

# MEASURES WITH MULTIPLE POLICY OBJECTIVES AND ARTICLE 2.1 TBT AGREEMENT – A GATT-LIKE BALANCE, OR A LIKELY CONFLICT, AFTER EC – SEAL PRODUCTS?

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**1. INTRODUCTION**

One of the issues on which the report of the Appellate Body in *EC – Seal Products (2014)*<sup>3</sup> has stirred considerable debate among legal academics is how to deal with product regulations allegedly pursuing multiple policy objectives under WTO law.<sup>4</sup> The measure at issue in that case was a sales ban imposed by the European Union (EU) on seal and seal-containing products out of European ‘public moral’ concerns over the cruel manner in which seals are hunted and killed, whereas an exception was made for (*inter alia*) seal products derived from hunts traditionally conducted by Inuit or other indigenous communities in order to protect their 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)<sup>5</sup> 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 exception) vis-à-vis seal products imported from Greenland (the majority of which were eligible to enter the EU market under the 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)<sup>6</sup>, since it did not address parallel claims made under the Agreement on Technical Barriers to Trade (TBT)<sup>7</sup> having (quite rightly) reversed the Panel’s finding that the EU seal regime qualified as a technical regulation.<sup>8</sup> And yet, as will be seen, it is plausible that in other cases a product regulation with multiple policy objectives comes within the scope of application of both agreements. With this in mind, this article seeks to contribute to the debate triggered by *EC – Seal Products (2014)* by taking a more systemic perspective and considering also how this type of measures would be treated under Article 2.1 TBT Agreement.

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<sup>3</sup> WTO Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, adopted 18 June 2014 [hereinafter, AB Report in *EC – Seal Products (2014)*].

<sup>4</sup> See notably, D.H. Regan, ‘Measures with Multiple Purposes: Puzzles from EC—Seal Products’ *AJIL Unbound* (25 June 2015); J. Y. Qin, ‘Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC—Seal Products’ *AJIL Unbound* (25 June 2015), available at: <http://www.asil.org/blogs/ajil-unbound?page=1&blog=83>.

<sup>5</sup> On this notion of ‘detrimental impact’, see L. 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.

<sup>6</sup> General Agreement on Tariffs and Trade 1947, 55 *U.N.T.S.* 194, signed on 30 October 1947, incorporated by reference into the General Agreement on Tariffs and Trade, 1867 *U.N.T.S.* 187, signed on 15 April 1994.

<sup>7</sup> Agreement on Technical Barriers to Trade, 1868 *U.N.T.S.* 120, signed on 15 April 1994.

<sup>8</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.59-5.69, where the Appellate Body reversed the Panel’s finding that the EU seal regime laid down ‘product characteristics’, but did not complete the analysis as to whether it laid down ‘their related processes and production methods’ and thus did not address claims under the TBT Agreement. For further discussion, see G. 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.

## Measures with Multiple Policy Objectives and Article 2.1 TBT Agreement A GATT-Like Balance, or a Likely Conflict, After EC – Seal Products?

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 decision in *EC – Seal Products (2014)*. 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”.<sup>9</sup> 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.”<sup>10</sup>

Taking this stance, the Appellate Body made clear *where* the balance between non-discrimination obligations and WTO 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 imports is made under Articles I/III and of whether it can be justified under Article XX GATT, whereas under the TBT Agreement both questions are addressed within Article 2.1 TBT Agreement itself.<sup>11</sup> While structural differences between the two agreements can arguably explain this interpretative approach,<sup>12</sup> 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)<sup>13</sup> – i.e., the ‘arbitrary or unjustifiable discrimination’ test of Article XX-chapeau GATT and the ‘legitimate regulatory distinction’ (LRD) test of Article 2.1 TBT Agreement– are *not* the same.<sup>14</sup>

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<sup>9</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.121-5.122, referring in particular to its previous jurisprudence in: WTO Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 [hereinafter, AB Report in *US – Clove Cigarettes (2012)*].

<sup>10</sup> AB Report in *EC – Seal Products (2014)*, para. 5.123 (emphasis in original).

<sup>11</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.71-5.130, where the Appellate Body essentially rejects the EU's claim that the legal standards under Articles I/III GATT should include an enquiry into whether detrimental impact on imports stems exclusively from a legitimate regulatory distinction, in line with the analysis under Article 2.1 TBT Agreement. The main reason given is: “the fact that, under the GATT 1994, a Member's right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like products stems exclusively from a legitimate regulatory distinction.” (para. 5.125). This approach has implications in terms of the burden of proof given the ‘rule-exception’ framework under the GATT, as well as for the ‘necessity’ requirement which acts as an additional condition for justification under Article XX GATT whereas Article 2.2 TBT Agreement adds to, and applies independently of, Article 2.1 TBT Agreement. For a more detailed overview of these structural differences between the GATT and the TBT Agreement, see G. Marceau and J. 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.

<sup>12</sup> It is not the place here to engage with the long-standing debate on the role of regulatory purpose under Articles I/III GATT, see generally: J. Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ (2013) 16(1) *Journal of International Economic Law* 37; D.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; W. 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.

<sup>13</sup> See notes 13-14 below.

<sup>14</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.310-5.313, where the Appellate Body ambivalently notes 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. These obscure statements seem to suggest that, for the Appellate Body, the notion of ‘discrimination’ under the chapeau of Article XX GATT is broader than that of ‘detrimental impact’ under the substantive non-discrimination obligations (i.e., Articles I/III GATT and Article 2.1 TBT Agreement). However, in this particular case, the ‘discrimination’ considered under the chapeau of Article XX GATT was actually the same in “quality and nature” as the ‘detrimental impact’ found in violation of Article I:1 GATT (para. 5.136). The terms ‘discrimination’ and ‘detrimental impact’ are thus used interchangeably in this article.

This is certainly puzzling particularly when, as in our 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 reflecting competing policy objectives) having detrimental effects on imports can or not be justified.<sup>15</sup> So why are the applicable legal tests all of a sudden different? How exactly do they differ and how can the same balance be nonetheless maintained under both agreements? This article will critically reflect on these systemic questions, taking the example of product regulations serving multiple policy purposes as a case-study.

On this background, the article proceeds as follows. Section 2 begins by outlining what is here understood by measures accommodating multiple *conflicting* objectives and why they often 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 measures with such conflicting policy purposes under the chapeau of Article XX GATT. As will be shown, this is mostly due to the rigidity of the ‘rational connection’ standard for assessing ‘unjustifiable discrimination’, which is not found in the text of Article XX-chapeau GATT but was first created by the Appellate Body in *Brazil-Retreaded Tyres (2007)*.<sup>16</sup> In this respect, the Appellate Body’s ruling in *EC – Seal Products (2014)* is criticised for failing to review the ‘rational connection’ standard so as to clearly accept that discrimination can be justified under the chapeau of Article XX GATT by a legitimate regulatory purpose, *even if* it goes against the main objective of the measure. Section 4 turns to the ‘legitimate regulatory distinction’ test of Article 2.1 TBT Agreement and shows that it offers a more flexible approach for appraising measures with multiple conflicting objectives, mainly because it does not embody an equally strict ‘rational connection’ standard. However, it is also cautioned that this new LDR test, which was similarly coined by the Appellate Body in *US – Clove Cigarettes (2012)* and appears nowhere in the TBT Agreement, is not itself without doctrinal ambiguity. Section 5 explores the consequences of the different legal standards for justifying discrimination/detrimental impact under the GATT and the TBT Agreement. In particular, it evaluates the extent to which Article 2.1 TBT Agreement reflects a GATT-like balance, or conversely whether a ‘conflict’ (in the sense of the General Interpretative Note to Annex 1A) could arise in relation to measures with conflicting policy purposes. Ultimately, the key finding of this article is that neither the ‘unjustifiable discrimination’ limb of Article XX-chapeau, nor the LRD prong of Article 2.1 TBT Agreement, are appropriate for dealing with this kind of measures under WTO law. Section 6 argues in favour of a more consistent interpretation of these justification provisions and makes some suggestions in this direction.

## 2. MEASURES WITH MULTIPLE POLICY OBJECTIVES – WHY AN ISSUE UNDER WTO LAW?

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<sup>15</sup> AB Report in *EC – Seal Products (2014)*, para. 5.136, where the Appellate Body notes: “the discrimination that the Panel found under Article I:1 of the GATT 1994 arises from the different regulatory treatment that the measure accords to seal products derived from ‘commercial’ hunts, on the one hand, as compared to seal products derived from IC hunts, on the other hand, in combination with the fact that seal hunts in Canada and Norway are primarily ‘commercial’ hunts, whereas seals hunts in Greenland are predominantly IC hunts [...] the circumstances that bring about the discrimination within the meaning of the chapeau may include, but are not limited to, the circumstances that led to a finding of a violation of a substantive provision of the GATT”; and para. 5.138: “[...] in the present case, the causes of the ‘discrimination’ found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau.”, namely: the different regulatory treatment that had caused detrimental impact on Canadian/Norwegian seal products vis-à-vis Greenlandic seal products.

<sup>16</sup> WTO Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R, adopted 17 December 2007 [hereinafter, AB Report in *Brazil – Retreaded Tyres (2007)*].

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It is widely accepted that domestic regulators may take into account, and accommodate within a single measure, several policy objectives.<sup>17</sup> This fact was indeed relied upon by the Appellate Body in *US – Clove Cigarettes (2012)* as one of the reasons for rejecting the Panel’s purpose-based approach to the determination of likeness under Article 2.1 TBT:

“Measures, such as technical regulations, may have more than one objective ... a purpose-based approach to the determination of likeness *does not, necessarily, leave more regulatory autonomy for Members*, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or *which of these objectives should prevail* in determining likeness or less favourable treatment *in the event of conflicting objectives*.”<sup>18</sup>

Given this apparent deference to domestic regulatory autonomy, what is then the issue with measures pursuing multiple policy objectives under WTO law? In addressing this question, it is first necessary to differentiate between two types of domestic regulations with multiple policy objectives: (i) such objectives may mutually support each other, or in other words be *consistent*, or conversely (ii) such objectives may go against each other, or in other words be *conflicting*. An example of the first type is offered by the *US-Tuna II (2012)* case, in which the contested measure established the conditions for the use of a ‘dolphin-safe’ label on tuna products sold on the US market and pursued the objectives of consumer information and dolphin protection.<sup>19</sup> From a regulatory perspective, there is no need to make any trade-off between these two policy purposes as nothing prevents them from being advanced in a mutually supportive manner –i.e., better protection of dolphins can go hand in hand with better consumer information.

Conversely, as the Appellate Body rightly suggests, there may be situations in which two policy objectives inevitably come into direct conflict. The best example is provided by the *EC – Seal Products (2014)* dispute, which 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 (i.e., for simplicity, seal welfare objective), coupled with a number of exceptions for (*inter alia*) seal products derived from hunts traditionally conducted by Inuit or other indigenous communities (IC) that contribute to their subsistence (i.e., for simplicity, Inuit protection objective).<sup>20</sup> Unlike in the *US – Tuna II (2012)* case, the two objectives here appear to go against each other given that “IC hunts can cause the very pain and suffering for seals that the EU public is concerned

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<sup>17</sup> See e.g., L. Bartels, ‘The Chapeau of Article XX GATT: A New Interpretation’, (2014) *Cambridge Legal Studies Research Paper Series No 40/2014*, at 14, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2469852](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469852); P.I Levy and D. H. Regan, ‘EC – Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)’ (2015) 14(2) *World Trade Review* 337, 363.

