

**MEASURES WITH MULTIPLE COMPETING PURPOSES
AFTER *EC – SEAL PRODUCTS*: AVOIDING A CONFLICT BETWEEN GATT
ARTICLE XX-CHAPEAU AND ARTICLE 2.1 TBT AGREEMENT**

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I. INTRODUCTION

One of the issues on which the report of the Appellate Body in *EC – Seal Products*² has stirred considerable debate among legal academics is how to deal with product regulations allegedly furthering multiple policy purposes under the law of the World Trade Organization (WTO).³ The measure at issue in that case was a sales ban imposed by the European Union (EU) on seal and seal-containing products, coupled with a number of exceptions including for seal products derived from hunts traditionally conducted by Inuit or other indigenous communities (IC exception). The ban was imposed out of European ‘public moral’ concerns over the cruel manner in which seals are hunted and killed, whereas the exception was made to protect Inuit cultural identity and livelihood. The key question that arose was whether this difference in regulatory treatment, which was found to cause detrimental impact (i.e., an asymmetric or disparate effect)⁴ on the conditions of competition for seals products imported from Canada and Norway (few of which were eligible to enter the EU market under the IC exception) vis-à-vis seal products imported from Greenland (the majority of which were eligible to enter the EU market under the IC exception), was nonetheless justifiable under WTO law. For the most part, academic discussions have focused on the Appellate Body’s analysis of this issue under the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT),⁵ since it did not address parallel claims made under the Agreement on Technical Barriers to Trade (TBT)⁶ having (quite rightly) reversed the Panel’s finding that the EU seal regime qualified as a technical regulation.⁷ And yet, as will be seen, it is plausible that in other cases a product regulation with multiple policy purposes comes within the scope of application of both agreements. With this in mind, this article seeks to contribute to the debate triggered by *EC*

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² WTO Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/DS401/AB/R, adopted 18 June 2014.

³ See notably, Donald H. Regan, ‘Measures with Multiple Purposes: Puzzles from EC—Seal Products’ *AJIL Unbound* (25 June 2015); Julia Y. Qin, ‘Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC—Seal Products’ *AJIL Unbound* (25 June 2015), <http://www.asil.org/blogs/ajil-unbound?page=1&blog=83>.

⁴ On this notion of ‘detrimental impact’, see Lothar Ehring, ‘De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?’ (2002) 36(5) *Journal of World Trade* 921.

⁵ World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (Cambridge University Press, 1999), 423.

⁶ *Ibid.*, 121.

⁷ Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 5.59-5.69. For further discussion, see Gracia Marín Durán, ‘Non-Tariff Barriers and the WTO Agreement on Technical Barriers to Trade: the Case of PPM-based Measures after *US – Tuna II* and *EC – Seal Products*’ (2015) 6 *European Yearbook of International Economic Law* 87, at 99-101.

– *Seal Products* by taking a more systemic perspective and considering also how this type of measure would be appraised under Article 2.1 TBT Agreement.

The relationship between the overlapping non-discrimination disciplines of the GATT (Articles I and III) and the TBT Agreement (Article 2.1) is, however, far from settled following the Appellate Body’s report in *EC – Seal Products*. On the one hand, the Appellate Body reiterated that the two agreements ‘should be interpreted in a coherent and consistent manner’, given that the balance between international trade liberalisation and domestic regulatory autonomy under the TBT Agreement ‘is not, in principle, different from the balance set out in the GATT’.⁸ On the other hand, it also held that the principle of coherent and consistent interpretation does not mean that ‘the legal standards for *similar* obligations –such as Articles I:1 and III:4 [GATT], on the one hand, and Article 2.1 [TBT Agreement], on the other hand– must be given identical meanings.’⁹

Taking this stance, the Appellate Body made clear *where* the balance between WTO non-discrimination obligations and members’ right to regulate ought to be struck in each agreement. In essence, under the GATT, a determination of whether there is detrimental impact on (or between) imports is made under Articles I/III and of whether it can be justified under Article XX, whereas under the TBT Agreement both questions are addressed within Article 2.1 itself.¹⁰ While structural differences between the two agreements can arguably explain this interpretative approach,¹¹ what is far less clear is why the Appellate Body also considered that the legal standards for justifying detrimental impact or discrimination (here used interchangeably) –i.e., the ‘arbitrary or unjustifiable discrimination’ test under the chapeau of Article XX GATT and the ‘legitimate regulatory distinction’ (LRD) test of Article 2.1 TBT Agreement– are *not* the same.¹² This is certainly puzzling particularly when, as in the *EC – Seal Products* case, the enquiries under these justification provisions overlap and have essentially the same function: that is, to determine whether the different regulatory treatment (i.e., prohibition/exception) having detrimental effects on imports can or cannot be justified.¹³ So why are the applicable legal tests all of a sudden different? And don’t we risk ending with inconsistent outcomes, rather than preserving the same balance, under both agreements?

On this background, the article proceeds as follows. Section 2 begins by outlining what is here understood by measures accommodating multiple *competing* purposes and why

⁸ Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 5.121-5.122.

⁹ *Ibid*, para 5.123 (emphasis in original).

¹⁰ *Ibid*, paras 5.71-5.130, where it essentially rejects the EU’s claim that the legal standards under Articles I/III GATT should include, in line with the analysis under Article 2.1 TBT Agreement, an enquiry into whether detrimental impact on imports ‘stems exclusively from a legitimate regulatory distinction’, given the existence of Article XX GATT. On these structural differences between the GATT and the TBT Agreement, see Gabrielle Marceau and Joel P. Trachtman, ‘A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade’ (2014) 48(2) *Journal of World Trade* 351, at 363-366 and 378-380.

¹¹ This is not the place to engage with the long-standing debate on the role of regulatory purpose under Articles I/III GATT, see generally: James Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ (2013) 16(1) *Journal of International Economic Law* 37; Donald H. Regan, ‘Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec’ (2003) 37(4) *Journal of World Trade* 737; Weihuan Zhou, ‘*US – Clove Cigarettes* and *US – Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT’ (2012) 15(4) *Journal of International Economic Law* 1075.

¹² Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 5.310-5.313, where it makes abstract statements on the ‘important parallels’ between the analyses under Article 2.1 TBT Agreement and the chapeau of Article XX GATT, but also the ‘significant differences’ in terms of their function, scope and applicable legal standards.

¹³ *Ibid*, paras 5.136 and 5.138, where it recognizes that the cause of the ‘discrimination’ considered under the chapeau of Article XX GATT was actually the same as that of ‘detrimental impact’ under Article I GATT.

they may necessitate justification under the chapeau of Article XX GATT or/and the LRD prong of Article 2.1 TBT Agreement. Section 3 exposes the difficulty in justifying such measures under the chapeau of Article XX GATT, which is mostly due to the rigidity of the rational connection standard for assessing unjustifiable discrimination that was first introduced by the Appellate Body in *Brazil – Retreaded Tyres*.¹⁴ It then criticizes the Appellate Body’s ambivalent stance on this rational connection standard in *EC – Seal Products*, and argues that it should have clearly recognized that discrimination under the chapeau can be justified by a legitimate regulatory purpose, *even if* it is independent from, or goes against, the main objective of the measure. Section 4 turns to the LRD prong of Article 2.1 TBT Agreement, which was similarly coined by the Appellate Body in *US – Clove Cigarettes*.¹⁵ It will be shown that this justification test offers a more flexible approach for appraising measures with multiple competing purposes, mainly because it does not embody an equally strict rational connection standard. Section 5 argues that, contrary to the Appellate Body’s puzzling statements in *EC – Seal Products*, the legal standards for justifying discrimination under GATT Article XX-chapeau and Article 2.1 TBT Agreement should be essentially the same, and thus conflicting interpretations avoided. It is cautioned that, *if* the Appellate Body instead maintains a different approach to rational connection under each of these justification provisions, we could end up with the absurd result that the exact same discriminatory treatment of a measure with multiple competing purposes is found to be TBT-*justified*, and yet GATT-*unjustified*. Section 6 concludes by suggesting a two-tier test for bringing in line the justification provisions under the GATT and TBT Agreement.

II. MEASURES WITH MULTIPLE POLICY PURPOSES – WHY AN ISSUE UNDER WTO LAW?

It is widely accepted,¹⁶ including by the Appellate Body,¹⁷ that domestic regulators may take into account, and accommodate within a single measure, several policy interests. That being so, what was then the issue with multiple-purposes regulation in *EC – Seal Products*? As noted earlier, the dispute concerned a ban on the placing on the EU market of seal and seal-containing products so as to address European public moral concerns on the welfare of seals (for simplicity, seal welfare purpose), while a number of exceptions were made for, amongst others, seal products derived from hunts traditionally conducted by Inuit or other indigenous communities that contribute to their subsistence (for simplicity, Inuit protection purpose).¹⁸ However, the two regulatory purposes appear to go against each other, given that ‘IC hunts can cause the very pain and suffering for seals that the EU

¹⁴ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007.

¹⁵ WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012.

¹⁶ See e.g., Lorand Bartels, ‘The Chapeau of Article XX GATT: A New Interpretation?’ (2014) *Cambridge Legal Studies Research Paper Series No 40/2014*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469852; Philip I. Levy and Donald H. Regan, ‘EC – Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)’ (2015) 14(2) *World Trade Review* 337, at 363.

¹⁷ Appellate Body Report, *US – Clove Cigarettes*, [above n 15](#), paras 113 and 115.

¹⁸ Council and European Parliament Regulation (EC) 1007/2009, OJ 2009 L286/36, Article 3(1). Note that the Regulation (Article 3(2)) contained another two explicit exceptions from the general ban for: (i) products obtained from seals hunted for the sole purpose of marine resource management and not placed on the market for commercial reasons (MRM exception); and (ii) seal products brought by travellers into the EU on an occasional basis and exclusively for their personal use (Travellers exception). However, these are not considered in this article as only the IC exception was at issue in the assessment of unjustifiable discrimination under the chapeau of Article XX GATT: see Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.316.

public is concerned about.¹⁹ The proper way of characterizing the objective(s) of the EU seal regime proved itself controversial, with Norway claiming that it pursued ‘independent policy objectives’, while the EU arguing that it reflected instead a single ‘moral standard of animal welfarism’ pursuant to which the protection of Inuit cultural identity and subsistence could be deemed morally superior to the welfare of seals under certain conditions.²⁰ For its part, the Appellate Body found that the ‘*principal* objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, *while accommodating IC and other interests* so as to mitigate the impact of the measure on those interests.’²¹ Arguably, this characterization appears reasonable given that it was the public moral concerns on seal welfare that primarily called the whole EU seal regime into existence: there would have been no reason to have an exception protecting Inuit interests if there were not *a priori* reason (i.e., protecting seal welfare) to ban seal products.²² However, in trying to discern the ‘principal’ or ‘main’ objective of the EU seal regime, the Appellate Body’s approach implicates that the rationale underlying an exception to a trade-restrictive rule is unlikely to be considered an ‘objective’ of the measure from a WTO law standpoint. To reflect this, the term multiple *competing* purposes (rather than ‘objectives’) will be used in this article to refer to measures that restrict trade for one policy purpose, but do not apply to certain ‘like products’ in order to accommodate another purpose.

