the Appellate Body read these three concepts as

\(^{216}\) See Appellate Body Report, EC–Seal Products, supra note 4, ¶ 5.3.3.

\(^{217}\) See Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception, PUB. CITIZEN (May 2014), https://www.citizen.org/documents/general-exception.pdf (noting that GATT Article XX exceptions have been invoked in 40 WTO disputes, and that in 39 of them, the defense was unsuccessful). The only exception is EC–Asbestos, where the panel’s finding that the measure fell within the exception in GATT Article XX(b) was vacated on appeal because the Appellate Body held that the measure did not violate GATT Article III:4 and consequently did not need to reach the GATT Article XX issue. See Dispute Settlement Summary, European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm (last visited Nov. 11, 2014) (“Report(s) adopted, no further action required on 5 April 2001.”).

\(^{218}\) GATT 1947, supra note 2, art. XX.


\(^{220}\) ZLEPTNIG, supra note 45, at 278–79.

\(^{221}\) GATT 1947, supra note 2, art. XX.
interrelated and overlapping, but other decisions, and some scholars, treat them independently. For example, "unjustifiable discrimination" exists, according to the Appellate Body in U.S.–Shrimp, where a measure constitutes a country-wide import ban if product-specific import prohibitions would have been sufficient to satisfy the policy goal at stake, or where a Member unilaterally imposes an environmental protection measure without undertaking serious efforts at bilateral or multilateral negotiation. On the other hand, discrimination is "arbitrary" where requirements of due process are not met or where a measure "imposes a single, rigid[,] unbending requirement" on exporting countries "without inquiring into the appropriateness of that [requirement] for conditions prevailing in the exporting countries." The chapeau therefore focuses on procedural aspects of regulatory cooperation and due process.

Examples of application of the chapeau test to the facts of a dispute illustrate why the test is so difficult to satisfy. According to the Appellate Body in Brazil–Tyres, the test for whether a discriminatory aspect of a measure is arbitrary or unjustifiable under the chapeau is whether the rationale or cause of the discrimination rationally relates to the interest sought to be protected. In Brazil–Tyres, the Appellate Body held that a measure banning the importation of retreaded tires was provisionally justified under GATT Article XX(b) as necessary for the protection of public health and the environment. However, the application of the measure was arbitrary and unjustifiable in violation of the chapeau because the measure included a carve-out for tires from MERCOSUR countries necessitated by a MERCOSUR arbitral tribunal ruling, thereby discriminating

---

223 See ZLEPTNIG, supra note 45, at 278–91.
224 See Appellate Body Report, U.S.–Shrimp, supra note 34, ¶ 164; ZLEPTNIG, supra note 45, at 280.
226 Id. ¶ 178–83; see also ZLEPTNIG, supra note 45, at 287–88.
228 See generally Appellate Body Report, Brazil–Tyres, supra note 121; Appellate Body Report, U.S.–Gasoline, supra note 47.
229 Appellate Body Report, Brazil–Tyres, supra note 121, ¶ 232.
230 See id. ¶¶ 225, 238.
against non-MERCOSUR countries, and this discrimination bore no rational connection to the asserted interest of protecting public health and the environment.\footnote{See id. ¶ 232.}

In contrast, in \textit{U.S.–Gasoline} the Appellate Body held that discrimination between domestic and foreign gasoline producers in a gasoline emissions regulation was unjustifiable because the measure gave domestic refiners time to restructure their operations without applying the same considerations to foreign companies,\footnote{Id. at 25.} and the United States failed to seek the cooperation of foreign producers and governments prior to enacting the measure.\footnote{Id. at 29.} The lack of cooperative efforts or efforts to ameliorate discriminatory effect by the United States consigned the measure to fail the chapeau test.\footnote{See Appellate Body Report, \textit{EC–Seal Products}, supra note 4, ¶ 5.337.} Similar concerns were apparent in the Appellate Body decision in \textit{EC–Seal Products}.\footnote{Id.} The Appellate Body noted that the EU made efforts to facilitate access to the IC exception by Greenlandic Inuit but failed to make comparable efforts with respect to Canadian Inuit.\footnote{Id.} The Appellate Body also found that the application of the EU Seal Regime did not allow for an inquiry into the appropriateness of the regulatory program for conditions prevailing in an exporting country.\footnote{Id.}