<sup>18</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 115 (emphasis added), proceeding thereafter to enumerate other (more important) reasons for rejecting the purpose-based approach to the determination of likeness under Article 2.1 TBT Agreement, and notably that it would narrow the scope of ‘like products’ and thus of the non-discrimination obligation under the TBT Agreement.

<sup>19</sup> WTO Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012 [hereinafter, AB Report in *US – Tuna II (2012)*], para. 302.

<sup>20</sup> Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36 [hereinafter, EU Seal Regulation], 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 here as only the IC exception was at issue in the assessment of ‘arbitrary or unjustifiable discrimination’ under the chapeau of Article XX GATT: see AB Report in *EC – Seal Products (2014)*, para. 5.316.

about.”<sup>21</sup> Such incompatibility calls therefore for a trade-off between protecting seal welfare and preserving Inuit cultural identity and livelihood –at least insofar as seal hunting, involving ‘inhumane’ methods, is considered an indispensable element of Inuit tradition and subsistence.<sup>22</sup> This last condition, in turn, highlights one of the difficulties when dealing with measures purported to serve conflicting policy goals: how do we ascertain that such objectives are *genuinely irreconcilable* and a trade-off in the form of rule/exception *truly needed* from a regulatory perspective?

Even where competing policy objectives do need to be accommodated through a rule/exception, this type of measures is likely to be regarded with suspicion under WTO law as being *à priori* in tension with the core non-discrimination obligations –i.e., most-favoured-nation (MFN) treatment (Article I GATT/Article 2.1 TBT Agreement) and national treatment (Article III GATT/Article 2.1 TBT Agreement). As most recently interpreted by the Appellate Body in the *EC – Seal Products (2014)* decision, the fundamental purpose of these disciplines is essentially to preserve equal competitive opportunities for ‘like’ (or competitive)<sup>23</sup> products imported from all WTO members (most-favoured-nation treatment) and for imported and ‘like’ domestic products (national treatment).<sup>24</sup> And yet, an exception to a trade-restrictive rule –be it a ban as in *EC – Seal Products (2014)* 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 ‘like’ products from country B that benefit from the exception. For instance, in the *EC – Seal Products (2014)* case, the combined operation of the IC exception and the ban led to *de facto* discrimination (under the MFN treatment obligation),<sup>25</sup> because it was found to cause 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 as mostly derived from non-Inuit ‘commercial’ hunts) when compared to seal products from Greenland (which were eligible to access the EU market under the IC exception as predominantly derived from Inuit hunts).<sup>26</sup> Accordingly, the discriminatory effects of such rule/exception measures reflecting multiple conflicting objectives will often require justification under WTO law –i.e., under the chapeau of Article XX GATT or/and the ‘legitimate regulatory distinction’ prong of Article 2.1 TBT Agreement.<sup>27</sup> That being so, the logically subsequent

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<sup>21</sup> WTO Panel, WT/DS400/DS401/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, adopted (as modified) 18 June 2014 [hereinafter, Panel Report in *EC – Seal Products (2014)*], para. 7.275; AB Report in *EC – Seal Products (2014)*, para. 5.320.

<sup>22</sup> See Panel Report in *EC – Seal Products (2014)*, para. 7.276, and further discussion in section 3.2 below.

<sup>23</sup> AB Report in *US – Clove Cigarettes (2012)*, 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 P. van den Bossche, *The Law and Policy of the World Trade Organization*, 2013 (3<sup>rd</sup> edition), pp. 325-328, 360-368 and 386-394.

<sup>24</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.82, 5.93 and 5.116 (with regards to Articles I and III:4 GATT); see also AB Report in *US – Clove Cigarettes (2012)*, paras. 179-180 (in relation to Article 2.1 TBT Agreement). Note that, 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 4.1 below.

<sup>25</sup> In addition, the MRM exception was found inconsistent with the national treatment obligation: Panel Report in *EC – Seal Products (2014)*, paras. 7.353 (under Article 2.1 TBT Agreement) and 7.629 (under Article III GATT). These findings were not appealed by the EU: AB Report in *EC – Seal Products (2014)*, para. 5.71.

<sup>26</sup> AB Report in *EC – Seal Products (2014)*, para. 5.316; see also Panel Report in *EC – Seal Products (2014)*, paras. 7.159-7.164, 7.170 and 7.600.

<sup>27</sup> 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 assessed under the chapeau: AB Report in *EC – Seal Products (2014)*, para. 5.136, where the Appellate Body examined whether the different regulatory treatment that the EU seal regime accorded to seal products derived from IC hunts (i.e., qualifying under the IC exception to enter to the EU market) as compared

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question is: how to determine which rationales are ‘legitimate’ and capable of justifying such detrimental impact/discrimination?

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 –i.e., as Bartels puts it, “measures for which an improper purpose is disguised by an ostensibly legitimate purpose”.<sup>28</sup> 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 Article XX-chapeau GATT and Article 2.1 TBT.<sup>29</sup> From this angle, as Levy and Regan aptly note, there may well be concerns that “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.”<sup>30</sup> 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 objectives, provided it can be shown these are genuinely legitimate. Against this background, the next sections proceed to assess the relevant legal standards under Article XX-chapeau GATT and Article 2.1 TBT Agreement.

### 3. MEASURES WITH MULTIPLE CONFLICTING OBJECTIVES AND ‘ARBITRARY AND UNJUSTIFIABLE DISCRIMINATION’ UNDER GATT ARTICLE XX-CHAPEAU

#### a. Justifying Discrimination under the Chapeau: the ‘Rational Connection’ Standard

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”.<sup>31</sup> And

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to “commercial hunts” (i.e., not qualifying under the IC exception) constituted “arbitrary and unjustifiable discrimination”.

<sup>28</sup> L. 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 scrutinising such mixed-purposes measures.

<sup>29</sup> Arguably, protectionism and favouritism go against the general spirit of the WTO (see notably, WTO Agreement, Preamble, para. 3) and the letter of Article XX-chapeau GATT and TBT Agreement, Preamble, para. 6, and in particular “disguised restriction on international trade”. Moreover, in the GATT context, there are special exceptions 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.

<sup>30</sup> Levy and Regan (2015), at 363.

<sup>31</sup> WTO Appellate Body, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/4/AB/R, adopted 20 May 1996 [hereinafter, AB Report in *US – Gasoline (1996)*], p. 23; WTO Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998 [hereinafter, AB Report in *US – Shrimp (1998)*], 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. See Bartels (2015), at 122-123, suggesting that “‘arbitrary’ discrimination could refer to discrimination for which no rationale is offered, whereas ‘unjustifiable’ discrimination could refer to discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.”

yet, in spite of the decisive role the chapeau has played in a number of WTO disputes,<sup>32</sup> the central question of how to determine whether discrimination can be justified is still uncertain. In *Brazil – Retreaded Tyres (2007)*, the Appellate Body held that “the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.”<sup>33</sup> 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 entirely open, with no express limit on the set of possible justifiable rationales for discrimination.<sup>34</sup> In *Brazil – Retreaded Tyres (2007)*, however, the Appellate Body narrowed the range of acceptable 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.”<sup>35</sup> It further specified that “the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.”<sup>36</sup> In the case of measures pursuing multiple conflicting objectives, 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.<sup>37</sup> Moreover, the Appellate Body seemed 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 Article XX-chapeau GATT to an end.<sup>38</sup>

A number of scholars have questioned whether this interpretation of unjustifiable discrimination as embodying a rigid requirement that the reasons for the discrimination be “rationally connected” to, and never “go against”, the main objective of the measure makes sense in

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<sup>32</sup> See, *inter alia*, Bartels (2015), at 96.

<sup>33</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 226.

<sup>34</sup> This observation is also made in Bartels (2015), at 118; Qin (2015), at 5.

<sup>35</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 227, thereby endorsing the interpretation advanced by the EU (para. 220).

<sup>36</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, 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”: AB Report in *US – Shrimp (1998)*, para. 149. For a critical discussion of this previous case law, 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.

<sup>37</sup> See notably AB Report in *EC – Seal Products (2014)*, paras. 5.141-5.167, where the Appellate Body rejected Norway’s multiple-purposes claim and found that the “*principal* objective [even if not the ‘sole 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.” (emphasis added). This characterisation seems appropriate given that it is the public moral concerns on seal welfare that called the whole EU seal regime into existence: there would be 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.

<sup>38</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 227, stating that: “we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.”

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general.<sup>39</sup> In any case, such a strict ‘rational connection’ standard appears utterly senseless and inappropriate when dealing with the specific type of measures we are concerned with here: those striking a balance between multiple conflicting objectives by means of a rule/exception. This is because the rationale for an exception will, by definition, not only differ from but often necessarily go against the objective justifying the general (trade-restrictive) rule.<sup>40</sup> That being so, it is simply pointless to ask whether the reasons given for the discrimination resulting from an exception are rationally connected to the measure’s main objective: evidently, this question can only be answered in the negative in most instances,<sup>41</sup> resulting *ipso facto* in a finding of unjustifiable discrimination. In this way, the ‘rational connection’ standard predetermines the outcome of the discrimination analysis under GATT Article XX-chapeau to a finding of inconsistency: if the rationale for discrimination can never go against the main objective of the measure, there is no meaningful opportunity for WTO members to ever justify discrimination caused by an exception. This rigidity appears most 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. But can we readily assume that the rationale for an exception is illegitimate, *just* because it differs, or even contradicts, the main objective of the measure?

This is far from a foregone assumption in all instances, and seems to have been instead dictated by the specific circumstances of the *Brazil – Retreaded Tyres (2007)* case, which concerned 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),<sup>42</sup> while exempting MERCOSUR countries even though retreaded tyres from these countries were found to pose comparable health risks than those originating in the complaining WTO member (the EU).<sup>43</sup> The explanation offered by Brazil for justifying this discrimination between MERCOSUR and non-MERCOSUR countries was the alleged need to comply with a ruling issued by a MERCOSUR arbitral tribunal.<sup>44</sup> 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.<sup>45</sup> 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 did not raised the public health defence available under the regional agreement (analogue to Article XX(b) GATT) in the MERCOSUR proceedings.<sup>46</sup> In other words, it was far from clear that there was a need for Brazil to make a

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<sup>39</sup> See notably, Bartels (2015), at 112 and 116, arguing that it illogically duplicates the preceding enquiry of whether there is discrimination “between countries where the same conditions prevail”, as it is the measure’s objective that determines when the “same conditions” do, or do not, prevail. See also, Levy and Regan (2015), at 363.

<sup>40</sup> This point was also recognised by the Panel in *EC – Seal Products (2014)*, para. 7.298, footnote 477; and reiterated by the EU on appeal but not addressed by the Appellate Body: AB in *EC – Seal Products (2014)*, paras. 2.100 and 2.149.