In this way, the contested measure in *EC – Seal Products* can be distinguished from that at issue in the *US – Tuna II* case, which established the conditions for the use of a ‘dolphin-safe’ label on tuna products sold on the US market and was held to pursue two objectives: consumer information and dolphin protection.²³ Such multiple objectives may be termed as *consistent* since, from a regulatory perspective, there is no need to make any trade-off as nothing prevents both objectives from being advanced in a mutually supportive manner –i.e., better protection of dolphins *can* go hand in hand with better consumer information. Conversely, in *EC – Seal Products*, a trade-off between protecting seal welfare and preserving Inuit cultural identity and livelihood appeared necessary, at least insofar as seal hunting, involving inhumane methods, is considered an indispensable element of Inuit tradition and subsistence.²⁴ This last condition, in turn, highlights one of the difficulties when dealing with measures purported to serve competing policy purposes: how do we ascertain that these are *genuinely competing* and a trade-off in the form of rule/exception is *truly needed* from a regulatory perspective?

In addition, measures accommodating competing policy purposes through a rule/exception are likely to be regarded with some suspicion under WTO law as being potentially in tension with the core non-discrimination disciplines: namely, the most-favoured-nation (MFN) treatment obligation under Article I GATT and national treatment obligation under Article III GATT, as well as the parallel obligations under Article 2.1 TBT Agreement *excluding* the LRD limb.²⁵ As most recently interpreted by the Appellate Body, the fundamental purpose of these disciplines is essentially to preserve equal competitive

¹⁹ Ibid, para 5.320.

²⁰ Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 5.141-5.143.

²¹ Ibid, para 5.167 (emphasis added).

²² For a similar view, see Regan, [above n 3](#), at 2.

²³ WTO Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/AB/R, adopted 13 June 2012, para 302.

²⁴ WTO Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/DS401/R, adopted (as modified) 18 June 2014, para. 7.276, and further discussion in [section III.B below](#).

²⁵ Due to the fact that the TBT Agreement does not contain a general exceptions clause similar to Article XX GATT, Article 2.1 TBT Agreement entails an additional step enquiring into whether the detrimental impact ‘stems exclusively from a legitimate regulatory distinction’; see further [section IV below](#).

opportunities for like (or competitive)²⁶ products imported from all WTO members (MFN treatment) and for imported and like domestic products (national treatment).²⁷ And yet, an exception to a trade-restrictive rule – be it a ban as in *EC – Seal Products* or another regulatory requirement – is prone to have a detrimental impact on competitive opportunities: that is, a disproportionately worse or disparate impact on products from country A that are subject to the trade-restrictive rule vis-à-vis those competitive products from country B that benefit from the exception. For instance, in the *EC – Seal Products* case, the combined operation of the IC exception and the ban led to *de facto* discrimination (under the MFN treatment obligation),²⁸ because it was found to have a disparate impact on seal products from Canada and Norway (the majority of which were not eligible to access the EU market under the IC exception) when compared to like seal products²⁹ from Greenland (the majority of which were eligible to access the EU market under the IC exception).³⁰

Under Articles I/III GATT and the first limb of Article 2.1 TBT Agreement (*minus* LRD prong), it thus suffices to demonstrate a detrimental impact on (or between) imports, while any rationale for such discriminatory effects becomes relevant only at the justification stage. Nonetheless, as a backdrop to that subsequent analysis, it is useful to clarify that the clearly defined ‘Inuit’ criterion³¹ was the main reason why the majority of Canadian/Norwegian seal products did not qualify under the IC exception to access the EU market, given that Inuit hunts only make up a very small portion of the overall seal hunting in these two countries (roughly 5%). Conversely, in Greenland, the share of Inuit hunts in total seal hunting is much higher (about 95%), explaining why virtually all Greenlandic seal products were likely to qualify under the IC exception for placing on the EU market.³² Additionally, the undefined ‘subsistence’ criterion under IC exception³³ had the effect of excluding Inuit seal products from Canada which, due to their small scale, relied on processing facilities and marketing channels used by commercially-hunted seal products while segregation between these products was allegedly too costly and impracticable.³⁴ But even so, the crux of the dispute was the discrimination between seal

²⁶ Appellate Body Report, *US – Clove Cigarettes*, [above n 15](#), para 120, stating that the determination of likeness under Article 2.1 TBT Agreement is, as under Article III:4 GATT, ‘a determination about the nature and extent of a competitive relationship between and among the products at issue’. For an overview of case law on ‘likeness’, see Peter van den Bossche, *The Law and Policy of the World Trade Organization*, 2013 (Cambridge University Press, 2013), at 325-328, 360-368 and 386-394.

²⁷ Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 5.82, 5.93 and 5.116; see also WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 by Mexico)*, WT/DS381/AB/RW, adopted 3 December 2015, para 7.29.

²⁸ In addition, the MRM exception was found inconsistent with the national treatment obligation: Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.353 and 7.629. These findings were not appealed by the EU: Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.71.

²⁹ Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.137-7.138 and 7.594, where it was undisputed that all seal products were ‘like’, irrespective of whether they conformed or not to the IC exception requirements; see also paras 7.151-7.154 and 7.597, where the Panel rightly compared the entire group of Canadian/Norwegian imported seal products (conforming and non-conforming) vis-à-vis the entire group of Greenlandic imported seal products (conforming and non-conforming) for the purpose of the MFN claims.

³⁰ Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.316; see also Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.159-7.164, 7.170 and 7.600.

³¹ Regulation (EC) 1007/2009, [above n 18](#), Article 3(1) and definition of ‘Inuit’ provided in Article 2(4).

³² Panel Report, *EC – Seal Products*, [above n 24](#), para. 7.161 and footnotes 213-215; and para. 7.599, referring in particular to: COWI, ‘Study on Implementing Measures for Trade in Seal Products – Final Report’ (January 2010), at 25-30,

http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf

³³ Regulation (EC) 1007/2009, [above n 18](#), Article 3(1), while no definition of ‘subsistence’ is provided in the measure; and Appellate Body Report, *EC – Seal Products*, [above n 2](#), para. 5.324.

³⁴ Panel Report, *EC – Seal Products*, [above n 24](#), para 7.314.

products from Greenlandic *Inuit subsistence* hunts and seal products from Canadian/Norwegian *non-Inuit commercial* hunts, and only marginally that between seal products from Inuit communities in different countries.

In justifying any discriminatory effects of these rule/exception measures reflecting multiple competing purposes under the chapeau of Article XX GATT³⁵ or/and the LRD prong of Article 2.1 TBT Agreement, two questions seem pertinent. As a first step, how do we determine which rationales are legitimate and capable of justifying discrimination/detrimental impact? In this regard, it appears important to distinguish between domestic regulations serving multiple *legitimate* purposes and those adopted for a mixture of *proper* and *improper* purposes: as Bartels puts it, ‘measures for which an improper purpose is disguised by an ostensibly legitimate purpose’.³⁶ It is, of course, quite a strenuous task to identify and agree on a set of legitimate objectives in the abstract. But for our purpose of justifying discrimination, it can be confidently stated that, at a minimum, protectionism and favouritism between trading partners are *not* justifiable rationales under GATT Article XX-chapeau and Article 2.1 TBT Agreement.³⁷ However, as Qin rightly notes, accepting the legitimacy of a given regulatory purpose does not automatically imbue the detrimental impact of a measure with justifiability.³⁸ A second step in the justification analysis ought to look deeper into how a legitimate policy purpose is implemented, and in particular whether and to what extent the discriminatory effects of a measure are necessary to achieve such a purpose.³⁹ The key challenge lies, therefore, in devising an interpretative framework that would allow us to respect WTO members’ right to adopt measures with multiple competing purposes, provided it can be shown these are genuinely legitimate and to the extent discrimination is necessary to attain them. Against this background, the next sections proceed to evaluate the relevant legal standards for justifying discrimination/detrimental impact under GATT Article XX-chapeau and the LRD prong of Article 2.1 TBT Agreement.

III. MEASURES WITH MULTIPLE COMPETING PURPOSES AND UNJUSTIFIABLE DISCRIMINATION UNDER GATT ARTICLE XX-CHAPEAU

A. Justifying Discrimination under the Chapeau: Rational Connection Requirement & Closed List

³⁵ Note that, under Article XX GATT, there is a prior condition that the measure be provisionally justified under one of the subparagraphs, but we are here concerned only with the discriminatory effects of an exception to a trade-restrictive rule, which are generally appraised under the chapeau: see Appellate Body Report, *EC – Seal Products*, [above n 2](#), para. 5.136; and Appellate Body Report, *Brazil – Retreaded Tyres*, [above n 14](#), para 217 and 226-227.

³⁶ Lorand Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction’ (2015) 109 *American Journal of International Law* 95, at 123 and 125, arguing further that the condition in the chapeau of Article XX GATT prohibiting measures constituting a ‘disguised restriction on international trade’ is most relevant for scrutinizing such mixed-purposes measures.

³⁷ Arguably, protectionism and favouritism go against the general spirit of the WTO and the letter of the chapeau of Article XX GATT and the preamble of the TBT Agreement (sixth recital), and in particular ‘disguised restriction on international trade’. Moreover, in the GATT context, there are other exceptions clauses specifically permitting favouritism (e.g., Article XXIV GATT for purpose of regional integration) or protectionism (Article XVIII:A GATT for the purpose of infant-industry protection), subject to specific conditions set out therein.

³⁸ Julia Y. Qin, ‘Defining Nondiscrimination under the Law of the World Trade Organization’ (2005) 23(2) *Boston University International Law Journal* 215, at 265.

³⁹ *Ibid.*, at 267-269; and Bartels, [above n 36](#), at 118-119 arguing this approach was followed in: WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/4/AB/R, adopted 20 May 1996 and WTO Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998.