The reality that the chapeau test is unlikely to ever be satisfied in practice upsets the delicate balance between GATT Article III:4 and Article XX.\footnote{GATT 1947, supra note 2, art. III:4, XX.} The Appellate Body refused to incorporate an exception in GATT Article III:4 for differential treatment that results in a "detrimental impact [on] competitive opportunities for like imported products [but] stems exclusively from a legitimate regulatory distinction" because of the availability of the general exceptions in Article XX.\footnote{Appellate Body Report, \textit{EC–Seal Products}, supra note 4, ¶ 5.125.} The GATT Article XX exceptions "serve the [important] function of distinguishing between legitimate regulatory choices and excuses for protectionism," where protectionist governments should not be permitted to use a
"legitimate objective as an excuse to design [a] domestic polic[y]
that] inhibit[s] foreign competition." However, if Article XX cannot serve its function of protecting regulatory autonomy due to the impossibility of meeting the chapeau test, the result is a strong non-discrimination obligation with no room for regulatory flexibility. This is clearly inconsistent with the object and purpose of Article XX, to allow "members to adopt trade-restrictive . . . measures that pursue legitimate societal values or interests . . . ."

C. The Appellate Body Has a Conflicted Relationship with the Issue of Intent

There is a strong presumption in WTO law that regulatory intent does not matter in determining whether or not a measure is WTO-consistent, including intent as demonstrated in legislative history. The Appellate Body's refusal to consider legislative history as evidence of intent derives from a desire to avoid considering subjective evidence. However, some argue that the intent of a regulatory body in enacting a measure is relevant to whether that measure is consistent with a Member's WTO obligations when attempting to justify a measure under the general exceptions in GATT Article XX. A comparison of the panel and Appellate Body reasoning in EC–Seal Products illustrates why intent is a deeply conflicted issue.

Under the panel's approach to the GATT Article XX chapeau in EC–Seal Products, discriminatory intent is highly relevant and is ascertained primarily by analyzing legislative history. In

---

241 Id. at 164.
242 VAN DEN BOSSCHE & ZDOUC, supra note 51, at 617.
243 See, e.g., Henrik Horn & Petros C. Mavroidis, Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination, 15 EUR. J. INT'L L. 36, 58; see also VAN DEN BOSSCHE & ZDOUC, supra note 51, at 683 ("[T]he intent of the persons engaging in 'dumping' is irrelevant in the determination of whether dumping exists.").
244 See Appellate Body Report, U.S.–Clove Cigarettes, supra note 4, ¶¶ 219-26.
245 MATSUSHITA, ET AL., supra note 12, at 480.
crafting its three-part test for "arbitrary or unjustifiable discrimination," the panel in EC–Seal Products placed a great deal of emphasis on the "even-handedness" of design or application of the EU Seal Regime.\textsuperscript{248} This is a requirement above and beyond the requirement previously enunciated by the Appellate Body in Brazil–Tyres that, to satisfy the prohibition of "arbitrary or unjustifiable discrimination" under the chapeau, the rationale for discrimination in a regulatory measure must be related to the interest sought to be protected under a subparagraph of Article XX.\textsuperscript{249} Whether a measure is "designed" to be discriminatory is essentially another way of asking whether the legislature or regulatory body enacting a measure intended it to be discriminatory.\textsuperscript{250} According to the panel, even if the discrimination relates to the interest sought to be protected, as was the case with the IC exception, if regulators knew and intended the discrimination to happen, the measure lacks even-handedness and violates the chapeau.\textsuperscript{251} The aspect of a regulatory measure with one or more exceptions that is therefore most likely to draw scrutiny is the measure's legislative history, from which evidence of the legislature or regulator's intent can be inferred.\textsuperscript{252}

In EC–Seal Products, the most damning evidence that the panel pointed to in concluding that the IC and MRM exceptions discriminated against foreign products while benefiting domestic products was legislative history.\textsuperscript{253} Specifically, the panel referred numerous times to studies commissioned by the European Commission's Directorate-General for the Environment, which were conducted by consultants, COWI (referred to as the COWI Reports).\textsuperscript{254} The panel relied on evidence from the 2010 COWI

\textsuperscript{248} See id. ¶ 7.650.

\textsuperscript{249} Appellate Body Report, Brazil–Tyres, supra note 121, ¶ 232.

\textsuperscript{250} See Panel Report, EC–Seal Products, supra note 4, ¶ 7.650.

\textsuperscript{251} Id.

\textsuperscript{252} See Appellate Body Report, U.S.–Tuna II, supra note 4, ¶ 314; see also Appellate Body Report, U.S.–COOL, supra note 4, ¶ 371; see also McGrady, supra note 240, at 156 ("[T]he Appellate Body has previously held that a regulatory goal should be determined objectively and that a [M]ember's characterization of its goal as evidenced by texts of statutes, legislative history, pronouncements of government agencies and officials may be taken into account.").

\textsuperscript{253} Panel Report, EC–Seal Products, supra note 4, ¶¶ 7.315, 7.351.