<sup>41</sup> Admittedly, there may be some instances where an exception to a general rule is motivated by the same policy objective. An example is offered by the 1961 UN Convention on Narcotic Drugs, which limits the production/distribution/trade in narcotic drugs for human health and welfare purposes, while exclusively permitting the use of such substances for medical and scientific purposes.

<sup>42</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 134.

<sup>43</sup> That is, the “same conditions prevail” between them in light of the public health objective of the measure: AB Report in *Brazil – Retreaded Tyres (2007)*, para. 217.

<sup>44</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 226.

<sup>45</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 232, where the Appellate Body noted that implementing a decision of a judicial or quasi-judicial body –such as the MERCOSUR arbitral tribunal– can hardly be characterized as a decision that is ‘capricious’ or ‘random’, but can still result in ‘arbitrary or unjustifiable’ discrimination under GATT Article XX-chapeau.

<sup>46</sup> AB Report in *Brazil – Retreaded Tyres (2007)*, para. 234, stating that “Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our

trade-off between complying with its MERCOSUR obligations and achieving its public health objective.<sup>47</sup> However, as will be seen next, there may be situations in which we are dealing with genuinely *conflicting legitimate* objectives when assessing discrimination associated with an exception under the chapeau of Article XX GATT.

### **b. *EC – Seal Products*: Softening the ‘Rational Connection’ Standard?**

It has been the subject of academic debate<sup>48</sup> whether the Appellate Body displayed more caution and refined its previous jurisprudence in *Brazil – Retreaded Tyres (2007)* when confronted with the factual circumstances of the *EC – Seal Products (2014)* dispute, where the discrimination to be justified under the chapeau of Article XX GATT resulted from an exception to the general ban on seal products designed to protect Inuit cultural identity and subsistence<sup>49</sup> –an objective which has been broadly recognised as being legitimate in,<sup>50</sup> *inter alia*, the United Nations Declaration on the Rights of Indigenous People<sup>51</sup> and in the ILO Declaration concerning Indigenous and Tribal People in Independent Countries.<sup>52</sup> The primary question that arose, therefore, was whether the EU could protect such Inuit interests through a carve-out from the ban on seal products, *even though* this clearly went against the measure’s main objective of protecting seal welfare.<sup>53</sup> In addressing this issue, the Appellate Body began by reiterating the significance of the ‘rational connection’ standard as “one of the most important factors in the assessment of arbitrary or unjustifiable discrimination”<sup>54</sup> under the chapeau, while somehow softening it vis-à-vis *Brazil – Retreaded Tyres (2007)*. 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

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view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.”

<sup>47</sup> For a similar view, see Levy and Regan (2015), at 364-365.

<sup>48</sup> See e.g., Bartels (2015), at 117; Regan (2015), at 3; Qin (2015), at 4.

<sup>49</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.318-5.319.

<sup>50</sup> Panel Report in *EC – Seal Products (2014)*, paras. 7.295-7.296, referring to these international instruments as “factual evidence” of the broadly recognised importance of preserving Inuit culture and tradition and sustaining their livelihood.

<sup>51</sup> UN General Assembly, ‘United Nations Declaration on the Rights of Indigenous People’ (A/RES/61/295), dated 13 September 2007. Most relevantly, see: Article 5 affirming “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”; Article 8(2)(b) calling on States “to provide effective mechanisms for prevention of, and redress for ... [a]ny action which has the aim or effect of dispossessing them of their lands, territories and resources”; Article 20(1) affirming “the right to ... engage freely in all their traditional and economic activities”; Article 32 affirming “the right to determine and develop priorities and strategies for the development or use of their land, territories and resources”.

<sup>52</sup> International Labour Organisation, Convention No 169 concerning Indigenous and Tribal People in Independent Countries, adopted 27 June 1989. Most relevantly, Article 15(1) states that “[t]he rights of [indigenous peoples] to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” However, and perhaps ironically, only three EU Member States (i.e., Denmark, the Netherlands, and Spain) have actually ratified this ILO Convention.

<sup>53</sup> AB Report in *EC – Seal Products (2014)*, para. 5.318, where the Appellate Body first addressed Canada’s and Norway’s claim that the EU seal regime resulted in arbitrary or unjustifiable discrimination because it discriminated on a basis that does not have a “rational relationship” with the objective of the measure, or goes against that objective.

<sup>54</sup> AB Report in *EC – Seal Products (2014)*, para. 5.318.

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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’.<sup>55</sup>

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. On the one hand, the first part of the statement harks back to the rigid ‘rational connection’ standard in *Brazil – Retreaded Tyres (2007)*: 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. On the other hand, the second part of the statement appears to suggest something subtler: discrimination may, in principle, be justified by reasons that are independent/unrelated to the main objective of the measure (*in casu*, Inuit protection), *provided* that the responding WTO member can establish that the two regulatory purposes are in effect conflicting and a trade-off is thus necessary. 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 objective 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 approach seems more reasonable, with two important caveats concerning the justifiability of the IC exception. First, it is disappointing that the legitimacy of the regulatory purpose underlying the IC exception was, at best, *implicitly* assumed by the Appellate Body: in this regard, it omitted any reference to the EU’s arguments, corroborated by the Panel, that the need to preserve Inuit cultural identity and to sustain their livelihood has been broadly recognised in a number of international instruments and that such a need is to be “balanced against” the main seal welfare objective of the measure.<sup>56</sup> This lacuna may not have been problematic in the specific circumstances of *EC – Seal Products (2014)* where the legitimacy of protecting Inuit interests, while not explicitly recognised in Article XX GATT,<sup>57</sup> could easily be presupposed in light of its broad-based international recognition.<sup>58</sup> And yet, it is unfortunate because it leaves great uncertainty as to the normative basis for identifying legitimate rationales that can justify discrimination under chapeau. That is, how far should we go in accepting permissible

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<sup>55</sup> AB Report in *EC – Seal Products (2014)*, para. 5.320 (emphasis added).

<sup>56</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.296. For a similar view, see G. Shaffer and D. 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 7, stating that “when addressing the justifiability of the IC exemption, the Appellate Body completely ignored the existence of such other international law, including the citations to it, and thus wrote formally in isolation of it.”

<sup>57</sup> Arguably, the protection of Inuit culture and subsistence can be considered a matter of ‘public morals’ under Article XX(a) GATT, inasmuch as (if not more than) animal welfare. In this particular case, however, the Panel did not consider that there was sufficient evidence to support the EU’s proposition that the European public attributed a higher moral value to the protection of Inuit interests as compared to seal welfare: see Panel Report in *EC – Seal Products (2014)*, paras. 7.299; see also AB Report in *EC – Seal Products (2014)*, para. 5.148.

<sup>58</sup> See Panel Report in *EC – Seal Products (2014)*, paras. 7.292-7.294, noting also the existence of Inuit exceptions in similar measures adopted by other WTO members on trade in products derived from marine mammals, including Canada.

justifications for discrimination beyond the policy objectives listed in the subparagraphs of Article XX GATT?

Secondly, the Appellate Body did not explain why the EU had failed to establish that the Inuit protection purpose underlying the IC exception was genuinely incompatible with the main seal welfare objective of the measure. Here again, the lack of reasoning is regrettable and results in ambiguity at both normative and practical levels. From a normative standpoint, 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.<sup>59</sup> 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 clearly '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".<sup>60</sup> 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, in particular given the Appellate Body agreed with the Panel 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).<sup>61</sup> This tension is, in fact, apparent in the Commission's proposal for amending the EU Seal Regulation which, on the one hand, 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 hunts",<sup>62</sup> while on the other hand it makes the use of the IC exception conditional upon new minimum standards on humane seal hunting.<sup>63</sup> But what is the point of introducing such minimum seal welfare requirements into the IC exception if their application cannot be effectively monitored and enforced by the EU?

A separate source of ambivalence concerning the relative weight of the 'rational connection' standard in the assessment of unjustifiable discrimination under the chapeau of Article XX GATT emerges from the following statement by the Appellate Body in *EC – Seal Products (2014)*:

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<sup>59</sup> AB Report *EC – Seal Products (2014)*, para. 5.320, footnote 1559, where the Appellate Body merely notes the parties' submissions before Panel concerning the burden of proof and seems to agree with Canada that the onus is on the respondent, without explaining why. Criticizing this point, see Bartels (2015), at 121.

<sup>60</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.276; and para. 7.295, where the Panel finds that "seal hunting represents a vital element of the tradition, culture and livelihood of the Inuit and other indigenous communities". See also European Union, 'Responses to the Panel's Questions following the Second Meeting', Question 122, para. 76, where the EU explains why the imposition of some minimum welfare requirements in connection with the IC exception was initially considered but rejected "in view of the fact that the Inuit are required to use killing methods which are very problematic from an animal welfare perspective" (e.g., trapping and netting).

<sup>61</sup> Panel Report in *EC – Seal Products (2014)*, paras. 7.224 and 7.496-7.497; and AB Report in *EC – Seal Products (2014)*, para. 5.289. These findings were 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 European Union.

<sup>62</sup> 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 [hereinafter, Proposed EU Seal Regulation], at 5; see also European Union, 'Responses to the Panel's Questions following the Second Meeting', 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, given that the Inuit hunts are generally a one-man activity conducted all-year round by thousands of hunters from every coastal settlement." (emphasis added).

<sup>63</sup> *Ibid.*, Article 3(1)(c), reads: "the hunt is conducted in a manner which reduces pain, distress, fear or other forms of suffering of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community."

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“[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.”<sup>64</sup>

Rather than a jurisprudential shift, this appears to signal a return to a more case-specific cumulative assessment of unjustifiable discrimination,<sup>65</sup> whereby the ‘rational connection’ standard, even if still a predominant factor, is no longer the “sole” relevant test. Put differently, a finding that the reasons given for discrimination are not rationally related to the measure’s objective will not necessarily be conclusive and bring to an end the measure’s appraisal under the chapeau as in *Brazil – Retreaded Tyres (2007)*, but other “additional factors” may also be taken into account in the overall assessment. However, and importantly for our purposes, these other factors were considered independently from, and *not* as a means to outweigh or cure, the unclear relationship between the reasons given for discrimination (i.e., Inuit protection) and the measure’s main objective (i.e., seal welfare). In fact, the Appellate Body proceeded to fault the EU measure on two grounds that went beyond and had little to do with the justifiability of the rationale for the IC exception, but pertain to manner in which it was designed and implemented.<sup>66</sup> The first was that due to certain ambiguities in the ‘subsistence’ and ‘partial use’ criteria of the IC exception, coupled with the broad discretion consequently enjoyed by recognised 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.”<sup>67</sup> 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 IC exception to the benefit of the latter.<sup>68</sup>

It is largely undisputed that the Appellate Body was right to condemn the EU measure for the discriminatory *design* and *application* of the IC exception. Even if we accept its underlying policy purpose (i.e., preserve Inuit cultural identity and sustain their livelihood) is a legitimate justification for discrimination under the chapeau, this particular discrimination in the design and application of the IC exception was in no way necessary to achieve that Inuit protection objective. Indeed, this has even been recognised in the Commission’s proposal for amending the EU Seal Regulation, where steps are being taken to prevent the use of the IC exception by seal

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<sup>64</sup> AB Report in *EC – Seal Products (2014)*, para. 5.321 (emphasis added).