Unlike the substantive non-discrimination obligations just seen, the chapeau of Article XX GATT does not, by its express terms, prohibit all discrimination but only discrimination ‘between countries where the same conditions prevail’ that is ‘arbitrary or unjustifiable’.⁴⁰ And yet, in spite of the decisive role the chapeau has played in a number of WTO disputes,⁴¹ the central question of how to determine whether discrimination can be justified is still uncertain. In *Brazil – Retreaded Tyres*, the Appellate Body held that this determination ‘should focus on the cause of the discrimination, or the rationale put forward to explain its existence.’⁴² This statement makes intuitive sense: if the rationales advanced by the WTO member responsible for the discrimination could not be the reference point for its justifiability, what could be? And yet, it raises another question: is *any* rationale acceptable as a justification for discrimination under the chapeau of Article XX GATT?

The chapeau’s text leaves this issue largely open, with no express limit on the set of possible justifiable rationales for discrimination.⁴³ In *Brazil – Retreaded Tyres*, however, the Appellate Body limited the range of legitimate justifications by stating that discrimination between countries where the same conditions prevail would be unjustifiable whenever ‘the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.’⁴⁴ It further specified that the assessment of whether discrimination is unjustifiable should be made in the light of the objective that provided the basis for the measure’s provisional justification under a given subparagraph of Article XX GATT.⁴⁵ In the case of measures pursuing multiple competing purposes, this means in light of the *principal* objective of the measure only –i.e., that which motivated the adoption of the trade-restrictive rule, and not the rationale underlying the exception.⁴⁶ Moreover, the Appellate Body appeared to elevate the question of whether there is a rational connection between the reasons for the discrimination and the (main) objective of the measure to some sort of litmus test: that is, the absence of such a rational connection will be *in itself* dispositive for a finding of unjustifiable discrimination and bring the appraisal of the measure under GATT Article XX-chapeau to an end.⁴⁷ Not surprisingly, the complainants in *EC – Seal Products* sought to rely on this earlier case law as the basis for their claim that the discrimination resulting from the IC exception was not justifiable under the chapeau of GATT Article XX, arguing that its Inuit protection purpose was not rationally connected to, but clearly went against, the measure’s main objective of protecting seal welfare.⁴⁸

⁴⁰ Appellate Body Report, *US – Gasoline*, [above n 39](#), p. 23; Appellate Body, *US – Shrimp*, [above n 39](#), para 150. The Appellate Body has thus far refrained from drawing a clear distinction between ‘arbitrary’ and ‘unjustifiable’ discrimination. For simplicity, this paper will generally refer to ‘unjustifiable’ discrimination following the definition suggested in Bartels, [above n 36](#), at 122-123, as ‘discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.’

⁴¹ See, *inter alia*, Bartels, [above n 36](#), at 96.

⁴² Appellate Body Report, *Brazil – Retreaded Tyres*, [above n 14](#), para. 226.

⁴³ This observation is also made in Bartels, [above n 36](#), at 118; Qin, [above n 3](#), at 5.

⁴⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, [above n 14](#), para. 227.

⁴⁵ *Ibid.*, para. 227. This was a departure from its previous jurisprudence that the ‘policy objective of a measure issue cannot provide its rationale or justification under the standards of the chapeau of Article XX’: Appellate Body Report, *US – Shrimp*, [above n 39](#), para 149. For a critical discussion, see S. Gaines, ‘The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures’ (2001) 22(4) *University of Pennsylvania Journal of International Economic Law* 739, at 776-781; see also A. Davies, ‘Interpreting the Chapeau of GATT Article XX in Light of the New Approach in Brazil – Retreaded Tyres’ (2009) 43(3) *Journal of World Trade* 507, at 518-521.

⁴⁶ On this distinction, see [section II above](#).

⁴⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, [above n 14](#), para 227.

⁴⁸ Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 2.39-2.40, 2.96 and 5.318.

The problem is, however, that this rational connection requirement is excessively rigid and rather senseless when dealing with measures accommodating multiple competing purposes.⁴⁹ This is because when an exception is inserted to balance between competing policy purposes,⁵⁰ its underlying rationale will not only differ from but necessarily go against the objective justifying the general (trade-restrictive) rule.⁵¹ That being so, it is simply pointless to ask whether the reasons given for the discrimination resulting from that exception are rationally connected to the measure's main objective. Evidently, this question can only be answered in the negative, resulting *ipso facto* in a finding of unjustifiable discrimination. In this way, applying a strict rational connection requirement predetermines the outcome of the analysis under GATT Article XX-chapeau to a finding of unjustifiable discrimination: if the rationale for discrimination can never differ, or contradict, the main objective of the measure, there is simply no meaningful opportunity for WTO members to ever justify measures accommodating competing policy purposes. This rigidity is obviously problematic because it does not even allow for a genuine investigation into whether the rationale for the exception, and hence for the discrimination, is or not legitimate. And yet, there is no ground to assume that a rational disconnect with the measure's main objective is *per se* evidence that the purpose underlying an exception is improper. A case in point is the IC exception, whose Inuit protection purpose has been broadly recognized as being legitimate in,⁵² *inter alia*, the United Nations Declaration on the Rights of Indigenous People⁵³ and in the ILO Declaration concerning Indigenous and Tribal People in Independent Countries,⁵⁴ as well as several national measures (including Canada's sealing regulations).⁵⁵

The inception of a rational connection requirement in *Brazil – Retreaded Tyres* was possibly motivated by the specific circumstances of that case which, arguably, did *not* concern an exception reflecting a genuinely competing legitimate purpose. The challenged measure was an import prohibition (and associated fines) on retreaded tyres adopted for public health purposes (i.e., reducing exposure to health risks arising from the accumulation of waste tyres),⁵⁶ while exempting MERCOSUR countries even though retreaded tyres from these countries were found to pose comparable health risks to those originating in the complaining WTO member (the EU).⁵⁷ The explanation offered by Brazil for justifying this discrimination between MERCOSUR and non-MERCOSUR countries

⁴⁹ Another problem is that the rational connection standard illogically duplicates the preceding enquiry of whether there is discrimination 'between countries where the same conditions prevail', which is already determined in light of the measure's objective: see Bartels, [above n 36](#), at 112 and 116.

⁵⁰ It is not always the case that an exception reflects a different policy purpose, but may in some instances be motivated by the same purpose as the general rule. An example is offered by the 1961 UN Convention on Narcotic Drugs, which limits the production, distribution and trade in narcotic drugs for human health and welfare purposes, while exclusively permitting the use of such substances for medical and scientific purposes.

⁵¹ This point was also recognized by the Panel in *EC – Seal Products*, [above n 24](#), para. 7.298, footnote 477; and reiterated by the EU but not addressed on appeal: Appellate Body Report, *EC – Seal Products*, [above n 2](#), paras 2.100 and 2.149.

⁵² Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.292 and 7.295-7.296, referring to these international instruments as 'factual evidence' of the broadly recognized importance of preserving Inuit culture and tradition and sustaining their livelihood.

⁵³ UN General Assembly, United Nations Declaration on the Rights of Indigenous People, A/RES/61/295, adopted on 13 September 2007. Most relevantly, see: Articles 5, 8(2)(b), 20(1) and 32.

⁵⁴ International Labour Organization, Convention No 169 concerning Indigenous and Tribal People in Independent Countries, adopted 27 June 1989, 28 I.L.M. 1382. Most relevantly, see Article 15(1). Ironically, only three EU Member States (i.e., Denmark, the Netherlands, and Spain) have actually ratified this ILO Convention.

⁵⁵ Panel Report, *EC – Seal Products*, [above n 24](#), para 7.294 and footnote 472.

⁵⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, [above n 14](#), para 134.

⁵⁷ *Ibid*, para 217.

was the alleged need to comply with a ruling issued by a MERCOSUR arbitral tribunal.⁵⁸ However, some passages of the Appellate Body’s reasoning appear to suggest that this declared compliance purpose underlying the MERCOSUR exemption could not be considered a valid legitimate rationale in the specific context of justifying discrimination under the chapeau of Article XX GATT.⁵⁹ Notably, it was questionable whether Brazil had an actual obligation under MERCOSUR to exempt its regional partners from the import ban, except by virtue of the fact that it had not raised the public health defence available under the regional agreement (analogue to Article XX(b) GATT) in the MERCOSUR proceedings.⁶⁰ In other words, it was far from clear that there was a need for Brazil to make a trade-off between complying with its MERCOSUR obligations and achieving its public health objective.⁶¹

In sum, the key point made here is that applying a strict rational connection requirement is not a sensible basis for identifying legitimate rationales capable of justifying discrimination under the chapeau of Article XX GATT. One cannot simply invalidate a justifying purpose as illegitimate *just* because it is independent from, or even undermines, the main objective of the measure. Accordingly, it is submitted that the justification analysis under the chapeau of Article XX GATT should not be restrained by a rational connection requirement, but instead enquire into whether the rationale given for the discrimination – be it the main objective of the measure, or another reason put forward by the regulating WTO member– is or is not legitimate.

B. Revisiting the Rational Connection Standard in *EC – Seal Products*: Some Way But Not Far Enough

In *EC – Seal Products*, the Appellate Body was directly confronted with the question of whether the (legitimate) purpose of protecting Inuit cultural identity and subsistence could justify discrimination under the chapeau of Article XX GATT, *even if* this rationale clearly went against the principal objective of protecting seal welfare.⁶² As such, this case offered the perfect opportunity for the Appellate Body to revise its self-imposed rational connection requirement, but whether and how far it did so is not entirely clear and remains a subject of academic debate.⁶³ In dealing with this issue, the Appellate Body began by reiterating the significance of the rational connection standard as ‘one of the most important factors’⁶⁴ in the assessment of unjustifiable discrimination under the chapeau, while somehow refining it vis-à-vis *Brazil – Retreaded Tyres*. It ruled that:

‘[T]he European Union has failed to demonstrate, in our view, how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to “commercial” hunts *can be reconciled with, or is related to,* the policy objective of addressing EU *public moral concerns regarding seal welfare*. In this connection, we note that the European Union has not established, for example, *why the need to protect the economic and social interests of the Inuit* and other indigenous peoples *necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts,* given that “IC hunts can cause the very pain and suffering for seals that the EU public is concerned about”.⁶⁵

⁵⁸ Ibid, para 226.

⁵⁹ Ibid, para 232.

⁶⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, above n 14, para 234.

⁶¹ For a similar view, see Levy and Regan, above n 16, at 364-365; and Regan, above n 3, at 4.

⁶² Appellate Body Report, *EC – Seal Products*, above n 2, paras 5.308-5.309 and 5.318.

⁶³ See e.g., Bartels, above n 36, at 117; Regan, above n 3, at 3; Qin, above n 3, at 4.

⁶⁴ Appellate Body Report, *EC – Seal Products*, above n 2, para 5.318.

⁶⁵ Ibid, para 5.320 (emphasis added).