\textsuperscript{254} European Commission, Directorate-General Environment, \textit{Assessment of the Potential Impact of a Ban of Products Derived from Seal Species} (Apr. 2008); European
Report to conclude that the IC exception lacked even-handedness in application because it was crafted to apply only to seal products from Greenland and not to seal products from Canada.\(^{255}\) The 2010 COWI Report specifically stated that “only Greenland will be able to make the investments needed to make use of [IC] exemptions,” and that “the scale of the Canadian... hunt is too small and not as centrally organized as that in Greenland...”\(^{256}\)

Similarly, with respect to the MRM exception, the panel found evidence in the 2010 COWI Report that the MRM exception was not applied even-handedly because it was designed to apply to seal products from EU countries, including “Sweden, Finland, and possibly the United Kingdom,” but not seal products from Canada and Norway.\(^{257}\) This is a glaring example of the type of evidence generated during the legislative or regulatory process that will be fatal to a measure as demonstrating discriminatory intent in design and both the TBT and the GATT.\(^{258}\) Whether legislative or regulatory bodies have the capacity or wherewithal to avoid generating this type of evidence, which explicitly discusses preferential treatment for domestic products and the exclusion of foreign products, is questionable: but this is one simple way to protect regulatory measures and make it less likely that they will be found WTO-inconsistent.\(^{259}\)

The Appellate Body squarely rejected the panel’s chapeau analysis in \textit{EC–Seal Products}, and, in doing so, confirmed the Appellate Body’s avowed refusal to consider intent when determining if a measure’s application is protectionist.\(^{260}\) For example, GATT Article III provides that internal taxes and other internal regulations should not be applied “so as to afford protection to domestic production.”\(^{261}\) The Appellate Body in \textit{Japan–Taxes on Alcoholic Beverages II} stated that the issue under

\begin{footnotes}
\item[256] 2010 COWI Report, \textit{supra} note 254.
\item[258] \textit{Id.}
\item[259] \textit{Id.} ¶ 7.654.
\item[261] GATT 1947, \textit{supra} note 2, art. III, ¶ 1.
\end{footnotes}
GATT Article III:2, "whether 'directly competitive or substitutable' imported and domestic products [are] 'not similarly taxed'" so as to afford protection to the domestic products, is not an issue of intent. The Appellate Body specifically stated, "[i]t is not necessary for a panel to sort through the many reasons legislators and regulators . . . have for what they do," or to "weigh the relative significance of those reasons to establish . . . regulatory intent." Rather, the real issue is how the measure is applied, which can be discerned from an examination of "the design, the architecture, and the revealing structure of [the] measure."

A similar formulation, looking to "the design, architecture, revealing structure, operation," and application of a measure, was incorporated into the TBT Article 2.1 analysis of detrimental impact and discrimination by the Appellate Body in U.S.—Clove Cigarettes. The Appellate Body did not reference the guidance from Japan—Taxes on Alcoholic Beverages II, namely that legislative intent is not relevant to this inquiry, nor did the Appellate Body engage in any analysis of legislative history in determining whether the U.S. measure discriminated against imported cigarettes. Instead, the Appellate Body based its positive determination of discrimination on the design of the U.S. measure banning clove-flavored cigarettes, which are virtually all imported from Indonesia, but exempting menthol-flavored cigarettes, which are virtually all produced domestically. The Appellate Body also noted that clove-flavored cigarettes were effectively the only type of flavored cigarettes the ban affected.

It could be argued that the Appellate Body's insistence that legislative intent is irrelevant when analyzing the design of a measure is an exercise of self-delusion, because it is impossible to consider how a measure was designed without considering legislative history. However, in disputes where the Appellate
Body has gone through the steps of considering the "design, architecture, revealing structure, operation, and application" of a measure, the Appellate Body has rigorously sought to avoid subjective evidence such as legislative history.\footnote{See, e.g., id. ¶¶ 219-26.}