<sup>65</sup> AB Report in *EC – Seal Products (2014)*, para. 5.321, footnote 1560; see also paras. 5.305-5.305, where the Appellate Body provides an overview of relevant factors other than ‘rational connection’ in *US – Gasoline (1996)* and *US – Shrimp (1998)*.

<sup>66</sup> For a similar reading, see Qin (2015), at 4; for an apparently different view, see Bartels (2015), at 117, stating that the “Appellate Body considered the extent to which the measure actually supported subsistence hunting by Inuit communities”; and Shaffer and Pabian, at 6 arguing that “by examining the discriminatory impact of the European Union’s application of the IC exception, the Appellate Body suggested (in our view correctly) that the exception would otherwise have been fine even though it did not advance the underlying objective of protecting public morals concerns regarding seal welfare.”

<sup>67</sup> AB Report in *EC – Seal Products (2014)*, para. 5.328; and paras. 5.324-5.327 for full reasoning. This rendered arbitrary or unjustifiable the different regulatory treatment of seal products derived from (Greenland) IC hunts (allowed into the EU market) as compared to seal products derived from (Canadian/Norwegian) ‘commercial hunts’ (banned from the EU market).

<sup>68</sup> AB Report in *EC – Seal Products (2014)*, para. 5.333-5.337. This was found to amount to arbitrary or unjustifiable discrimination between Inuit communities in different countries.

products derived from hunts conducted primarily for commercial purposes,<sup>69</sup> while facilitating its use by seal products derived from Canadian Inuit hunts.<sup>70</sup> Both of these amendments thus confirm that the Inuit protection objective can be achieved in a less discriminatory manner than in the original EU measure.

That being said, the key issue remains whether the broader discriminatory effects caused by the very *existence* of the IC exception (i.e., between conforming/allowed and non-conforming/banned seal products) can be justified under the chapeau of Article XX GATT, *despite* the rational disconnect between its Inuit protection rationale and the main seal welfare objective of the measure. In this regard, Bartels posits that the Appellate Body implicitly accepted such discrimination was justifiable: had the Appellate Body instead considered that the IC exception itself could not be justified because of the rational disconnect between the two regulatory purposes, it would have disposed of the case at this early stage without further examining whether the exception could be designed and applied in a less discriminatory manner.<sup>71</sup> 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 supported by the conclusive paragraph of the judgement,<sup>72</sup> which raises further doubts as to whether the lack of a ‘rational connection’ between the rationale given for the discrimination and the measure’s main objective could ever be overcome under the chapeau.<sup>73</sup>

In sum, the Appellate Body in *EC – Seal Products (2014)* did not clearly confront the fundamental question raised by the *EC – Seal Products (2014)* dispute: namely, can discrimination under the chapeau of Article XX GATT be ever justified by reasons that are independent from, and may even undermine, the main objective of the measure? On a generous reading, the Appellate Body at best *implicitly* accepted this possibility, provided it can be shown the discrimination reflects multiple regulatory purposes that are genuinely legitimate and irreconcilable. However, it never said flatly that, in the specific circumstances where the discrimination is caused by an exception, the chapeau requirements could be satisfied *in spite of* the absence of a ‘rational connection’ between the rationale for that discrimination and the main objective of the measure.<sup>74</sup> Had it

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<sup>69</sup> Proposed EU Seal Regulation, Article 3(5), empowering the Commission to limit to the placing on the market of seal products under the IC exception if the scale of the hunt or other circumstances are such as to indicate that the hunt is being conducted primarily for commercial purposes.

<sup>70</sup> See 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.

<sup>71</sup> Bartels (2015), at 119. For a similar view, see Shaffer and Pabian (2015), at 6, stating that “by examining the discriminatory impact of the European Union’s application of the IC exception, the Appellate Body suggested (in our view correctly) that the exception would otherwise have been fine even though it did not advance the underlying objective of protecting public morals concerns regarding seal welfare.”

<sup>72</sup> AB Report in *EC – Seal Products (2014)*, 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).

<sup>73</sup> AB Report in *EC – Seal Products (2014)*, para. 5.338, stating that: “[...] First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to products derived from ‘commercial’ hunts can be reconciled with the objective of addressing with the objective of addressing EU public morals concerns regarding seal welfare”, without further refinement; *cf.* note 54 above and accompanying text.

<sup>74</sup> Arguably, this ambiguity can be partly attributed to the EU’s contradictory argumentation under Article XX GATT as to whether its seal regime pursue multiple *conflicting* objectives: see AB Report in *EC – Seal Products (2014)*, paras. 2.108 and 5.143, where the EU argues for the purposes of identifying the measure’s objective(s) that the objective of the IC exception is “not independent” of the main objective of the measure, but part of the same “moral standard of animal welfarism”, and reflects the assessment of the EU’s legislator that the subsistence of the

intended to unequivocally loosen the ‘rational connection’ standard in this manner, this was arguably the perfect case to do so in light of the factual circumstances. With its ambivalent approach and limited reasoning, the Appellate Body missed the opportunity to articulate a clear legal test for sensibly assessing, rather than *ipso facto* censuring, the discriminatory impact associated with an exception in future cases. That being so, how differently would a technical regulation similarly balancing multiple competing objectives be appraised under the relevant legal standard of Article 2.1 TBT Agreement –namely, the ‘legitimate regulatory distinction’ prong?

#### 4. MEASURES WITH MULTIPLE CONFLICTING OBJECTIVES AND ‘LEGITIMATE REGULATORY DISTINCTION’ UNDER ARTICLE 2.1 TBT AGREEMENT

##### c. Justifying Detrimental Impact under Article 2.1 TBT: the New ‘Legitimate Regulatory Distinction’ Test

The term ‘legitimate regulatory distinction’ is a new concept first coined by the Appellate Body in *US – Clove Cigarettes (2012)*, 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.”<sup>75</sup> In this way, the Appellate Body introduced a basis for justifying detrimental impact on imports and thereby seated the balance between the objective of trade liberalisation and WTO members’ right to regulate within Article 2.1 TBT Agreement, given this agreement does not contain a general exceptions clause similar to Article XX GATT.<sup>76</sup> Whereas it is sensible to read such flexibility into Article 2.1 TBT Agreement,<sup>77</sup> it is far from clear what an enquiry into whether detrimental impact on imports ‘stems exclusively from a legitimate regulatory distinction’ actually entails. In fact, these terms appear nowhere in the TBT Agreement itself, nor for that matter in the GATT, but were ‘invented’ by the Appellate Body. And yet, partly due to the limited number of recent TBT trilogy cases, we have only given little guidance on this new legal test.

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Inuit and other indigenous communities and the preservation of their cultural identity “provide benefits to humans which, from a moral point of view, outweigh the risks of suffering inflicted upon seals as a result of the hunts conducted by those communities.”; conversely, at para. 2.149, the EU submits in the context of Article XX-chapeau GATT that “exceptions are often not ‘rationally connected’ to the main purpose of a measure, and when they are inserted to achieve a balance between the main objective ... and *conflicting other* legitimate objectives, there will typically be a ‘disconnect’ between their rationale and the main objective pursued”(emphasis added), thus presumably accepting that the objective of the IC exception was independent (“other”) and in conflict with the main objective of the measure.

<sup>75</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 175; see also para. 174.

<sup>76</sup> AB Report in *US – Clove Cigarettes (2012)*, paras. 94-96 and 101.

<sup>77</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 169, aptly noting that “technical regulations are measures that, by their nature, establish distinctions between products according to their characteristics or their related processes and production methods. This suggests ... that Article 2.1 should not be read to mean that *any* distinction, in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods, would *per se* accord less favourable treatment ...” (emphasis in original); see also WTO Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/DS386/AB/R, adopted 23 July 2012 [hereinafter, AB Report in *US – COOL (2012)*], para. 268.

At a first sight, it would seem to involve a two-steps enquiry: (i) whether the regulatory distinction causing the detrimental impact is ‘legitimate’; and *if so*, (ii) whether the detrimental impact stems ‘exclusively’ from it.<sup>78</sup> Yet, the Appellate Body has not (as of yet) treated these elements separately,<sup>79</sup> nor provided much direction as to the overall structure of the analysis. In *US – COOL (2012)*, it simply stated that “when a regulatory distinction is not designed and applied in an *even-handed* manner ... that distinction cannot be considered ‘legitimate’”.<sup>80</sup> Even-handedness is set to play a determinative role in deciding whether or not a regulatory distinction is ‘legitimate’ in the context of Article 2.1 TBT Agreement, and thus capable of justifying detrimental impact. But here again, the origin of this analytical tool is unclear, as there are no clear references to ‘even-handedness’ in the TBT Agreement, nor in the GATT.<sup>81</sup> So how exactly should a panel assess even-handedness? In this respect, the Appellate Body just said: “[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.”<sup>82</sup> However, on its plain meaning, even-handedness requires the regulatory distinction in question 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?

To add to the confusion, it also unclear whether this new legal test under Article 2.1 TBT Agreement differs from, and if so how, the assessment of unjustifiable discrimination under the chapeau of Article XX GATT. The Appellate Body created the terms ‘legitimate regulatory distinction’ by reading Article 2.1 TBT Agreement in the context of the preamble of that agreement, which actually uses the very same language as Article XX-chapeau GATT of ‘arbitrary and unjustifiable discrimination’.<sup>83</sup> Nonetheless, it has been suggested that, the Appellate Body in *US – COOL (2012)* equated these two concepts.<sup>84</sup> And yet, in *EC – Seal Products (2014)*, the

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<sup>78</sup> Evidently, if the answer to the first question is negative (i.e., the regulatory distinction is not legitimate), there is no need to consider the second one.

<sup>79</sup> See e.g., AB Report in *US – Tuna II (2012)*, para. 284: “The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP [not eligible for the ‘dolphin-safe’ label and mostly Mexican tuna products] on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP [eligible for the ‘dolphin-safe’ label and mostly tuna products from the US and other third countries], on the other hand. The question before us is thus whether the United States has demonstrated that this difference in labelling conditions is a legitimate regulatory distinction, *and hence* whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.” (emphasis added).

<sup>80</sup> AB Report in *US – COOL (2012)*, para. 271.

<sup>81</sup> See AB Report in *US – Clove Cigarettes (2012)*, para. 95 referring to the preamble of the TBT Agreement; see also G. Marceau, ‘The New TBT Jurisprudence in *US – Clove Cigarettes*, *US – Tuna II* and *US – COOL*’ (2013) 8(1) *Asian Journal of WTO and International Health Law and Policy* 1, at 28-29.

<sup>82</sup> AB Report in *US – COOL (2012)*, para. 271; see also AB Report in *US – Clove Cigarettes (2012)*, paras. 182 and 215.

<sup>83</sup> AB Report in *US – Clove Cigarettes (2012)*, paras. 172-173, referring to the sixth recital of the preamble of the TBT Agreement, which reads: “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade ...”; see also AB Report in *EC – Seal Products (2014)*, para. 5.124.