This statement is, regrettably, ambivalent particularly if one considers its practical implications as to whether or not withdrawing the IC exception is deemed necessary to comply with the chapeau of Article XX GATT. The first part of the statement harks back to the rigid rational connection requirement in *Brazil – Retreaded Tyres*: discrimination can only be justified by reasons that are rationally related to the main objective of the measure (*in casu*, seal welfare). In practical terms, this would imply that the IC exception would need to be removed for the EU seal regime to meet the chapeau requirements of Article XX GATT. Yet the second part of the statement appears to suggest something subtler: discrimination may, in principle, be justified by reasons that are unrelated to the main objective of the measure (*in casu*, Inuit protection), *provided* that the responding WTO member can establish that the two purposes are genuinely competing and implicate a regulatory trade-off. In other words, the Appellate Body seems here to be (implicitly) accepting the protection of Inuit interests as a legitimate justification for discrimination under the chapeau, but requiring the EU to demonstrate that there is no reasonable alternative (i.e., it ‘cannot do anything further’) that would achieve this Inuit protection purpose while being less inconsistent with the seal welfare objective of the measure. In practical terms, this would mean that the IC exception can be retained *to the extent* that it is shown that the two regulatory purposes cannot be reconciled –i.e., the need to protect Inuit interests ‘necessarily implies’ the EU can do nothing to ensure that the welfare of seals is addressed in the context of IC hunts.

This second position seems more reasonable, but the Appellate Body did not follow through by explaining why it considered the EU had failed to establish that the Inuit protection and seal welfare purposes were in effect competing. This lack of reasoning is regrettable and results in ambiguity at both normative and practical levels. From a normative perspective, there was no attempt to evaluate whether or not improving seal welfare in the context of IC hunts would put at risk the subsistence of the Inuit and the preservation of their cultural identity, and thus be contrary to the international commitments mentioned above.⁶⁶ In this connection, the Appellate Body could have considered and assessed the validity of the EU’s argument before the Panel that the application of inhumane hunting methods, such as trapping and netting, is ‘indispensable for the subsistence of the Inuit, who otherwise would not be able to hunt during almost half of the year’.⁶⁷ Besides this, it is unclear what the EU could be reasonably expected to do at a more practical level to ensure seal welfare is addressed in the context of IC hunts. This is so, in particular, in light of the Appellate Body’s previous finding that the inherent welfare risks of seal hunting pose an obstacle to the effective monitoring and enforcement of the application of humane killing methods, and that such risks are present in seal hunts in general (including IC hunts).⁶⁸ This tension is, in fact, apparent in the Commission’s proposal for amending the EU Seal Regulation: on the one hand, it states that ‘a genuinely humane killing method cannot be effectively and consistently applied in the hunts conducted by the Inuit and other indigenous communities, just like in the other seal

⁶⁶ Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.320, footnote 1559, seemingly agreeing with Canada that the burden of proof is on the respondent, but without explaining why. Criticizing this point, see Bartels, [above n 36](#), at 121.

⁶⁷ Panel Report, *EC – Seal Products*, [above n 24](#), para 7.276; and para 7.295; see also European Union, Responses to the Panel’s Questions following the Second Meeting, dated 23 May 2013, Question 122, para 76, http://trade.ec.europa.eu/wtodispute/show.cfm?id=475&code=2#_eu-submissions.

⁶⁸ This finding was made in the context of the necessity analysis under Article XX(a) GATT (and Article 2.2 TBT Agreement), and relied upon for determining that the alternative measure proposed by the complainants (i.e., animal welfare certification and labelling requirements) was *not* ‘reasonably available’ to the EU: Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.224 and 7.496-7.497; and Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.289.

hunts’,⁶⁹ while on the other hand it makes the use of the IC exception conditional upon new minimum standards on humane seal hunting.⁷⁰ But what is the point of formally introducing minimum seal welfare requirements into the IC exception if their application cannot be effectively monitored and enforced by the EU? In these factual circumstances, the proposed amendment seems largely pointless as it is unlikely to make IC hunts more seal-friendly in practice, and thus it does not serve to explain (nor to reduce) the discrimination between seal products from IC and commercial hunts.

Leaving its stance on the rational connection standard ambiguous, the Appellate Body proceeded to fault the EU measure for ‘additional factors’⁷¹ that went beyond the justifiability of the rationale for the IC exception, and which pertain to the manner in which it was designed and applied.⁷² The first was that the IC exception contained no safeguard against its potential abuse. Due to certain ambiguities in the ‘subsistence’ and ‘partial use’ criteria, coupled with the broad discretion consequently enjoyed by recognized bodies in applying them, ‘seal products derived from what should in fact be properly characterized as ‘commercial’ hunts could potentially enter the EU market under the IC exception.’⁷³ The second was that the European Union had not made ‘comparable efforts’ to facilitate market access for seal products derived from Canadian Inuit hunts as it did with respect to Greenlandic Inuit hunts, resulting in a *de facto* exclusivity of the IC exception to the benefit of the latter.⁷⁴

Bartels posits that this additional enquiry indicates that the Appellate Body *implicitly* accepted that the IC exception was otherwise justifiable under GATT Article XX-chapeau, *despite* the rational disconnect between its Inuit protection rationale and the main seal welfare objective of the measure. He argues that, had the Appellate Body treated this rational disconnect as dispositive for a violation of the chapeau, it would have disposed of the case at this early stage without further examining whether the IC exception could be designed and applied in a less discriminatory manner.⁷⁵ This is a pertinent point, but an equally possible reading is that the Appellate Body was just piling on additional reasons that aggravated its overall finding that the EU seal regime resulted in unjustifiable discrimination under GATT Article XX-chapeau. Indeed, this alternative reading seems to be supported by the conclusive paragraph of the ruling,⁷⁶ where the rational disconnect between the discrimination and the seal welfare objective is given pride of place among the factors for condemning the EU seal regime.⁷⁷ But in any event, we should not have been

⁶⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1007/2009 on trade in seal products, COM(2015) 45 final, dated 6 February 2015, at 5; see also European Union, [above n 67](#), Question 133, para 126, where the EU submitted that ‘effective monitoring and enforcement would be *even less viable* in the IC hunts than in the case of commercial seal hunts ...’ (emphasis added).

⁷⁰ European Commission, [above n 69](#), Article 3(1)(c); incorporated by Council and European Parliament Regulation (EU) 2015/1775, OJ 2015 L 262/1, Article 3(1)(c).

⁷¹ Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.321, where the Appellate Body stated: ‘[t]he relationship of the discrimination to the objective of a measure is *one of the most important factors, but not the sole test*, that is relevant to the assessment of arbitrary or unjustifiable discrimination. In other words, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be *additional factors* that may *also* be relevant to that overall assessment.’ (emphasis added).

⁷² This is welcome departure from the Appellate Body’s somehow superficial distinction between the ‘design’ (or contents) and ‘application’ of the measure under Article XX GATT: see Bartels, [above n 36](#), at 6-7.

⁷³ Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.328; and paras 5.324-5.327 for full reasoning.

⁷⁴ *Ibid*, para. 5.333-5.337.

⁷⁵ Bartels, [above n 36](#), at 119.

⁷⁶ Appellate Body Report, *EC – Seal Products*, [above n 2](#), para 5.338, stating that: ‘[...] we have identified *several features* of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception.’ (emphasis added).

⁷⁷ *Ibid*, para. 5.338; cf. [above n 65](#) and accompanying text.

left to speculate on the relative weight of the rational connection standard under the chapeau of Article XX GATT. Given that this was the crux of disagreement between the parties in *EC – Seal Products*, the Appellate Body should have taken a clear position on the matter. And for the reasons previously mentioned,⁷⁸ that position should have been to relinquish rational connection as a strict requirement by unequivocally stating that discrimination under the chapeau can be justified by a legitimate purpose, *even if* it is separate from, or goes against, the main objective of the measure.

It could well be, as Bartels and others⁷⁹ suggest, that the Appellate Body at least tacitly accepted the Inuit protection purpose as an independent legitimate rationale for justifying discrimination under the chapeau of Article XX GATT. But this is still disappointing because we are left to wonder on which normative grounds it did so. The protection of Inuit cultural tradition and subsistence is not explicitly mentioned in the closed list of policy objectives of Article XX GATT. While it could arguably be considered a matter of ‘public morals’ under Article XX(a) GATT, both the Panel and the Appellate Body found there was insufficient evidence to do so in this particular case.⁸⁰ This raises an important question: does *EC – Seal Products* then imply a broadening of permissible justifications for discrimination under the chapeau *beyond* the legitimate objectives listed in the subparagraphs of Article XX GATT? And if so, only insofar as the legitimacy of a (non-listed) policy objective enjoys broad-based international recognition? This could be inferred from *EC – Seal Products*, given that the need to preserve Inuit cultural identity and to sustain their livelihood has been broadly recognized in a number of international instruments.⁸¹ And yet, the Appellate Body omitted any reference to these international law sources, cited by both the EU and the Panel, when addressing the justifiability of the IC exception under the chapeau.⁸² As a result, the Appellate Body’s approach has left great uncertainty as to the normative basis for identifying legitimate justifications under the chapeau of Article XX GATT.

Furthermore, the Appellate Body’s decision in *EC – Seal Products* was not fully satisfactory for another reason. Once it is established that Inuit protection can be a valid justification under GATT Article XX-chapeau, the next critical issue is whether the discrimination resulting from the IC exception is actually necessary to achieve such a legitimate purpose. From this standpoint, it becomes easier to understand why the Appellate Body condemned the EU measure for discriminating between commercial seal products originating in different countries (i.e., by not safeguarding against potential abuse of the IC exception), as well as between Inuit seal products of Greenlandic and Canadian origin (i.e., by making the IC exception *de facto* available only to Greenland):⁸³ this discrimination was in no way necessary to preserve Inuit cultural identity and sustain their livelihood. Indeed, in the amended EU Seal Regulation, provisions have been made to prevent the abuse of the IC exception by the importation of seal products derived from hunts conducted primarily for commercial purposes,⁸⁴ while ‘comparable efforts’ are being

⁷⁸ See section III.A above.

⁷⁹ See above n 75; and also Gregory Shaffer and David Pavian, ‘The WTO EC Seal Products Decision: Animal Welfare, Indigenous Communities and Trade’ (2015) *University of California Legal Studies Research Paper Series No 2015-17*, at 6.

⁸⁰ Panel Report, *EC – Seal Products*, above n 24, para 7.299; see also Appellate Body Report, *EC – Seal Products*, above n 2, para 5.148. For a critical discussion, see Elizabeth Whitsitt, ‘A Comment on the Public Morals Exception in International Trade and the *EC – Seal Products* Case: Moral Imperialism and Other Concerns’ (2014) 3(4) *Cambridge of International and Comparative Law* 1376.

⁸¹ See above n 53 and n 54.