While the \textit{EC-Seal Products} panel's reliance on legislative history is contrary to Appellate Body guidance, arguably, it goes directly to what the GATT and the TBT are supposed to address, namely protectionism.\footnote{See Moonhawk Kim, \textit{Disguised Protectionism and Linkages to the GATT/WTO}, 64 \textit{World Pol.} 426, 433-37 (2012) (discussing the link between a state's protectionist motivations and other state's hostile reactions).} According to Matsushita, Schoenbraun, and Mavroidis, non-discrimination is simply legalese for non-protectionism.\footnote{\textit{Matsushita, et al.}, supra note 12, at 479.} There are two ways to find protectionism: either by looking at trade-effects or looking for evidence of protectionist intent.\footnote{\textit{Id.} at 479-80; see also Jacqueline Peel, \textit{Confusing Product with Process: A Critique of the Application of Product-Based Tests to Environmental Process Standards in the WTO}, 10 \textit{N.Y.U. Envtl. L.J.} 217, 238 (2002); Bret Puls, \textit{The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy}, 8 \textit{Minn. J. Global Trade} 343, 379 (1999).} Punishing trade-effects is sub-optimal because trade-effects that discriminate may be completely accidental.\footnote{\textit{Matsushita, et al.}, supra note 12, at 480.} The better approach would be to punish where there is evidence of discriminatory intent, though discriminatory intent is generally difficult to detect.\footnote{\textit{Id.} But see Sean T. Fox, \textit{Note, Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere}, 84 \textit{Geol. L.J.} 2499, 2541 (1996) (arguing for the converse in that panels should examine "where the burden of the trade measure falls rather than second-guessing the motives of the national legislators" because "panels rarely have either the capacity or the political legitimacy to question the intentions of national leaders").} Under the GATT, this problem is resolved by asking if there is evidence of adverse effects under Article III:4, then putting the burden on the responding Member to demonstrate a lack of intent under GATT Article XX, because the responding party is presumed to be better informed and capable of justifying its policy as non-protectionist.\footnote{\textit{Matsushita, et al.}, supra note 12, at 480.} Accordingly, under GATT Article XX, necessity is used as a proxy for intent.\footnote{\textit{Id.}}

The panel's methodology in \textit{EC-Seal Products} can be viewed

\footnote{\textit{See Matsushita, et al.}, supra note 12, at 480.}
as incorporating a necessity test into the chapeau.\textsuperscript{278} This is essentially the approach advocated by scholars such as Gaetan Verhoosel, who argues for collapsing the Article III and Article XX inquiries into a single examination of whether distinctions applied to non-competing products can be justified as necessary or rational in light of a legitimate non-protectionist public purpose.\textsuperscript{279} According to Verhoosel, the distinction between the analysis of discrimination under GATT Article III and under Article XX is, with respect to the latter, whether the discrimination is arbitrary or unjustifiable, a test that can be equated with the necessity test.\textsuperscript{280} Discrimination is arbitrary or unjustifiable when it could be avoided, for example, where it is not necessary.\textsuperscript{281} To support this theory, Verhoosel points to the Appellate Body’s analysis in \textit{U.S.–Gasoline}, where the Appellate Body stated that the United States’ omission to explore means of mitigating the effects of its measure or to take into account the costs imposed on foreign refiners went well beyond what was necessary for the panel to find a violation of GATT Article III:4.\textsuperscript{282} Verhoosel points out that this is but one example of the Appellate Body at first distinguishing the analysis under the chapeau as a unique inquiry independent from that under GATT Article III, but still nonetheless borrowing from its analysis under GATT Article III to support its chapeau findings.\textsuperscript{283}

The panel’s analysis of the chapeau in \textit{EC–Seal Products} can be viewed as consistent with the approach advocated by Verhoosel.\textsuperscript{284} After finding that the IC exception fell within the scope of GATT Article XX(a) and met its relational clause, the panel nonetheless found that the discrimination between commercial/foreign seal products and non-commercial/domestic seal products was arbitrary or unjustifiable because the EU Seal


\textsuperscript{279} TREBILCOCK, ET AL., supra note 27, at 169-70. See \textit{generally} VERHOOSEL, supra note 14, at 65 (arguing that “for a proper line to be drawn between trade liberalization and deep integration or negative harmonization, WTO adjudicators should apply an integrated necessity test under the provisions of the GATT and the GATS laying down their respective National Treatment obligations”).

\textsuperscript{280} VERHOOSEL, supra note 14, at 65.

\textsuperscript{281} Id. at 66.

\textsuperscript{282} Id.

\textsuperscript{283} Id. at 67.

Regime had been designed to permit only certain domestic products into the EU market.\textsuperscript{285} The panel termed this intended or designed discrimination a "lack of even-handedness."\textsuperscript{286} Intentional discrimination is arbitrary and unjustifiable because it is not just foreseeable, but also avoidable and unnecessary.\textsuperscript{287}

Verhoosel’s approach admittedly loses some of the distinction between the inquiry under the sub-paragraph of GATT Article XX and the chapeau.\textsuperscript{288} However, in some cases the Appellate Body has blurred the line between these two steps of analysis under Article XX.\textsuperscript{289} For example, in \textit{U.S.–Gasoline}, the Appellate Body, in interpreting the chapeau, noted that the United States had more than one alternative measure whose use may have avoided any discrimination, thereby incorporating the \textit{least restrictive} test from the Article XX sub-paragraphs into the chapeau.\textsuperscript{290} Therefore, while the \textit{EC–Seal Products} panel’s analysis of the chapeau conflicts with the letter of Article XX jurisprudence,\textsuperscript{291} it is not entirely out of line with prior Appellate Body practice.\textsuperscript{292}

\textbf{D. Discriminatory Intent Can Be Addressed in the GATT Article XX Sub-Paragraphs}

It should be noted that the Appellate Body has been presented with opportunities to interpret the chapeau to GATT Article XX to include an even-handedness requirement but has not done so, suggesting the Appellate Body does not view “even-handedness” as a requirement under the chapeau.\textsuperscript{293} However, the Appellate


\textsuperscript{286} Id.