<sup>84</sup> See e.g., J. Norpoth, ‘Mysteries of the TBT Agreement Resolved? Lessons to Learn for Climate Policies and Developing Country Exporters from Recent TBT Disputes’ (2013) 47(3) *Journal of World Trade* 575, at 592-594; B. McGrady and A. Jones, ‘Tobacco Control and Beyond: The Broader Implications of United States – Clove Cigarettes for Non-Communicable Diseases’ (2013) 39 *American Journal of Law and Medicine* 265, at 272. Reference is made to, in particular, AB Report in *US – COOL (2012)*, para. 271 (note 81 above and accompanying test), which

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Appellate Body reversed the Panel for “applying the same legal test to the chapeau of Article XX as it applied under [the LRD limb of] Article 2.1 TBT Agreement.”<sup>85</sup> So, in which ways are these legal tests not the same?<sup>86</sup> And most significantly for present purposes, is the ‘rational connection’ standard previously discussed in relation to the chapeau of Article XX GATT equally relevant to the assessment of even-handedness under Article 2.1 TBT Agreement? More specifically, would a regulatory distinction be deemed uneven-handed/illegitimate, and hence unable to justify detrimental impact, *just because* it is not rationally related, or goes against, the overall objective of the technical regulation?

### d. A More Flexible Approach – No Rigid ‘Rational Connection’ Standard

The question of whether the LRD prong of Article 2.1 TBT Agreement embodies a ‘rational connection’ standard has no straightforward answer, and has indeed been highly contested before several WTO panels, with different approaches taken on this issue depending on the specific circumstances of the case.<sup>87</sup> Nevertheless, it is here submitted that the Appellate Body itself has not explicitly articulated, nor implicitly applied, a strict ‘rational connection’ requirement under Article 2.1 TBT Agreement. Instead, as illustrated in Table 1 below, the Appellate Body seems to have adopted a more flexible approach to the set of possible justifying purposes.

*Table 1 – Detrimental Impact/Justification in TBT Trilogy Cases*

<b><i>AB Report</i></b>	<b><i>Cause of Detrimental Impact</i></b>	<b><i>Justifying Rationales</i></b>
<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

however states “[...] because, *for example*, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination [...]” (emphasis added).

<sup>85</sup> AB Report in *EC – Seal Products (2014)*, para. 5.313.

<sup>86</sup> See AB Report in *EC – Seal Products (2014)*, para. 5.311, where the Appellate Body reiterates the applicable legal standards but fails to clearly explain why exactly it considers these differ; and footnote 1543, where it appears to equate both concepts: “a regulatory distinction that is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination cannot be considered ‘legitimate’”.

<sup>87</sup> See notably, WTO Panel, *US – Tuna II (2012) (Recourse to Article 21.5 by Mexico)*, WT/DS381/RW, dated 14 April 2015 and appealed 5 June 2015, paras. 7.80-7.86 (for an overview of the parties and third-parties’ arguments) and paras. 7.87-7.91 and 7.916 taking the view that “whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue” is a relevant and central factor in the analysis of even-handedness under Article 2.1 TBT Agreement; see also WTO Panel, *US – COOL (2012) (Recourse to Article 21.5 by Canada and Mexico)*, WT/DS384/DS386/RW, adopted (as modified) 29 May 2015, paras. 7.214-7.217, also focusing the even-handedness analysis on whether “the relevant distinctions are ‘rationally connected to the objective’ of the measure.” Cf Panel Report in *EC – Seal Products (2014)*, paras. 7.259 and 7.296-7.298, where the Panel generally accepts the relevance of the ‘rational connection’ standard for the assessment of ‘legitimate regulatory distinction’ under Article 2.1 TBT Agreement, but qualifies that the “justifiability of a specific cause or rationale provided for a given distinction must be examined on a case-by-case basis”, and finds that the rationale for the IC exception is “justifiable despite the rational disconnection to protecting seal welfare ...”; see further discussion below.

<i>US – COOL (2012)</i>	Segregation through record-keeping/ verification requirements	Main (sole) objective
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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 (2012)*, the Appellate Body found that the regulatory distinction causing the detrimental impact on Mexican tuna products<sup>88</sup> was not even-handed in light of the objective of the measure (i.e., dolphin protection),<sup>89</sup> because it was not “calibrated to the to the risks to dolphins arising from different fishing methods in different areas of the ocean.”<sup>90</sup> Similarly, in *US – COOL (2012)*, the Appellate Body’s finding that the relevant regulatory distinction<sup>91</sup> 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.”<sup>92</sup> Yet importantly, the Appellate Body further noted that “nothing in the Panel’s findings or on the Panel record explains or supplies a rational basis for this disconnect” between the informational requirements imposed upon upstream producers/processors and the level of information actually communicated to consumers through the mandatory retail labels.<sup>93</sup> This statement seems to imply that a ‘rational disconnect’ between the regulatory distinction causing the detrimental impact and the main objective of the measure *could*, in principle, be explained (and cured) by independent reasons in other cases.

This possibility was recognised more explicitly in *US – Clove Cigarettes (2012)*, 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., reduce youth smoking),<sup>94</sup> 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 hence the detrimental impact on imported clove cigarettes.<sup>95</sup> Ultimately, the Appellate Body did not find these

<sup>88</sup> Namely, the difference in labelling conditions for tuna products caught by setting on dolphins in the ETP and not eligible for the ‘dolphin-safe’ label and those for tuna products caught by other fishing methods outside the ETP and eligible for the ‘dolphin-safe’ label: AB Report in *US – Tuna II (2012)*, para. 284.

<sup>89</sup> AB Report in *US – Tuna II (2012)*, para. 282, where the US submits that there is a “clear relationship” between the objectives of the measure and the difference in labelling conditions, which is “calibrated to the risk that dolphins may be killed or seriously injured when tuna is caught.”

<sup>90</sup> AB Report in *US – Tuna II (2012)*, para. 297, further stating that: “We note, in particular, 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’” (emphasis in original).

<sup>91</sup> AB Report in *US – COOL (2012)*, paras. 342 and 348, identifying as the relevant regulatory distinction the recordkeeping and verification requirements that necessitate segregation, and that create an incentive for US producers to process exclusively domestic livestock and a disincentive to process imported livestock.

<sup>92</sup> AB Report in *US – COOL (2012)*, para. 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, and consequently, the verification and recordkeeping requirements were found to impose a “disproportionate burden” on these producers and processors.

<sup>93</sup> AB Report in *US – COOL (2012)*, para. 347.

<sup>94</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 225, noting that both clove and menthol cigarettes are equally appealing to youth.

<sup>95</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 225, stating that “the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes do not, in our view, demonstrate that the

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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 materialise.<sup>96</sup> Therefore, for present purposes, the critical point is that the Appellate Body has not pronounced, nor followed, a rigid ‘rational connection’ requirement under Article 2.1 TBT Agreement, whereby a regulatory distinction would never be legitimate/even-handed if its underlying rationale cannot be reconciled with the main objective of the measure. As we have seen, whether the relevant regulatory distinction is or not rationally explained by the main objective has certainly been a pertinent factor in the even-handedness analysis, but it is *not* by itself dispositive for a violation of Article 2.1 TBT Agreement. Instead, the Appellate Body in *US – Clove Cigarettes (2012)* has explicitly left open the possibility that a regulatory distinction may be found to be legitimate, and hence capable of justifying detrimental impact under Article 2.1 TBT Agreement, *in spite of* a ‘rational disconnect’ between its rationale and the main objective of the measure.

This reading of the Appellate Body’s more flexible approach to the range of possible justifying purposes under Article 2.1 TBT Agreement was echoed by the Panel in *EC – Seal Products (2014)* which, having found the contested EU measure qualified as a technical regulation,<sup>97</sup> considered the following two elements in determining whether the regulatory distinction causing the detrimental impact –i.e., between IC hunts and commercial hunts– was legitimate: “first, is the distinction rationally connected to the objective of the EU Seal Regime; second, *if not*, is there any cause or rationale that can justify the distinction (i.e., explain the existence of the distinction) despite the absence of the connection to the objective of the Regime [...]”.<sup>98</sup> Having answered the first question in the negative,<sup>99</sup> the Panel nevertheless found that the regulatory distinction between IC and commercial hunts was justifiable “*despite* the rational disconnection to protecting seal welfare.”<sup>100</sup> In reaching this conclusion, the Panel considered that the primary purpose of IC hunts –i.e., to preserve Inuit cultural identity and sustain their livelihood– was distinguishable from that of commercial hunts, and legitimate because the need to protect the “unique interests of Inuit and other indigenous communities” has been “broadly recognised” in international (notably, the ILO Convention No 169 and UN Declaration mentioned earlier)<sup>101</sup> and national legal instruments (including Canada’s sealing regulations).<sup>102</sup> Accordingly, unlike the Appellate Body,<sup>103</sup> the Panel was unambiguous that the protection of Inuit interests sufficiently justified the

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detrimental impact on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction.”

<sup>96</sup> AB Report in *US – Clove Cigarettes (2012)*, 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”; see further discussion on this point in section 4.3 below.

<sup>97</sup> AB Report in *EC – Seal Products (2014)*, paras. 5.59-5.69 (see note 7 above).

<sup>98</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.259 (emphasis added) and footnote 415 referring to the Appellate Body’s reasoning in *US – Clove Cigarettes (2012)*, discussed above (notes 93-95), to support this approach.

<sup>99</sup> Panel Report in *EC – Seal Products (2014)*, paras. 7.275 and 7.290, noting that IC hunts pose at least the same risks to seal welfare as commercial hunts, given the evidence showing that the killing methods used by IC hunters can cause pain and suffering for seals.

<sup>100</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.298 (emphasis added); see also para. 7.297 where the Panel differentiates the factual circumstances of this dispute from *Brazil – Retreaded Tyres (1997)* and *US – Clove Cigarettes (2012)*, positing that in those cases the Appellate Body did not consider the rationales provided to explain the exceptions at issue where sufficiently persuasive “in the face of the rational disconnection” with the main objective of the measure.

<sup>101</sup> See notes 35-36 above, and Panel Report in *EC – Seal Products (2014)*, para. 7.292.

<sup>102</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.294 and footnote 472.