⁸² Criticizing this approach, see Shaffer and Pavian, above n 79, at 7.

⁸³ See above n 72 and 73; and accompanying text.

⁸⁴ Regulation (EU) 2015/1775, above n 70, Preamble, fifth recital and Article 3(5).

made to facilitate its use by Canadian Inuit.⁸⁵ Both of these amendments thus confirm that the Inuit protection purpose can be achieved in a less discriminatory manner than in the original EU measure. But this was a relatively ancillary matter in the dispute, as the bulk of the discrimination associated with the IC exception was –and will remain even after these amendments– between seal products derived from Greenlandic *Inuit subsistence* hunts (conforming/permitted) and from Canadian/Norwegian *non-Inuit commercial* hunts (non-conforming/prohibited).⁸⁶ Therefore, the Appellate Body should have also considered whether this discrimination was necessary to protect Inuit subsistence and cultural identity. In other words, the key question it should have but did not address is whether there was a less discriminatory alternative to the carve-out from the ban, which was reasonably available to the EU in order to protect such Inuit interests.

In conclusion, the Appellate Body ambivalently loosened the rational connection standard under the chapeau of Article XX GATT in *EC – Seal Products*, but it never went as far as flatly saying that discrimination can be justified by a legitimate policy purpose, *even if* it is unrelated or goes against the main objective of the measure. As we have seen, its ambivalent approach and limited reasoning have left a number of critical puzzles unresolved. It would have been more sensible for the Appellate Body to unambiguously discard rational connection as a requirement under the chapeau, to explicitly accept the Inuit protection purpose as an independent legitimate justification on the basis of its broad-based international recognition, and then to fully assess whether the discrimination associated with the IC exception was necessary to achieve that purpose. Had it done so, the Appellate Body would have laid down a clearer analytical framework for appraising measures accommodating multiple competing purposes under GATT Article XX-chapeau in future cases. But most importantly, as will be seen next, it would also have brought the unjustifiable discrimination test under the chapeau in closer alignment with its reasoning under the LRD prong of Article 2.1 TBT Agreement.

IV. MEASURES WITH MULTIPLE COMPETING PURPOSES AND LEGITIMATE REGULATORY DISTINCTION UNDER ARTICLE 2.1 TBT AGREEMENT

A. **Justifying Detrimental Impact under Article 2.1 TBT Agreement: No Rational Connection Requirement & Open List**

The terms ‘legitimate regulatory distinction’ appear nowhere in the TBT Agreement but were first coined by the Appellate Body in *US – Clove Cigarettes*, where it held that: ‘[...] the context and object and purpose of the *TBT Agreement* weigh in favour of reading the “treatment no less favourable” requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.’⁸⁷ In this way, the Appellate Body introduced a basis for justifying detrimental impact on (or between) imports and thereby placed the balance between the objective of trade liberalization and WTO members’ right to regulate within Article 2.1 TBT Agreement, given that this agreement does not contain a general exceptions clause similar to Article XX GATT.⁸⁸ Whereas it is sensible to read such

⁸⁵ European Commission, Decision on the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada, C(2014) 5881 final, dated 18 August 2014.

⁸⁶ Appellate Body Report, *EC – Seal Products*, above n 2, para 5.316; and section II above.

⁸⁷ Appellate Body Report, *US – Clove Cigarettes*, above n 15, para 175.

⁸⁸ *Ibid*, paras 94-96 and 101.

flexibility into Article 2.1 TBT Agreement,⁸⁹ the Appellate Body has provided limited guidance as to what this new LDR test actually entails. Most recently in *US – COOL (Article 21.5)*, it stated that the legitimacy of regulatory distinctions for the purpose of justifying detrimental impact in the context of Article 2.1 TBT Agreement is essentially ‘a function of whether they are designed and applied in an *even-handed* manner’.⁹⁰ On its plain meaning, even-handedness requires the relevant regulatory distinction to be ‘unbiased’, ‘impartial’ or ‘fair’, but these terms do not mean much in the abstract: even-handed *in light of what?* In other words, what is the point of reference through which the even-handedness (and hence, the legitimacy) of the regulatory distinction at issue is to be assessed? And most significantly for present purposes, does this assessment of even-handedness embody a rational connection standard, similar to that previously discussed in relation to the chapeau of Article XX GATT?

This latter question has been highly contested before several WTO panels, with different approaches taken depending on the specific circumstances of the case.⁹¹ Nevertheless, it is here submitted that the Appellate Body itself has not articulated or applied a strict rational connection requirement under Article 2.1 TBT Agreement. Instead, as illustrated in Table 1 below, the Appellate Body has adopted a more flexible approach to the range of permissible justifications for detrimental impact.

Table 1 – Detrimental Impact/Justification in TBT Trilogy Cases

<i>AB Report</i>	<i>Cause of Detrimental Impact</i>	<i>Justifying Rationales</i>
<i>US – Clove Cigarettes (2012)</i>	Ban/exception	Main objective/ <i>reasons for exception</i>
<i>US – Tuna II (2012)</i>	Difference in labelling conditions	Main (mutually supportive) objectives
<i>US – COOL (2012)</i>	Segregation through record-keeping/verification requirements	Main (sole) objective

To be sure, in all three cases, the main objective of the technical regulation at issue was a point of reference for assessing the even-handedness of the regulatory distinction causing the detrimental impact. Thus, in *US – Tuna II*, the Appellate Body found that the regulatory distinction causing the detrimental impact on Mexican tuna products⁹² was not even-handed in light of the objectives of the measure (i.e., dolphin protection/consumer information),⁹³ because it was not ‘calibrated to the risks to dolphins arising from different

⁸⁹ Ibid, para 169; see also WTO Appellate Body Report, *United States – Certain Country of Origin Labelling Requirements (US – COOL)*, WT/DS384/DS386/AB/R, adopted 23 July 2012, para 268.

⁹⁰ WTO Appellate Body Report, *United States – Certain Country of Origin Labelling Requirements (Recourse to Article 21.5 by Canada and Mexico)*, WT/DS384/DS386/AB/RW, adopted 29 May 2015, para 5.93 (emphasis added).

⁹¹ See notably, WTO Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 by Mexico)*, WT/DS381/RW, adopted (as modified) 3 December 2015, paras 7.80-7.91 and 7.916; and WTO Panel Report, *United States – Certain Country of Origin Labelling Requirements (Recourse to Article 21.5 by Canada and Mexico)*, WT/DS384/DS386/RW, adopted (as modified) 29 May 2015, paras 7.214-7.217. Cf with Panel Report, *EC – Seal Products*, [above n 24](#), paras 7.259 and 7.296-7.298.

⁹² Namely, the difference in labelling conditions for tuna products caught by setting on dolphins in the Eastern Tropical Pacific (ETP) and not eligible for the ‘dolphin-safe’ label (primarily of Mexican origin) and those for tuna products caught by other fishing methods outside the ETP and eligible for the ‘dolphin-safe’ label (primarily from the United States and other countries): Appellate Body Report, *US – Tuna II*, [above n 23](#), para 284.

⁹³ Ibid, paras 242 and 282.

fishing methods in different areas of the ocean.⁹⁴ Similarly, in *US – COOL*, the finding that the relevant regulatory distinction⁹⁵ lacked even-handedness was made in view of the objective of the measure: that is, the recordkeeping and verification requirements causing detrimental impact on imported livestock could ‘not be explained by the need to provide origin information to consumers.’⁹⁶ In this sense, as most recently clarified by the Appellate Body in *US – Tuna II (Article 21.5)*, the nexus between the regulatory distinction causing detrimental impact and the main objective of the measure *can* be a pertinent factor in the even-handedness analysis, depending on the ‘particular circumstances of the case’.⁹⁷

Yet importantly, it does not follow that detrimental impact under Article 2.1 TBT Agreement can never be explained by reference to reasons other than the main objective of the measure. Quite the contrary, the Appellate Body conceded this possibility in *US – Clove Cigarettes*, where the regulatory distinction giving rise to the detrimental impact was an exception for menthol cigarettes (mainly domestically produced) from the general ban on cigarettes with a characterizing flavour (primarily clove cigarettes imported from Indonesia). Having found that this distinction between prohibited clove cigarettes and permitted menthol cigarettes could not be explained by the principal objective of the measure (i.e., to reduce youth smoking),⁹⁸ the Appellate Body went on to consider whether other *unrelated* reasons put forward by the United States (i.e., the alleged risks of healthcare costs and black market smuggling arising from withdrawal symptoms that would afflict menthol smokers) could nonetheless justify the regulatory distinction, and thus the detrimental impact on imported clove cigarettes. Ultimately, the Appellate Body did not find these independent reasons sufficiently persuasive, *not* on the ground that such reasons were unrelated to the main objective of reducing youth smoking, but because it was unclear the risks alleged by the US would actually materialize.⁹⁹

Therefore, the core point for present purposes is that the LRD prong of Article 2.1 TBT Agreement is not restrained by a rigid rational connection requirement. Instead, the Appellate Body has explicitly left open the possibility that a regulatory distinction may be found to be legitimate, and hence capable of justifying detrimental impact, *in spite of* a rational disconnect between its rationale and the main objective of the measure.¹⁰⁰ This flexibility is more sensible for dealing with measures pursuing multiple competing purposes, insofar as it allows for a genuine investigation into whether the rationale for the

⁹⁴ Ibid, para 297.

⁹⁵ Namely, the recordkeeping and verification requirements that necessitated segregation, and that created an incentive for US producers to process exclusively domestic livestock and a disincentive to process imported livestock: Appellate Body Report, *US – COOL*, above n 89, paras 342 and 348.

⁹⁶ Appellate Body Report, *US – COOL*, above n 89, paras 347-349. This was because the level of information conveyed to consumers through the mandatory retail labels was far less detailed and accurate than the information required to be tracked and transmitted by the upstream producers and processors, while the US had supplied ‘no rational basis for this disconnect’. Consequently, the regulatory distinctions drawn in the COOL measure were found to be arbitrary and the ‘disproportionate burden’ imposed on upstream producers and processors unjustifiable.

⁹⁷ Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, paras 7.85 and 7.97, where it is stated that rational connection is not a ‘single-factor test that should always and exclusively be used’, but ‘one way of demonstrating that a measure is not even-handed’ (emphasis in original).

⁹⁸ Appellate Body Report, *US – Clove Cigarettes*, above n 15, para 225, noting that both clove and menthol cigarettes are equally appealing to youth.

⁹⁹ Ibid, para 225, where the Appellate Body found that ‘it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market’.