\textsuperscript{288} VERHOOSEL, \textit{supra} note 14, at 67.


\textsuperscript{290} Id.

\textsuperscript{291} See \textit{supra} note 278 and accompanying text.

\textsuperscript{292} See Waincymer, \textit{supra} note 289, at 174.

\textsuperscript{293} The Appellate Body was presented with an opportunity to read a requirement of “even-handedness” into the chapeau in Korea–Beef, where Korea argued that the chapeau to GATT Article XX required that national legislation be applied “even-handedly” between trading partners. Appellate Body Report, \textit{Korea–Beef}, \textit{supra} note 41, ¶ 24. However, the Appellate Body found that Korea’s measure was not justified under
Body in *U.S.–Gasoline* and *U.S.–Shrimp* did explicitly read a requirement of "even-handedness" into sub-paragraph (g) of GATT Article XX. Accordingly, it would seem that the discriminatory intent evidenced in the design of the EU Seal Regime could have been adequately addressed under sub-paragraph (a) of GATT Article XX rather than the chapeau.

There are two elements to the sub-paragraphs of GATT Article XX: a measure must fall within the range of policies protected by a specific sub-paragraph, and it must satisfy the relational clause, which in the case of Article XX(a) is "necessary to." Protectionist intent could be addressed through either of these elements.

A measure falls within the scope of a sub-paragraph where the policy objective or regulatory goal of the measure falls within the ambit of that sub-paragraph. "[T]he Appellate Body has... held that [while the] regulatory goal [of a measure] should be determined objectively... a [M]ember’s characterization of its goal, as evidenced by texts of statutes, legislative history, pronouncements of government agencies and officials, may be taken into account." The panel in *EC–Seal Products* could have determined, considering the clear evidence of discriminatory intent in the legislative history, that the EU Seal Regime did not fall within the scope of GATT Article XX(a), because its regulatory purpose was not to protect the morals of the EU public.

The discriminatory intent behind the EU Seal Regime could alternatively have been addressed by the second element of GATT Article XX(a), the relational clause "necessary to." Determining Article XX(d) and did not reach the question of whether the measure satisfied the requirements of the chapeau. *Id.* ¶ 185.


295 See generally McGrady, *supra* note 240 (addressing the application of the "necessity tests" in GATT art. XX(a),(b) and (d)).

296 *Id.* at 155.