<sup>103</sup> See section 3.2 above.

existence of an IC exception in the EU seal regime, even in the face of a rational disconnect with the main seal welfare objective.<sup>104</sup>

Nevertheless, the Panel ultimately found that the regulatory distinction between IC and commercial hunts was not even-handed, but it did so due to the manner in which the IC exception was designed and applied, and *not* because of its underlying purpose.<sup>105</sup> The main reason why the Panel found the IC exception lacked even-handedness in its design and application was its *de facto* exclusivity to Greenlandic Inuit hunts, even though they were the most commercialised among any other Inuit or indigenous community.<sup>106</sup> In this respect, the Panel's reasoning comes very close to that of the Appellate Body when examining 'additional factors' of unjustifiable discrimination under the chapeau of Article XX GATT which, in fact, drew upon the Panel's analysis of even-handedness under Article 2.1 TBT Agreement.<sup>107</sup> As previously discussed, these discriminatory defects in the design and application of the IC exception were rightly condemned: as subsequently recognised by the EU itself, this particular discrimination was not necessary to achieve, and hence in no way justified by, the Inuit protection purpose.<sup>108</sup> Therefore, the key aspect in which the approach of the Panel (under Article 2.1 TBT Agreement) differed vis-à-vis that of the Appellate Body (under Article XX-chapeau GATT) was in relation to the 'rational connection' standard. While not denying its relevance to the assessment of even-handedness, the Panel unequivocally accepted the possibility of justifying detrimental impact/discrimination caused by an exception by reasons that 'go against' the main objective of the measure. Conversely, as we have seen, this possibility is at best uncertain, if not ruled out, under the Appellate Body's analysis of unjustifiable discrimination under the chapeau of Article XX GATT.<sup>109</sup> Even if not explicitly recognised in *EC – Seal Products (2014)*, this difference in the relative weight of the 'rational connection' standard appears to be the only material reason why the Appellate Body faulted the Panel for directly importing its analysis under the LRD limb of Article 2.1 TBT into the chapeau of Article XX GATT.<sup>110</sup>

### **e. A Too Flexible Approach – No List of 'Legitimate Objectives'?**

As we have just seen, the 'legitimate regulatory distinction' prong of Article 2.1 TBT Agreement is less rigid, when compared to the 'unjustifiable discrimination' limb of the chapeau of Article XX GATT, in relation to the range of permissible justifications for detrimental impact: there is no irrevocable requirement that this impact be explained *solely* by the main objective of the measure. As such, this test appears more suitable to deal with the discriminatory effects of an exception in domestic regulations pursuing multiple conflicting objectives. This is because when an exception is inserted in order to balance between competing policy purposes, there will

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<sup>104</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.298.

<sup>105</sup> Panel Report in *EC – Seal Products (2014)*, para. 7.319.

<sup>106</sup> Panel Report in *EC – Seal Products (2014)*, paras. 7.314-7.317.

<sup>107</sup> AB Report in *EC – Seal Products (2014)*, para. 5.324 and 5.334-5.337 referring to Panel's findings made in the context of Article 2.1 TBT Agreement.

<sup>108</sup> See notes 68-69 above and accompanying text; *Cf.* Panel Report in *EC – Seal Products (2014)*, para. 7.255 where the EU made the contrary argument that the IC exception was designed and applied in an even-handed manner, because it was "calibrated" and did not go "beyond what is necessary to achieve its purpose."

<sup>109</sup> See section 3.2 above.

<sup>110</sup> AB Report in *EC – Seal Products (2014)*, para. 5.313; see also para. 5.308, where the only reason given by the complainants for appealing the Panel's reasoning under the chapeau of Article XX GATT was the 'rational connection' requirement.

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typically be a rational disconnect, or even a contradiction, between its underlying rationale and the main objective of the measure. Yet importantly, this rational disconnect *per se* does not render the rationale for the exception ‘illegitimate’: it may well be, or it may not. The flexibility offered by Article 2.1 TBT Agreement is therefore sensible, insofar as it allows for a genuine investigation into whether the rationale for the exception, and hence for the detrimental impact, is or not legitimate. This being so, the critical question becomes which rationales are, and which are not, legitimate for the purpose of justifying detrimental impact under Article 2.1 TBT Agreement. As noted earlier, the text of Article 2.1 TBT Agreement offers no guidance as the term ‘legitimate’ is mentioned nowhere in that provision. Thus, should the scope of legitimacy under Article 2.1 TBT Agreement be confined by the objectives recognised in other provisions of the TBT Agreement,<sup>111</sup> or elsewhere in WTO law?<sup>112</sup> Or may it also include objectives sanctioned as legitimate in other areas of international law?<sup>113</sup> Or is any rationale, in principle, justifiable?

The Appellate Body seems to have left the scope of legitimate objectives in the context of Article 2.1 TBT Agreement entirely opened, by focusing the enquiry on the legitimacy of the regulatory distinction as “a function of whether [it is] applied and designed in an even-handed manner”,<sup>114</sup> while avoiding parties’ claims as to whether the stated justifying purpose was itself legitimate.<sup>115</sup> In this regard, Marceau posits that it is not necessary under Article 2.1 TBT Agreement to evaluate the legitimacy of the regulatory purpose because what ought to be legitimate is the difference in regulatory treatment itself, and not the objective *per se*.<sup>116</sup> 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 regulatory purpose. As aptly explained by the Panel in *EC – Seal Products (2014)*, the existence of a legitimate objective alone would not automatically lead to establishing the legitimacy of the regulatory distinction, but it is a necessary element for its

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<sup>111</sup> See AB Report in *US – Clove Cigarettes (2012)*, paras. 94-95 and 173, where in reading ‘legitimate regulatory distinction’ into Article 2.1 TBT Agreement the Appellate Body referred to the sixth recital of the preamble of the TBT Agreement, which contains a *closed* list of legitimate objectives: namely, “to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices”. It also referred to Article 2.2 TBT Agreement, which contains a similar list of legitimate objectives, but it is only *illustrative* (i.e., given the mention “inter alia”). However, Article 2.2 TBT Agreement was used as context to show that this provision, like Article 2.1 TBT Agreement, does not operate to prohibit any obstacles to international trade, rather than to import the term ‘legitimate’: AB Report in *US – Clove Cigarettes (2012)*, paras. 170-171; and Marceau (2013), at 11 for a similar reading.

<sup>112</sup> This would follow the approach taken in relation to Article 2.2 TBT Agreement in AB Report in *US – Tuna II (2012)*, para. 313, where the Appellate Body held that objectives recognised in the provisions of other WTO covered agreements may provide guidance for determining whether an unlisted objective qualifies as legitimate under Article 2.2 TBT Agreement. This approach could imply that policy objectives listed in Article XX GATT but not in Article 2.2 TBT Agreement – notably, the protection of ‘public morals’ – could nonetheless be transposed into the latter. See also AB in *US – COOL (2012)*, paras. 444-452, where the Appellate Body showed a preference for objectives recognised in the WTO *acquis* as the basis for determining legitimacy under Article 2.2 TBT Agreement, and rejected the relevance of “practice in a considerable number of WTO members” and “social norms” to this analysis.

<sup>113</sup> Notably, the Inuit protection objective at issue in *EC – Seal Products (2014)* is not explicitly mentioned in the TBT Agreement, and the Panel treated it as a legitimate purpose with no attempt to bring it under any bit of WTO text at all, but on the basis of its wide recognition in international and national legal instruments (notes 100-101 above and accompanying text).

<sup>114</sup> As most recently confirmed in: WTO Appellate Body, *US – COOL (2012) (Recourse to Article 21.5 by Canada and Mexico)*, WT/DS384/DS386/AB/RW, adopted 29 May 2015, para. 5.93.

<sup>115</sup> See e.g., AB Report in *US – COOL (2012)*, paras. 330-331, where Canada and Mexico took the view that legitimacy in the context of Article 2.1 TBT Agreement is limited to the closed list of objectives contained in the sixth recital of the preamble of the TBT Agreement (see note 110 above), which they claimed did not include the objective allegedly pursued by the COOL measure (i.e., consumer information on origin), and thus the regulatory distinctions drawn in the measure could not be considered legitimate. The Appellate Body, however, just noted the Panel’s identification of the measure’s objective, and only addressed claims regarding its legitimacy in the context of Article 2.2 TBT Agreement: AB Report in *US – COOL (2012)*, para. 332 and footnote 632.

<sup>116</sup> Marceau (2013), at 28 (footnote 111).

justifiability.<sup>117</sup> For the most part, the legitimacy of the policy objectives at issue in the TBT trilogy cases could be easily assumed –i.e., public health protection in *US – Clove Cigarettes (2012)*; dolphin protection/consumer information in *US – Tuna II (2012)* and consumer information on origin in *US – COOL (2012)*.<sup>118</sup> However, the limits of this approach became evident first in *US – Clove Cigarettes (2012)*, and later in *US – COOL (2012) (Article 21.5)*.

Let's recall the two reasons given by the United States in *US – Clove Cigarettes (2012)* for justifying the exemption of menthol cigarettes from the ban on flavoured cigarettes: (i) minimising the costs to the domestic health care system associated with treating “millions of menthol cigarette smokers affected by withdrawal symptoms”; and (ii) preventing the development of a black market and smuggling of menthol cigarettes.<sup>119</sup> These are not self-evidently ‘legitimate’ objectives that are recognised in the TBT Agreement, or elsewhere in WTO law. And yet, the Appellate Body appeared to accept –at least *arguendo*– these as a permissible justification for the discriminatory treatment between clove and menthol cigarettes, even though it ultimately 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.”<sup>120</sup> But this reasoning misses entirely the key point, which is *not* whether the US had enough evidence to prove the alleged risks would materialise (i.e., that menthol-cigarette smokers would not switch to regular cigarettes if menthol cigarettes were banned),<sup>121</sup> but whether *domestic* costs considerations can be accepted as a *legitimate* rationale for justifying detrimental impact against imports. To be clear, it is not here suggested that budget or other domestic costs are not proper considerations for a WTO member to taken into account when adopting technical regulations: they clearly are and are taken into account in most domestic legislative processes.<sup>122</sup> Rather, it is questioned whether minimising domestic costs is also a justifiable reason for overtly discriminatory technical regulations –put differently, for imposing costs *only/mainly* on other WTO members.<sup>123</sup> In *US – COOL (2012) (Article 21.5)*, the Appellate Body was pressed to confront this issue directly in relation to the costs savings enjoyed by US entities through the exemptions provided in the amended COOL measure,<sup>124</sup> and clearly pronounced that: “[such] cost considerations do not constitute a supervening justification for discriminatory measures.”<sup>125</sup>

The specific circumstances in the *US – Clove Cigarettes (2012)* and *US – COOL (2012)* cases should not, however, lead us to the over-simplification that an exception in a domestic regulation will

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<sup>117</sup> See Panel in *EC – Seal Products (2014)*, para. 7.279 and 7.290.

<sup>118</sup> 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 AB Report in *US – COOL (2012)*, para. 445, where the Appellate Body considered that “the provision of information to consumers on origin bears some relation to the objective of prevention of deceptive practices [reflected in both the preamble and Article 2.2 TBT Agreement, as well as in Article XX(d) GATT], insofar as consumers could be deceived as to the origin of products if labelling is inaccurate or misleading.”

<sup>119</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 225.

<sup>120</sup> AB Report in *US – Clove Cigarettes (2012)*, para. 225.

<sup>121</sup> See e.g., R. Howse, ‘Clove Cigarettes’ *International Economic Law and Policy Blog* (12 April 2012), suggesting that the US had the option to undertake a more careful evaluation and provide evidence that the alleged risks would materialise if menthol cigarettes were banned.

<sup>122</sup> See in this regard, AB in *US – Clove – Cigarettes (2012)*, 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).

<sup>123</sup> This would seem at odds with Article 12.3 TBT Agreement requiring, albeit using best-endeavour language, WTO members to ‘take into account’ the costs arising from their technical regulations on developing-country members (*in casu*, Indonesia).