¹⁰⁰ This reading of *US – Clove Cigarettes* was echoed by the Panel in *EC – Seal Products*, above n 24, para 7.259 and footnote 415. For further discussion, see Gracia Marín Durán, ‘Measures with Multiple Policy Objectives and Article 2.1 TBT Agreement: A GATT-like Balance, or a Likely Conflict, after *EC – Seal Products*? CTEI Working Paper 2015-06, at 19-20, http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/working_papers.html.

exception, and hence for the detrimental impact, is or is not legitimate. But it logically raises a separate question: which rationales are acceptable for the purpose of justifying detrimental impact under Article 2.1 TBT Agreement?

The text of Article 2.1 TBT Agreement leaves this issue entirely open absent a list of legitimate objectives therein, while the Appellate Body has generally evaded defining the scope of legitimacy under this specific provision.¹⁰¹ In this regard, Marceau argues that what ought to be legitimate under Article 2.1 TBT Agreement is the difference in regulatory treatment itself, and not the objective *per se*.¹⁰² Whereas it is true that the two concepts are not fully akin, it is hard to see how a regulatory distinction could be deemed legitimate *unless* it is based on a legitimate purpose. As aptly explained by the Panel in *EC – Seal Products*, the existence of a legitimate purpose alone would not automatically lead to establishing the legitimacy of the regulatory distinction, but it is a necessary element for its justifiability.¹⁰³ Arguably, the legitimacy of most policy objectives at issue in the TBT trilogy cases could be tacitly assumed –i.e., public health protection in *US – Clove Cigarettes*; dolphin protection/consumer information in *US – Tuna II* and consumer information on origin in *US – COOL*.¹⁰⁴ However, the limits of this approach became evident in *US – COOL (Article 21.5)*, when the Appellate Body was confronted with the question of whether costs savings enjoyed by US entities through the exemptions in the amended COOL measure could justify the detrimental impact on imported livestock.¹⁰⁵ It had little choice but to assert that ‘[such] cost considerations do not constitute a supervening justification for discriminatory measures’.¹⁰⁶ This does not mean that WTO members may not seek to minimize domestic costs when adopting technical regulations. But that is different from accepting domestic costs considerations as a legitimate rationale for justifying detrimental impact against imports –put another way, for imposing costs only or mainly on other WTO members.¹⁰⁷

Thus, the approach to legitimacy favoured by the Appellate Body in the context of Article 2.1 TBT Agreement is to identify on a case-by-case basis a shorter list of regulatory purposes that are considered improper for justifying detrimental impact, rather than looking for a positive list of legitimate objectives. However, as rightly noted by Levy and Regan, focusing on restraining illegitimate purposes under Article 2.1 TBT Agreement may mean that a wider range of policy objectives are permissible for justifying discrimination under that provision than under GATT Article XX-chapeau.¹⁰⁸ The Appellate Body shied away from addressing this systemic issue when raised by the EU in *EC – Seal Products*, and retorted that: ‘[...] beyond stating that the list of legitimate objectives that may factor into an analysis under Article 2.1 [TBT Agreement] is open, in contrast to the closed list of

¹⁰¹ See e.g., Appellate Body Report, *US – COOL*, [above n 89](#), paras 330-331, where Canada and Mexico disputed whether the objective pursued by the COOL measure (i.e., consumer information on origin) was legitimate in the context of Article 2.1 TBT Agreement. The Appellate Body only addressed claims regarding the legitimacy of the measure’s objective in the context of Article 2.2 TBT Agreement (para 332 and footnote 632).

¹⁰² Gabrielle Marceau, ‘The New Jurisprudence in *US – Clove Cigarettes*, *US – Tuna II* and *US – COOL*’ (2013) 8 *Asian Journal of WTO and International Health Law and Policy*, at 28 (footnote 111).

¹⁰³ Panel Report, *EC – Seal Products*, [above n 24](#), para 7.279.

¹⁰⁴ These are explicitly recognised as such in both the sixth recital of the preamble of the TBT Agreement and Article 2.2 TBT. In relation to consumer information, see Appellate Body Report, *US – COOL*, [above n 89](#), para 445.

¹⁰⁵ Appellate Body Report, *US – COOL (Article 21.5)*, [above n 90](#), paras 5.110-5.113.

¹⁰⁶ *Ibid*, para 5.116.

¹⁰⁷ Appellate Body Report, *US – Clove – Cigarettes*, [above n 15](#), para 221, footnote 431: ‘[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, *provided* that the technical regulation at issue does not overtly or covertly discriminate against imports.’ (emphasis added).

¹⁰⁸ Levy and Regan, [above n 16](#), at 362.

objectives enumerated under Article XX [GATT], the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 [TBT Agreement] but would not fall within the scope of Article XX [GATT].¹⁰⁹ This appears to be a hint by the Appellate Body that we should not be too concerned about the formal asymmetry across agreements, as it intends to interpret the closed list of legitimate objectives in Article XX GATT in a way that covers all regulatory purposes that may fall within the open list of Article 2.1 TBT Agreement. Some regulatory purposes considered legitimate under the TBT Agreement can be easily integrated into Article XX GATT: an example is consumer information on origin at issue in *US – COOL*, where the Appellate Body held that it ‘bears some relation to the objective of prevention of deceptive practices reflected in both Article 2.2 [TBT Agreement] itself and Article XX(d) [GATT].’¹¹⁰ In addition, as illustrated by the *EC – Seal Products* case,¹¹¹ the public morals justification under Article XX(a) GATT offers considerable room for interpretative maneuvering and *de facto* expanding the closed list of legitimate objectives under the GATT. But it seems difficult to do this for everything: for instance, how may the objective of ‘ensuring the quality of exports’ listed in the preamble of the TBT Agreement be fitted into Article XX GATT?

B. Unpacking Even-handedness: A Necessity Test?

Even if uncertainty remains as to the scope of legitimacy under Article 2.1 TBT Agreement, the existence of a legitimate purpose is a necessary but not sufficient condition for justifying a regulatory distinction causing detrimental impact. The Appellate Body’s even-handedness analysis under Article 2.1 TBT Agreement rightly suggests that we should further enquire into whether the regulatory distinction, and the resulting detrimental impact, is actually necessary to achieve such a legitimate purpose.¹¹² Thus, in *US – Tuna II*, the difference in labelling conditions causing detrimental impact on Mexican tuna products could not be fully explained by the need to protect dolphins and inform consumers, since it was not commensurate with the risks to dolphins arising from different fishing methods employed in different areas of the ocean. Notably, products containing tuna caught outside the Eastern Tropical Pacific (ETP) by fishing methods other than setting on dolphins (primarily of US and third-country origin) were eligible for the dolphin-safe label, without any certification as to whether dolphins had been killed or seriously injured during the course of the tuna fishing operations.¹¹³ Similarly, in *US – COOL*, the recordkeeping and verification requirements causing detrimental impact on imported livestock could not be explained by the need to provide information on origin to consumers, given that only a small amount of the information required to be tracked and transmitted by upstream producers was actually communicated to the consumers through the mandatory retail labels.¹¹⁴ In this sense, even-handedness could be seen as a proxy for a necessity test, even though the Appellate Body has not articulated it as such.

¹⁰⁹ Appellate Body Report, *EC – Seal Products*, above n 2, para 5.128.

¹¹⁰ Appellate Body Report, *US – COOL*, above n 89, para. 445.

¹¹¹ For a discussion, see J. Möllenhoff, ‘Framing the ‘Public Morals’ Exception After *EC – Seal Products* With Insights from the ECtHR and the GATT National Security Exception’ *CTEI Working Paper* 2015-07, http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2015-07_Mollenhoff_EC-Seals-ECtHR.pdf.

¹¹² See Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, paras 7.153 and 7.160 referring to an additional enquiry into whether the detrimental impact is explained as ‘proportionate’, or ‘commensurate’, in light of the objective pursued.

¹¹³ Appellate Body Report, *US – Tuna (II)*, above n 23, paras 289-292; Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, para 7.250.

¹¹⁴ Appellate Body Report, *US – COOL*, above n 89, paras 347 and 349.

In reality, the Appellate Body has not provided much direction on the overall structure of the even-handedness analysis. It has just said that “[i]n assessing even-handedness, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation and application of the technical regulation at issue.”¹¹⁵ This merely indicates that deciding whether a measure pursues a given legitimate purpose in an even-handed manner involves a case-specific and highly fact-based inquiry into its design and application, with no facts being *à priori* excluded. While this approach is not *per se* wrong, it is too vague as to what even-handedness actually requires. To illustrate this point, let’s take the *US – Tuna II* dispute as an example.

In this case, the main reason for the Appellate Body’s finding that the different labelling requirements were not even-handed in addressing risks to dolphins was that “[...] the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does “not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP”.”¹¹⁶ The implication here seems to be that there were alternative measures reasonably available to the US that would achieve its dolphin protection/consumer information objectives in a less discriminatory manner –i.e., by doing something to sufficiently address similar adverse effects on dolphins outside the ETP. However, alternative measures were only superficially flagged at this stage of the dispute,¹¹⁷ and as a result it was left unresolved how exactly the US measure could be made even-handed and thus consistent with Article 2.1 TBT Agreement. In particular, it was unclear whether even-handedness would require the same certification requirements being applicable within and outside the ETP (i.e., mandatory independent observer certification), or conversely whether laxer certification requirements (i.e., captain self-certification) could still be applied outside the ETP in light of the prevailing risks to dolphins in this particular area of the ocean.¹¹⁸ Similarly, it was undetermined whether other fishing methods pose a comparably high risk as setting on dolphins, and thus whether even-handedness would entail disqualifying tuna products caught by any such equally harmful method from accessing the dolphin-safe label.¹¹⁹ This uncertainty arising from the original proceedings has, inevitably, led to the appropriateness of alternative measures being contested at Panel compliance proceedings,¹²⁰ and regrettably, the matter remains unsettled even after Appellate Body compliance proceedings.¹²¹ This is because the Appellate Body was unable to ‘complete the legal analysis’ and assess fully whether regulatory distinctions (other than the ‘determination provisions’) drawn under the amended US measure can be explained and justified in the light of the objective of protecting dolphin, ‘in the absence of a proper assessment by the Panel’ of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery. To be sure, it is not for the Appellate Body itself to undertake such a highly fact-intensive assessment,¹²² but the Panel’s own failure to do so may be partly attributed to the vagueness of even-handedness as an analytical tool, which has not been conducive to a prompt and effective settlement of the *US – Tuna II* dispute.¹²³

¹¹⁵ Ibid, para 271; see also Appellate Body Report, *US – Clove Cigarettes*, above n 15, para 182.

¹¹⁶ Appellate Body Report, *US – Tuna II*, above n 23, para 297 (emphasis in original).

¹¹⁷ Ibid, para 296.