297 See *id.* at 154.

298 See *id.* at 155-57.


300 See GATT 1994, *supra* note 2, art. XX(a) ("necessary to protect public morals").

301 See *id.*
whether a measure is “necessary” requires a weighing and balancing of several factors, including “the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.”\footnote{Appellate Body Report, Brazil--Tyres, \textit{supra} note 121, ¶ 178 (“If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives . . . .”). The necessary test “can be characterized as a test of relative necessity, which compare[s the] GATT inconsistency of the adopted measure[] with reasonably available alternatives” and weighs and balances these alternatives, considering the “contribution made by the . . . measure . . . , the importance of the . . . interests or values [to be] protected . . . , and the . . . impact” of the measure on trade. \textit{CONRAD}, \textit{supra} note 46, at 287-88.} The aspect of a measure, which must be “necessary” for the attainment of an interest or policy objective, is not the measure as a whole, but rather the GATT-inconsistent aspects of the measure.\footnote{Aaditya Mattoo \& Petros C. Mavroidis, \textit{Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 327, 338 (Ernst-Ulrich Petersmann ed., 1997).} The Appellate Body reaffirmed this principle in \textit{Thailand--Customs and Fiscal Measures on Cigarettes from the Philippines}, stating that the showing of “necessity” under Article XX(d) is a showing not that a measure as a whole is necessary, but that a discriminatory regulatory distinction is necessary.\footnote{Appellate Body Report, \textit{Thailand--Customs and Fiscal Measures on Cigarettes from the Philippines}, ¶ 177, WT/DS371/AB/R (June 17, 2011); Benn McGrady \& Alexandra Jones, \textit{Tobacco Control and Beyond: The Broader Implications of United States – Clove Cigarettes for Non-Communicable Diseases, 39 AM. J.L. & MED. 265, 272 (2013). There is some conflicting jurisprudence on this issue, as the Appellate Body in \textit{U.S.--Gasoline} criticized the panel for asking whether the “less favorable treatment” of imported gasoline was “primarily aimed at” the conservation of natural resources, rather than asking whether the “measure” was “primarily aimed at” conservation of clean air, suggesting that there is a fine line between analyzing whether the discriminatory aspect of a measure is necessary, which is permissible, and analyzing whether discrimination under GATT Article III:4 is necessary, which is not permissible. Appellate Body Report, \textit{U.S.--Gasoline, supra} note 47, at 16. For a general discussion of necessity tests, see Note by the Secretariat, “Necessity Tests” in the WTO, S/WPDR/W/27 (Dec. 2, 2003). The analysis under the sub-paragraphs of GATT Article XX is not supposed to merely duplicate the analysis under the substantive obligations of the GATT. Id. ¶ 50.} The panel in \textit{EC--Seal Products} found that the EU Seal Regime as a whole did materially contribute to the EU objective of protecting morals in the EU by reducing global demand for seal products,\footnote{Panel Report, \textit{EC--Seal Products, supra} note 4, ¶¶ 7.638-639.} but did not consider whether the
discriminatory regulatory distinctions, the IC and MRM exceptions, were necessary or materially contributed to that interest.\textsuperscript{306} If the panel had correctly applied the "necessary" test,\textsuperscript{307} it would likely have concluded that the IC and MRM exceptions did not materially contribute to the policy objective of protecting EU public morals because the exceptions were designed primarily to protect domestic seal hunting industries.\textsuperscript{308} Therefore, discriminatory intent motivating a measure can be addressed either as part of the scope determination or the relational clause of a GATT Article XX subparagraph.

V: Implication for Regulators

The implication for regulators and national legislatures from the panel and Appellate Body decisions in \textit{EC-Seal Products} is that measures are most likely to be found inconsistent with the GATT and the TBT if they include exceptions or carve-outs favoring domestic products or services.\textsuperscript{309} Given the lack of an exception in GATT Article III:4 for differential treatment based on a legitimate regulatory distinction and the difficulty of justifying a measure under GATT Article XX, any carve-out resulting in differential treatment for a domestic product will likely be WTO-inconsistent.\textsuperscript{310} Unfortunately for regulators, it is likely that these types of carve-outs are included in regulatory measures because they are necessary to appease a domestic constituency.\textsuperscript{311} Domestic constituencies may also prevent regulatory bodies from enacting regulations necessary to come into compliance with international obligations.\textsuperscript{312} This is particularly relevant in the

\textsuperscript{306} See generally id.

\textsuperscript{307} See supra notes 302-303 and accompanying text.

\textsuperscript{308} See Panel Report, \textit{EC-Seal Products}, supra note 4, ¶ 7.300.

\textsuperscript{309} See Appellate Body Report, \textit{EC-Seal Products}, supra note 4, ¶ 5.320.

\textsuperscript{310} See supra notes 45–50, describing the limitation on exceptions to GATT art. III:4.


\textsuperscript{312} See Melissa J. Durkee, \textit{Persuasion Treaties}, 99 Va. L. Rev. 63, 97–102 (2013) ("Persuasion of domestic constituencies is a necessary condition for a state’s compliance with persuasion treaties.").
environmental context.\textsuperscript{313} From the perspective of a regulator, it is likely not feasible to eliminate all exceptions from regulatory measures in order to ensure that they are consistent with WTO obligations.\textsuperscript{314} Consequently, there is tension between enacting regulatory measures that include carve-outs to satisfy domestic constituencies, making the measures WTO-inconsistent, and not enacting regulatory measures at all.\textsuperscript{315}

However, the key takeaway from WTO jurisprudence on regulatory measures to date is that in balancing the political reality of needing to satisfy domestic constituents with the possibility of being in violation of international obligations under the WTO agreements, the GATT and the TBT, most governments will choose to satisfy a domestic constituency.\textsuperscript{316} This is due to several factors that weigh against the theoretical gravity of violating WTO obligations.\textsuperscript{317} First, there is no guarantee a regulatory measure will be challenged at the WTO because WTO disputes are very expensive.\textsuperscript{318} Unless a measure adversely impacts a WTO Member in a critical industry,\textsuperscript{319} that Member may be unwilling to

\textsuperscript{313} See generally id. (explaining how domestic politics have plagued the enactment of environmental regulations required by international agreements). “Environmental treaties serve as a leading example of persuasion treaties, though persuasion treaties are not limited to the environmental arena.” Id. at 64 n.4. In the United States, national leaders have failed “to conclude effective [environmental] treaties, and the treaties [they] do conclude fail to garner compliance.” Id. at 65. Thus, “[t]here is a pressing need for a new approach to treaty problems.” Id.