<sup>124</sup> AB Report in *US – COOL (2012) (Recourse to Article 21.5 by Canada and Mexico)*, paras. 5.110-5.113, for parties’ arguments on whether such domestic cost savings could justify discrimination.

<sup>125</sup> AB Report in *US – COOL (2012) (Recourse to Article 21.5 by Canada and Mexico)*, para. 5.116.

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*always* be motivated by an improper purpose, and thus should be automatically sanctioned as resulting in unjustifiable discrimination. An obvious counter-example would be a technical regulation setting out mandatory environmental sustainability standards for a given product,<sup>126</sup> and providing an exception for least-developed-countries (LDCs)<sup>127</sup> on grounds that these countries do not have the financial and technical capability to implement the standards concerned. It is clear that these reasons for the LDC exception bear no rational connection, and indeed go against, the main objective of the technical regulation (i.e., environmental protection). And yet, it would be inconceivable to argue that accommodating LDC interests is not a legitimate reason for justifying discrimination under WTO law, when it reflects the fundamental principle of special and differential treatment.<sup>128</sup> In fact, Article 12.3 TBT Agreement explicitly requires WTO members “to take into account of the special development, financial and trade needs of developing country Members” in the preparation and application of technical regulations, and an appropriate way to do so may be to provide these countries with temporary or permanent exemptions, even if this is direct conflict with the main objective of the technical regulation at issue.

Accordingly, what these examples corroborate is the need for a normative basis in identifying which rationales can be considered legitimate and capable of justifying detrimental impact under Article 2.1 TBT Agreement. Admittedly, this is not an easy question to address, but one that cannot continue to be evaded particularly when the terms ‘legitimate regulatory distinction’ have no basis in the text of Article 2.1 TBT Agreement itself but were created by the Appellate Body.<sup>129</sup> One possible interpretative approach is to look for a positive list of legitimate objectives, with reference to WTO law or even international law.<sup>130</sup> Another possible approach, which seems to be the one favoured by the Appellate Body in *US – COOL (2012) (Article 21.5)*, is to identify on a case-by-case basis a shorter list of objectives that are not considered legitimate for the purpose of justifying discrimination.

And yet, as Levy and Regan rightly note, focusing on restraining ‘illegitimate’ purposes under Article 2.1 TBT Agreement may mean that a wider range of policy objectives are acceptable for justifying discrimination under that provision than under GATT Article XX-chapeau.<sup>131</sup> The Appellate Body shied away from addressing this systemic issue when raised by the EU in *EC – Seal Products (2014)*, 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 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].”<sup>132</sup> Is

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<sup>126</sup> For present purposes, this measure is assumed to be covered by the TBT Agreement, leaving aside the product characteristics/PPM issue in Annex 1.1.

<sup>127</sup> For present purposes, it is assumed that this would be a case of *de facto* discrimination, as the LDC category can be said to be based on origin-neutral socio-economic criteria, and the UN list of LDCs is accordingly not fixed.

<sup>128</sup> See notably, GATT Contracting Parties, ‘Decision of 28 November of 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’, L/4903 [hereinafter, GATT Enabling Clause]; WTO Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004 [hereinafter, *EC – Tariff Preferences (2004)*]; WTO Ministerial Conference, ‘Doha Ministerial Declaration’ (WT/MIN(01)/DEC/1), adopted on 14 November 2001, para 44.

<sup>129</sup> A similar situation arose in *EC – Tariff Preferences (2004)*, where the text of the GATT Enabling Clause itself provided no basis for establishing the existence of a ‘special development need’ that would justify differential treatment among developing countries, and the Appellate Body found this should be assessed on the basis of an objective standard for which “broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve ...” (para. 163).

<sup>130</sup> See Bartels (2015), at 24.

<sup>131</sup> Levy and Regan (2015), at 362.

<sup>132</sup> AB Report in *EC – Seal Products (2014)*, para. 5.128.

this a hint by the Appellate Body that we should not be too concerned about the formal asymmetry as it intends to interpret the closed list of legitimate objectives in Article XX GATT so as to cover all regulatory purposes that may fall within the open list of Article 2.1 TBT Agreement? Some objectives considered legitimate under the TBT Agreement could be integrated into the Article XX-list GATT without much difficulty: an example is consumer information at issue in *US – COOL (2012)*, where the Appellate Body already noted 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]”.<sup>133</sup> But what about the objective of “ensuring the quality of exports” listed in the preamble of the TBT Agreement? Or of taking account of development needs recognised in Article 12.3 TBT Agreement discussed above?<sup>134</sup>

## 5. A GATT-LIKE BALANCE, OR A LIKELY CONFLICT?

The preceding analysis of WTO jurisprudence has revealed two key differences in the legal standards applicable under the GATT and the TBT Agreement for determining whether discrimination/detrimental impact is or not justified, which are summed up in Table 2 below:

*Table 2 – Legal Standards for Justifying Discrimination under GATT and TBT*

<i>Provision</i>	<i>Rational Connection Standard</i>	<i>Permissible Justifications</i>
Article XX-chapeau GATT	(Possibly) dispositive	Closed list of objectives
Article 2.1 TBT (LRD)	Relevant/ <i>not</i> dispositive	Open/ <i>no</i> list of objectives

If this reading is correct and there is a more flexible approach under Article 2.1 TBT Agreement, it cannot be excluded that a measure pursuing multiple conflicting objectives 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 (2014)* 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),<sup>135</sup> and hence was subject to the TBT Agreement;<sup>136</sup> 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 (2014)*).<sup>137</sup> 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

<sup>133</sup> AB Report in *US – COOL (2012)*, para. 445.

<sup>134</sup> This raises an interesting question regarding the relevance of the GATT Enabling Clause, and more generally the WTO principle of special and differential treatment, to the interpretation of GATT Article XX-chapeau, but is beyond the scope of this article.

<sup>135</sup> This was, in fact, the less trade-restrictive alternative measure advanced by the complainants in *EC – Seal Products (2014)*, but both the Panel and Appellate Body found that it was not ‘reasonably available’, because (*inter alia*) the inherent welfare risks of seal hunting pose an obstacle to the effective monitoring and enforcement of the application of humane killing methods (see note 60 above and accompanying test).

<sup>136</sup> 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. However, it remains open to question which ‘processes and production methods’ are covered by Annex 1 TBT Agreement: for a discussion, see Marín Durán (2015); M. Du, ‘What is a Technical Regulation under the TBT Agreement? Some Reflections on *EC – Seal Products*’, forthcoming in (2015) *European Journal of Risk Regulation*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2579361](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579361).

<sup>137</sup> See section 3.2 above, for a discussion of the discriminatory defects in the design and application of the IC exception under the EU seal regime.

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*EC – Seal Products (2014)*).<sup>138</sup> Under the chapeau of Article XX GATT, the possibility of justifying this discrimination would be (most plausibly) foreclosed by the ‘rational connection’ standard, 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 protection of Inuit interests from being accepted as an independent justifying policy purpose, 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. In other words, while Article 2.1 TBT Agreement may incorporate a GATT-like balance –in the sense of integrating a mechanism for balancing non-discrimination obligations/right to regulate, this does not necessarily translate into a GATT-same balance –in the sense of achieving the same consistent outcome. Now, how should we deal with a situation where the discriminatory impact of a technical regulation is found to be *justified* under the TBT Agreement but *unjustified* under the GATT?

In order to answer this question, it is useful to shed some light on the relationship between the two agreements. This relationship remains somehow uncertain partly because it is not specifically regulated in the TBT Agreement, in contrast with the clear mutual exclusivity rule provided therein in relation to the SPS Agreement.<sup>139</sup> In *EC – Asbestos (2001)*, the Appellate Body positioned the TBT Agreement as a *lex specialis* to the GATT: “[...] although the *TBT Agreement* is intended to ‘further the objectives of GATT 1994’, it does so through a specialized legal regime that applies solely to a limited class of measures.”<sup>140</sup> This means that a WTO panel, when faced with both GATT and TBT claims, should normally start by assessing the legality of the contested measure with the norms of the TBT Agreement,<sup>141</sup> since this agreement deals “specifically, and in detail” with technical regulations.<sup>142</sup> But this priority given to the TBT Agreement as a *lex specialis* in the order of analysis does not necessarily amount to excluding the applicability of the GATT as a *lex generalis*.<sup>143</sup> Instead, pursuant to the General Interpretative Note to Annex 1A, both agreements apply cumulatively *unless* this 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”.<sup>144</sup> Put differently, the precedence

<sup>138</sup> Panel Report in *EC – Seal Products (2014)*, paras. 7.137-7.138.

<sup>139</sup> Article 1.5 TBT Agreement, whereby the application of the SPS Agreement to a given measure precludes the application of the TBT Agreement. All that matters for this hierarchy rule to apply is that the measure meets the definition of a ‘sanitary and phytosanitary measure’ set out in the SPS Agreement, regardless of whether such measure is or not consistent with that agreement.

<sup>140</sup> WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 80.

<sup>141</sup> Note, however, that in *EC – Asbestos (2001)*, GATT claims were examined first whereas TBT claims were not examined at all: for a criticism, see J. Pauwelyn, ‘Cross-agreement Complaints before the Appellate Body: a case study of the EC – Asbestos dispute’ (2002) 1(1) *World Trade Review* 63.

<sup>142</sup> See WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, adopted (as modified) 5 April 2001, para. 8.16; see also WTO Panel, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted (as modified) 23 October 2002, paras. 7.14-7.19. See more generally on this point, WTO Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 [hereinafter, AB Report in *EC – Bananas III (1997)*], para. 204, in relation to the GATT and the Agreement on Import Licensing Procedures; and WTO Appellate Body, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS252/AB/R, adopted 17 February 2004, para. 134, in relation to the GATT and the Agreement on Subsidies and Countervailing Measures.

<sup>143</sup> For a similar view, see Pauwelyn (2002), at 82; see also UN General Assembly, ‘Fragmentation of 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.

<sup>144</sup> General Interpretative Note to Annex 1A reads: “[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization [including the TBT Agreement]..., the provision of the other agreement shall prevail to the extent of the conflict.”

of the TBT Agreement over the GATT is subject to their simultaneous application to the same measure resulting in a ‘conflict’.<sup>145</sup> Nonetheless, the Appellate Body’s approach in the TBT trilogy cases 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 does require such further examination.<sup>146</sup> Applying this to our hypothetical version of the EU Seal Regulation, the key question becomes whether there would be a ‘conflict’, in the sense of the General Interpretative Note, if the discrimination caused by the IC exception is disapproved as ‘unjustifiable discrimination’ under Article XX-chapeau GATT while justified as reflecting a ‘legitimate regulatory distinction’ under Article 2.1 TBT Agreement, such that the latter prevails.