¹¹⁸ Ibid, footnotes 612-613.

¹¹⁹ Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, para 7.131.

¹²⁰ Panel Report, *US – Tuna II (Article 2.1 5)*, above n 91, paras 7.120-7.135 and 7.180-7.263; and 7.264-7.283 for separate opinion on the matter.

¹²¹ Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, paras 7.229-7.230, 7.253 and 7.266.

¹²² Article 17.6 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) in World Trade Organization, above n 5, 354.

¹²³ Ibid, Article 3(3).

To remedy this shortcoming, it is submitted that the even-handedness analysis under Article 2.1 TBT Agreement should comprise a more in-depth consideration of whether a *less discriminatory* alternative measure exists that would be at least equally effective in reaching the legitimate goal pursued by the challenged measure –that is, a properly articulated necessity test. Doing so, would not only avoid the need for compliance proceedings in order to determine this very question, but also serve to provide a clearer analytical framework for WTO panels to conduct the factual examination under the LRD prong of Article 2.1 TBT Agreement. In addition, the approach suggested here would also have the advantage of delimiting the scope of enquiry under Article 2.1 TBT Agreement vis-à-vis Article 2.2 of the same agreement, the latter focusing instead on the availability of *less trade-restrictive* alternative measures that would contribute at least as much to achieving the pursued legitimate objective.¹²⁴ Conversely, what matters under Article 2.1 TBT is whether a given legitimate purpose can be achieved in a less discriminatory manner, even if not necessarily in a less trade-restrictive one: notably, in *US – Tuna II*, even-handedness would appear to require an alternative measure that addresses similar adverse effects on dolphins outside the ETP, even though this may be *more* restrictive of trade in tuna products (i.e., from third countries other than Mexico) than the original US measure. Drawing such a line between Articles 2.1 and 2.2 TBT Agreement appears, in turn, the only possible way of dealing with a measure presenting a trade-off between its trade-restrictive and discriminatory effects,¹²⁵ which is typically the case of measures accommodating multiple competing purposes: for instance, in *US – Clove Cigarettes*, banning all flavoured cigarettes would have been a less discriminatory, yet more trade-restrictive, alternative measure available to the US in pursuing its objective of reducing youth smoking.

V. AVOIDING CONFLICTING INTERPRETATIONS OF THE GATT AND TBT JUSTIFICATION PROVISIONS

The preceding analysis has revealed two main differences in the relevant provisions under the GATT and TBT Agreement for justifying discrimination/detrimental impact. The first partly stems from the text of these agreements, namely the closed list of legitimate objectives in Article XX GATT and the absence of such a list in Article 2.1 TBT Agreement leaving the scope of permissible justifications thereunder largely open. Yet arguably, this is not a primary concern given the Appellate Body hinted in *EC – Seal Products* that it will seek to avoid, as far as possible, any tension arising thereof through harmonious interpretation. The second results instead from the manner in which these justification provisions have been interpreted, and pertains to the rational connection standard on which the Appellate Body's stance has been more ambivalent. As we have seen, under the LRD prong of Article 2.1 TBT Agreement the rationale for the regulatory distinction causing detrimental impact does not need to be rationally related to the main objective of the measure (as per *US – Clove Cigarettes*), whereas at least some degree of rational connection between the two appears to be required under the unjustifiable discrimination limb of Article XX GATT (even after *EC – Seal Products*). Indeed, this difference was the only ground for the complainants' appeal in *EC – Seal Products* that the Panel had erred in applying the same legal test under both justification provisions.¹²⁶ The Appellate Body did fault the Panel for directly importing its analysis under the LRD prong of Article 2.1 TBT Agreement into the chapeau of Article XX GATT, but only gave a cursory and formalistic explanation as to why the applicable legal tests are not the same.¹²⁷

¹²⁴ Appellate Body Report, *US – Tuna II*, above n 23, para 319-320.

¹²⁵ On this point, see further Bartels, above n 36, at 11-15.

¹²⁶ Appellate Body Report, *EC – Seal Products*, above n 2, paras 2.39-2.40, 2.94-2.97 and 5.308.

¹²⁷ *Ibid*, paras 5.311-5.313.

If one compares the Panel's reasoning and findings under the LDR prong of Article 2.1 TBT Agreement with those of the Appellate Body under GATT Article XX-chapeau, the only material difference seems to be the relative weight attached to the rational connection standard.¹²⁸ But the purpose here is not to further speculate on what the Appellate Body may have intended. Rather, it is to caution that, *if* the Appellate Body sticks to some rational connection requirement under the chapeau of Article XX GATT, we could end up with a troublesome result that the exact same discriminatory treatment of a measure pursuing multiple competing purposes is found to be TBT-*consistent*, and yet GATT-*inconsistent*.

This is not merely a theoretical possibility, but one that can be envisioned in practice by modifying the facts of the *EC – Seal Products* case. For the sake of the argument, let's consider that: (i) the EU Seal Regulation had instead laid down a mandatory certification and labelling scheme that required seal products sold on the EU market to comply with certain humane hunting methods (assuming their application could be effectively monitored and enforced),¹²⁹ and hence was subject to the TBT disciplines;¹³⁰ while (ii) still provided an exception for seal products derived from hunts traditionally conducted by Inuit or other indigenous communities, but which was properly designed and applied (unlike in *EC – Seal Products*).¹³¹ In principle, this difference in regulatory treatment could be challenged under both Article I GATT and Article 2.1 TBT Agreement (i.e., MFN obligation), and would likely lead to a finding of detrimental impact on opportunities for imported non-Inuit seal products vis-à-vis imported Inuit seal products (assuming these are 'like products', which was undisputed in *EC – Seal Products*).¹³² Applying some rational connection requirement under the chapeau of Article XX GATT would preclude this discrimination from being justified, given that its underlying rationale (i.e., protection of Inuit culture and subsistence) is unrelated to, and even goes against, the main objective of the measure (i.e., seal welfare protection). Conversely, under the LRD prong of Article 2.1 TBT Agreement, nothing prevents the Inuit protection purpose from being accepted as an independent justifying rationale, and the detrimental impact caused by the Inuit/non-Inuit regulatory distinction could be justified if fully explained by the need to protect such Inuit interests.

Now, how do we deal with this situation where the discriminatory impact of the IC exception is deemed *justified* under the LRD prong of Article 2.1 TBT Agreement but *unjustified* under GATT Article XX-chapeau? In principle, both agreements are cumulatively applicable, since the priority usually given to the TBT Agreement as a *lex specialis* in the order of analysis¹³³ does not necessarily amount to excluding the applicability of the GATT as a *lex generalis*.¹³⁴ In practice, the Appellate Body's approach in the TBT trilogy cases

¹²⁸ For further discussion, see Marín Durán, [above n 100](#), at 19-20.

¹²⁹ This was, in fact, the less trade-restrictive alternative measure advanced by the complainants in *EC – Seal Products* (2014): see [above n 68](#) and accompanying text.

¹³⁰ For present purposes, it is assumed that a certification and labelling scheme prescribing seal hunting techniques qualifies as a technical regulation and falls under the scope of application of the TBT Agreement. In reality, it remains open to question which processes and production methods are covered by Annex 1 TBT Agreement: see further, Gracia Marín Durán, [above n 7](#).

¹³¹ See [above section III.B](#), for a discussion of the discriminatory defects in the design and application of the IC exception under the original EU seal regime.

¹³² See [above n 29](#).

¹³³ See WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted (as modified) 5 April 2001, para 8.16; see also WTO Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted (as modified) 23 October 2002, paras 7.14-7.19.

¹³⁴ See Joost Pauwelyn, 'Cross-agreement Complaints before the Appellate Body: a case study of the EC – Asbestos dispute' (2002) 1(1) *World Trade Review* 63, at 82; see also UN General Assembly, Fragmentation of

appears to imply that a measure found to be inconsistent with Article 2.1 TBT Agreement may not need further examination under the GATT, whereas a measure consistent with that TBT provision (as in our hypothetical case) does require such further examination.¹³⁵ The only exception to such a cumulative application is, pursuant to the General Interpretative Note to Annex 1A, where it results in a ‘conflict’ between a provision of the GATT and a provision of the TBT Agreement, and in this case the latter ‘shall prevail to the extent of the conflict’.¹³⁶ However, it is not obvious that our hypothetical example would constitute a ‘conflict’ so as to be captured by the General Interpretative Note.

The term ‘conflict’ is not defined in the General Interpretative Note, and is yet to be clarified by the Appellate Body in that specific context. It is largely undisputed that a conflict between WTO covered agreements exists in situations of mutually exclusive obligations that cannot be complied with simultaneously –i.e., whereby a GATT provision requires what a provision in another agreement in Annex 1A prohibits, or *vice versa*. But it is unsettled whether the notion of conflict should be strictly limited to this direct incompatibility between obligations in the GATT and in other Annex 1A agreements. Such a strict definition was, for instance, applied by the Panel in *Indonesia – Autos* in the framework of the relationship between the GATT and the Agreement on Subsidies and Countervailing Measures¹³⁷ (included in Annex 1A).¹³⁸ However, as Pauwelyn rightly criticizes, following this narrow definition of conflict would implicate that the WTO ‘systematically elevates the obligations of WTO members over and above [their] rights’.¹³⁹ This is because there could never be a conflict between a prescriptive GATT provision imposing an obligation (e.g., not to discriminate between like products) and a permissive provision in another Annex 1A agreement granting a right (e.g., an authorization or justification for discrimination): the former GATT provision will simply prevail, irrespective of the General Interpretative Note. To put it differently, it will always be possible for a WTO member to adhere to both provisions by renouncing its right.¹⁴⁰ This restrictive interpretation of conflict cannot be correct, as Bartels points out, in light of Articles 3.2 and 19.2 DSU, which equally protect the rights and obligations of WTO members under the covered agreements.¹⁴¹

A more appropriate stance was taken by the Panel in *EC – Bananas III*, which interpreted the notion of conflict in the General Interpretative Note more broadly, encompassing not only clashes between mutually exclusive obligations but also situations ‘where a rule in one agreement prohibits what a rule in another agreement explicitly

International Law: Difficulties arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, A/CN.4/L.702, dated 18 July 2006, at 9.

¹³⁵ See in particular, Appellate Body Report, *US – Tuna II*, above n 23, paras 405-406; and Marceau, above n 102, at 33-34 for a discussion.

¹³⁶ General Interpretative Note to Annex 1A in World Trade Organization, above n 5, 16; WTO Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, at 12-14.

¹³⁷ Agreement on Subsidies and Countervailing Measures (SCM Agreement) in World Trade Organization, above n 5, 231.