\textsuperscript{314} See Verdier, supra note 311, at 126–30.

\textsuperscript{315} Sara Dillon, Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies, 8 MINN. J. GLOBAL TRADE 197, 207-08 (1999).

\textsuperscript{316} See Durkee, supra note 312, at 88–89 (“[S]tate interests are the products of domestic political processes and interactions between individuals and groups.”).


\textsuperscript{319} See Andrea E. Goldstein & Steven M. McGuire, The Political Economy of Strategic Trade Policy and the Brazil-Canada Export Subsidies Saga, 27 WORLD ECON. 541, 548 (2004). See generally MARC L. BUSCH, TRADE WARRIORS, STATES, FIRMS, AND STRATEGIC-TRADE POLICY IN HIGH-TECHNOLOGY COMPETITION (Cambridge Univ. Press, 1999) (arguing that states will “maximize their national welfare gains,” and in doing so, they “weigh the expected benefits from intervention against the potential costs of initiating a trade war”).
bring a dispute it is not guaranteed to win. Second, even if a measure is challenged, the respondent can delay resolution of the dispute for a significant period of time, possibly until the domestic situation resolves itself or the need to satisfy the domestic constituency is no longer an issue.

Finally, even when a measure is challenged and found to be inconsistent with a WTO obligation, WTO Members have historically had a relatively poor track record at coming into compliance, where compliance is defined as the revocation of an inconsistent measure. There are several reasons for this. It may be possible for the violating Member to make very minor changes to a regulation to come within the letter of a panel or Appellate Body decision. Alternatively, in some cases, WTO Members

320 See Peter Holmes et al., Trade, Dev. Research Grp., Emerging Trends in WTO Dispute Settlement: Back to the GATT? 21 (2003) (noting that the “high proportion of complainant victories” in disputes suggests “complainants consider very carefully the likelihood of success before bringing” a dispute).

321 William J. Davey, Expediting the Panel Process in WTO Dispute Settlement, in The WTO: Governance, Dispute Settlement & Developing Countries 409, 415–20 (Merit E. Janow et al. eds., 2008). For example, one estimate of the average length of a WTO dispute is up to two and a half years. Bernard M. Hoekman & Petros C. Mavroidis, WTO Dispute Settlement. Transparency and Surveillance, 23 World Econ. 527, 531 (2000).

322 See generally Holmes et al., supra note 320.


324 Frieder Roessler, The Scope of WTO Law Enforced Through WTO Dispute Settlement Procedures, in The WTO: Governance, Dispute Settlement & Developing Countries 331, 331–32 (Merit E. Janow et al. eds., 2008). There is some debate in WTO law as to whether or not compliance should be defined solely as revocation of an inconsistent measure. Matsushita, et al., supra note 12, at 118 (“A problem with the implementation of WTO dispute settlement recommendations and rulings is the lack of guidance over exactly what a losing party must do to comply.”). However, DSU Article 22.8 suggests that compliance should be defined as removal of an inconsistent measure, and that alternatives such as compensation or retaliation are only temporary solutions. DSU, supra note 33, art. 22.8 (“The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.”).

325 Matsushita, et al., supra note 12, at 118 (“The tendency has been for the losing party to take minimal steps and declare itself in full compliance.”); see also
have chosen to pay compensation, which is typically calculated as a lump sum, and then never revoke the inconsistent measure. In some of the most contentious cases where a Member was faced with a strong and vocal domestic constituency opposing elimination of a WTO-inconsistent measure, the Member has chosen to continue implementing the measure and faced retaliation in the form of suspension of concessions. Retaliation is generally calculated to impact sensitive domestic constituencies of the losing Member, but the fact that Members still refuse to

JACQUELINE D. KRIKORIAN, INTERNATIONAL TRADE LAW AND DOMESTIC POLICY: CANADA, THE UNITED STATES, AND THE WTO 81-82 (2012) (pointing out that the U.S. government "thwarted the potential impact of the dispute settlement mechanism . . . by implementing them in such a way as to minimize their overall effect").

326 See Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, ¶ 8.1, WT/DS27/ARB (Apr. 9, 1999); MATSUISHITA, ET AL., supra note 12, at 119 ("Compensation is voluntary and the subject of agreement between the parties to the dispute.").

327 See Award of the Arbitrators, United States – Sec. 110(5) of the U.S. Copyright Act (Recourse to Arbitration under Article 25 of the DSU), ¶ 4.73, WT/DS160/ARB25/1 (Nov. 1, 2001); see also SHERZOD SHADIKHODJAEV, RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM 23 (2009) (noting the monetary compensation that arose out of a WTO case where, after negotiations, the U.S. government agreed to a temporary arrangement that required a lump-sum payment of USD 3.3 million).