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. At first, the Appellate Body appeared to favour such a strict definition of conflict in *Guatemala – Cement I (1998)* in relation to the DSU and the special rules on dispute settlement contained in other WTO covered agreements,<sup>147</sup> being confined to a “situation where adherence to the one provision will lead to a violation of the other provision” and the provisions cannot therefore be read as “complementing each other”.<sup>148</sup> This narrow definition was then applied by the Panel in *Indonesia – Autos (1998)* in the framework of the relationship between the GATT and the SCM Agreement (included in Annex 1A).<sup>149</sup> However, there is a strong presumption in international law against legal conflict in this strict sense,<sup>150</sup> and if that was all it meant for the purposes of the General Interpretative Note, it would be largely redundant. Moreover, as Pauwelyn rightly criticises, following this narrow definition of conflict would implicate that the WTO “systematically elevates the obligations of WTO members over and above [their] rights”,<sup>151</sup> as there could never be a conflict between a prescriptive GATT provision imposing an obligation and a permissive provision in another Annex 1A agreement granting a right (e.g., an authorisation or justification): 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.<sup>152</sup> This

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<sup>145</sup> See L. Bartels, ‘Overlaps and Conflicts Between the WTO Agriculture Agreement and the Agreement on Subsidies and Countervailing Measures’ forthcoming in (2016) 50 *Journal of World Trade*, referring to this as a “consequence-based” hierarchy rule, as opposed to a “condition-based” hierarchy rule (e.g., Article 1.5 TBT Agreement, note 138 above).

<sup>146</sup> See in particular, AB Report in *US – Tuna II (2012)*, paras. 405-406; and Marceau (2013), at 33-34 for a discussion.

<sup>147</sup> See Article 1.2 DSU; see e.g. Articles 4 and 7 SCM Agreement providing for special and additional rules and procedures (e.g., shorter timeframes), which prevail over those in the DSU in case of conflict.

<sup>148</sup> WTO Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 65, even though the term used in Article 1.2 DSU under examination is “difference”, but the Appellate Body read it down as “conflict”.

<sup>149</sup> WTO Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/Ds55/DS59/DS64/R, adopted 23 July 1998, paras. 14.97-14.99. In support of this approach, see E. Montagui and M. Lugard, ‘The GATT 1994 and other Annex 1A Agreements: Four Different Relationships?’ (2000) 3(3) *Journal of International Economic Law* 473, at 476.

<sup>150</sup> Given that States are generally assumed not to undertake contradicting legal obligations: see *inter alia*, J. Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 *American Journal of International Law* 535, at 551; van den Bossche (2013), at 45 (footnote 196).

<sup>151</sup> Pauwelyn (2002), at 80.

<sup>152</sup> See WTO Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted (as modified) 25 September 1997 [hereinafter, Panel Report in *EC – Bananas III (1997)*], para. 7.159, footnote 403 noting that: “Article XI:1 of GATT 1994 prohibits what Article 2 of the [Agreement on Textiles and

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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.<sup>153</sup>

A more appropriate stance was taken by the Panel in *EC – Bananas III (1997)*, 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* permits.”<sup>154</sup> Under this approach, WTO rights (or authorisations) are not always subordinated to WTO obligations (or prohibitions): a GATT provision forbidding a certain conduct can be superseded, for instance, by a TBT provision allowing that same conduct. While the General Interpretative Note itself was not addressed by the Appellate Body in *EC – Bananas III (1997)*, it seemed to endorse this broader definition of conflict when examining the relationship between Article XIII GATT and Articles 4 and 21.1 of the Agreement on Agriculture (AA). The question was whether the provisions of the Agreement on Agriculture allowed market access concessions on agricultural products to deviate from the requirements of Article XIII GATT,<sup>155</sup> and the Appellate Body answered it negatively because the relevant AA provisions contain no express authorisation to act inconsistently with Article XIII GATT.<sup>156</sup> Therefore, the Appellate Body’s reasoning suggests that an *explicit* authorization (or right) in an Annex 1A Agreement would have prevailed over a contrary obligation in the GATT.<sup>157</sup>

But even if this broader definition is adopted in the context of the General Interpretative Note, it is doubtful 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, but rather a contradiction *between rights*: that is, between the set of provisions that allow WTO members to justify discrimination under the GATT and under the TBT Agreement. Arguably, nothing in the text of the General Interpretative Note prevents it from being applicable

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Clothing (ATC)] permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994.”

<sup>153</sup> Bartels (2016), at 6.

<sup>154</sup> WTO Panel in *EC – Bananas III (1997)*, para. 7.159 (emphasis added); see also, para. 7.161, stating that, if any such conflict, “the *obligation* or *authorization* contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994” (emphasis added). In support of this broader definition of conflict, see Pauwelyn (2002), at 78.

<sup>155</sup> AB Report in *EC – Bananas III (1997)*, para. 155.

<sup>156</sup> AB Report in *EC – Bananas III (1997)*, para. 157, stating that: “[...] we do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII [GATT] ... If the negotiators had intended to permit Members to act inconsistently with Article XIII [GATT], they would have said so *explicitly* (emphasis added).

<sup>157</sup> See AB Report in *EC – Bananas III (1997)*, para. 157, where the Appellate Body refers for example to Article 5 of the Agreement on Agriculture which allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX GATT; see also WTO Appellate Body, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 532, stating that Article 21.1 AA (regulating its relationship with the GATT and other Annex 1A agreements) 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*.” Given the approach taken by the Appellate Body, it seems unlikely that it would accept an *implicit* authorization (or right) in an Annex 1A agreement to take precedence over a contrary obligation in the GATT.

to a conflict between rights, given that it refers to “provisions” in general (not obligations, nor rights).<sup>158</sup> But even so, the contradiction between rights is *not explicit* in the text of the relevant provisions –both using the identical language of ‘arbitrary and unjustifiable discrimination’.<sup>159</sup> It rather stems from the ‘clarification’ of these provisions by the Appellate Body as involving different legal standards for determining whether discrimination is justified, even though it is yet to clearly explain why the justification tests for violations of almost identical obligations should actually differ.<sup>160</sup> Furthermore, recognising a conflict exists between the justification provisions of the GATT and the TBT Agreement does not appear desirable as it may increase the risk of 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 may just bring claims under the GATT and avoid parallel TBT claims altogether.

## 6. CONCLUSIONS

As we have seen, measures purportedly pursuing multiple conflicting objectives by means of a rule/exception pose a singular challenge from a WTO law perspective: these typically have a disparate impact on products that are subject to the rule vis-à-vis those ‘like’ products that benefit from the exception and may at times be (mis-)used as pretext for covert protectionism or other improper purpose. However, it is not sensible to address this challenge by adopting a legal test for justifying discrimination/detrimental impact that simply precludes WTO members from ever accommodating competing regulatory purposes via an exception to a rule. This approach is excessively restrictive of domestic regulatory autonomy, since it neglects the fact that this type of measures are sometimes adopted to accommodate different policy interests that are sincerely *legitimate* and genuinely *conflicting*. And in this specific case, it should be up to the regulating WTO member to decide how best to balance between these objectives. To retake the example of *EC – Seal Products (2014)*, to the extent there is a direct conflict between the two objectives, it is perfectly reasonable for a regulator to consider that it is more important to support Inuit subsistence and allow the expression of their culture than to protect seal welfare. Accordingly, it is here submitted that an appropriate legal test is needed for justifying discrimination/detrimental impact under WTO law, which allows for a meaningful two-step enquiry into:

- (i) Whether there is a genuinely legitimate rationale for the discrimination, *even if* independent from the main purpose of the measure; and if so;
- (ii) Whether the discriminatory impact is *fully* explained by, or necessary to achieve, that legitimate objective –i.e., in other words, there is no less discriminatory alternative available to realise it.<sup>161</sup>

From this standpoint, the first argument made here is that neither the unjustifiable discrimination limb of Article XX-chapeau GATT, nor the LRD prong of Article 2.1 TBT Agreement, provide an adequate legal test to deal with measures serving multiple conflicting objectives. As it was shown, the ‘rational connection’ standard under GATT Article XX-chapeau is excessively strict and over-simplistic, as discrimination caused by an exception is *ipso facto* censured *only because* its

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<sup>158</sup> For an interesting argument that the General Interpretative Note includes conflict between rights, see European Union, ‘Third Participant Oral Statement in *US – COOL (Article 21.5)*’, dated 16 February 2015, in particular paras. 8-14.

<sup>159</sup> See section 4.1 above.

<sup>160</sup> That is, essentially the same legal test is applied to establish a violation of Articles I/III GATT and Article 2.1 TBT (minus LRD prong): see section 2 above.

<sup>161</sup> This second step was already followed by the Appellate Body in the TBT trilogy cases in its assessment of even-handedness under Article 2.1 TBT Agreement: see section 4.2 above for a discussion. See also Bartels (2015), at 118-120, arguing that this is also the approach followed by the Appellate Body in several cases under the chapeau of Article XX GATT.

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rationale ‘goes against’ the main objective of the measure and *regardless* of whether or not it reflects a legitimate policy purpose. Conversely, the LRD test is (quite rightly) less rigid in this sense but too flexible in that it lacks a normative basis for determining which rationales are legitimate and capable of justifying detrimental impact. A second point made in this article is that, given the different legal standards for determining whether discrimination is justified under each agreement, it is conceivable that the disparate impact of a measure with multiple conflicting (legitimate) purposes is *justified* under the LRD limb of Article 2.1 TBT Agreement, and yet *unjustified* under the chapeau of Article XX GATT.

That being so, the next logical question is how to deal with this imbalance between the justification provisions of the GATT and the TBT Agreement? In this respect, it was argued that the conflict rule in the General Interpretative Note is unlikely to be applicable, and even if it was, it would not offer a fully satisfactory solution. In *EC – Seal Products (2014)*, the Appellate Body took the position that “[i]f there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance.”<sup>162</sup> This is certainly a valid statement *insofar as* the imbalance stems *exclusively* from the text of the agreements. A glaring example here is the closed list of legitimate objectives under the GATT versus the open list under the TBT Agreement, and WTO members have not only the authority but also the responsibility to address any imbalance resulting thereof.<sup>163</sup> However, as we have seen, this is only part of the problem and the Appellate Body seems willing to avoid it through a harmonious interpretation of ‘legitimate objectives’ under the GATT and the TBT Agreement. Conversely, the Appellate Body has created an imbalance with its interpretation of the relevant justification provisions under each of these agreements. Notably, there is no ‘rational connection’ requirement in the text of the chapeau of Article XX GATT, while the terms ‘legitimate regulatory distinction’ appear nowhere in the TBT Agreement. As a result, there is no textual obstacle to a more harmonious interpretation of what ‘unjustifiable discrimination’ –i.e., the term actually used in both agreements– means under the GATT and the TBT Agreement. This being so, it seems odd and inappropriate to shift responsibility for redressing such an imbalance entirely to the members of the WTO. It is here submitted that the Appellate Body ought to assume its own responsibility in aligning the legal tests for justifying discrimination/detrimental impact under the chapeau of Article XX GATT and the LRD prong of Article 2.1 TBT Agreement, along the two-step analysis suggested above.

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<sup>162</sup> AB Report in *EC – Seal Products (2014)*, para. 5.129.

<sup>163</sup> The quoted statement was indeed made in that specific context: AB Report in *EC – Seal Products (2014)*, para. 5.128, and section 4.3 above for further discussion.