¹³⁸ WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/DS55/DS59/DS64/R, adopted 23 July 1998, paras 14.97-14.99; see also WTO Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para 65, adopting also a narrow definition of conflict in relation to the DSU and the special rules on dispute settlement contained in other WTO covered agreements. In support of this approach, see Elisabetta Montaguì and Maurits Lugard, ‘The GATT 1994 and other Annex 1A Agreements: Four Different Relationships?’ (2000) 3(3) *Journal of International Economic Law* 473, at 476.

¹³⁹ Pauwelyn, above n 134, at 80.

¹⁴⁰ See WTO Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WT/DS27/R, adopted (as modified) 25 September 1997, para 7.159, footnote 403.

¹⁴¹ Lorand Bartels, ‘Overlaps and Conflicts Between the WTO Agriculture Agreement and the Agreement on Subsidies and Countervailing Measures’ (2016) 50 *Journal of World Trade* 7, at 10-11.

permits.’¹⁴² Under this approach, WTO rights are not always subordinated to WTO obligations: a GATT provision forbidding a certain conduct can be superseded, for instance, by a TBT provision allowing that same conduct. In *US – Upland Cotton*, the Appellate Body seemed to endorse this broader definition of conflict in relation to Article 21.1 of the Agreement on Agriculture, which regulates its relationship with the GATT and Annex 1A agreements. It held that this provision could apply in three situations, including: ‘[...] where there is an explicit authorization in the text of the [Agreement on Agriculture] that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the [SCM Agreement].’¹⁴³ Therefore, the Appellate Body’s reasoning could suggest that an *explicit* authorization (or right) in an Annex 1A Agreement could prevail over a contrary obligation (or prohibition) in the GATT.¹⁴⁴

But even if this broader definition is adopted in the context of the General Interpretative Note, it is still questionable there would be a conflict in our hypothetical example: that is, between the lack of justification for the discriminatory impact of the IC exception under the chapeau of Article XX GATT and its possible justification under the LRD limb of Article 2.1 TBT Agreement. In this case, we are neither dealing with a conflict between obligations, nor between an obligation and a right,¹⁴⁵ but rather a contradiction *between rights* (or authorizations): that is, between the set of provisions that allow WTO members to justify discrimination under the GATT and the TBT Agreement. Arguably, nothing in the text of the General Interpretative Note prevents it from being applicable to a conflict between rights, given that it just refers to ‘provisions’ in general (not obligations, nor rights).¹⁴⁶ Even so, the contradiction between justification provisions is *not explicit* in the text –as both agreements use the identical language of ‘arbitrary and unjustifiable discrimination.’¹⁴⁷ It rather stems from the interpretation of these provisions by the Appellate Body as involving different legal standards for determining whether discrimination is justified. Arguably, this should not be an obstacle as nothing in the General Interpretative Note confines its application to textual conflicts between provisions, and not the manner in which these have been interpreted and applied.

And yet, applying the General Interpretative Note to our hypothetical TBT-justified/GATT-unjustified tension through a broad definition of conflict would create another hurdle. That is, recognizing a conflict exists between the justification provisions of the GATT and the TBT Agreement risks increasing strategic litigation: if the complaining party perceives it may be easier for the defendant to justify the discriminatory effect of a measure under the TBT Agreement, it would logically just bring discrimination claims under the GATT and avoid parallel TBT claims altogether. Moreover, this interpretative approach would be at odds with the Appellate Body’s own proposition in *EC – Asbestos* that the TBT Agreement is intended to ‘further the objectives of the GATT’ by imposing

¹⁴² Panel Report, *EC – Bananas III*, above n 140, paras 7.159 and 7.161. In support of this broader definition of conflict, see Pauwelyn, above n 134, at 78.

¹⁴³ WTO Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para 532. Thus, it seems unlikely that the Appellate Body would accept an *implicit* authorization (or right) in an Annex 1A agreement to take precedence over a contrary obligation in the GATT.

¹⁴⁴ See also Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, paras 155-157, where it took a similar approach when examining the relationship between Article XIII GATT and Articles 4 and 21.1 of the Agreement on Agriculture.

¹⁴⁵ The discrimination obligations in Articles I/III GATT and Article 2.1 TBT (*minus* LRD prong) are essentially the same: see above section II.

¹⁴⁶ On this point, see European Union, ‘Third Participant Oral Statement in *US – COOL (Article 21.5)*’, dated 16 February 2015, in particular paras. 8-14.

¹⁴⁷ This similarity between the language of GATT Article XX-chapeau and the Preamble of the TBT Agreement (sixth recital), which served as context for introducing the LRD prong into Article 2.1 TBT Agreement, was noted in Appellate Body Report, *US – Tuna II (Article 21.5)*, above n 27, para 7.88.

‘additional’ obligations upon WTO members.¹⁴⁸ However, the alternative of excluding the application of General Interpretative Note by adopting a strict definition of conflict would be equally absurd. In this case, both agreements would apply cumulatively and the inconsistency with GATT Article XX-chapeau given effect, which would also be odd given the exact same discriminatory treatment is justifiable under the LRD limb of Article 2.1 TBT Agreement. In sum, either way of dealing with the TBT-justified/GATT-unjustified tension would lead to a problematic outcome. This is a good reason for avoiding conflicting interpretations and aligning the legal standards for justifying discrimination under the GATT and TBT Agreement.

6. CONCLUSIONS

As we have seen, measures purportedly balancing multiple competing purposes by means of a rule/exception pose a singular challenge from a WTO law perspective. Such measures may not only come into tension with core WTO non-discrimination disciplines (i.e., Articles I and III GATT, as well as Article 2.1 TBT Agreement *minus* the LRD prong) but, as Levy and Regan aptly note, ‘as the regulatory regime responds to more and more purposes, the opportunities for covert protectionism, or for favouritism between trading partners, increase, so we should look for such covert purposeful discrimination with special care.’¹⁴⁹ However, this article has argued that such a concern is not sensibly addressed by pronouncing a *dictum* that discrimination can never be justified by reasons other than the principal objective of the measure. This rational connection requirement formulated by the Appellate Body in *Brazil – Retreaded Tyres* is over-simplistic and excessively restrictive of domestic regulatory autonomy, since discrimination caused by an exception would be *ipso facto* censured only because its rationale is different from, and may go against, the main objective of the measure. And yet, this rational disconnect is not, in and of itself, evidence that the exception is motivated by an improper policy purpose: it may well be or it may not. Accordingly, it is suggested that a more appropriate legal test for justifying discrimination/detrimental impact under WTO law should comprise a two-step enquiry into:

- (i) Whether there is a genuinely legitimate rationale for the discrimination, *even if* disconnected from, or in contradiction with, the main objective of the measure, and if so;
- (ii) Whether the discriminatory impact is *fully* explained by, or necessary to achieve, that legitimate purpose –i.e., in other words, there is no less discriminatory alternative measure reasonably available to this end.

From this standpoint, a second argument made here is that the Appellate Body’s decision in *EC – Seal Products* was disappointing for a number of reasons. With respect to the first prong of the above justification test, the Appellate Body ambivalently relaxed the rational connection requirement under the chapeau of Article XX GATT, but it never went as far as accepting that discrimination can be justified by a legitimate policy purpose, *even if* it is unrelated or goes against the main objective of the measure. It could well be that the Appellate Body implicitly accepted the Inuit protection purpose as an independent rationale for justifying discrimination, but it did so without reference to any normative considerations. As a result, it has left great uncertainty as to the normative basis for identifying legitimate justifications under the chapeau of Article XX GATT in future cases.

¹⁴⁸ WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para 80.

¹⁴⁹ Levy and Regan, [above n 16](#), at 363.

With regard to the second prong of the proposed justification test, the Appellate Body was right to condemn the discriminatory manner in which the IC was designed and applied, as this was evidently not necessary to protect Inuit cultural identity and subsistence. But even after these defects have been corrected, the revised IC exception will continue to have a detrimental impact on Canadian/Norwegian *non-Inuit commercial* seal products (i.e., still banned from the EU market) vis-à-vis Greenlandic *Inuit subsistence* seal products (i.e., permitted into the EU market). Therefore, it would have been desirable for the Appellate Body to address whether this discrimination was necessary to protect such Inuit interests, and thus justifiable under GATT Article XX-chapeau.

Had the Appellate Body followed the approach suggested here, it would have brought the unjustifiable discrimination test under the chapeau of Article XX GATT in closer alignment with its reasoning under the LRD prong of Article 2.1 TBT Agreement – even though, uncertainty also remains under this latter provision as to both the scope of legitimacy and what even-handedness actually requires. Indeed, a third argument advanced in this article is that there are good systemic reasons for the GATT and TBT justification provisions *not* to substantively differ with regard to the rational connection standard.¹⁵⁰ In both instances, the relationship between the detrimental impact and the main objective of the measure can be *a* relevant factor in the justification analysis, and particularly so when the defending WTO member has offered no other legitimate explanation for the discrimination.¹⁵¹ But under none of these provisions should rational connection be construed as a strict *requirement* or condition that would preclude a defending WTO member from justifying detrimental impact on the basis of a genuinely legitimate rationale that is unrelated to the measure's main objective. Regrettably, the Appellate Body's stance on this critical point remains ambiguous, as most recently illustrated in *US – Tuna II (Article 21.5)* by its sweeping statements on rational connection being 'one of the most important factors' under GATT Article XX-chapeau while 'potentially helpful' under the LRD limb of Article 2.1 TBT Agreement.¹⁵² And yet, clinging to some rational connection requirement under the chapeau of Article XX GATT while not under the LRD prong of Article 2.1 TBT Agreement, could lead us to the absurd outcome that the exact same discriminatory treatment of a measure pursuing multiple competing objectives is found to be *TBT-justified*, and yet *GATT-unjustified*. As we have seen, it is unclear whether the conflict rule in the General Interpretative Note would be applicable to this situation, but even if it was, it would not offer a fully satisfactory solution. Accordingly, the preferred way forward in avoiding an irrational TBT-justified/GATT-unjustified scenario is through consistent interpretation of the relevant justification provisions along the two-step test suggested above.

¹⁵⁰ Other than for the formal difference in terms of the burden of proof under Article 2.1 TBT Agreement (imposing an obligation) and Article XX GATT (establishing an exception): see Appellate Body Report, *US – Tuna II (Article 21.5)*, [above n 27](#), para 7.89.

¹⁵¹ See e.g., *ibid*, para 7.98, where the only explanation provided by the US for the differences in labelling conditions, and the resulting detrimental impact, was based on the dolphin protection objective of the measure (i.e., the allegedly different risks to dolphins associated with tuna fishing in different areas of the oceans and using different fishing methods).

¹⁵² *Ibid*, paras 7.92-7.93, 7.95, 7.99 and 7.153.