328 SHADIKHODJAEV, supra note 327, at 23–24 (2009) (explaining how the U.S. government never revoked, and has yet to be asked to revoke, their inconsistent measure after agreeing to pay compensation over a three year period, at the end of which, the parties were supposed to re-enter consultations if the measure hadn’t been removed).

329 MATSUISHITA, ET AL., supra note 12, at 119–20. Retaliation is authorized under DSU Article 22.2, which provides that if the losing party fails to bring its offending measure into compliance within 20 days from the expiry of the reasonable period allotted under DSU Article 21.3, the winning party may request authorization from the DSB to retaliate by suspending trade concessions. DSU, supra note 33, art 22.2. Retaliation can be in "the same economic sector in which the nullification or impairment has been found," in a different sector under the same agreement, or in a sector under a different agreement. MATSUISHITA, ET AL., supra note 12, at 120. Retaliation is supposed to be temporary and "terminated once the inconsistent measure has been removed, the losing party has provided a solution to the nullification [and] impairment of benefits, or the parties have reached a satisfactory solution.” Id.

330 Request for Authorization of Suspension of Concessions or Other Obligations by Ecuador, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/52 (Nov. 9, 1999) (requesting permission to suspend concessions under agreements other than GATT). Ecuador requested permission to suspend concession because the economic cost of withdrawal of concessions in goods alone would have had a greater impact on Ecuador than the EC. Id. Instead Ecuador requested permission to suspend concessions under TRIPS, including in the areas of copyright of
come into compliance by revoking the inconsistent measure tends
to show that the original domestic constituency is stronger or more
motivated than any harmed by the retaliation.  

VI: Conclusion

The EC-Seal Products dispute is notable for several reasons. The panel ostensibly followed the path laid out by the Appellate
Body in the recent trio of TBT decisions, U.S.–Clove Cigarettes,
U.S.–Tuna II, and U.S.–COOL, of using GATT Article XX jurisprudence to analyze TBT Article 2.1, for example, by
incorporating the terms “arbitrary or unjustifiable discrimination”
into the determination of whether a regulatory distinction is
legitimate. However, the panel’s innovative transposition of the
analysis under TBT Article 2.1 to GATT Article XX, grounded in
textual similarities between the two provisions, was soundly
rejected by the Appellate Body, based on a contextual
interpretation of differences between the two provisions. In
applying a similar contextual analysis to GATT Article III:4 and
TBT Article 2.1, the Appellate Body clarified the relationship
between the two provisions and, by rejecting a limitation for
legitimate regulatory distinctions in the former, confirmed the
status of GATT Article III:4 as the stronger national treatment
obligation.

The Appellate Body also cemented the status of the GATT
Article XX chapeau test as one that is practically impossible to

sound recordings, geographical indications, and patents. Matsushita, et al., supra note 12, at 170. In EC–Hormones, the United States was granted authorization to retaliate by
suspending concessions up to $116.8 million per year, and chose to do so by targeting,
among other products, Italian scarves and Roquefort cheese. Joost Pauwelyn, The
Calculation and Design of Trade Sanctions in Context: What is the Goal of Suspending
Workshop on the Calculation and Design of Trade Sanctions in WTO Dispute Settlement, Centre for Trade and Economic Integration), available at

331 Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules are Rules
(demonstrating that countermeasures are ineffective at inducing compliance except
where imposed by a Member disproportionately stronger than the target).

332 See supra Sec. III.2.
333 See supra Sec. III.3.
334 See supra Sec. IV.1.
satisfy. In doing so, the Appellate Body steadfastly refused to consider evidence of regulatory or legislative intent, such as legislative history. This refusal by the Appellate Body is somewhat disingenuous, as the preferred test laid out by the Appellate Body, looking to the “design, architecture, revealing structure, operation, and application” of a measure, necessarily implicates regulatory intent. However, protectionist intent can and should be addressed in the sub-paragraphs of GATT Article XX, rather than under the chapeau as the panel did in EC–Seal Products.

The lesson for regulators following EC–Seal Products is that exceptions in regulatory measures are likely to be fatal when tested against GATT Articles III:4 and XX. However, given the factors that make it unlikely that a regulatory measure will be challenged at the WTO and Members’ poor track record at coming into full compliance in the event of an adverse WTO ruling, WTO obligations will likely not prevent regulators from including discriminatory exceptions in regulatory measures when necessary to satisfy domestic constituencies.

See supra Sec. IV.2.
See supra Sec. IV.3.
Id.
See supra Sec. IV.4.
See supra Sec. V.
Id.